

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)
)
v.)
) Case No. 23SC188947
ROBERT DAVID CHEELEY, ET AL.,)
)
Defendants.)
)

**DEFENDANT ROBERT DAVID CHEELEY’S MOTION TO SEVER FROM
THE DEFENDANTS SET FOR TRIAL ON OCTOBER 23, 2023**

COMES NOW, Defendant Robert David Cheeley, by and through counsel, and files this Motion to Sever from the defendants who have moved for a speedy trial and for whom a trial has been set for October 23, 2023, as follows:

On August 14, 2023, the State of Georgia, (“the State”) filed an indictment (“the Indictment”) against 19 separate individuals alleging 41 alleged criminal violations against various combinations of these defendants (“Defendants”). The overbroad nature of the indictment unsuccessfully attempts to tie together multiple, unrelated alleged courses of conduct and nineteen separate defendants that bear no relation to one another in action or identity, aside from the fact that the various courses of conduct and the named defendants were all concerned with possible infirmities in the 2020 Presidential election. As a result, the indictment casts too broad a net in terms of both defendants and conduct, and thus warrants severance.

At least two defendants, Kenneth John Cheseboro and Sidney Katherine Powell, requested a speedy trial pursuant to O.C.G.A. § 17-7-170. On August 24, 2023, the Court set a trial date of October 23, 2023 for defendants Cheseboro and Powell. On September 1, 2023, the Court additionally stated it would file a Case Specific Scheduling Order governing the schedule of the remaining Defendants’ matters shortly after arraignment.

In response to the Court’s September 1, 2023 statement, and although the time for filing a motion for severance is not yet due, Defendant Robert David Cheeley (“Cheeley”) hereby moves the Court to sever his case from those Co-Defendants who have demanded a speedy trial for the reasons set forth below.¹

First, while the State has investigated and prepared the case outlined in its Indictment for the past two years, and despite controlling the date upon which the indictment was returned, the State has still not produced a single page of discovery. Further, even three weeks after the return of the indictment, the State still does not have the discovery ready to be produced. Instead, on August 25, 2023, the State sent an email regarding its “initial round of discovery.” *See* August 25, 2023, email attached hereto as Exhibit A. In that email, the State asked Defendants to provide it with “an empty USB drive that is at least 2 terabytes ... by September 4, 2023.” *Id.* The State anticipated providing this 2 terabytes of information by September 15, 2023. *Id.* So, given that this future production will be the “initial round of discovery,” the State apparently does not intend to produce all discovery, even after two years of investigation, and six weeks post-indictment.

Two terabytes of data is a huge amount of information that could not possibly be digested by Defendants’ counsel by October 23, 2023.² Further, the State still has not indicated when full discovery will be produced or the volume of complete discovery. In order to properly prepare for trial, Defendants need sufficient time to review the State’s discovery and related material, conduct their own investigation, interview witnesses, and otherwise engage in trial preparation. Requiring

¹ Cheeley is contemplating filing a motion to sever his trial from all other Defendants, at which time the defense will file a fact-specific motion.

² According to at least one website, two terabytes of storage could house 6 million e-books, 60,000 songs, 250 hours of HD video, and 500,000 high-resolution photos. *See* <https://storables.com/articles/how-much-is-2-tb-of-storage/>.

Mr. Cheeley to rush to trial under these circumstances would be so prejudicial as to deny him the right to a fair trial.

Second, the State brought only 10 charges against Mr. Cheeley, namely:

- One count of violating Georgia’s Racketeer Influenced and Corrupt Organizations Act (“RICO Act”), O.C.G.A. § 16-14-4(c);
- One count of conspiring to impersonate a public officer in violation of O.C.G.A. §§ 16-4-8, 16-10-23;
- Two counts of conspiring to commit forgery in the first degree in violation of O.C.G.A. §§ 16-4-8, 16-9-1(b);
- Two counts of conspiring to Georgia’s prohibition against making and using false statements and writings in violation of O.C.G.A. §§ 16-4-8, 16-10-20;
- One count of actually making false statements and writings in violation of O.C.G.A. § 16-10-20;
- One count of conspiring to file false documents in violation of O.C.G.A. §§ 16-4-8, 16-10-20.1(b)(1);
- One count of soliciting public officers to violate their oaths in violation of O.C.G.A. §§ 16-4-7, 16-10-1; and
- One count of committing perjury in violation of O.C.G.A. § 16-10-70(a).

Indictment at 1–4. The remaining 31 charges in the Indictment have nothing to do with Mr. Cheeley. Fairly read, the claims against Mr. Cheeley can be and should be segregated from the remaining Defendants. Failure to segregate these claims and the other Defendants would similarly lead to jury confusion and an unfair trial.

Third, severance is required to protect Mr. Cheeley’s Sixth Amendment rights. Mr. Cheeley anticipates the State will present evidence against other Defendants, who will likely assert their Fifth Amendment rights against self-incrimination, as “admissions” at trial. To the extent this occurs, and to the extent these statements might negatively impact or implicate Mr. Cheeley, he has a right to cross-examine those witnesses. If he is tried with those other witnesses, his right to such cross-examination will be nullified. Mr. Cheeley further has a right to present witnesses (even

if they are Co-Defendants) who might offer exculpatory or favorable testimony for him. By seeking to try these cases together, the State seeks to eliminate Mr. Cheeley's right to do so. Taken together or separately the foregoing reasons require severance here.

When the State indicts two or more defendants for a non-capital offense, they "may be tried jointly or separately in the discretion of the trial court." O.C.G.A. § 17-8-4(a). Guiding that discretion, "[t]he relevant American Bar Association Minimum Standards relating to joinder and severance provide that the court should grant a severance before or during the trial whenever it appears 'necessary to achieve a fair determination of the guilt or innocence of a defendant.'" *Cain v. State*, 235 Ga. 128, 129 (1975) (quoting ABA Standards, § 2.3(b)). Here Mr. Cheeley would be prejudiced by a joint trial of this matter – and certainly he would be prejudiced if he has to try this case by October 23, 2023.

Moreover, there is a clear danger that evidence implicating one defendant will be considered against a co-defendant despite limiting instructions, and that the strength of the evidence against one defendant will prejudice the others., In cases such as this, a trial court abuses its discretion by failing to sever. *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).

In determining whether to grant a motion to sever, Georgia courts commonly ask the following questions:

- *First*, will the number of defendants create confusion of the evidence and law applicable to each individual defendant?
- *Second*, is there a danger that evidence admissible against one defendant will be considered against another despite the admonitory precaution of the court?
- *Third*, are the defenses of the defendants antagonistic to each other or to each other's rights?

Cain v. State, 235 Ga. at 129. If a defendant demonstrates that the answers to “one or more” of those questions is in the affirmative, then “his motion should probably be granted.” *Id.*

With respect to the first inquiry, there are 19 individual defendants charged with various combinations of 41 alleged criminal violations. Mr. Cheeley is, however, only charged with 10 offenses. Aside from those daunting metrics, the sprawling Indictment attempts to connect Defendants who were spread across the country and allegedly engaged in different conduct over a period of nearly two years to a single enterprise. *See* Indictment at 15 (alleging that the “enterprise operated in Fulton County, Georgia, elsewhere in the State of Georgia, in other states, including, but not limited to, Arizona, Michigan, Nevada, New Mexico, Pennsylvania, and Wisconsin, and in the District of Columbia; *see id.* at 62 (charges arising from conduct at a January 2021 rally in Washington, D.C.); *id.* at 69 (alleging false statements made in April and May of 2022); *id.* at 97 (alleging perjury in September 2022)). No reasonable juror could be expected to untangle Mr. Cheeley’s supposed role in this alleged enterprise from the roles that his co-Defendants purportedly played. Absent severance, the only result will be 12 confused jurors and 19 prejudiced Defendants, one of whom will be Mr. Cheeley. That is enough to warrant severance. *See Cain*, 235 Ga. at 129.

Turning to the second inquiry, which is admittedly closely related to the first, “the evidence and law applicable to [Cheeley will be] significantly different from that applicable to his [18] co-defendants.” *See Crawford*, 148 Ga. App. at 526. At least two of the charges against Mr. Cheeley involve no other Defendants. *See* Indictment at 85, 97. Of the other charges, one implicates only *two* other Defendants, *see* Indictment at 84, six charges implicate six co-Defendants, *see* Indictment at 76–81, and only one charge implicates all 19 Defendants, *see* Indictment at 11. In other words, Mr. Cheeley is unconnected to two-thirds of his Co-Defendants except through one

charge. And, regarding those charges that do involve Mr. Cheeley and a handful of co-Defendants, “the evidence [will] show[] no more than possibly a passive involvement on [Cheeley’s] part.” *See Crawford*, 148 Ga. App. At 526. It is therefore “highly probable” that a jury could erroneously convict Mr. Cheeley “as the result of some spillover of the substantial evidence adduced against his co-defendants.” *Id.*; *see also Price*, 155 Ga. App. at 845.³

The inevitability of substantial evidence against Mr. Cheeley’s co-defendants being attributed to him constitutes substantial prejudice and therefore a lack of due process. *See Cain*, 235 Ga. at 129. That is because Mr. Cheeley cannot “be convicted merely by association, or by being enveloped within a vague, generalized notion that [D]efendants, as a group but in different ways, had contributed to” some post-election challenges that allegedly ran afoul of some laws. *See Crawford*, 148 Ga. App. at 526. Because Mr. Cheeley’s conviction would “more likely result[] from the evidence against his co-defendants than from the evidence against him, [the court must] not hesitate to conclude that he [is] entitled to a separate trial.” *Id.*; *see also Price*, 155 Ga. App. at 845.

Additionally, as established in *Burton v. United States*, 391 U.S. 123, 126(1968) and *Floyd v. State*, 307 Ga. 789, 792 (2020), “[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.” And “[t]he naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” *Burton*, 391 U.S.

^{6##} The State attempts to fold the conduct of all Defendants together into a “RICO conspiracy” in an effort to prejudice those, like Cheeley, with the conduct of others. The State hopes the jury will be so confused by the myriad of claims and allegations it will simply lump everyone together. This violates due process. Additionally, Cheeley intends to file a demurrer indicating that the RICO counts and the individual counts against him are grossly deficient under Georgia law.

at 129 (citing *Krulewitch v. United States*, 336 U.S. 440, 453 (Jackson, J. concurring)). Here, Mr. Cheeley would want to cross-examine any statements by his co-defendants that might implicate him. He additionally would want to call these defendants at trial, were they to have exculpatory information. Both of these rights are abridged if he is tried with the other co-Defendants.

Severing Mr. Cheeley's trial from that of his co-Defendants is "necessary to achieve a fair determination of [his] guilt or innocence" given the prejudice and denial of due process that would result from a joint trial. *See Cain*, 235 Ga. at 129 (citation and punctuation omitted). As explained above, Mr. Cheeley has demonstrated far more than just showing that he has a better chance of acquittal if tried separately or that the evidence against his co-defendants is stronger. Both of those may be true, but the prejudice Mr. Cheeley faces from a joint trial carry far more weight and cannot be denied.

Based upon the facts, authorities and grounds set forth herein, Defendant Robert David Cheeley requests that the Court grant his Motion to Sever.

Respectfully submitted, September 5, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that this 5th day of September, 2023, a copy of the foregoing **DEFENDANT ROBERT DAVID CHEELEY'S MOTION TO SEVER FROM THE DEFENDANTS SET FOR TRIAL ON OCTOBER 23, 2023** has been served using the Odyssey eFileGA system, which will automatically serve notice of the filing to counsel of record, and via email, on the following counsel of record:

Fani Willis, Esq. Nathan
J. Wade, Esq.
Fulton County District Attorney's Office 136
Pryor Street SW
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Atlanta GA 30303
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I have also served this filing by email on the following counsel who to my knowledge are representing other defendants named in the underlying indictment:

Drew Findling - drew@findlinglawfirm.com.
Marissa Goldberg- marissa@findlinglawfirm.com
Jennifer Little- jlittle@jllaw.com.
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Exhibit A

From: [Rood, Grant](#)
To: [Anulewicz, Chris](#); [Beckermann, Wayne](#); richard.rice@trlfirm.com
Subject: 23SC188947 (State of Georgia v. Cheeley et al.) - Initial round of discovery
Date: Friday, August 25, 2023 10:21:57 AM

CAUTION - EXTERNAL EMAIL

Greetings Counselors:

In 23SC188947, we are preparing the first batch of Discovery for your review. Please drop off an empty USB drive that is at least 2 terabytes to the 3rd floor of the District Attorney's office no later than close of business on Tuesday, September 5, 2023. We plan to serve the initial packet of Discovery on / or about September 15, 2023.

Thank you,

Grant Rood
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