FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA, V. KENNETH CHESEBRO *ET AL*., DEFENDANTS.	CASE NO. 23SC188947 JUDGE MCAFEE

GENERAL DEMURRER TO COUNT 1 (RICO)

On August 14, 2023, the State of Georgia filed a 98-page Indictment against 19 defendants, including Ken Chesebro. Mr. Chesebro is charged with seven counts, including violations of Georgia's RICO Statute (Count 1).

Count 1 of the Indictment should be dismissed as to Mr. Chesebro for two independent reasons. First, the alleged pattern of criminal activity does not fall within the ambit of the RICO statute because there is no allegation of pecuniary gain or economic or physical injury, as required by law. And second, even if there were such allegations, Count 1 still must be dismissed because the Indictment fails to allege a nexus between the enterprise and the racketeering activity as required to survive a demurrer.

FACTUAL BACKGROUND

Taking the allegations in the Indictment as true for purposes of this motion, Mr. Chesebro's involvement in the alleged RICO conspiracy consists of writing three legal memoranda, sending and receiving a handful of email all sent in his capacity as an attorney, and having one meeting with a Republican party chairman in Wisconsin. The State's interpretation of these actions, which resulted in Mr. Chesebro being indicted under RICO, puts this statute on its ear. It also willfully ignores the legislative intent written into the statute.

Mr. Chesebro's involvement in the subject matter at issue started on or about November 18, 2020, when he was asked by a former colleague, Judge James Troupis, to provide some research into the 12th Amendment, the Electoral Count Act (ECA), and issues related to the presidential election in Wisconsin. Mr. Chesebro, as an experienced appellate attorney with substantial experience in election law, accepted the task.[1] Mr. Chesebro wrote a legal memorandum dated November 18, 2020, outlining his legal theories based upon his good faith statutory interpretation, case citations, law review articles, and academic papers.[2]

Importantly, although the campaign's underlying litigation in Wisconsin was originally unsuccessful via a 4-3 decision by the Wisconsin Supreme Court (based on the arcane equitable doctrine of *laches*),[3] these same issues were fully litigated some months later in *Teigen v. Wisconsin Elections Commission*, 403 Wis.2d 607 (2022). The Trump campaign's challenges were ultimately successful in the *Teigen* litigation.

After finalizing his initial legal memo, Mr. Chesebro was then asked to conduct additional research and provide input as to the application of his legal analysis in other states where there was a pending challenge to the election results, including Georgia.[4] In

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[1] Mr. Chesebro was part of then-Vice President and Democratic nominee for President Al Gore's legal team in *Bush v. Gore*, 531 U.S. 98 (2000), and a litany of lower court federal and state cases fighting over the 2000 election.

[2] Mr. Chesebro does not waive attorney–client privilege—to the extent it exists—by referencing his memoranda for the purpose of exercising his right to challenge Count 1 of the indictment.

[3] *Trump v. Biden,* 394 Wis.2d 629 (2020).

[4] Mr. Chesebro never set foot in Georgia—his only contact with Georgia involved two emails, sent on December 10, 2020, to co-defendant David Shafer.

response, he wrote an additional legal memo dated December 6, 2020, wherein he again outlined his legal theories based upon his good faith interpretation of legal and historic precedent.

To be clear, at no time did Mr. Chesebro provide any guidance as to how to handle any state court litigation in Georgia. Instead, Mr. Chesebro's work product, as it relates to Georgia, simply described the process in which electors or alternate electors are selected in the states at issue and the applicable deadlines those electors had to forward their votes to Congress.[5] Perhaps even more importantly, Mr. Chesebro made clear multiple times that his advice was contingent upon there being a valid legal challenge pending at the time the alternate slate of electors convened.[6]

CITATION TO AUTHORITY AND ARGUMENT

A. RICO Requires a Pecuniary Gain or Economic/Physical Threat or Injury, None of Which is Alleged Here.

O.C.G.A. § 1-3-1(a) states that "[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly, keeping in view at all times the old law, the evil, and the remedy." "In construing these statutes, '[Georgia courts] apply the fundamental rules of statutory construction that require [the courts] to construe

[5] The two Georgia emails had attachments that were based on a review of the Georgia elector ballots from 2016.

[6] The American Bar Association's Model Rules of Professional Conduct say that an attorney may counsel or assist a client "to make a good faith effort to determine the validity, scope, meaning, or application of the law." Rule 1.2(d). An attorney is obviously prohibited from counseling a client on committing a crime or fraud, but the attorney is permitted to give "an honest opinion about the actual consequences that appear likely to result from a client's conduct." *See* Rule 1.2, cmt. [9]. The American Bar Association notes the distinction between presenting a legal analysis versus recommending the means by which to commit a crime.

the statutes according to their terms, [and] to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage.'" *Singletary v. State*, 310 Ga. App. 570, 572 (2011) (quoting *Currid v. DeKalb State Ct. Prob. Dep't*, 285 Ga. 184, 187 (2009)); *see State v. Whitman*, No. A22A0489, 2923 WL 5213800 (Ga. Ct. App. Aug. 15, 2023); *State v. Walker*, 367 Ga. App. 365 (2023). "Needless to say, when the language of a statute is plain and susceptible of only one natural and reasonable construction, 'courts must construe the statute accordingly.'" *Rijal v. State*, 367 Ga. App. 703, 706 (2023) (quoting *Martinez v. State*, 325 Ga. App. 267, 273 (2013)).

RICO itself states that "[i]t is the intent of the General Assembly . . . that [the RICO] chapter apply to an interrelated pattern of criminal activity motivated by or the effect of which is ***pecuniary gain or economic or physical threat or injury***." O.C.G.A. § 16-14-2(b) (emphasis added).[7] The statute further states that "[i]t is not the intent of the General Assembly that isolated incidents of misdemeanor conduct or acts of civil disobedience be prosecuted under this chapter." *Id*.

The predicate acts in this indictment do not encompass any "physical threat or injury," nor do they allege any motivation for pecuniary gain. The predicate acts include:

(a) Forgery (O.C.G.A. § 16-9-1);

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[7] Before the current version was updated in 1997, the RICO statute required that the "pattern of criminal activity . . . [must be] directed towards acquiring or maintaining something of pecuniary value." *Sevech v. Ingles Mkts., Inc.*, 222 Ga. App. 221, 222 (1996). Indeed, the pre-1997 version states that "[t]he General Assembly finds that a severe problem is posed in this state by . . . the increasing extent to which criminal activities and funds acquired as a result of criminal activity are being directed to and against the legitimate economy of the state." O.C.G.A. § 26-3401(b) (1980) (former version of § 16-14-2(b)). Accordingly, "[i]t is not the intent of the General Assembly that isolated incidents of misdemeanor conduct be prosecuted under this chapter, but ***only*** an interrelated pattern of criminal activity the motive or effect of which is to derive pecuniary gain." *Id.* (emphasis added).

(b) False Statements (O.C.G.A. §§ 16-10-20, 16-10-20.1);

(c) Impersonating a Public Officer (O.C.G.A. § 16-10-23);

(d) Influencing Witnesses (O.C.G.A. § 16-10-93);

(e) Computer Invasion of Privacy (O.C.G.A. § 16-9-93);

(f) Conspiracy to Defraud State (O.C.G.A. § 16-10-21, which may fall under the catch all provision of O.C.G.A. § 16-14-3(5)(B));

(g) Perjury (O.C.G.A. § 16-10-70); and

(h) Non-Georgia Code violations that may fall under the catch all provision of O.C.G.A. § 16-14-3(5)(B).

While these types of "white collar" predicate acts are ubiquitous in RICO cases, every one of those cases involve defendant(s) whose actions involve offenses such as fraud, forgery, conversion, or false statements, and are motived by one common factor: the desire for pecuniary gain. While it is true that there is no longer a mandatory element requiring an *actual* financial gain before one can violate RICO, the State must still prove that "an interrelated pattern of criminal activity [was] ***motivated by*** . . . pecuniary gain or economic . . . injury." O.C.G.A. § 16-14-2(b) (emphasis added).

There can be no colorable claim of financial motive or financial gain in this case. If the predicate acts alleged are not motivated by, or result in, pecuniary gain or physical harm—no matter how many predicate crimes the Defendant(s) have committed—they do not qualify as a RICO violation. *Cf. Overlook Gardens Props., LLC v. Orix, USA, LP*, 366 Ga. App. 820 (2023) (finding financial motive proven via breach of contract and fraud claim); *Carr v. State*, 350 Ga. App. 461, 465 (2019) ("with conspiring to acquire money and property through a pattern of racketeering activity"); *Mosley v. State*, 253 Ga. App. 710 (2002) (finding 22 predicate crimes alleging theft by taking and securities violations supported RICO claim); *Sec. State Bank v. Visiting Nurses Ass'n of Telfair Cnty., Inc.*, 256 Ga. App. 374 (2002) (RICO alleging fraudulent check cashing scheme).

The Indictment does not allege that Mr. Chesebro acted with a financial or pecuniary motive. Because the legislative intent is clear that such a motive is required to support a RICO prosecution, Count 1 must be dismissed as to Mr. Chesebro.

B. Count 1 Also Fails to Allege the Required Nexus Between the Enterprise and the Racketeering Activity.

"To establish a RICO conspiracy violation . . . the government must prove that the defendants 'objectively manifested, through words or actions, an agreement to participate in the conduct of the affairs of the enterprise through the commission of two or more predicate crimes.'" *United States v. Starrett*, 55 F.3d 1525, 1543 (9th Cir. 1995) (quoting *United States v. Russo*, 796 F.2d 1443, 1455 (11th Cir. 1986)) (citing *United States v. Gonzalez*, 921 F.2d 1530, 1540 (9th Cir. 1991); and *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. Apr. 1978)).[8]

In addition, a person may only be found liable for RICO conspiracy "if they knowingly and willfully join a conspiracy which itself contains a common plan or purpose to commit two or more predicate acts." *Wylie v. Denton*, 323 Ga. App. 161, 165 (2013) (construing O.C.G.A. § 16-14-4(c)) (quoting *Rosen v. Protective Life Ins.* Co., 817 F. Supp. 2d 1357, 1382 (N.D. Ga. 2011)); *see also Chancey*, 256 Ga. at 427 (finding that the State was "required to prove that appellants' participation in the enterprise through a pattern of racketeering activity was knowing and voluntary," and that "concepts of intent and scienter were ingrained upon the statute").

[8] The Georgia RICO Act is modeled after the federal RICO statute and Georgia courts may look to decisions of the federal courts construing and applying the federal statute when considering the meaning and application of the Georgia RICO Act. *See Kimbrough v. State*, 300 Ga. 878, 882 n.13 (2017) (citing *Williams Gen. Corp. v. Stone*, 279 Ga. 428, 430 (2005); and *Chancey v. State*, 256 Ga. 415, 418 (1986)).

The Georgia Supreme Court has held that an essential element under Section 16-14-4(b) "is a connection or nexus between the enterprise and the racketeering activity." *Kimbrough*, 300 Ga. at 882 (citing *Dorsey v. State*, 279 Ga. 534, 540 (2005); and *United States v. Welch*, 656 F.2d 1039, 1062 (5th Cir. Unit A Sept. 1981)). In *Kimbrough*, the State charged the defendants with violating Section 16-14-4(b) by participating in the affairs of an enterprise through a pattern of racketeering activity. 300 Ga. at 878. The indictment alleged that the defendants were associated with an enterprise, Executive Wellness and Rehabilitation, and participated in the enterprise through a pattern of racketeering activity which involved the defendants unlawfully obtaining Oxycodone as "'more particularly described' in subsequent counts of the indictment." *Id.* at 879. The defendants filed special demurrers regarding the alleged connection between the alleged enterprise and racketeering acts which were denied by the trial court, and the defendants appealed. *Id.*

Following the Court of Appeals' finding that the indictment contained sufficient detail concerning the connection between the enterprise and the racketeering activity, the Supreme Court issued a writ of certiorari and reversed. 300 Ga. at 879. The Court found that:

> Although Count 1 identifies the enterprise with which the defendants allegedly were associated (Executive Wellness and Rehabilitation) and specifies the alleged racketeering activity through which they participated in the enterprise (unlawfully obtaining Oxycodone by withholding information from medical practitioners), the indictment fails to set forth any facts that show a connection between the enterprise and the racketeering activity, and the nature of that connection is not apparent from the identification of the enterprise, the general description of the racketeering activity in Count 1, or the subsequent counts charging more particularly the predicate acts of racketeering.

Id. at 882. The Court reversed the judgment of the Court of Appeals, concluding that the defendants could not ascertain from the indictment what they must be prepared to meet with respect to proof of the requisite connection between the enterprise and the alleged pattern of racketeering activity at trial. *Id*. at 882-83. This was due to the fact that the indictment failed to allege whether the enterprise was a licit or illicit one, how the defendants allegedly were "associated with" it, or how the alleged racketeering activity allegedly related in any way to the business or affairs of the enterprise. *Id.* (citing O.C.G.A. § 16-14-3(3); *Elliott*, 571 F.2d at 903; *Starrett*, 55 F.3d at 1548; *United States v. Carter*, 721 F.2d 1514, 1526–27 (11th Cir. 1984); and *Welch*, 656 F.2d at 1062).

Likewise, here, the State's RICO charge is fatally defective in its failure to allege any connection or nexus between the enterprise and the racketeering activity. Count 1 contains no description of the specific, alleged racketeering activity to support the count—it merely incorporates by reference all of the alleged racketeering activity in Count 1. *See* Indictment at 13. Furthermore, the racketeering acts alleged in Count 1 merely state that defendants, who were alleged "a group of individuals associated in fact," committed alleged predicated crimes on various dates. *Id.* at 13–71.

As with the indictment in *Kimbrough*, the indictment here fails to allege how any of the alleged acts were connected to the alleged enterprise or its affairs. Likewise, the indictment contains no allegations tending to show how any of the alleged racketeering acts are related to one another. *See Starrett*, 55 F.3d at 1543 ("[T]he government must prove that the predicate acts are related to each other and have continuity."). In short, the indictment is devoid of facts on which Mr. Chesebro can prepare his defense to the prosecution's alleged evidence of a nexus between the alleged enterprise and racketeering activity, or between the acts themselves, at trial. The indictment furthermore lacks facts from which it could be concluded that the grand jury found any

alleged connection or nexus between the enterprise and the racketeering activity. These fatal omissions in Count 1 violate the requirements for an indictment and render the indictment imperfect and Count 1 subject to dismissal.

Conclusion

In short, Count 1 of the indictment (RICO) should be dismissed as to Mr. Chesebro, because the alleged pattern of criminal activity does not fall within the ambit of the RICO statute as there is no pecuniary gain, nor economic or physical injury. Further, even if it did, Count 1 still should be dismissed because the indictment fails to allege a nexus between the enterprise and the racketeering activity as required to survive a demurrer.

WHEREFORE, Mr. Chesebro requests that the Court dismiss Count 1 of the indictment.

Respectfully submitted, this the 7th day of September, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served, via U.S. Mail, a copy of the within and foregoing ***General Demurrer to Count 1 (RICO)*** via the e-filing system.

This the 7th day of September, 2023.

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