IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT CHESEBRO'S REPLY BRIEF IN SUPPORT OF HIS GENERAL DEMURRER TO COUNT 1 (RICO)

COMES NOW Kenneth Chesebro, by and through undersigned counsel, and submits this reply to the State's Response to his General Demurrer to Count 1. Because this motion may be dispositive of a Count 1, and thus a significant portion of the case, Mr. Chesebro respectfully requests this Honorable Court schedule a hearing on this motion. In support thereof, Mr. Chesebro shows this Honorable Court as follows:

I. MR. CHESEBRO'S DEMURRER IS NOT A "SPEAKING DEMURRER"

The State claims that Mr. Chesebro's demurrer is an improper "speaking demurrer" and thus void as a matter of law because it provides facts not alleged in the indictment. However, Mr. Chesebro's demurrer is not a void speaking demurrer for multiple reasons. First, although the demurrer does include a "Factual Background" section, the substantive portion of the demurrer—the "Argument and Citation to Authority" section—does not rely on, cite, or refer to any of the proposed facts. A demurrer's inclusion of a fact that is not alleged in the indictment does not automatically render the entire motion void. If the merits of a defendant's challenge can be determined "without reaching matters outside the four corners of the indictment," then the demurrer

is not an improper "speaking demurrer." *See State v. Grube*, 293 Ga. 257, 258 (2013). Here, the demurrer ***does*** allege that the indictment is flawed on its face by virtue of the lack of a material allegations—namely, that the pattern of racketeering activity must be "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).

Second, the only additional information which Mr. Chesebro would submit to this Court in support of his general demurrer is testimony—whether live or in the form of an affidavit—from former State Senator Chuck Clay. Senator Clay authored the 1997 amendment to O.C.G.A. § 16-14-2 regarding the legislature's intent. Senator Clay's testimony is akin to using a research database to find the relevant committee report in order to discern the legislative intent. In fact, it is more authoritative that performing such a tedious task. As U.S. Supreme Court Chief Justice John Roberts noted at his confirmation hearing, "[a]ll legislative history is not created equal."[1] Different weight should be given to different evidence to reflect the legislative process, its rules, and internal hierarchy of communications. A statute's author's direct testimony about what the legislature intended surely carries the most weight.

Third, even if Senator Clay's testimony could be considered extrinsic facts, this Court can still consider it in ruling on the general demurrer. The Georgia Supreme Court holds that "[a]s a *general matter*, a demurrer (whether general or special) must allege some flaw on the face of the indictment itself; a demurrer *ordinarily* cannot rely on extrinsic

[1] Orin Kerr, *John Roberts in 2015: The Ultimate Goal of Interpreting a Statute Is "to Figure out What Congress Intended"*, WASH. POST (June 26, 2015, 1:41 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/roberts-in-2005-the-ultimate-goal-of-interpreting-a-statute-is-to-figure-out-what-congress-intended/.

facts that are not alleged in the indictment." *State v. Williams*, 306 Ga. 50, 53 (2019) (emphases added). Importantly, the Court did not say that a demurrer can ***never*** rely on extrinsic evidence. Rather, the Court has left open the possibility that courts may consider extrinsic evidence in ruling on demurrers in specific circumstances. *See, e.g.*, *Williams*, 306 Ga. at 53 (finding an exception where parties stipulate to extrinsic facts). Courts can also consider extrinsic facts in demurrers if they take judicial notice of those facts.[2] Under Georgia law, courts can take judicial notice of facts that are "not subject to reasonable dispute in that [they are] . . . [c]apable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." O.C.G.A. § 24-2-201(b)(2). Here, the Court can take judicial notice of the legislature's intent in amending the Georgia RICO Act through the testimony of Senator Clay, the author of the bill.

II. LEGISLATIVE HISTORY OF O.C.G.A. § 16-14-2

Prior to 1997, O.C.G.A. § 16-14-2 stated as follows:

> (a) This chapter shall be known and may be cited as the Georgia RICO Act.
>
> (b) The General Assembly finds that a severe problem is posed in this state by the increasing organization among certain criminal elements and 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. The General Assembly declares that the intent of this chapter is to impose sanctions against this subversion of the economy by organized criminal elements and to provide compensation

[2] Notably, the Court of Appeals defines a "speaking demurrer" as "one which alleges some new matter, not disclosed by the pleading (indictment) against which the demurrer is aimed and ***not judicially known or legally presumed to be true***." *State v. Givens*, 211 Ga. App. 71, 72 (1993) (emphasis added). What is important here—and what the State conveniently omits—is that the issue with considering extrinsic facts on a demurrer is that such facts are, at this stage, not judicially known or presumed to be true.

> to private persons injured thereby. It 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. This chapter shall be construed to further that intent.

Ga. Laws 1980, p. 405–06.[3] It was then amended in 1997 to state the following:

> (a) The General Assembly finds that a severe problem is posed in this state by the increasing sophistication of various criminal elements and the increasing extent to which the state and its citizens are harmed as a result of the activities of these elements.
>
> (b) 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.

Ga. Laws 1997, p. 672.[4] The statute has remained unchanged since.

III. O.C.G.A. § 16-14-2(b) IS A THRESHOLD REQUIREMENT TO RICO

The State argues that O.C.G.A. § 16-14-2(b) does not create an additional element of RICO. In support, it cites multiple cases for the holding that § 16-14-2 is not an element of a civil RICO claim. *See, e.g.*, *State v. Shearson Lehman Bros.*, 188 Ga. App. 120 (1988);

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[3] The State can access this document at http://dlg.galileo.usg.edu/do:dlg_zlgl_406881155 on page 129 of the PDF.

[4] The State can access this document at http://dlg.galileo.usg.edu/do:dlg_zlgl_579990726 on page 254 of the PDF.

Reaugh v. Inner Harbour Hosp., Ltd., 214 Ga. App. 259 (1994);[5] *Cotton, Inc. v. Phil-Dan Trucking, Inc.*, 270 Ga. 95 (1998). However, each of these cases address only the portion of § 16-14-2 that discusses the ***findings*** that lead lawmakers to enact RICO.[6] The cases do not address the subsequent portion of the statute which specifically discusses the types of conduct ***intended*** to be prosecuted.[7] In other words, the cases which the State cites only hold that the legislative *findings* are not an element of a RICO claim; these cases say nothing about the express legislative *intent*.

Moreover, all of these cases addressed the pre-1997 version of § 16-14-2 ***before*** it was amended. This Court can presume that the legislature was aware of these cases when it chose to amend the statute. *See Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 852 (2017). The State argues that this means the legislature did not intend § 16-14-2 to be a threshold requirement for RICO because it amended a statute that had no force instead of § 16-14-4. But the State's argument is illogical. Why would the legislature expend the effort to amend a statute that had ***no*** effect on RICO cases whatsoever?

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[5] The *Reaugh* case is about the type of recovery available in a civil RICO case. In *Reaugh*, the Court of Appeals held that the legislative findings for enacting RICO does not limit civil damages to certain types of injuries. 214 Ga. App. 259.

[6] Prior to 1997, the statute stated that the "General Assembly ***finds*** that a severe problem is posed in this state by the increasing organization among certain criminal elements and 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. . . ." (emphasis added).

[7] Immediately after stating the legislature's findings, the pre-1997 statute discusses the intent of the RICO Act, stating that "[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."

The Georgia Supreme Court holds that "when a statute is amended, from the addition of words it may be presumed that the legislature intended some change in the exisiting law." *Nuci Phillips Mem'l Found., Inc. v. Athens-Clarke Cnty. Bd. of Tax Assessors*, 288 Ga. 380, 383 (2010) (internal quotations omitted). When the legislature amended § 16-14-2 in 1997, it expanded the type of targeted criminal activity from that which "the motive or effect of which is to derive pecuniary gain" to activity "motivated by or the effect of which is pecuniary gain *or economic or physical threat or injury*." *Compare* Ga. Laws 1980, p. 405; *with* Ga. Laws 1997, p. 672 (emphasis added). Thus, the Court can presume that the legislature intended some change in existing law—i.e., the case law the State cites—when it amended § 16-14-2. Indeed, it is evident that this expression of legislative intent is a threshold requirement to a valid RICO prosecution by virtue of the fact that the legislature expanded the targeted activity by amendment.

Yet the State argues that this Court should ignore the clear legislative intent and focus only on the sections of the RICO Act which suit the State. In support of this, the State cites several federal cases for the bold claim that the U.S. Supreme Court has refused to limit the federal RICO Act in similar way. *See, e.g.*, *Russello v. United States*, 464 U.S. 16 (1983); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994). But the State cherry-picks language from these cases in a manner that is misleading to this Court.

In *Russello*, the sole issue before the Court was the meaning of "interest" within the RICO statute. 464 U.S. at 20. Because the RICO statute did not define "interest," the Court begins its analysis by looking to the legislative purpose and intent. *Id.* at 20–21. In

Northwestern Bell, the Court discussed how the *Sedima* case rejected a "pinched construction of RICO's provision for a private civil action" only be used against organized crime syndicates. 492 U.S. at 249 (citing *Sedima*, 473 U.S. at 499). In *Sedima*, the Court rejected the argument that civil RICO claims could not be brought against "legitimate businesses," noting that "Congress ***wanted*** to reach both 'legitimate' and 'illegitimate' enterprises." 473 U.S. at 499 (emphasis added). Also in *Sedima*, the Court rejected a lower court's imposition of a "racketeering injury" requirement, in lieu of a general "injury" requirement, that the district court had devised out of thin air because the concept was too vague and hard to define. 473 U.S. 479.[8]

In *Scheidler*, the Court held that economic motivation was not a required element of the federal RICO Act because ***nowhere*** in the federal RICO Act was "there any indication that an economic motive is required." 510 U.S. at 257.[9] In contrast, there is a very clear, express statement in the Georgia RICO Act that racketeering activity must have some sort of monetary or injurious motivation or effect. *Compare* O.C.G.A. § 16-14-2(b) *with* 18 U.S.C. § 1961 et seq. The *Scheidler* Court further explained that a statement of Congress' *findings* was insufficient to support a basis for an economic motive requirement

[8] Unlike the lower court's vague "racketeering injury," it is far easier to determine when criminal activity is motivated by or has the effect of either pecuniary gain or economic or physical threat or injury.

[9] The federal RICO Act made it unlawful for an "enterprise engage in, or the activities of which affect, interstate or foreign commerce" to conduct a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c). The Court recognized that enterprises "engaged in" commerce have profit-seeking motives. 510 U.S. at 257–58. However, the Court also pointed out that an enterprise does not need to have a profit-seeking motive in order for its activities to "affect" commerce because "affect" means "to have a detrimental influence on." *Id.* at 258.

in the federal RICO Act because Congress had chosen to enact a statute that was not limited to organized crime syndicates. 510 U.S. at 260.

Lastly, in *Northwestern Bell*, the Court declined to use the provisions of one statute, the Organized Crime Control Act, to dictate the definition of a term in an entirely separate act, the federal RICO Act. 492 U.S. at 245. But unlike in *Northwestern Bell*, Mr. Chesebro is not asking this Court to look anywhere other than the Georgia RICO Act to determine RICO's requirements. The rules of statutory construction would require this. Georgia courts hold that "statutes that are *in pari materia* to each other must be construed together." *Expedia, Inc. v. City of Columbus*, 285 Ga. 684, 689 (2009).

The State also argues that many of enumerated predicate acts that are listed under the definition of "racketeering activity" in the statute do not ordinarily involve a monetary or injurious motivation or effect. Perhaps when some of these enumerated offenses are committed *alone*—and not part of a racketeering pattern—they do not necessarily involve a monetary or injurious motivation or effect. But a cursory search of Georgia cases where such offenses were committed as part of a racketeering pattern shows that these predicate acts were either motivated by or had the effect of pecuniary gain or economic or physical harm.[10] Thus, the State may be hard-pressed to find any RICO cases in which the criminal activity was not motivated by or had the effect of pecuniary gain or economic or physical threat or injury. Notably, the State has offered no example of any actual case to support its point.

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[10] *See, e.g.*, *Maddox v. S. Eng'g Co.*, 231 Ga. App. 802 (1998); *Adams v. State*, 231 Ga. App. 279 (1998); *Purvis v. State*, 208 Ga. App. 653 (1993); *Maddox v. S. Eng'g Co.*, 216 Ga. App. 6 (1994).

The State further takes issue with Mr. Chesebro's citations, asserting that these cases do not explicitly hold that a failure to plead § 16-14-2(b)'s threshold requirement mandates a dismissal of an indictment.[11] But Mr. Chesebro never claimed that these cases held such. Mr. Chesebro cited those cases as authority that supports a proposition different from the demurrer's, but sufficiently analogous to lend support. That is why the citations are preceded by the "*Cf.*" signal.[12] Despite the State's incessant cries that Mr. Chesebro produce a citation explicitly stating that failure to allege § 16-14-2(b)'s threshold requirement warrants an indictment's dismissal, Mr. Chesebro's challenge is likely an issue of first impression for Georgia courts.

But this Court need not ponder or entertain debate about whether the legislature intended for § 16-14-2(b) to be a threshold requirement for RICO. For this question is best answered by the author of the bill: Senator Clay.

IV. THE INDICTMENT FAILS TO MEET O.C.G.A. § 16-14-2(b)'S THRESHOLD

The State claims that the indictment does sufficiently allege a monetary or injurious motivation or effect. First, it claims that the RICO conspiracy would have conferred pecuniary gain upon Trump had it succeeded because Trump would have received a salary and benefits if he was President. However, the primary issue with this logic is that the indictment does not contain any allegations about a salary or benefits or

[11] The cases cited in Mr. Chesebro's demurrer are the following: *Overlook Garden Props., LLC v. Orix, U.S.A. LP*, 366 Ga. App. 820 (2023); *Carr v. State*, 350 Ga. App. 461 (2019); *Moseley v. State*, 253 Ga. App. 710 (2002); *Sec. State Bank v. Visiting Nurses Ass'n of Telfair Cnty.*, 256 Ga. App. 374 (2002).

[12] The State can refer to Rule 1.2 of the Bluebook (whitepages) if it needs assistance on how introductory signals are used.

what Trump would have received had the conspiracy succeeded. Second, the State claims that the Coffee County breach had the effect of economic injury on Dominion Voting Systems. Again, the indictment does not specifically allege any economic injury to Dominion Voting Systems.

Third, the State claims that the conspiracy had the effect of physical threats because Ruby Freeman was harassed, intimidated, and lied about. But the indictment does not allege that any ***actual*** threat was made to Ruby Freeman. Although it alleges that Freeman was harassed with multiple phone calls, text messages, visits, and offers to help; the indictment does not specifically allege that a *threat*—i.e., a statement of intention to inflict physical or economic injury—was made to Ruby Freeman or anyone else.

Even assuming *arguendo* that the indictment does allege a threat was made, the effect of any threat is too attenuated to meet § 16-14-2(b)'s threshold. In this social media age, it is increasingly difficult to escape the wrath of trolls, online bullies, and individuals who believe it is their responsibility to hold strangers "accountable." Threats from strangers—whether empty or genuine—are the consequence of all notable activity in the 21st century. Thus, even if the Court agreed on the consequence of the overt acts regarding Freeman, the consequence was neither the purpose nor the principal motive or effect of the activity.[13] If the Court were to allow attenuated effects to survive § 16-14-2(b)'s threshold, then little if nothing could stop prosecutors from indicting the Plastics clique from *Mean Girls* on RICO charges.

[13] In contrast, a drug distribution ring which uses violence to obtain and protect its product has a principal effect of physical threat or injury.

V. CONCLUSION

In sum, despite the State's efforts to claim otherwise, the indictment fails to allege O.C.G.A. § 16-14-2(b)'s threshold requirement of a monetary or injurious motive or effect. Accordingly, Count 1 to the indictment has not been sufficiently pled and should be dismissed.

WHEREFORE, Mr. Chesebro respectfully requests this Court schedule a hearing on his general demurrer to Count 1 and thereafter grant his demurrer and dismiss Count 1.

Respectfully submitted, this 6th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing *Reply Brief in Support of General Demurrer to Count 1 (RICO)* upon counsel for the State of Georgia via the e-filing system.

ON THIS, the 6th day of October, 2023.

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