

FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,

V.

KENNETH CHESEBRO *ET AL.*,

DEFENDANTS.

CASE No. 23SC188947

JUDGE MCAFEE

Motion to Disclose Unindicted Co-Conspirators Individual 1 Through Individual 30 and Others Known to the Grand Jury

The instant indictment references thirty unindicted individual co-conspirators that are known to the grand jury. See Indictment at 15, *The Enterprise*. The indictment also references “others known and unknown to the Grand Jury.” *Id.*

As to Mr. Chesebro, Count 1 references the following unindicted co-conspirators who allegedly interacted with Mr. Chesebro in some capacity: (a) Individual 3 (overt acts 94 and 109); (b) Individual 4 (overt acts 71 and 72); (c) Individual 5 (overt act 61); (d) Individual 9 (overt acts 47 and 48); and (e) Individuals 10 and 11 (overt act 48).

ARGUMENT AND CITATION TO AUTHORITY

The identity of the unindicted-but-known co-conspirators is needed for Mr. Chesebro to be able to adequately challenge the State as it attempts to meet its requirement to make a prima facie showing of the existence of the conspiracy. See 11 GA. PROC. CRIMINAL PROCEDURE § 27:46. To establish a prima facie case of conspiracy, the State cannot use a co-conspirator’s statements to do so. See *Fisher v. State*, 295 Ga. App. 501, 503 (2009); see also *Grissom v. State*, 296 Ga. 406, 410–11 (2015). Without knowing the identities of the co-conspirators, it will be near impossible to follow what statements or evidence come from the unindicted co-conspirators the State relies on in

order to prove the underlying conspiracy.

Additionally, the unindicted co-conspirators are *de facto* witnesses and subject to disclosure under O.C.G.A. § 17-16-3.¹

Finally, Mr. Chesebro must be able to challenge whether the unindicted co-conspirators' testimony is sufficiently corroborated. See *Randolph v. State*, No. S23A0636, 2023 WL 5338581 (Ga. Aug. 21, 2023). Without being able to connect a statement to a specific unindicted co-conspirator this issue cannot be challenged. And if Mr. Chesebro is unable to determine which unindicted co-conspirators made which statements, this further raises concerns over Confrontation Clause issues.² See *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004).³

While there does not appear to be case law in Georgia regarding unindicted co-conspirators and their disclosure, this predicament may be resolved by looking at case

¹ The witness list attached to the indictment lists only two witnesses—both investigators with the Fulton County District Attorney's Office. See Indictment at 98. However, it has been widely reported that multiple individuals were subpoenaed to testify before the grand jury for this case (e.g., Bee Nguyen, Jen Jordan, Geoff Duncan, Gabriel Sterling, George Chidi). See *Live Coverage of Fulton County Grand Jury*, ATLANTA J. CONST., <https://www.ajc.com/news/live-updates/fulton-grand-jury-trump-investigation/> (last visited Aug. 27, 2023); *Trump Indicted in Georgia: Updates*, N.Y. TIMES, <https://www.nytimes.com/live/2023/08/14/us/trump-indictment-georgia-election> (last visited Aug. 27, 2023).

² There may also be a *Bruton* issue here and it is being expressly reserved. Currently, undersigned is not aware of what circumstances surrounded the making of any verbal or written statements by any unindicted co-conspirator (and whether this unindicted co-conspirator is actually going to testify).

³ Additionally, undersigned is not aware of whether any of the statements at issue would be testimonial but the fact that the statements are referenced in the indictment would lead to the obvious conclusion that they are testimonial.

law as it applies to the disclosure of confidential informants. In *Cooper v. State*, the Court of Appeals stated:

Public policy in Georgia favors nondisclosure of the identity of an informant in the interest of the free flow of information about criminal activity. The identity of a mere tipster is privileged, but where the informer is a witness or participant, or has entrapped a defendant into committing a crime, disclosure could be material to the defense. This court has held numerous times that ***disclosure of an informant's identity was required where the informant was a witness or participant*** whose testimony would be the only testimony available to amplify or contradict that of the [witnesses]. The [confidential informant] in this case purchased suspected contraband and provided information that led to issuance of the search warrant.

258 Ga. App. 825, 829 (2002) (emphasis added) (quotations and internal citations omitted).

In *Jones v. State*, 289 Ga. App. 767 (2008), the Court succinctly stated that “[d]isclosure of an informant’s identity was required where the informant was a witness or participant whose testimony would be the only testimony available to amplify or contradict that of the police officer or the defendant.” 289 Ga. App. 767, 769 (2008) (citing *Simmons v. State*, 208 App. 721, 723 (1993)); see also *McGhee v. State*, 337 Ga. App. 150 (2016).

In *Browner v. State*, the Court explained that a trial court must conduct a two-step inquiry to determine whether the prosecution must disclose the identity of a confidential informant. 265 Ga. App. 788, 791 (2004). Specifically, the *Browner* Court states that

. . . the trial court should hear evidence to determine: (a) that the confidential informant is an alleged informer-witness or informer-participant whose testimony appears to be material to the defense on the issue of guilt or punishment; (b) that the testimony for the prosecution and the defense is or will be in conflict; and (c) that the confidential informant was the only available witness who could amplify or contradict the testimony of these witnesses. The movant must establish the

relevance, materiality, and necessity of the identity of the informant as a predicate for disclosure. Once this threshold has been met, the trial court must conduct an in camera hearing of the [confidential informant]'s testimony under the mandates set forth in *Thornton v. State*, 238 Ga. 160, 231 S.E.2d 729 (1977), and *Moore [v. State]*, 187 Ga. App. 387 (1988)].

265 Ga. App. at 791–92 (alteration adopted). In other words, the first step is to conduct an evidentiary hearing to determine whether the informant's identity is important to the defense. The second step of the inquiry is to conduct an *in camera* hearing to determine if the informant's testimony would help the defense. *Id.* at 792.

Accordingly, should this Court disagree with Mr. Chesebro's position that the identities of the known unindicted co-conspirators *must* be disclosed to the defense, this Court can follow the two-step inquiry used by courts to determine whether the identity of a confidential informant *should* be disclosed.

WHEREFORE Mr. Chesebro respectfully requests that the identities of all the unindicted co-conspirators be disclosed.⁴

Respectfully submitted this 30th day of August, 2023.

/s/ Scott R. Grubman
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⁴ The indictment also references others that are "unknown to the Grand Jury." Therefore, while the grand jury may not know who they are, if the State knows who these people are then it should be disclosed. See Indictment at 15, *The Enterprise*.

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Certificate of Service

I hereby certify that I have this day served a copy of the within and foregoing **Motion to Disclose Unindicted Co-Conspirators Individual 1 Through Individual 30 and Others Known to the Grand Jury** upon all counsel via the Fulton County e-filing system.

This the 30th Day of August, 2023.

/s/ Scott R. Grubman
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