

IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

STATE OF GEORGIA

Case No. 23SC188947

v.

DAVID J. SHAFER et al.,

Defendants.

**DEFENDANT SHAFER’S MOTION TO SEVER**

Defendant David J. Shafer files this Motion to Sever, respectfully moving the Court, pursuant to O.C.G.A. § 17-8-4(a), to sever any trial, pre-trial proceedings and scheduling concerning Defendant from any trial, pre-trial proceedings and scheduling concerning any co-defendants who have demanded a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States; Article I, Section I, Paragraph XI of the Georgia Constitution and/or O.C.G.A. §§ 17-7-170 *et seq.*<sup>1</sup>

Defendant Kenneth Chesebro and Defendant Sidney Powell have made speedy trial demands in this action. Mr. Shafer recognizes his co-defendants’ rights speedy trial, as well as the State’s charging discretion to join defendants in a single action and its interest in avoiding the consequences of a failure to abide by Georgia’s speedy trial statutes, namely dismissal. However, Mr. Shafer’s rights to due process and a fair trial cannot be abridged as a result of other parties’ rights or interests. In a multi-defendant criminal

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<sup>1</sup> Mr. Shafer shows that this Motion to Sever is made necessary by the prosecution’s initiation of this criminal proceeding against Mr. Shafer, the procedural requirements of the Georgia Code and Georgia Uniform Superior Court Rules, and the deadlines imposed by the Court, and that, in filing this Motion to Sever, Mr. Shafer in no way or degree waives any request or right to remove this proceeding to the United States District Court for the Northern District of Georgia. *See Yusefzadeh v. Nelson, Mullins, Riley & Scarborough, LLP*, 365 F.3d 1244, 1246 (11th Cir. 2004) (quoting Charles A. Wright, et al., *14B Federal Practice & Procedure* § 3721 (2003)).

prosecution such as this action, in which some defendants insist on a speedy trial while others do not, fundamental fairness urges that the Court to grant severance to the defendants who raise their right to allow sufficient time to prepare their defenses, and to prepare for trial.

## **I. BACKGROUND**

On August 14, 2023, the State filed an Indictment in this Court against the former President of the United States, the former White House Chief of Staff and 17 other individuals, including Mr. Shafer. *See* Indictment. The State's Indictment is nearly 100 pages long and contains 41 counts. *Id.* Mr. Shafer is a defendant to nearly a quarter of the counts. *Id.* at 13, 76-81, 96.

On August 23, 2023, Defendant Chesebro filed a Demand for Speedy Trial in this action. *See* Demand for Speedy Trial, August 23, 2023. The following day, August 24, 2023, the State filed a Motion to Specially Set Trial, requesting that the Court specially set the trial of all 19 defendants in this action for October 23, 2023. *See* Motion to Set Trial, p. 1. On August 24, 2023, the Court issued a Case Specific Scheduling Order, setting forth dates, including a trial date, and deadlines solely applicable to Mr. Chesebro. *See* Case Specific Scheduling Order. The next day, Defendant Powell filed a Demand for Speedy trial in this action. *See* Demand for Speedy Trial, August 23, 2025.

In addition, the State currently has until September 20, 2023, in which to produce discovery to the defense in this action. It has requested that the defense furnish a hard drive with capacity of at least two terabytes—implying that the production will be of a very large volume of evidence.

Mr. Shafer's rights to due process and a fair trial under the United States Constitution and the Georgia Constitution demand that Mr. Shafer's defense not be

rushed in pre-trial proceedings and the setting of trial. Mr. Shafer and his counsel anticipate that numerous motions, raising complex issues, will be made in this action, requiring extensive pre-trial proceedings. The discovery produced by the State is expected to be voluminous, and Mr. Shafer and his counsel require sufficient time in which to prepare a complete defense to the State's charges against him, as well as to prepare to meet the State's evidence at trial.

Mr. Shafer has furthermore filed a Notice of Removal of State Court Action to Federal Court and Request for Habeas Corpus or Equitable Relief (Notice of Removal) with the United States District Court for the Northern District of Georgia (U.S. District Court), and intends to request that the Court stay this action and any deadlines to file any pre-trial demurrers and motions as to all non-speedy trial co-defendants until 30 days following the U.S. District Court's adjudication of any notice or petition for removal by any defendant to this action. *See* Notice of Filing of Notice of Removal with the United States District Court for the Northern District of Georgia. Several other co-defendants in this action have also filed notices or petitions for removal of this action pursuant to their right to request removal as officers of the United States or persons acting thereunder.

For these reasons, the Court should exercise its discretion pursuant to O.C.G.A. § 17-8-4(a) and sever any trial, pre-trial proceedings and scheduling concerning Mr. Shafer from any trial, pre-trial proceedings and scheduling concerning any co-defendants who have demanded a speedy trial pursuant to the Sixth Amendment to the Constitution of the United States; Article I, Section I, Paragraph XI of the Georgia Constitution and/or O.C.G.A. §§ 17-7-170 *et seq.*

## **II. ARGUMENT**

O.C.G.A. § 17-8-4 provides, in relevant part:

When indicted for a capital felony when the death penalty is waived, or for a felony less than capital, or for a misdemeanor, such defendants may be tried jointly or separately in the discretion of the trial court. In any event, a jointly indicted defendant may testify for another jointly indicted defendant or on behalf of the state. When separate trials are ordered in any case, the defendants shall be tried in the order requested by the state.

O.C.G.A. § 17-8-4(a). Accordingly, in a non-death penalty case, “defendants may be tried jointly or separately in the discretion of the trial court.” *Pride v. State*, 356 Ga. App. 835, 836 (2020) (citing O.C.G.A. § 17-8-4(a); *Walter v. State*, 304 Ga. 760, 762 (2018)).

“A trial court should sever the trials of co-defendants whenever it is necessary to achieve a fair determination of the guilt or innocence of a defendant.” *Avellaneda v. State*, 261 Ga. App. 83, 87 (2003) (quoting *Cain v. State*, 235 Ga. 128 (1975)). Due process requires that criminal prosecutions “comport with prevailing notions of fundamental fairness.” *Morris v. State*, 324 Ga. App. 756, 760 (2013) (quoting *State v. Blackwell*, 245 Ga. App. 135, 137 (2000)). Furthermore, criminal defendants are guaranteed “a meaningful opportunity to present a complete defense.” *State v. Burns*, 306 Ga. App. 117, 121–22 (2019) (quoting *Crane v. Kentucky*, 476 U. S. 683, 690 (1986)).

Any fair trial of Mr. Shafer in this action requires that both he and his counsel be given sufficient time to prepare a complete defense to the State’s charges against him, and to meet the evidence which the State will present in any trial. Pressing Mr. Shafer to trial on complex charges under Georgia Racketeer Influenced and Corrupt Organizations Act, O.C.G.A. §§ 16-14-1 *et seq.* with numerous other defendants within months of being indicted and arraigned would be in serious violation of Mr. Shafer’s rights to due process and a fair trial. Mr. Shafer and his counsel have not even received the States discovery production, which will likely require months of review.

Thus far, Mr. Chesebro and Ms. Powell have demanded a speedy trial, as is their right. However, Mr. Shafer's right to sufficient time to prepare his defense and prepare for trial must not be infringed in giving effect to his co-defendants' rights. It is furthermore bewildering why the State would allegedly want to insist upon rushed proceedings in a complex RICO prosecution against nearly 20 defendants which it has spent two-and-a-half years investigating and preparing. The State has already had substantial time to prepare its charges and its case—Mr. Shafer requests sufficient time to prepare his defense and prepare to meet the State's evidence in any trial.

The Code provides that “[t]he cases on the criminal docket shall be called in the order in which they stand on the docket unless the accused is in jail or, otherwise, in the sound discretion of the court.” O.C.G.A. § 17-8-1(a). Mr. Shafer recognizes that the code section is “directory and not mandatory...” *Williams v. State*, 188 Ga. App. 496, 498 (1988) (quoting *Rosenbrook v. State*, 78 Ga. 111 (1886); *Barrentine v. State*, 136 Ga. App. 802 (1975); *In re Pending Cases, Augusta Judicial Circuit*, 234 Ga. 264, 268 (1975) (concurring opinion).” *Rogers v. State*, 155 Ga. App. 685 (1980)). The trial court may, in its discretion, call cases out of order. *See Culliver v. State*, 247 Ga. App. 877, 878 (2001) (citing *Cuzzort v. State*, 271 Ga. 464, 465 (1999)). However, “the power to control the proceeding of the court is subject to the proviso that in so doing a judge does not take away or abridge any right of a party under the law.” *State v. Perry*, 261 Ga. App. 886, 887 (2003) (quoting *State v. Colquitt*, 147 Ga. App. 627, 629 (1978)). Here, Mr. Shafer's rights to due process and a fair trial should not be infringed as a result of the State's insistence upon joining the defendants in a single action, or its desire to avoid the consequences of violating Georgia's speedy trial statutes.

Furthermore, there exists a need to respect the right to removal to federal court which has been asserted by some of the defendants in this action, as well as any need of the U.S. District Court for sufficient time to adjudicate the defendants' notices or petitions for removal. "[N]o state or local government may discriminate against rights arising under federal laws..." *Jones v. Valdosta Bd. of Educ.*, 317 Ga. App. 771, 773 (2012). Accordingly, not only Mr. Shafer's need for sufficient time to prepare for any trial but interests of comity between this Court and the U.S. District Court urge the severance of the defendants who have demanded a speedy trial from the other defendants in this action.

Based upon these principles of fairness and due process, the Court should exercise its discretion to sever defendants and sever any trial, pre-trial proceedings and scheduling involving Mr. Shafer from the trial, pre-trial proceedings and scheduling concerning any defendants to this action who have demanded a speedy trial, pursuant to Section 17-8-4(a). The Court has already had to make separate provisions concerning trial, pre-trial proceedings and scheduling for different defendants to this action, as shown by the Court's Case Specific Scheduling Order solely relating to Mr. Chesebro. Severance of the defendants in this action who have demanded a speedy trial from the defendants who have not is proper and consistent with due process and a fair trial.

### **III. CONCLUSION**

Based upon the facts and authorities set forth herein, Defendant David J. Shafer respectfully requests that the Court exercise its discretion and grant Defendant's Motion to Sever, and sever any trial, pre-trial proceedings and scheduling concerning Defendant from any trial, pre-trial proceedings and scheduling concerning any co-defendants who have demanded a speedy trial pursuant to the Sixth Amendment to the Constitution of

the United States; Article I, Section I, Paragraph XI of the Georgia Constitution and/or  
O.C.G.A. §§ 17-7-170 *et seq.*

Respectfully submitted, this 5th day of September, 2023.

/s/ Craig A. Gillen

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**CERTIFICATE OF SERVICE**

Counsel for Mr. David J. Shafer shows that the foregoing document was this 5th day of September, 2023, served on the following individuals by depositing the document in the United States mail, postage prepaid; by statutory electronic service via Odyssey eFile Georgia and/or electronic mail to:

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