IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

STATE'S CORRECTED RESPONSE TO DEFENDANT POWELL'S GENERAL DEMURRER AND MOTION TO DISMISS COUNT 1 (RICO)

COMES NOW the State of Georgia, by and through Fulton County District Attorney Fani T. Willis, and responds in opposition to Defendant Sydney Katherine Powell's General Demurrer and Motion to Dismiss Count 1 (RICO). The defendant challenges the indictment issued by Fulton County grand jury on the grounds that the RICO statute is unconstitutionally vague, that she was not part of any enterprise-based on extrinsic facts-and she argues for a construction of the statute that is foreclosed by binding authority. Her argument that the State has alleged "insufficient

predicate offenses" is similarly foreclosed, and based upon multiple misreadings of the statute. For the reasons set forth below, the Court should deny the motion.

I. INTRODUCTION

Two fundamental flaws run through Powell's general demurrer. First, Powell ignores Georgia criminal procedure. No defendant is entitled to dismissal of an indictment simply because she insists the facts are other than as alleged by the State. Powell's Motion is also characterized by an egregious failure to cite controlling authority.

Second, she persistently fails to cite controlling Georgia authority on the issues she raises and where she relies upon federal law, she repeatedly ignores decisions foreclosing her position, including decisions of the United States Supreme Court. Simply put, Powell persistently misreads the statute, the case law is against her, and if she wishes to present facts which she believes controvert the allegations against her, the time and place to do that is at trial, not in a general demurrer.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The governing legal standards.

Powell has filed a general demurrer. A general demurrer "challenges the sufficiency of the *substance* of the indictment."[1] Thus, 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. But if 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.[2]

[1] *Kimbrough v. State,* 300 Ga. 878, 880 (2017), quoting *Green v. State,* 292 Ga. 451, 452 (2013) (emphasis in original).
[2] *Kimbrough*, 300 Ga. at 880.

O.C.G.A. § 17-7-54 describes generally the standard for determining the sufficiency of an indictment: "Every 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." The indictment does both. Count 1 charges each defendant with the offense of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act O.C.G.A § 16-14-4(c), tracking the language of the statute:

> for the said accused, individually and as persons concerned in the commission of a crime, and together with unindicted co-conspirators, in the State of Georgia and County of Fulton, on and between the 4th day of November 2020 and the 15th day of September 2022, while associated with an enterprise, unlawfully conspired and endeavored to conduct and participate in, directly and indirectly, such enterprise through a pattern of racketeering activity in violation of O.C.G.A § 16-14-4(b), as described below and incorporated by reference as if fully set forth herein . . ..

Indictment at 13 (emphasis omitted). In addition to tracking the language of the statute, the indictment sets forth in detail the enterprise, listing specific persons associated with it and their activities. It alleges that these members and associates of the enterprise had connections and relationships with one another and with the enterprise. It further alleges that the enterprise constituted an ongoing organization whose members and associates function as a continuing unit.[3] The manner and methods used by the defendants and other members and associates of the enterprise to further its goals and achieve its purposes are set forth in detail.[4] The indictment then goes on to list 161 overt acts (substantial number of which are also acts of racketeering activity under the RICO statute).[5] The indictment alleges that the acts engaged in by the defendants and the unindicted co-conspirators have the same and similar intents, results, accomplices, victims,

[3] Indictment at 15.
[4] *Id.* at 16-19.
[5] *Id.* at 20-71.

and methods of commission and otherwise were interrelated by distinguishing characteristics and were not isolated acts.[6]

Powell could not admit these allegations and be innocent of a RICO conspiracy violation.

B. The State properly alleges a RICO enterprise and a conspiracy to participate in that enterprise through a pattern of racketeering activity

Powell's argument that she did not join a RICO enterprise does not rely on any case law or statutory authority. Instead, it cites only extrinsic facts, rendering her general demurrer void.

1. Powell's motion is a speaking demurrer and must be denied on that ground.

Powell's general demurrer is void because it refers to matters outside the record, including the Special Purpose Grand Jury's Report, a government advisory addressing Iranian efforts concerning voter registration, and a transcript from the January 6 Committee.[7]

These extrinsic facts that are not alleged in the indictment and cannot be considered by the Court.[8] A "speaking demurrer" is one which "attempts to add facts not otherwise apparent on the face of the indictment by means of stipulation. . . . 'Such a demurrer presents no question for decision, and should never be sustained.' Speaking demurrers present no legal authority for quashing an indictment. Speaking demurrers are void." *State v. Givens*, 211 Ga. App. 71, 72 (1993) (quoting *Walters v. State,* 90 Ga. App. 360, 365 (1954)). "A demurrer may properly attack only defects which appear on the face of the indictment, and a demurrer which seeks to add facts not so apparent but supply extrinsic matters must fail as a speaking demurrer." *State v. Holmes,* 142 Ga. App. 847, 848 (1977).

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[6] *Id.* at 71.
[7] General Demurrer at 5-6, nn. 6-9.
[8] The State does not stipulate or agree to the facts relied upon by Powell. Presentation of these extraneous facts is improper and requires denial of the motion. *Bullard v. State,* 307 Ga. 482, 486 n.5 (2019).

2. Powell's attempt to pursue summary judgment in a criminal case is unavailing.

Section II of Powell's general demurrer also relies largely on the assertion of facts not found in the Indictment through which she hopes to explain why she is not guilty of the charges against her. These include assertions that she never signed an engagement letter or agreed to represent Defendant Trump or his campaign, that she was acting as a lawyer, and that she did not make false statements.[9] Powell cannot avoid the strictures of a general demurrer by presenting extrinsic facts that she believes support a claim of innocence and asking the court to adjudicate the case on the merits at the pre-trial stage. Georgia law admits of no such process. As held in *State v. Henderson*, 283 Ga. App. 111 (2006)

> Next, we address the State's assertion that the trial court improperly granted Henderson's motion. A criminal charge is generally dismissed only when there is a defect on the face of the indictment or accusation. Henderson, however, sought to have the charge at issue dismissed based on the existence of an affirmative defense, which required the consideration of facts extrinsic to the accusation. There is no basis in Georgia criminal practice for "what, in civil practice, would be termed a motion for summary judgment." Thus the trial court had no authority to dismiss the charge against Henderson prior to trial.

Id. at 112. There "is no authority" for attempting "to convert . . . [a] demurrer into what, in civil practice, would be termed a motion for summary judgment." *Givens,* 211 Ga. App. at 72. The fundamental premise of a general demurrer is the assumption that all facts alleged in the indictment are true. *State v. Cohen,* 302 Ga. 616, 617 (2017) (quoting *Lowe v. State,* 376 Ga. 538, 539 (2003)).

Because Powell's demurrer is a speaking demurrer it is void and must be denied on that ground.

[9] General Demurrer at 5-6.

3. Powell's enterprise argument is unsupported by case law or statutory authority and is wrong.

To the extent she makes any substantive argument at all in the enterprise section of her demurrer, Powell suggests that the State has not adequately defined the enterprise. Of course, her argument is unburdened by reference to any decision or even the indictment itself.

Contrary to Powell's argument, the State has properly alleged an association-in-fact enterprise. An association-in-fact enterprise "is simply a continuing unit that functions with a common purpose." *Boyle v. United States,* 556 U.S. 938, 948 (2009) (referencing *United States v. Turkette,* 452 U.S. 576 (1981)). *Boyle* is instructive because it demonstrates the breadth of the enterprise concept:

> Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods-by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.

556 U.S. at 948.

Here, the indictment alleges that the enterprise consisted of a group of individuals associated in fact.[10] Defendants and other members and associates of the enterprise had connections and relationships with one another and with the enterprise.[11] The enterprise was an ongoing organization whose members functioned as a continuing unit for a common purpose.[12] The enterprise operated in Fulton County, Georgia, elsewhere in the State of Georgia and in other

[10] Indictment at 15.
[11] *Id.*
[12] *Id.*

states, including the District of Columbia.[13] The enterprise operated for a period of time sufficient to permit its members and associates to pursue its objectives.[14]

Powell makes no effort to explain why any of these allegations, which track *Boyle*, are inadequate. Instead, she simply asserts-based on extrinsic facts-that she is not part of the enterprise, an argument that is inappropriate for a general demurrer.

To the extent that Powell contends that some of the overt acts alleged where protected by the First Amendment, she fails to identify any such acts. Moreover, since a Georgia RICO conspiracy violation requires only one overt act,[15] and 161 are alleged, her argument fails because it does not present any scenario in which the "conspiracy violation would not be supported by at least one overt act."

C. There is no due process violation.

Powell's due process vagueness challenge to the constitutionality of Georgia RICO is meritless.

Powell argues that Georgia RICO is unconstitutional, but in doing so she fails to cite the decision of the Supreme Court of Georgia that rejected the same due process challenges to RICO she asserts here.[16] *Chancey v. State*, 256 Ga. 415 (1986). After noting that vagueness challenges to the federal RICO statute have repeatedly failed, *Chancey* concluded that a person of average intelligence, on a clear reading of the Georgia statute, together with the relevant definitional

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[13] *Id.*
[14] *Id.*
[15] O.C.G.A. § 16-14-4(c)(1).
[16] The Georgia appellate courts have also rejected every other constitutional challenge to RICO. *See, Dee v. Sweet*, 268 Ga. 346 (1997) (rejecting equal protection challenge); *Waller v. State*, 251 Ga. 124 (1983) (rejecting Fourth Amendment challenge), *reversed on other grounds*; *Walker v. Georgia*, 467 U.S. 39 (1984); *Evans v. State*, 252 Ga. 312 (1984) (rejecting *ex post facto* challenge); *Ledesma v. State*, 251 Ga. 885 (1984); *Western Bus. Sys. v. Slaton*, 492 F. Supp. 513 (N.D. Ga. 1980) (rejecting First Amendment challenge).

provisions, "could not help but realize that they would be criminally liable for participating in 'any enterprise' including their own, 'through a pattern of racketeering activity.'" 256 Ga. at 428 (quoting *United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976)). Powell does cite one decision of the Supreme Court of Georgia and two decisions of the Court of Appeals.[17]

Powell's due process argument overwhelmingly relies upon federal authority. The problem with that argument is that none of the federal cases she cites address the constitutionality of RICO, while she omits to cite even one of the multitude of federal decisions that reject vagueness challenges to that statute. Defendants in federal RICO cases first asserted due process void for vagueness challenges in the 1970s. Those challenges failed early and often. In the former Fifth Circuit, a vagueness challenge was first rejected in *United States v. Hawes*, 529 F.2d 472, 479 (5th Cir. 1976), which, as noted above, was followed by the Supreme Court of Georgia in *Chancey*. The Eleventh Circuit has also repeatedly rejected vagueness challenges to federal RICO. *United States v. Van Dorn*, 925 F.2d 1331, 1334 n.2 (11th Cir. 1991), held that an argument that RICO is unconstitutionally vague "completely lacking in merit," while *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1398 (11th Cir. 1994), followed *Van Dorn* in rejecting yet another vagueness challenge.

All of the other federal circuits have reached the same conclusion. Indeed, federal courts achieved unanimity in rejecting vagueness challenges to RICO over 30 years ago. For example, *United States v. Dischner*, 974 F.2d 1502, 1508 (9th Cir. 1992), noted that "[v]agueness challenges to RICO have been uniformly rejected by this Circuit and every other that has considered the issue." Similarly, *United States v. Bennett*, 984 F.2d 597, 606 (4th Cir. 1993), observed that "[t]o

[17] General Demurrer at 10, but those decisions do not contain any constitutional analysis. Her failure to cite the directly applicable adverse decision of the Supreme Court of Georgia in *Chancey* is inexplicable.

resolve this issue, we need look no further than to our sister circuits which have uniformly rejected vagueness challenges to RICO . . . ." Only Powell can explain why her parade of citations to non-RICO cases fails to include even one of the host of RICO decisions that reject her arguments.

Powell also fails to cite any of the decisions of the numerous state courts of last resort rejecting similar challenges to those jurisdictions' RICO statutes.[18] Powell also ignores the decisions of numerous intermediate state appellate courts that have reached the same conclusion.[19] The fact of the matter is that not a single case—whether from a Georgia court, the federal system, or another state—has held a RICO statute unconstitutional on any of the grounds raised by Powell in her motion. This wall of adverse authority will not go away simply because Powell ignores it.

Powell's final constitutional argument is that the only way to preserve the constitutionality of RICO is for the Court to read a requirement of pecuniary gain or economic or physical threat or injury into its operative provisions. Powell's actual argument for this restrictive reading of Georgia RICO is not a constitutional one, but rather an incorporation of Defendant Chesebro's assertion that O.C.G.A. § 16-14-2(b) requires such a reading.[20] The problem with Chesebro's argument is that it fails to cite any of the three controlling Georgia decisions holding that O.C.G.A. § 16-14-2 does not create elements of a Georgia RICO violation. *Cotton, Inc. v. Phil-Dan Trucking, Inc.,* 270 Ga. 95 (1998); *Reaugh v. Inner Harbour Hosp., Ltd.,* 214 Ga. App. 259, 264 (1994); *State v.*

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[18] *See*, *e.g.*, *State v. Reed*, 618 N.W.2d 327 (Iowa 2000); *State v. Bates*, 933 P.2d 48 (Haw. 1997); *State v. Ball*, 661 A.2d 251, 265 (N.J. 1995); *State v. Hansen*, 877 P.2d 898, 903-04 (Idaho 1994); *Flinn v. State*, 563 N.E.2d 536 (Ind. 1990); *State v. Tocco*, 750 P.2d 874 (Ariz. 1988).

[19] *See*, *e.g.*, *People v. Barone*, 635 N.Y.S.2d 35 (N.Y. App. Div. 1995); *State v. O'Connell*, 508 N.W.2d 23 (Wis. Ct. App. 1993); *Wirt v. Cent. Life Assur. Co.*, 613 So.2d 478, 479 (Fla. Dist. Ct. App. 1992); *State v. Thrower*, 575 N.E.2d 863 (Ohio Ct. App. 1989); *State v. Harris*, 980 P.2d 1132 (Or. Ct. App. 1999); *State v. Feld*, 745 P.2d 146 (Ariz. Ct. App. 1987); *State v. Johnson*, 728 P.2d 473 (N.M. Ct. App. 1986).

[20] General Demurrer at 10.

Shearson Lehman Bros., 188 Ga. App. 120, 121 (1988).[21] Powell's argument suffers from the same flaw. And, like Chesebro, Powell fails to acknowledge that 29 years ago the United States Supreme Court rejected an argument that 18 U.S.C. § 1962(c) requires an economic motive, concluding that "a requirement of economic motive" was "neither expressed nor, we think, fairly implied in the operative sections of the Act." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 260 (1994).[22] As the Court succinctly put it, "RICO contains no economic motive requirement." *Id*. at 262.

Powell also argues for a restricted reading of Georgia RICO relies on vague invocations of the First Amendment, but she fails to acknowledge the nature of the offenses alleged in the indictment. These include conduct in violation of O.C.G.A. § 16-10-23 (impersonating a public officer or employee), O.C.G.A. § 16-9-1(b) (forgery), O.C.G.A. § 16-10-20 (false statements and writings, concealment of facts, and fraudulent documents in matters within the jurisdiction of state or political subdivisions), and O.C.G.A. § 16-10-20.1 (filing false documents). Powell ignores the fact that the government has the authority to restrict certain categories of speech, including fraud, "the prevention and punishment of which have never been thought to raise any Constitutional problem." *United States v. Stevens,* 559 U.S. 460, 468-69 (2010) (quoting *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571-72 (1942)). It is, of course, well settled that a false statement knowingly and willfully made to the government or in a matter within its jurisdiction is not protected speech. *Haley v. State,* 289 Ga. 515, 528 (2011), (upholding the constitutionality of O.C.G.A. § 16-10-20 because the First Amendment affords no protection to lies that threaten to

[21] The numerous defects in Chesebro's argument are addressed in greater detail in the State's Brief in Opposition to Defendant Kenneth Chesebro's General Demurrer to Count 1 (RICO) at 5-9. In the interest of efficiency the State incorporates those arguments here rather than duplicating them their entirety.

[22] General Demurrer at 10-11.

harm the government). Simply put, lies are not afforded constitutional protection and neither is speech integral to criminal conduct. *Stevens,* 559 U.S. at 468-69.

D. The RICO conspiracy count does not fail for "insufficient predicate offenses."

Powell conflates the elements of a RICO conspiracy violation with those of a substantive RICO violation, incorrectly assuming that proof of a substantive violation is a prerequisite to a conspiracy violation.[23] For example, on page 12 of her general demurrer, she asserts that the RICO conspiracy count "fails for insufficient predicate offense that implicate Ms. Powell." Powell is wrong because, as explained below, a Georgia RICO conspiracy violation does not require allegation or proof that Powell:

- engaged in a pattern of racketeering activity;
- agreed personally to commit two or more acts of racketeering activity;
- committed or agreed to personally commit even one act of racketeering activity; or
- committed an overt act to effect the object of the conspiracy.

1. There is no requirement that the State allege or prove Powell committed or agreed to commit two predicate offenses

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." *Cotman v. State*, 342 Ga. 569, 585 (2017).[24] Or, as the Eleventh Circuit put

[23] *Scheidler,* 510 U.S. at 261 ("Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive."

[24] Georgia courts consistently use this formulation of RICO conspiracy liability. *See, e.g., McArthur v. Beech Haven Baptist Church of Athens,* 890 S.E.2d 427, 437 (Ga. App. 2023); *Z-Space, Inc. v. Dantanna's CNN Center, LLC,* 349 Ga. App. 248, 253 (2019); *Wilie v. Denton,* 323 Ga. App. 161, 165 (2013). Federal courts have also used this formulation in analyzing Georgia RICO; *Rosen v. Protective Life Ins. Co.,* 817 F.Supp.2d 1357, 1382 (N.D. Ga. 2011); and federal RICO; *Southern Intermodal Logistics v. D.J. Powers Co.,* 10 F.Supp.2d 1337, 1361 (S.D. Ga. 1998) (analyzing federal RICO and citing *Salinas v. United States,* 522 U.S. 52 (1997)).

it, the "touchstone of liability is an agreement to participate in a RICO conspiracy . . . .", *United States v. Browne*, 505 F.3d 1229, 1264 (11th Cir. 2007).

As *Cotman* makes clear, in contrast to a substantive violation, a RICO conspiracy violation offense is premised not upon the commission of acts of racketeering activity, but upon a joining conspiracy that contains a common plan or purpose to commit two or more predicate acts. As long as the plan contemplates that two or more predicate acts will be committed, it does not matter whether they ever actually occur, or, if they do, whether they are committed by conspirators other than the defendant.

Powell's argument that the RICO conspiracy claim against her fails because she did not personally engage in a pattern of racketeering activity has no support in the text of O.C.G.A. § 16-14-4(c). In contrast to the substantive violations set forth in subsections (a) and (b) of O.C.G.A. § 16-14-4, each of which requires a pattern of racketeering activity, subsection (c) contains no reference at all to racketeering activity or a pattern of racketeering activity. Instead, subsection (c) requires that one or more of the conspirators commit an "overt act to effect the object of the conspiracy." O.C.G.A. § 16-14-4(c)(1). If the General Assembly had intended to make a pattern of racketeering activity an element of a conspiracy violation it would simply have incorporated that term into the text of subsection (c), as it did in subsections (a) and (b). It did not.

Georgia courts have repeatedly rejected any requirement that a defendant must engage in a pattern of racketeering activity as a prerequisite to RICO conspiracy liability. For example, *Faillace v. Columbus Bank & Trust Co.*, 269 Ga. App. 866 (2004) specifically rejected the defendants' contention that "each of them must have committed at least two predicate acts in order to have the requisite intent for RICO conspiracy." *Id.* at 870. In doing so, *Faillace* quoted the United States Supreme Court's ruling in *Salinas v. United States*, 522 U.S. 52 (1997):

> The interplay between [federal RICO enterprise liability] and [federal RICO conspiracy liability] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense.

522 U.S. at 65.[25]

Salinas is instructive here. In *Salinas* the petitioner challenged his conviction because the jury was not instructed that he must have committed or agreed personally to commit two predicate acts. *Id*. at 63. The Supreme Court rejected that interpretation of the federal RICO conspiracy statute. In discussing general principles of conspiracy law, the Court noted that "[i]t is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself." *Id.* at 65. With this in mind, *Salinas* concluded that the proposition that each conspirator must himself commit or agree to commit two or more predicate acts "cannot be sustained as a definition of the conspiracy offense, for it is contrary to the principles we have discussed." *Id*. at 66.

Georgia decisions subsequent to *Faillace* have confirmed that a particular defendant personally commit two or more acts of racketeering activity is not a prerequisite to a RICO conspiracy violation:

> Furthermore, while Pasha argues that he was not adequately charged with the predicate offenses, he misapprehends what is central to conspiracy, namely that each actor in a conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy. . . .Thus, Pasha's argument is unavailing, since *there is no requirement in a conspiracy case that the State prove that Pasha personally committed the underlying predicate offenses*.

[25] Powell does not cite either *Faillace* or *Salinas*.

Pasha v. State, 273 Ga. App. 788, 790 (2005) (emphasis added).[26] As *Pasha* holds—and subsequent cases confirm—a Georgia RICO conspiracy defendant's liability may be based upon the own acts of other conspirators. *Whaley v. State,* 343 Ga. App. 701, 704 (2017).[27] In reaching this conclusion, both *Pasha* and *Whaley* followed general principles of Georgia conspiracy law:

> [I]f two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefore. This means that everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose, so long as they are a natural and probable consequence of the conspiracy.

Whaley, 343 Ga. App. at 704, quoting *Hicks v. State,* 295 Ga. 268, 272 (2014) (*Whaley* omitting citations, punctuation and emphasis from *Hicks*).

Salinas also stated another foundational principle of conspiracy law:

> A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. If conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, the supporters are as guilty as the perpetrators.

Salinas, 522 U.S. at 63-64 (internal citations omitted). This principle is equally applicable to a conspiracy to violate Georgia RICO and involvement in such a scheme is sufficient for RICO conspiracy liability. *Overton v. State,* 295 Ga. App. 223, 230 (2008) ("The evidence was also sufficient for a reasonable trier of fact to have found Kendric Dudley guilty beyond a reasonable doubt of the RICO violation, as it showed Dudley was involved in planning the murders of Arroyo and Singh and that he participated in the groups' other crimes alleged in the RICO indictment."),

[26] Powell does not cite *Pasha*.
[27] Powell does not cite *Whaley*.

id. at 230-31 ("The evidence showed that Overton was present and was involved in the planning of the murders of Arroyo and Singh.").[28]

2. The Coffee County acts of racketeering activity do not constitute only one act, nor would it make any difference to Powell's RICO conspiracy violation if they did.

Powell argues that the acts committed in Coffee County[29] constitute only one "act" as a matter of law. This argument suffers from numerous defects. First, it is wrong because, as shown above, there is no requirement that Powell commit *any* acts of racketeering activity for her to be guilty of a Georgia RICO conspiracy violation. O.C.G.A. § 16-14-4(c); *Pasha*.[30]

Once again, although Powell cites cases that she contends support her argument, she fails to mention the statutory amendment and controlling cases that defeat it.

Second, even if the State were required to allege a pattern of racketeering activity—and it is not in a conspiracy case—the indictment more than satisfies any such requirement.

In this case, the State alleges 161 overt acts. Under the plain language of O.C.G.A. § 16-14-4(c), any one of these 161 overt acts is sufficient to support a conviction. Moreover, even if contrary to the established caselaw, one act of racketeering activity was required, the indictment more than satisfies imposition of any such erroneous requirement, because 34 of the 161 overt acts

[28] *See also, de la Osa v. State*, 158 So. 3d 712, 731 (Fla. 4th Dist. Ct. App. 2015) (The State may prove a conspiracy violation by showing that the defendant knew the overall objective of the enterprise and intended to participate in it or agreed to further its purpose.).
[29] *See* Indictment at Acts 134, 144-155.
[30] Powell also suggests that the acts alleged by the State are too dissimilar and disconnected to constitute a pattern of racketeering activity. She is incorrect. "A criminal enterprise is more, not less, dangerous if it is versatile, flexible, diverse in its objectives and capabilities. Versatility, flexibility, and diversity are not inconsistent with pattern." *United States v. Masters*, 924 F.2d 1362, 1367 (7th Cir. 1991); "[A] single enterprise engaged in diversified activities fits comfortably within the proscriptions of the statute and the dictates of common sense." *United States v. Elliott*, 571 F.2d 880, 899 (5th Cir. 1978).

alleged in the Indictment constitute racketeering activity.[31] Even if a pattern of racketeering activity is required for a RICO conspiracy conviction—and the plain language of § 16-14-4(c) makes it clear it is not—Powell herself is alleged to have committed four such acts.[32] Even if those four acts were erroneously consolidated into a single act under *Faillace*, there would still be another 30 acts available provide the second act of racketeering activity required for a pattern. *Faillace*, 269 Ga. App. at 870.[33]

As noted above, *Pasha* holds that acts by other conspirators can support a defendant's RICO conspiracy conviction, and *Salinas* holds the same thing. This is important because Powell does not argue that the acts of racketeering activity alleged against the other conspirators are insufficient to constitute a pattern.

Powell's argument has been negated by statutory amendment and caselaw. When it was originally enacted, the RICO statute required a pattern of racketeering activity to involve "at least two *incidents* of racketeering activity." Ga. Code Ann. § 26-3402(c) (emphasis added). Various cases interpreting that language included that although the elements of two or more acts of racketeering activity might be present, in some circumstances they were so closely related in time or subject matter as to constitute only one "incident." These are the cases relied upon by Powell, such as *Security Life Insurance Co. of America v. Clark*, 273 Ga. 44 (2000); and *Stargate Software International v. Rumph*, 224 Ga. App. 873, 877 (1997). But in 2001, the General Assembly responded to these interpretations by amending the statute to provide that a pattern of racketeering

[31] *See* Indictment at Acts 24, 25, 56, 79, 80, 81, 82, 83, 84, 87, 88, 98, 103, 104, 105, 108, 113, 120, 121, 142, 143, 146, 147, 148, 149, 150, 151, 152, 153, 155, 157, 158, 160 and 161.
[32] *See id.* at Acts 146-149.
[33] *See also, Dorsey v. State*, 279 Ga. 534, 540-41 (2005) (two acts of racketeering activity are sufficient to form a pattern); *InterAgency, Inc. v. Danco Fin. Corp.*, 203 Ga. App. 418, 425 (1992) (same).

activity exists when a person engages "in at least two acts of racketeering in furtherance of *one* or more incidents, schemes, or transactions." Ga. L. 2001, p. 858, § 1 (emphasis added). As a result of this amendment, two acts of racketeering activity in furtherance of a single incident, scheme, or transaction are now sufficient to establish a pattern. *Mbigi v. Wells Fargo Home Mortg.*, 336 Ga. App. 316, 323 (2016). Simply put, the 2001 amendment to the pattern definition changed the cases such as *Stargate Software*; *Raines v. State*, 219 Ga. App. 893, 894 (1996), and *Emrich v. Winsor*, 198 Ga. App. 333 (1991), relied upon. All of the cases Powell relies upon pre-date the 2001 amendment.

The essence of a RICO conspiracy is an agreement "to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity." *United States v. Elliott*, 571 F.2d 880, 902 (5th Cir. 1978). Or, as a Florida court put it when analyzing Florida's counterpart to Georia RICO, "the RICO conspiracy statute proscribes a defendant's agreement to participate in the conduct of the affairs of an enterprise, not a defendant's agreement to commit predicate acts." *State v. Reyan*, 145 So. 3d 133, 140 n.7 (Fla. 3d Dist. Ct. App. 2014).

E. An overt act need not be an act of racketeering activity.

Powell also incorrectly argues that overt acts must constitute acts of racketeering activity.[34] She is wrong. While Georgia's RICO conspiracy provision does require that one or more of the conspirators commit an overt act, it contains no requirement that an overt act also constitute an act of racketeering activity and Georgia law is clear that an overt act need not be a crime. *McCright*

[34] This assumption is also unsupported by any citation to text or case law.

v. State, 176 Ga. App. 486, 487 (1985) ("Of course, the overt act need not be a crime in itself.").[35] Moreover, as noted above, O.C.G.A. § 16-14-4(c) contains no reference to racketeering activity, only to an overt act. There is no definition in O.C.G.A. § 16-14-3 of an overt act and therefore no reason to believe it has a unique meaning in the RICO context. Under Georgia law, an overt act is not itself an essential element to the crime of conspiracy, but instead is required to be plead in the indictment "to demonstrate that the conspiracy was actually 'at work.'" *Nordahl v. State*, 306 Ga. 15, 26 n.22 (2019) (quoting *Carlson v. United States*, 187 F.2d 366, 370 (10th Cir. 1951)). If the General Assembly intended to require an act of racketeering activity be committed as an element of conspiracy violation, it could easily have said so. Instead, while the General Assembly specifically referred to racketeering activity in subsections (a) and (b), in subsection (c) it adopted a different requirement, that of an overt act.

F. The overt act required for a RICO conspiracy conviction may be committed by any conspirator.

Powell also argues that the State must allege she personally committed an overt act. Once again, she is wrong. O.C.G.A. § 16-14-4(c)(1) only requires an overt act by any one of the conspirators. *Pasha*, 273 Ga. App. at 790 ("Furthermore, while Pasha argues that he was not adequately charged with the predicate offenses, he misapprehends what is central to conspiracy,

[35] Georgia and federal cases are consistent regarding this point. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975)("The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53 (1942)("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime."); *Pierce v. United States*, 252 U.S. 239, 243 (1920)("[Y]et the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy."). As this caselaw makes clear, Powell's suggestion on page 6 of her General Demurrer that an overt act must be a crime is wrong.

namely, that each actor in a conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy."). As *Whaley* held

> [I]f two or more persons enter into a conspiracy, *any act done by any of them* pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This means that everything said, written, or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done or written by each of them.

343 Ga. App. at 704 (emphasis added).

The Indictment alleges a total of 161 overt acts, 12 of which were committed by Powell.[36] Because it would make no difference to the viability of Count I if every overt act allegedly committed by Powell was eliminated from the indictment, because at least 12 overt acts by other defendants would remain, any one of which is sufficient to satisfy the overt act requirement of O.C.G.A. § 16-14-4(c)(1), her demurrer must be overruled.

G. There is no basis for this Court to dismiss the indictment.

Powell has filed a void speaking demurrer. That in and of itself is sufficient to deny relief. In addition, Powell's arguments are controlled against her by binding authority.

III. CONCLUSION

Powell's General Demurrer and Motion to Dismiss Count 1 (RICO) must be overruled and denied in its entirety.

Respectfully submitted this 2nd day of October 2023.

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[36] *See* Indictment at Acts 3, 33, 90, 91, 144, 145, 146, 147, 148, 149, 155, 159.

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE TO DEFENDANT POWELL'S GENERAL DEMURRER AND MOTION TO DISMISS COUNT 1 (RICO) upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 2nd day of October 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John W. "Will" Wooten

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