Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. KENNETH JOHN CHESEBRO, and SIDNEY KATHERINE POWELL.	Indictment No. 23SC188947

ORDER ON DEFENDANTS' DEMURRERS

The Defendants have collectively filed and adopted several motions contending that every count with which they are charged is fatally defective and must be dismissed. (Powell Docs. 29, 35, 59; Chesebro Docs. 30, 35, 46-49, 59, 63). The Court heard argument on October 11, 2023, concerning the challenges to Count 1, which alleges a violation of the Georgia RICO ("Racketeer Influenced and Corrupt Organizations") Act. Having the benefit of the parties' extensive written responses and replies, the Court finds oral argument unnecessary for the demurrers addressing Counts 9, 11, 13, 15, 17, 19, and 32-37. (Powell Doc. 29; Chesebro Docs. 46-49). After reviewing the law, record, and parties' arguments, and finding that each challenged count is facially sound as alleged, the motions are DENIED.

Legal Authority

An indictment may be challenged before trial by a general or special demurrer. Demurrers provide a means to ensure that the State's charging document satisfies the constitutional mandates of Due Process and the Sixth Amendment. *See* U. S. Const. Amend. VI ("the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation"); *State v. Mondor*, 306 Ga. 338, 341 (2019); *Everhart v. State*, 337 Ga. App. 348, 354 (2016). A general demurrer challenges the substance of an indictment by asserting its legal invalidity, specifically that the indictment fails to allege facts that constitute a crime. To survive a general demurrer, the "deeply embedded" test within our caselaw instructs us to compare the charging document to the

statutory language and ensure every essential element is included. *Tate-Jesurum v. State*, 368 Ga. App. 710, 711 (2023); O.C.G.A. § 17-7-54(a) ("[e]very indictment of the grand jury which states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct"). Simply invoking the violation of a criminal statute is not enough. *Jackson v. State*, 301 Ga. 137, 140 (2017) (demurrer granted when the indictment did not allege all the facts necessary to establish a violation). Put another way:

> If the accused could admit each and every fact alleged in the indictment and still be innocent of any crime, the indictment is subject to a general demurrer. If, however, the admission of the facts alleged would lead necessarily to the conclusion that the accused is guilty of a crime, the indictment is sufficient to withstand a general demurrer.

Kimbrough v. State, 300 Ga. 878, 880 (2017); *Newman v. State*, 63 Ga. 533, 534 (1879) ("if all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good"). By way of analogy to civil practice, a general demurrer is appropriately characterized as "a motion to dismiss for failure to state a claim" under O.C.G.A. § 9-11-12(b)(6). *State v. Mondor*, 306 Ga. 338, 340 (2019). More than a "fussy technicality," this standard enables a defendant to prepare a defense and establishes the scope of prosecution for double jeopardy purposes. *Everhart v. State*, 337 Ga. App. 348, 355 (2016).

On the other hand, a special demurrer challenges the form of the indictment by claiming that the defendant is entitled to additional specificity or more information. *Kimbrough v. State*, 300 Ga. 878, 881 (2017); O.C.G.A. § 17-7-54(a) (requiring that the offense be stated "with sufficient certainty"); *c.f. Ward v. State*, 188 Ga. App. 372, 373 (1988) (finding "a 'bill of particulars,' which informs a defendant of the charges in sufficient detail to minimize surprise at trial, is not a recognized pleading"). Again, our appellate courts have provided a well-grooved standard:

> [The test] is not whether [the indictment] could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Sanders v. State, 313 Ga. 191, 195 (2022). Continuing the civil analogy, a special demurrer is akin to a "motion for a more definite statement" under O.C.G.A. § 9-11-12(e). *Kimbrough*, 300 Ga. at 881 n.12. As with a general demurrer, the ultimate purpose is to put the Defendant on notice and protect against double jeopardy. *State v. English*, 276 Ga. 343, 346 (2003); *Dunn v. State*, 263 Ga. 343, 344 (1993) ("Due process is satisfied where the indictment puts the defendant on notice of the crimes with which he is charged and against which he must defend.").

Whether labeled general or special, a demurrer cannot cross the line and transform itself into a "speaking demurrer." A trial court has no authority, absent stipulation from both parties, to add facts not appearing on the face of the indictment and wade into a pretrial consideration of the evidence. *Schuman v. State*, 264 Ga. 526 (1994); *State v. Grube*, 293 Ga. 257, 258 (2013) (noting that a speaking demurrer reaches matters outside the four corners of the indictment). To complete the civil analogy, our criminal law does not provide for summary judgment resulting in the dismissal of facially sound indictments. *Hairston v. State*, 322 Ga. App. 572, 575 (2013); *State v. Corhen*, 306 Ga. App. 495, 502 (2010) ("the State was not required to set out its evidence in response to the demurrers").

General Demurrer to Count 1 (No Allegation of Pecuniary Gain)

Defendant Chesebro begins by challenging Count 1 for failing to allege predicate acts encompassing any motive of pecuniary gain or physical threat or injury. (Chesebro Doc. 30). The basis for this argument is found at the outset of the Georgia RICO Act, which begins with a preamble of legislative intent:

> The General Assembly declares that the intent of this chapter is to impose sanctions against those who violate this chapter and to provide compensation to persons injured or aggrieved by such violations. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct or acts of civil disobedience be prosecuted under this chapter. It is the intent of the General Assembly, however, that this 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. This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions.

O.C.G.A. § 16-14-2(b). Two sections later, the reader finds the operative provisions describing exactly how one violates the Act. O.C.G.A. § 16-14-4(a)-(c). These provisions make no mention of pecuniary gain as an element of the crime. Defendants contend that reading the whole text of the Act and construing these two statutes harmoniously together, *in pari materia*, requires the State to explicitly satisfy the General Assembly's expressed intent in the indictment's allegations.

To begin, the opinion of former State Senator Chuck Clay, a sponsor of the 1997 amendment which changed the preamble into its current form, is an interesting historical tangent. But this and other arguments made by the Defendant as indicative of legislative intent have absolutely no bearing. Senator Clay may well have had his own subjective view of what the legislation was meant to do. Yet he was only one of hundreds with a seat at the countertop of the drafting kitchen. At a minimum, approximately 120 elected legislators and the assent of a Governor were required to pass the amendment, and determining their collective intent is a pointless exercise. This is not a novel theory of interpretation according to our Supreme Court. *See*, *e.g.*, *Olevik v.*

State, 302 Ga. 228, 237 (2017) ("When we consider the meaning of statutes enacted by 236 members of the General Assembly, we determine meaning from text and context, '*not the subjective statements of individual legislators*.'") (emphasis added); *Bishop v. State*, 341 Ga. App. 590, 593 (2017) (Bethel, J., concurring) ("Any attempt to discern legislative intent beyond the express language passed by a legislative body is as practical and productive as attempting to nail Jell-O to the wall.").

Properly focusing on the text of the Act itself, the Court finds the final sentence of the amended preamble to be determinative. The directive that the entire chapter should be "liberally construed" by empowering the "operative provisions" echoes the general interpretative principle that a purpose clause cannot override the operative language. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 34, at 217 (2012) ("an expression of specific purpose in the prologue will not limit a more general disposition that the operative text contains"). If the General Assembly wanted to make the preamble binding, they could have done so by welding their intent to the provisions that follow. *C.f.* O.C.G.A. § 16-15-7 (limiting the real property abatement section of the Georgia Street Gang Terrorism and Prevention Act by requiring that "No judgment shall be awarded unless the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2.").

Further corroborating this interpretation, the 1997 amendment expressly loosened the applicability of O.C.G.A. § 16-14-2(b). Instead of continuing to end the preamble with "This chapter shall be construed to further that intent," the General Assembly altered the final sentence to read "This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions." O.C.G.A. § 16-14-2(b). As the Defendant rightly points out, "changes in statutory language generally indicate an intent to change the meaning of the statute." *Jones v. Peach Trader Inc.*, 302 Ga. 504, 514 (2017); *see also Glass v. Faircloth*, 354 Ga. App. 326, 331

(2020) ("When a statute is amended, from the addition of words it may be presumed that the legislature intended some change in the existing law."). But the 1997 changes cut against the Defendant's argument. The existing law at the time, as interpreted by *Sevcech v. Ingles Mkts.*, required that Georgia RICO apply "to a pattern of criminal activity where it is directed towards acquiring or maintaining something of pecuniary value." 222 Ga. App. 221, 222 (1996) ("Mere evidence that a person's criminal conduct constitutes a pattern of racketeering activity is insufficient[.]"); *but see State v. Shearson Lehman Bro.*, 188 Ga. App. 120, 121 (1988) (interpreting the prior version of the preamble and finding that "the expression of legislative purpose in enacting Georgia's RICO Act is not an element of a civil cause of action under the act") (emphasis omitted); *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 265 (1994) (same); *Cotton, Inc. v. Phil-Dan Trucking*, 270 Ga. 95, 95 (1998) (approving *Shearson*). By amending the preamble to address the decision in *Sevcech* and refocus the Act on its operative provisions, the current statutory meaning of O.C.G.A. § 16-14-2(b) provides no indication that the General Assembly's expressed intentions are a required element. The demurrer on this point does not succeed.

The Defendant also claims Count 1 must be dismissed due to the State's failure to allege a nexus between the enterprise and the pattern of racketeering pursuant to *Kimbrough v. State*, 300 Ga. 878, 884 (2017). But the deficient indictment in *Kimbrough*, which completely failed to allege any connection or nexus at all, is extensively distinguished from the indictment here. This motion is DENIED.

General Demurrer to Count 1 For Failure to Allege Continuity

The Defendants next argue that Count 1 failed to allege an essential element: continuity, i.e., the threat of continuing criminal activity on behalf of the enterprise. (Chesebro Doc. 63).[1] Continuity is not a term found in the Georgia RICO statute, instead originating from the United States Supreme Court's analysis of federal RICO. Relying heavily on legislative history to interpret the definition of a "pattern of racketeering activity" found in 18 U.S.C. § 1961(5), the Court held that to establish a pattern the predicate acts must amount to or pose a threat of continued criminal activity. *H. J. Inc. v. Nw. Bell Tel. Co*., 492 U.S. 229, 240 (1989).

As an initial matter, the Defendants have not specifically explained how the indictment is subject to a demurrer. Even assuming continuity applies to a Georgia RICO violation, the argument does not clarify whether continuity is an element that must be particularly alleged in an indictment or merely deduced from the alleged facts contained within. *See*, *e.g*., *United States v. Palumbo Bros., Inc*., 145 F.3d 850, 878 (7th Cir. 1998) ("[e]ven though explicit allegations of continuity are not required to initially charge a criminal violation of RICO, an indictment must include supplemental facts that reasonably substantiate the existence of continuity"). In either event, the federal requirement of continuity established by *H.J. Inc*. cannot be so cleanly grafted onto Georgia's RICO. Setting aside for now the State's argument that establishing a pattern of racketeering activity is not required to prove a RICO conspiracy in violation of O.C.G.A. § 16-14-4(c), our courts have long recognized that Georgia's RICO has a "number of significant differences" when compared to its federal counterpart. *Interagency, Inc. v. Danco Fin. Corp*., 203 Ga. App. 418, 419 (1992). Most relevant here, while the federal definition of a "pattern of racketeering activity" is preceded by "requires at least," Georgia's definition instead utilizes the word "means" to introduce the pattern definition. A cursory look may not suggest that "requires"

[1] Adopted by Defendant Powell and repeated in her Special Demurrer. (Powell Doc. 59).

and "means" are materially different, but the legislature's use of the word "means" indicates the definition that follows is "complete and self-contained." *Comput. Concepts Profit Sharing Plan v. Brandt*, 310 Ore. 706, 719 (1990) (superseded by statute); *see also People v. Chaussee*, 880 P.2d 749, 757 (Colo. 1994). The United States Supreme Court itself recognized this distinction in the decision that provided the foundation for its subsequent holding establishing the continuity requirement. *See Sedima v. Imrex Co*., 473 U.S. 479, 496 n.14 (1985) ("[T]he definition of a 'pattern of racketeering activity' differs from the other provisions [] in that it states that a pattern '*requires* at least two acts of racketeering activity,' § 1961(5) (emphasis added), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient.") (superseded by statute on other grounds).

This certainly appears to be the understanding adopted by our appellate courts. In *Dover v. State*, the court characterized the defendant's appeal as a challenge to the "requirement of 'continuity' to establish a pattern." 192 Ga. App. 429, 431 (1989). The eventual holding stated that Georgia's definition of pattern did not include "the added burden of showing that defendant would continue the conduct or had been guilty of like conduct before the incidents charged[.]" *Id*. at 432. While much of *Dover*'s analysis centered on the single vs. multiple scheme standard contested among federal circuits at the time, the *Dover* court also rejected any continuity requirement by explicitly stating that the recently decided *H.J. Inc*. standard of continuity "ignores the differences between the federal and Georgia statutes." *Id*. Federal courts applying Georgia RICO have not hesitated to follow that interpretation. *See*, *e.g*., *Wade Park Land Holdings, LLC v. Kalikow*, 522 F. Supp. 3d 1341, 1354 (N.D. Ga. 2021); *Murphy v. Farmer*, 176 F. Supp. 3d 1325, 1346 n.20 (N.D. Ga. 2016); *Chesapeake Employers' Ins. Co. v. Eades*, 77 F. Supp. 3d 1241, 1256 (N.D. Ga. 2015) (citing *Dover* to find that "unlike the federal RICO statute, Georgia does not require a showing of continuity to demonstrate a 'pattern of racketeering.'");

see also Michael P. Kenny & H. Suzanne Smith, *A Comprehensive Analysis of Georgia RICO*, 9 Ga. St. U. L. Rev 537, 551 (1993) ("The Georgia courts' refusal to require a showing of continuity between or among the predicate acts is significant…"). One may quibble with just how explicit the Court of Appeals has been in rejecting the concept of continuity, but not with the State's ultimate conclusion.

The fact remains that our Supreme Court has provided a binding definition of a "pattern of racketeering activity" that does not include continuity: "proof of two but separate related acts is sufficient[.]" *Dorsey v. State*, 279 Ga. 534, 541 (2005). Defendants have not sufficiently shown how this precedent can be disregarded, or why Georgia RICO requires an additional element. This motion must be DENIED.

Powell's General Demurrer to Count 1

Defendant makes two primary arguments in her general demurrer to Count 1.[2] (Powell Doc. 35). The first, as clarified by her reply brief, raises an "as applied" constitutional challenge under the Due Process vagueness doctrine and the First Amendment.[3] The void-for-vagueness argument centers on the issue already addressed, namely whether a Georgia RICO violation must include an element of "pecuniary gain or economic or physical threat or injury." Having found that it does not, this aspect of the motion fails. The "as applied" First Amendment argument,

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[2] Defendant Powell raises many new arguments in her reply brief that do not correspond to the State's filed response, such as general demurrers to indicted counts with which she is not even charged. These arguments were submitted well after the motions deadline imposed in this case and, if not addressed by this Order, are DENIED as untimely.

[3] To the extent the Defendant reverses course in her post-hearing brief to make a void-for-vagueness facial challenge to the statute, this issue has already been decided adversely in *Chancey v. State*, 256 Ga. 415, 428 (1986) (rejecting facial vagueness and overbreadth challenges to O.C.G.A. §§ 16-14-3(2) and 16-14-4(b)).

similar in substance to the motion filed by Defendant Chesebro, will be addressed through a separate order.

Second, Powell argues Count 1 is defective because it fails to allege sufficient predicate acts against her. She further notes that Counts 32-37 only qualify as one transaction for alleging a sufficient number of predicate acts. However, whether the activities which allegedly took place in Coffee County constitute one or more transactions is irrelevant. A defendant need not personally commit or be "connected" to any of the underlying predicate offenses to be convicted under O.C.G.A. § 16-14-4(c), as conspirators are responsible for overt acts committed by all co-conspirators. The State need not have asserted that Powell personally participated in even a single predicate offense to sufficiently allege the RICO count laid out against her. *Pasha v. State*, 273 Ga. App. 788, 790 (2005) ("[E]ach actor in a [RICO] conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy. . . . [T]here is no requirement in a [RICO] conspiracy case that the State prove that [a defendant] personally committed the underlying predicate offenses."); *see also Faillace v. Columbus Bank & Trust Co*., 269 Ga. App. 866, 870 (2004) (citing *Salinas v. United States*, 522 U.S. 52 (1997) to reject defendant's contention that each charged participant must have committed "at least two predicate acts . . . to have the requisite intent for RICO conspiracy"); *Cotman v. State*, 342 Ga. App. 569 (2017) ("under Georgia law, a person may be found guilty of a 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'").

Defendant also contends that the acts listed in Count 1 cannot constitute sufficient "overt acts" because none meet the definition of "racketeering." No authority is provided for this point. O.C.G.A. § 16-4-14(c) plainly requires an overt act to prove a RICO conspiracy violation. But nothing else in the statutory scheme or decades of precedent applying conspiracy law requires

that the overt act be the substantive crime alleged as the object of the conspiracy or that the overt act even be criminal in nature. *See*, *e.g.*, *Yates v. United States*, 354 U.S. 298, 334 (1957) (overruled on other grounds by *Burks v. United States*, 437 U.S. 1, 16–17 (1978)). It is sufficient for the overt act to "simply [] manifest that the conspiracy is at work[.]" *Id*. (quotations omitted).

Finally, to the extent Defendant Powell adopts Defendant Smith's Demurrer filed September 11, 2023 (Smith Doc. 24), and contends that the State did not adequately define the "enterprise," this argument lacks merit.[4] Setting aside the State's argument that a Georgia conspiracy RICO need not establish the existence of an enterprise at all, the indictment alleges that the Defendant participated in an enterprise of "individuals associated in fact," names the individuals involved, and lists the predicate acts - all that was necessary. *Grant v. State*, 227 Ga. App. 88, 90–91 (1997) ("The requisite predicate acts and enterprises comprising the charges . . . are precisely described and named . . . No greater detail was required to allege the RICO offense under Georgia law."). The United States Supreme Court did not impose a requirement on the State through *Boyle v. United States*, 556 U.S. 938, 948 (2009) to allege a "hierarchical structure" or provide a full membership list. Defendant's general demurrer to Count 1 is DENIED.

Powell's General and Special Demurrers to Counts 32-37

Defendant Powell also contends that every non-RICO count returned against her should be dismissed outright. (Powell Docs. 29, 59). The reason provided is that the State "cannot prove an essential element of each of the crimes charged," namely that Powell acted without authority when conspiring to access the electronic ballot markers and tabulating machines in Coffee County on January 7, 2021. The general demurrer motion then goes on to reference several

[4] This argument is repeated in greater detail in Powel's Special Demurrer. (Powell Doc. 59).

hearing and deposition transcripts collected from two civil cases, which Powell argues conclusively show that Coffee County officials authorized her alleged actions.

This first motion, with its seven attached transcripts attempting to introduce additional facts into the record, undoubtedly takes the form of a "speaking demurrer."[5] The "question of authority" and whether the Defendant's actions were lawful necessarily depends on a determination of facts found outside the indictment. The State has not consented nor stipulated to any kind of factual basis. Appellate precedent is clear that a defendant could proffer overwhelming evidence of his or her innocence, yet a trial court would still not be permitted to weigh these facts and make a determination through a demurrer.

To the extent these motions demand further detail as special demurrers, the Court finds that the indictment contains the necessary elements of each offense and sufficiently apprises the defendant of what she must be prepared to meet at trial. By pleading that Defendant Powell's actions were willful (Count 32), unlawful[6] (Counts 33, 37), and with knowledge (Counts 34-36), the State has put the Defendant on notice of what must be proven. And as previously mentioned,

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[5] Powell cites *State v. Finkelstein*, 170 Ga. App. 608, 609 (1984) for the proposition that a trial court possesses the authority to weigh the evidence and dismiss an indictment pretrial. But this rarely cited opinion is procedurally murky as written, and it appears the motion to dismiss in *Finkelstein* occurred only after a jury was sworn and witnesses testified. *Id*. at 609 ("the state announced it was ready to proceed and the jury was sworn"). Moreover, it relies on *State v. Tuzman*, 145 Ga. App. 481 (1978), a case involving a plea in bar challenging the statute of limitations, a process with its own explicitly recognized pretrial procedure. *See Jenkins v. State*, 278 Ga. 598, 604 (2004) ("we believe that the proper procedure for litigating a plea in bar based upon the statute of limitations should be analogous to a pretrial *Jackson v. Denno* hearing"). Ultimately, the avalanche of unambiguous caselaw stating the exact oppositive of defense counsel's procedural proposition is definitive.

[6] *See, e.g.*, *Tate-Jesurum v. State*, 368 Ga. App. 710, 713 (2023) ("the allegation of criminal intent is necessarily inferred from an indictment that charges an offense in the language of the statute and alleges it was committed 'unlawfully'") (citation omitted).

the deficient indictment in *Kimbrough v. State* is not comparable to the one in this case. 300 Ga. 878, 884 (2017). The motions are DENIED.[7]

Chesebro's Motion to Quash Count 9

Defendant Chesebro filed four Motions to Quash attacking each of the indicted counts returned against him. Considering the first (Chesebro Doc. 46), to the extent this motion contends that Count 9 does not sufficiently allege which type of public officer is at issue, this demurrer is DENIED.[8] *See Pennington v. State*, 323 Ga. App. 92, 96 n.9 (2013) ("A motion to quash is the equivalent of a general demurrer, attacking the validity of the indictment."); *State v. Mondor*, 306 Ga. 338, 340 (2019) ("the substance and function of a motion or pleading" controls the court's review). The indictment alleges a conspiracy to falsely impersonate "the duly elected and qualified presidential electors." Defendant asserts that based on his interpretation of the Electoral Count Act, the actions of the "Republican electors" did not violate this allegation because they were elected and qualified by the Republican Party and did not purport to be certified. The Defendant obviously does not agree with the State's legal interpretation of whether this conduct was false, but this dispute does not make the indictment defective. Attaching discovery provided by the State to circumvent the prohibition on speaking demurrers does not change this reality, as the bare exhibits may well be lacking context or can only be appropriately considered in conjunction with other evidence not yet introduced. Defendant has necessarily added extraneous facts for consideration, most notably the transcript of the Republican elector

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[7] To the extent Defendant Powell argues that Count 1 must also be dismissed due to the dismissal of Counts 32-37, that argument now fails.

[8] Defendant Chesebro also adopts by reference Defendant Smith's Demurrer. However, this motion does not enumerate a specific challenge to Count 9. Any portions of the Smith Demurrer not addressed in this Order are deemed DENIED as to Defendants Chesebro and Powell as insufficiently articulated for each particular Defendant.

meeting, and the State is under no obligation to further tailor this indictment that charges all elements of the alleged crime.

In his reply, the Defendant contends the law could not possibly force one to endure a trial over legally insufficient charges. (Chesebro Doc. 97 at 3). *State v. Williams*, 306 Ga. 50 (2019) provides an illustrative example of just such an allowable possibility. In *Williams*, the trial court granted a general demurrer after finding the defendant injected heroin into the decedent at the decedent's request, and the defendant was subsequently charged with felony murder for the distribution of heroin. *Id.* at 52. While the trial court "concluded as a matter of law that [the defendant] did not distribute heroin," this conclusion was improper because it required consideration of extrinsic facts. *Id.* Yet the Supreme Court went out of its way to note that "[n]othing in [the] opinion should be understood to suggest that the trial court was wrong to conclude that injecting [the decedent] with [the decedent's] own heroin at [the decedent's] request would not as a matter of law amount to 'distributing' heroin." *Id.* at 54 n.8; *c.f. State v. Cohen*, 302 Ga. 616, 625 (2017) (affirming general demurrer where the indicted count failed as a matter of law without consideration of extrinsic facts by alleging a threat to sue - something that can never constitutionally form the basis of extortion).

Thus, to answer the Defendant's lament, *Williams* demonstrates that even cases possibly destined for a directed verdict as a matter of law once the record is established do not get to take a shortcut by way of demurrer. *See also Tucker v. State*, 283 Ga. App. 428, 428 (2007) ("A motion for directed verdict of acquittal is not the proper way to contest the sufficiency of an indictment."). This rule may seem better suited for the time when multiple felony trials could be resolved in a day. *See*, *e.g.*, Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 466-71 (1992) (charting the expansion in the average length of American jury trials). But it remains the standard today.

Chesebro's Motion to Quash Counts 13 & 19

For similar reasons, Counts 13 and 19 also withstand Defendant Chesebro's speaking demurrers. (Chesebro Doc. 47). If Defendant Chesebro believes that the evidence will not show any false statements, or that the Georgia Secretary of State's Office and Governor's Office had no authority over presidential electors after December 8, 2020, the time to demonstrate that is at trial. Determining the safe harbor deadline and the circumstances of the Republican elector meeting all require facts extraneous to this indictment. The motion is DENIED.

Nor did *Haley v. State*, 289 Ga. 515 (2011) add an additional element to the statute as argued in Defendant Smith's adopted demurrer. Instead, the Supreme Court construed O.C.G.A. § 16-10-20 as requiring "proof that the defendant knowingly and willfully made a false statement and that he knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency." *Id.* at 527 (punctuation omitted), 529 (finding the indictment was sufficient to inform [the defendant] of the charges against him when it alleged that he "did knowingly and willfully make a false and fictitious statement and representation in a matter within the jurisdiction of the Georgia Bureau of Investigation, a governmental agency"). The statute as written, and without the inclusion of any additional language, passed constitutional muster when properly interpreted and after "follow[ing] the language of the statute." *Id*. at 521. The indictment here tracks that same language and is therefore sufficient.

To the extent Defendant Chesebro incorporates Defendant Smith's special demurrer demanding more detail on how the allegedly false document was used and delivered, the Court finds that such detail is unnecessary to sufficiently apprise the Defendant of what he must be prepared to meet.

Chesebro's Motion to Quash Count 15

As with the previous motions, Defendant Chesebro's arguments that the facts of the case demonstrate that no false statement or documents existed as alleged in Count 15 transform this motion into a speaking demurrer that must be DENIED. (Chesebro Doc. 47). One must take the facts of an indictment as accepted premises, regardless of whether they ultimately prove true. In his reply, Defendant cites *Jackson v. State*, 301 Ga. 137 (2017) which granted a demurrer based on an indictment's failure to include several "assumptions of fact." But a lack of facts is not what Defendant ultimately criticizes – he wants to include *more* to show why the charges are defective. To the extent Defendant Chesebro incorporates Defendant Smith's special demurrer demanding more detail on how the allegedly "false document" was mailed to the Chief Judge, the Court finds that such detail is unnecessary to sufficiently apprise the Defendant of the crime with which he is charged.

In addition, Defendant Chesebro adopts Defendant Smith's challenge of Count 15. The relevant portion takes the form of a general demurrer, contending that the alleged false document fails to satisfy the statutory definition of the indicted offense because the document must have encumbered another's interest in property. *See* O.C.G.A. § 16-10-20.1(a). Because it does not, Defendant Chesebro claims that he could admit to Count 15 in its entirety and still not be guilty of a crime. However, the Defendant places too much weight on an older version of the statute, clearly gaining inspiration from the references to "liens." In addition to the other reasons argued by the State in its response, the Defendant's reliance on the original section title or 2014 amendment's synopsis is unpersuasive. Only the statutory text is deemed enacted by the General Assembly. *See* O.C.G.A. § 1-1-1(b). Headings, catchlines, and captions for each code section are not written by the legislature and "shall bear no weight or effect." O.C.G.A. § 1-1-1(c). Moreover, unlike the "tangible object" in *Yates v. United States*, 574 U.S. 528 (2015), the

inclusion of "document" in O.C.G.A. § 16-10-20.1(a) does not rest at the end of a naked list but is rather preceded by the catchall phrase "shall include, but shall not be limited to[.]" The word "include" does not introduce an exhaustive catalogue, and the inclusion of this phrase supersedes the statutory canon *noscitur a sociis*, as well as the more narrow canon of *ejusdum generis*. *See Premier Health Care Invs., LLC v. UHS of Anchor, L.P.*, 310 Ga. 32, 45 (2020) ("the General Assembly intended for 'including but not limited to' to introduce a list of illustrative examples"); *Kinslow v. State*, 311 Ga. 768, 773 (2021) (applying both doctrines with an overriding focus on "examining the context in which a word appears").

Chesebro's Motion to Quash Counts 11 & 17

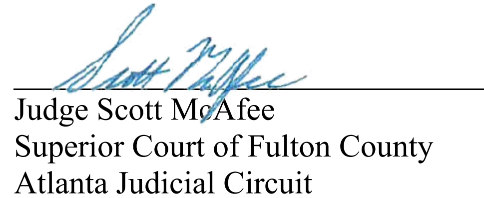
Defendant Chesebro's final motion again relies on facts extrinsic to the indictment by detailing the circumstances of the "Republican elector" meeting. (Chesebro Doc. 49). It further argues a lack of criminal intent by providing an explanation of why the Defendants created the allegedly forged document at issue. Such matters are irrelevant for a general demurrer and do not undermine the sufficiency of the indictment.

The motion further adopts Defendant Smith's Demurrer by arguing that both counts fail to allege an essential element – the intent to defraud a specific person. No authority is provided for this proposition, and the counts as alleged track the language of the statute and contain all required elements. The motion is DENIED.

Conclusion

The demurrers filed and adopted by Defendants Powell and Chesebro challenging Counts 1, 9, 11, 13, 15, 17, 19, and 32-37 have not established a defect in the substance or form of the indictment and are DENIED.

SO ORDERED, this 17th day of October, 2023.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit