Fulton County Superior Court
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Date: 9/6/2023 11:35 AM
Che Alexander, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	
v.	Case No.
JEFFREY B. CLARK, ET AL.,	23SC188947
Defendants	

LODGED MOTION ON SEVERANCE PROCESS

Comes Now, Jeffrey B. Clark, one of 19 co-defendants in the above-entitled matter to place a position on severance before the Court in a lodged capacity consistent with Mr. Clark's removal of this case to federal court and, if demurrer deadlines are not put off, until the threshold issue of personal jurisdiction (among others) over him is resolved.[1]

In short, we believe that the issue of severance should only be adjudicated at this time as to the two co-defendants who have moved for speedy trials. As to the other co-defendants, severance would best await completion of all other pretrial proceedings—especially the filing and adjudication of motions to dismiss and demurrers. Such demurrers may prune out either the whole or parts of one or more counts in the

[1] In filing this Lodged Motion, Mr. Clark reserves his previously asserted defenses of lack of personal jurisdiction, lack of subject matter jurisdiction, federal immunity and qualified immunity, and his right to remove this case to an Article III federal court as contemplated by 28 U.S.C. § 1442, *et al.*, pursuant to his timely filed Notice of Removal dated August 14, 2023. Mr. Clark files this Lodged Motion in this Court only out of an abundance of caution in light of the various procedural requirements applicable to this case and in light of the remarkably accelerated pace of proceedings in this Court thus far. With respect to non-waiver of removal, *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)).

Indictment or prune out defendants or both. Hence, deciding on severance now, in a global fashion, will potentially prejudge and prejudice the opportunities the Court will have to assess severance at a more appropriate time when the then-remaining counts and defendants remaining in the case at that point might suggest severance solutions that are not apparent at this early date.

Nevertheless, because the Court might decide not to postpone decisions on severance until a more appropriate, post-demurrer adjudication period, Mr. Clark makes part of this Lodged Motion a request in the alternative for the Court, pursuant to O.C.G.A. § 17-8-4(a), to sever any trial, pre-trial proceedings and scheduling concerning Mr. Clark 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.*

BACKGROUND

Defendant Jeffrey Clark is charged in counts 1 (RICO) and 22 (Criminal Attempt to Commit False Statements and Writings). As to the lead RICO count, Mr. Clark is included only in Acts 98 through 99 and 110 through 11. As far as the Indictment itself is concerned, Mr. Clark is involved in only a tiny portion of the 98-page Indictment and is not alleged to have made any agreements with any of the other co-defendants. Instead, Mr. Clark is accused of drafting a letter that was discussed internally at the highest level

of the Department of Justice but without any allegation that the letter was ever sent. His alleged “crime” thus appears to consist of having made a privileged and confidential legal proposal inside the halls of the federal government—halls that are not subject criminal prosecution by a state or county prosecutor.

Defendants Chesebro and Powell have each filed demands for speedy trial. In response to Chesebro’s speedy trial demand, the Court has set his trial for October 23, 2023.

Mr. Clark has not demanded a speedy trial.

Both Chesebro and Powell have moved to sever their cases from the main case. Chesebro has also moved to sever from Powell. Multiple other co-defendants have also filed motions to sever, including President Donald J. Trump, David Shafer, Shawn Still, John Eastman and Robert Cheeley. The first motion to sever was filed on August 30, 2023. In an order issued September 5, 2023, the Court set a hearing on certain of the motions to sever for today, September 6, 2023.

The Court, however, also asked the District Attorney’s Office for a “good-faith estimate of the time reasonably anticipated to present the State’s case during a joint trial of all 19 co-defendants, and alternatively any divisions thereof, including the number and size of exhibits likely to be introduced.” Notice of Motion Hearing (Sept. 5, 2023). And that portion of the Notice of Motion Hearing suggests that decisions may be made at or shortly after the hearing to be held today that may affect Mr. Clark’s interests, despite the

fact that his notice of removal in federal court has not been fully adjudicated and despite the fact that the existence of personal or subject matter jurisdiction over him in this Court has not yet been adjudicated.

ARGUMENT

I. SEVERANCE DECISIONS ARE PREMATURE EXCEPT FOR THOSE WHO HAVE DEMANDED A SPEEDY TRIAL.

It is logically premature in this case to decide questions of severance for any co-defendants other than those who have demanded a speedy trial. The posture of the case is quite likely to change in relevant ways before trial as a result of motions to dismiss, demurrers, special pleas, or the federal court's forthcoming rulings on the pending removals. There is already one motion to dismiss, filed by Mr. Chesebro. There will certainly be others, as well as demurrers and other special pleas in bar or to jurisdiction.

Just yesterday, Mr. Clark filed a motion to extend the deadline for demurrers and special pleas until after his removal litigation is concluded. Mr. Shafer has similarly moved to stay his case or extend his motion deadlines until his removal litigation is concluded. The President has until 30 days after arraignment to file a notice of removal, and can certainly be expected to assert a variety of immunity defenses. In short, the lineup of co-defendants and the charges that will eventually be tried is very much up in the air, as is the fundamental question of whether they will be tried in this Court at all.

Consequently, and apart from severing those who have demanded a speedy trial from those who have not, further decisions on severance are premature. As to the co-

defendants who have not demanded a speedy trial, and especially as to the removing defendants like Mr. Clark, the Court should, in the exercise of its inherent discretion to manage its docket, defer ruling on severance until such matters are clarified through later motion practice over time. With the present uncertainty as to the structure and posture of the case, ruling with undue haste or otherwise ruling prematurely on severance issues for the other 17 co-defendants who have not demanded a speedy trial would likely require the same issues to be revisited once the shape of the case emerges in the wake of pending and forthcoming dispositive motion practice and removal litigation.

II. MR. CLARK'S CASE SHOULD BE SEVERED FROM THE DEFENDANTS DEMANDING A SPEEDY TRIAL.

As it is possible that the Court may decide to make a severance decision *en globo* today, although we would urge the Court not to do so, Mr. Clark presents as an alternative position below in this Lodged Motion on the issue of severance as to his defense.

The speedy trial demands filed by others do not apply to or bind Mr. Clark. Instead, Mr. Clark and his counsel want sufficient time to prepare their defense of the charges against him, which are notably distinct and disconnected from the charges against the other co-defendants. The District Attorney elected to bring an indictment of Brobdingnagian complexity—98-pages, 41-counts, and 161 separate overt acts in furtherance of the alleged RICO conspiracy, and which supposedly involves 30 unnamed and unindicted co-conspirators who remain unknown to this Defendant.

The District Attorney's office has also given notice that its "initial batch" of discovery will be produced by September 15, 2023 and will be so voluminous as to require a two terabyte USB drive. There is thus far no indication of what, when or how much additional discovery will be provided. Indeed, the District Attorney has taken two-and-a-half years to investigate this matter, and apparently expects the co-defendants to all be ready in a matter of weeks. This is neither fair nor realistic and should not be ordered or acquiesced in by the Court. Forcing Mr. Clark to trial on that schedule in this Court would deprive him of a fair trial, of effective assistance of counsel, and of his right to have his federal defenses adjudicated by a federal court, an element of federal supremacy inherent in the structure of the Republic.

Mr. Clark therefore moves to sever his case from those co-defendants who have demanded a speedy trial. Although it does not appear to be the Court's intention to include all defendants in the contemplated Oct 23, 2023 trial, Mr. Clark nonetheless lodges this request in the record out of an abundance of caution, as the record reflects several rulings being made in this case within just one or two days of motions being filed.

Under O.C.G.A. § 17-8-4(a), the Court has discretion to try the defendants jointly or separately. *See 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)). The Court's discretion is to be exercised in the interests of providing each defendant a fair trial and effective assistance of counsel.

Avellaneda v. State, 261 Ga. App. 83, 87 (2003) (*quoting Cain v. State*, 235 Ga. 128 (1975)); *Strickland v. Washington*, 466 U.S. 668 (1984).

In *Cain v. State*, 235 Ga. 128, 129 (1975) the Court set out factors to be considered in deciding whether to sever a criminal case against multiple defendants:

> Some of the considerations for the court in exercising its discretion have emerged from the cases considering motions to sever: 1. Will the number of defendants create confusion of the evidence and law applicable to each individual defendant? 2. Is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court? 3. Are the defenses of the defendants antagonistic to each other or to each other's rights? *See, People v. Maestas*, 517 P.2d 461 (Colo. 1973). If the defendant can show the court by some facts that failure to sever will prejudice him under one or more of these considerations, his motion should probably be granted.

Cain v. State, 235 Ga. 128, 129 (Ga. 1975). Each of these factors supports severance of the case against Mr. Clark.

First, the sprawling nature of the indictment and the numerosity of the overt acts, counts and defendants will almost certainly confuse any jury that might be seated to hear the case. Each defendant is entitled to an individualized and particularized fair trial, and to not be subjected to the crude "justice" of trial *en masse*. Mr. Clark is identified in just four out of 161 overt acts alleged in the indictment. It is the jury's duty to sort out the guilt or innocence of each defendant on an individual and particularized basis, and they should not be saddled with a practically impossible burden in doing so.

Second, the same complexity and numerosity poses a clear danger that evidence implicating one defendant will be considered against a co-defendant despite limiting

instructions. Similarly, the strength of the evidence against one defendant will prejudice the others. Mr. Clark's case should be severed from the others to protect his fundamental right to a fair trial. *See Price v. State*, 155 Ga. App. 844, 845 (1980), *rev'd on other grounds*, 247 Ga. 58 (1981); *Crawford v. State*, 148 Ga. App. 523, 526 (1978).

Third, though it is premature to fully assess the question, with so many defendants, counts and overt acts, there is a strong likelihood that there will be antagonistic defenses in this case. The alternate electors have plead in various filings in this Court and in removal papers in federal court that they acted on legal advice of certain other co-defendants. There is evident tension between defendants over the strategies and implications of the speedy trial demands filed by Mr. Chesebro and Ms. Powell. Conflicts over admissibility of statements of co-conspirators, their cross-examination, and other matters are likely to emerge. It should be clear, however, that the nature and extent of any such antagonisms will not become clear until after pending and anticipated demurrers, special pleas and other motions have been resolved, and until after the various defendants have had an opportunity to evaluate the State's discovery production.

In addition, as established in *Bruton v. United States*, 391 U.S. 123, 126 (1968), "[a] defendant's Sixth Amendment right to be confronted by the witnesses against him is violated . . . when co-defendants are tried jointly and the testimonial statement of a co-defendant who does not testify at trial is used to implicate the other co-defendant in the crime." *See also Ardis v. State* , 290 Ga. 58, 60(2)(a) (2011) (applying *Bruton*); *Floyd v. Harrell*,

307 Ga. 789, 797 (2020) (applying *Bruton* and finding no violation in a two-defendant murder prosecution). It is of course a "naïve assumption that prejudicial effects can be overcome by instructions to the jury … all practicing lawyers know to be unmitigated fiction." *Bruton*, 391 U.S. at 129. It is, however, premature to fully evaluate this factor as it is presently impossible to know whether or what testimonial statements of witnesses who do not testify might be offered at trial. The State has not yet produced even a single bit of the two terabytes of its "initial batch" of discovery.

In sum, though the question of severance for the defendants who have not requested a speedy trial is premature, it is nevertheless clear that the factors identified in *Cain* all support severance, The Court should return to severance when the relevant considerations come into sharper focus.

In addition, it is not unusual for a major, multi-defendant RICO case to take several years to go to trial or several months to try as the glacial pace of the Young Slime Life case before Judge Glanville painfully demonstrates. Forcing Mr. Clark to proceed to trial a less than two months after arraignment and only five weeks after the voluminous ***"initial batch"*** of discovery is expected to be produced will not allow his legal team sufficient time to review discovery, prepare motions, perform necessary independent investigation, and prepare for trial. Moreover, we have no idea when or in what volume subsequent discovery will be provided or how that might affect our trial preparation.

Moreover, Mr. Clark filed a Notice of Removal in the Northern District of Georgia, with an evidentiary hearing scheduled for September 18, 2023. As set forth in Mr. Clark's Motion for Extension of Deadlines for Demurrers and Special Pleas and Other Deadlines, filed September 5, 2023, this Court should await the results of the removal proceedings before setting a trial date, let alone a lightning trial date that would be unprecedented for a case of this complexity and historic significance. *See* Benjamin Franklin, *Poor Richard's Almanac* (1753) ("Haste makes Waste."), *available at* https://www.fi.edu/en/benjamin-franklin/famous-quotes (last visited Sept. 6, 2023).

The threshold for federal officer removal is quite low, and Mr. Clark has ample grounds sufficient to surmount that threshold. Thus, there is a significant likelihood that the federal court will accept Mr. Clark's removal, in which event, his case—and with it the entirety of *State v. Trump et al.*—will be removed to federal court, rendering moot all matters of scheduling and severance to which the Court and so many of the parties are so hurriedly devoting their energies as of the date of this filing.

Finally, when severance issues are more ripe for decision, counsel will advise the Court of any scheduling conflicts with the trial dates that might be set by the Court for Mr. Clark,

CONCLUSION

For the foregoing reasons, defendant Jeffrey Clark respectfully lodges his request that this Court defer ruling on severance until the pending removal litigation has been

concluded and the expected flurry of dispositive motions have been decided. And, in the alternative, he lodges his request that the Court sever his case from those co-defendants who have demanded a speedy trial.

Respectfully submitted, this 6 day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of September, 2023, I electronically lodged the within and foregoing ***Lodged Motion on Severance Process*** with the Clerk of Court using the PeachCourt eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia:

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