

FULTON COUNTY SUPERIOR COURT
STATE OF GEORGIA

STATE OF GEORGIA,

V.

SIDNEY KATHERINE POWELL
ET AL.,
DEFENDANTS.

CASE No. 23SC188947

JUDGE MCAFEE

**POWELL'S REPLY IN SUPPORT OF HER
GENERAL DEMURRER AND MOTION TO DISMISS
COUNTS 32-37 AND RELATED ACTS**

Counts 32-37 must be dismissed because the Indictment is legally insufficient on the issue of authority—much less how Ms. Powell would have known that. This is a purely legal issue for the Court to decide. The Indictment fails to identify any fact or law that apprises Ms. Powell of how SullivanStrickler's access to the voting machines in Coffee County was *without authority*; while, at the same time, all witnesses and documents of actual participants in the State's own file prove County Officials gave authority, and everyone present for the forensics understood they had authority. These facts are undisputed as are the statutory requirements which the State has failed to meet.¹

¹ In its Response to Powell's Brady motion, n. 2, the State suggests that the authority must be "lawful." (See below.) However, neither the statute nor any relevant cases contain such an element.

² The State maintains that this purported "invitation letter," if it is even authentic, in no way authorized any person to unlawfully access secure election equipment and copy the data contained within it.

First, the Indictment is legally insufficient because “the accusation, read in conjunction with the statute, fails to set out the essential elements of the crime or to apprise” the defendant of the actual charges against him. *Newsome v. State*, 296 Ga. App. 490, 491, 675 S.E.2d 229 (2009) (holding the trial court erred in denying the defendant’s general demurrer). In this case, the Indictment provides no information, statute, regulation, or context whatsoever to its bald assertion of “lack of authority.” *Second*, as a matter of law, the authority undisputedly given by Coffee County officials negates an essential element of each offense and renders conviction legally impossible. The legally insufficiency of an indictment is a legal issue for a general demurrer.²

1. Background

The substance of this Indictment is “fatally defective and incapable of supporting a conviction.” *State v. Heath*, 308 Ga. 836, 839, 843 S.E.2d 801, 804–05 (2020) (quotation and citation omitted) (emphasis in original). It does not “allege the facts necessary to establish violation of a criminal statute.” *Jackson v. State*, 301

² “To the extent that an indictment fails to allege all the essential elements of the crime or crimes charged, including the required *mens rea*, it violates due process, is void, and cannot withstand a general demurrer.” *State v. Mondor*, 306 Ga. 338, 341, 830 S.E.2d 206, 210 (2019) (quotation omitted); *see also Strickland v. State*, 349 Ga. App. 673, 674, 824 S.E.2d 555, 557 (2019) (“[A] challenge to the sufficiency of an indictment because it fails to set forth all of the essential elements of the charged crime is properly considered a general demurrer.”). The failure to apprise a defendant of all the charges against her also cannot survive a general demurrer. *Newsome v. State*, 296 Ga. App. 490, 491, 675 S.E.2d 229 (2009) (holding the trial court erred in denying a general demurrer where “the accusation, read in conjunction with the statute, fail[ed] to set out the essential elements of the crime or to apprise” the defendant of the charges against him).

Ga. 137, 141, 800 S.E.2d 356, 360–61 (2017). The State’s Response is unpersuasive, misstates Ms. Powell’s arguments, and fails to address the gravamen of Ms. Powell’s general demurrer.

2. The Law Requires the Indictment Be Dismissed for Legal Insufficiency.

Counts 32-37 prohibit activities done *knowingly, willfully, or with knowledge that use is without authority*. See, e.g., O.C.G.A. § 16-9-93(a) (“Any person who uses a computer or computer network with knowledge that such use is without authority...”); O.C.G.A. § 21-2-574 (permitting the possession of official ballots by a person entrusted by “an officer charged by law with the care of the ballots”); O.C.G.A. § 21-2-566 (prohibiting the “willful” tampering of voting machines). Although phrased differently, the same is true for O.C.G.A. § 16-10-21 (Count 37), which prohibits the conspiracy to “commit theft of any property” which belongs to the state, state agencies, or political subdivisions – a crime that does not exist where authority is granted.³

The State has not pled sufficient facts to show an essential element of Counts 32-37: that unindicted coconspirators SullivanStrickler were *not authorized* by county officials—much less how Powell would have known that to be branded a

³ Not only is the State’s RICO count unprecedented, but the State’s alleged violations of two other statutes are unprecedented as well: O.C.G.A. §§ 21-2-603; 21-2-566 (Count 32 - Conspiracy to commit election fraud by tampering with voting machines) and O.C.G.A. §§ 21-2-603; 21-2-574 (Count 33 - Conspiracy to Commit Election Fraud by unlawful possession of ballots). Westlaw searches reveal no prosecutions under these statutes, save for this case.

criminal.⁴ The State’s own file renders it beyond dispute that Coffee County officials invited and authorized the forensic collection of data on January 7, 2021. The January 7, 2021, imaging was conducted in the presence of the Board member Eric Cheney and elections supervisor Misty Hampton.

If the State is contending that *the authorization given by Coffee County officials* was not “lawful,” as implied in a footnote to its Brady response at page 4, it did not allege that. Further, it would still be a purely legal issue, and the State would be trying to impose an additional element that does not appear in the statutes or any case applying them. That approach fails also.

Moreover, Coffee County officials not only have sole possession of the equipment in their offices, to which they have the keys, they have authority pursuant to statutes and regulations in Georgia to maintain and inspect the voting equipment. In fact, it is their responsibility. This might explain why the State’s indictment is devoid of facts giving rise to criminal conduct.

The State has not alleged or even argued a single fact or statute that prohibits the County officials from giving the authority Georgia law provides: “Each county shall be responsible for maintaining all components of the voting system.” Ga. Regs. 183-1-12-14(a). Counties “assume the responsibility for repair, maintenance, and upkeep of all [voting] system components.” Ga. Regs. 183-1-12-14(a). Where a voting system is faulty, the local officials may take the initiative to fix those problems. Ga.

⁴ The computer-related charges in Counts 34-36 require “knowledge” that such acts are, or would be, “without authority.” See Ga. Code. Ann. 16-9-93(b).

Regs. 183-1-12-14(b). Counties are responsible for the “maintenance and upkeep” of voting systems. Ga. Regs. 183-1-12-.04. Counties are allowed, by law, to provide for the “adequate technical support” for the “operation” of “voting equipment.” Ga. Code Ann. § 21-2-300(c). Moreover, the State has previously admitted this undisputed fact in the *Pearson v. Kemp* litigation, Case 1:20-cv-4809-TCB, where it conceded that county officials have authority over voting machines.

Because Coffee County officials gave SullivanStrickler and parties their permission and authority, there is no willful tampering of voting equipment, no prohibited possession of ballots, no conspiracy to commit computer theft, trespass, or invasion of privacy, and no conspiracy to defraud the state.⁵ Counts 32-37 must fail because as a matter of law, Coffee County officials authorized the actions of the unindicted coconspirators who accessed the voting equipment; or, the factual allegations of the Indictment are legally insufficient to state an offense. *Newsome v. State*, 296 Ga. App. 490, 492–93, 675 S.E.2d 229, 231 (2009).

In summary, the State has not alleged “the facts necessary to establish violation of a criminal statute.” *Jackson v. State*, 301 Ga. 137, 141, 800 S.E.2d 356, 360–61 (2017) in Counts 32-37. It cannot add an element to the statutes that the authority must be “lawful,” and the question of authority is reduced to a purely legal issue for decision by the Court.

⁵ See *Clarke v. State*, 317 Ga. App. 471, 472-73, 731 S.E.2d 100, 102 (2012) (A person does not commit theft where they take “under a fair or honest claim of right.”).

CONCLUSION

In conclusion, and for these reasons, Counts 32-37 are legally insufficient to apprise Ms. Powell of the offenses against her and must be dismissed.

Respectfully submitted,

/s/ Brian T. Rafferty
BRIAN T. RAFFERTY
Georgia Bar No. 311903
Counsel for Defendant

RAFFERTY LAW, LLC
1575 Johnson Road NE
Atlanta, Georgia 30306
(912)658-0912
brian@raffertylawfirm.com

CERTIFICATE OF SERVICE

I hereby certify the above styled motion has been served, this day, by electronic mail. These documents have been served by the Fulton County electronic filing system upon all parties.

Dated this 9th day of October 2023.

/s/ Brian T. Rafferty
BRIAN T. RAFFERTY
Georgia Bar No. 311903
Counsel for Defendant

RAFFERTY LAW, LLC
1575 Johnson Road NE
Atlanta, Georgia 30306
(912) 658-0912
brian@raffertylawfirm.com