IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, v. JEFFREY B. CLARK, ET AL., Defendants	Case No. 23SC188947

JEFFREY B. CLARK'S GENERAL DEMURRERS AND MOTION TO QUASH AS TO COUNT ONE

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TABLE OF CONTENTS

I. General Demurrers: Count One Fails to State any Cognizable Violation of the RICO Statute. 1

II. Motion to Quash the Indictment 2

Argument and Citation of Authority 2

I. Standard of Review 2

II. General Demurrer - Count One Fails to Allege a Cognizable Violation of the Georgia RICO Statute Against Mr. Clark. 3

1. The Object of the Alleged Conspiracy, “Attempting to Unlawfully Change the Outcome of an Election” Is Not a Crime 3

2. Lack of Distinction Between Enterprise and Conspiracy 8

3. The Indictment fails to Allege a Cognizable Pattern of Racketeering Activity 9

a. Lack of Continuity 9

b. The Indictment Fails to Allege that Mr. Clark Engaged in a Pattern of Racketeering Activity. 13

4. Absence of Pecuniary Gain or Economic or Physical Threat or Injury. 15

5. The Required Nexus Between the Enterprise and the Pattern of Racketeering Activity Is Missing. 20

6. The Indictment Fails to Allege How Mr. Clark Agreed to Join any Conspiracy. 21

7. The Charges Violate Mr. Clark’s First Amendment Rights. 22

Conclusion 24

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GENERAL DEMURRERS AND MOTION TO QUASH AS TO COUNT ONE

Comes Now Jeffrey Bossert Clark, and asserts these general demurrers and motion to quash as to Count One of the Indictment against him.

I. GENERAL DEMURRERS: COUNT ONE FAILS TO STATE ANY COGNIZABLE VIOLATION OF THE RICO STATUTE.

Mr. Clark demurs generally to Count One on the grounds that it fails to state any cognizable violation by Mr. Clark of the Georgia RICO statute in that:

(1) it alleges a conspiracy to "unlawfully change the outcome of the election," which is not a crime (and cannot be made so simply by application of the adverb "unlawfully"), and further that it fails to allege that the defendant, or any defendant, had criminal intent to conspire to "unlawfully change the outcome of the election;"

(2) there is no pattern of racketeering activity because there is only one transaction alleged against Mr. Clark;

(3) there is no allegation or inference of an agreement between Mr. Clark and anyone to do any act in furtherance of the alleged conspiracy, and without such an agreement it cannot be part of any conspiracy;

(4) the alleged enterprise did not last long enough to satisfy the requirement of continuity;

(5) there is no pecuniary motive alleged or inferable as to Mr. Clark's conduct; and

(6) the charges against Mr. Clark violate his First Amendment rights.

II. MOTION TO QUASH THE INDICTMENT

For the same reasons, Mr. Clark moves to quash the Indictment.

ARGUMENT AND CITATION OF AUTHORITY

I. STANDARD OF REVIEW

The standard of review for a general demurrer is set forth in *Kimbrough v. State*:

> A general demurrer "challenges the sufficiency of the substance of the indictment." *Green v. State*, 292 Ga. 451, 452, 738 S.E.2d 582 (2013) (citation omitted; emphasis supplied). 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. *See Lowe v. State*, 276 Ga. 538, 539 (2), 579 S.E.2d 728 (2003). 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. *See id*.

Kimbrough v. State, 300 Ga. 878, 880 (2017).

Where a count incorporates other allegations by reference, it is read as a whole:

> As to the offenses set forth in an indictment, "each count must be complete within itself and contain every allegation essential to constitute the crime." *State v. Jones*, 274 Ga. 287, 288 (1), 553 S.E.2d 612 (2001). Nonetheless, "one

> count [of an indictment] may incorporate by reference portions of another, and the indictment is read as a whole." Id. at 289 (1), 553 S.E.2d 612.

Daniels v. State, 302 Ga. 90, 99 (2017), *overruled on other grounds* by *State v. Lane*, 308 Ga. 10 (2020).

II. GENERAL DEMURRER - COUNT ONE FAILS TO ALLEGE A COGNIZABLE VIOLATION OF THE GEORGIA RICO STATUTE AGAINST MR. CLARK.

1. THE OBJECT OF THE ALLEGED CONSPIRACY, "ATTEMPTING TO UNLAWFULLY CHANGE THE OUTCOME OF AN ELECTION" IS NOT A CRIME.

The Indictment alleges a broad criminal conspiracy to "unlawfully change the outcome of the election." On page 13, the opening allegations of Count One allege the defendants unlawfully conspired to participate in the enterprise through a pattern of racketeering activity in violation of O.C.G.A. § 16-14-4(c) "as described below and incorporated herein by reference." This allegation of a conspiracy is thus modified by the incorporated allegations and they are read together. This rule is normally applied to find an indictment sufficient as against a demurrer, *see e.g., Hester v. State*, 283 Ga. 367, 368 (2008), but cannot be viewed as a one-way ratchet in favor of the State. Here it means that the allegations on p. 13 are modified by the remaining allegations of Count One.

Therefore, the conspiracy allegation is modified by the Introduction on p. 14, which alleges that defendants "refused to accept that Trump lost, and they knowingly and willfully *joined a* ***conspiracy to unlawfully change the outcome of the election*** *in favor of Trump*." (Emphasis added).

It is elementary that an agreement between persons to commit a lawful act is not a criminal conspiracy. Thus, the plain language of O.C.G.A. § 16-4-8 defines a criminal conspiracy as "A person commits the offense of conspiracy to commit a crime when he together with one or more persons ***conspires to commit any crime*** and any one or more of such persons does any overt act to effect the object of the conspiracy." (Emphasis added). Thus *Hourin v. State*, 301 Ga. 835, 839 (2017), held that if the substantive claim of a crime fails, so does the conspiracy claim.

Every state in the Union has laws allowing election contests. In Georgia they are found at O.C.G.A. § 21-2-520, *et seq*. The Twelfth Amendment to the U.S. Constitution and the Electoral Count Act of 1877, 3 U.S.C. § 15, *et seq*. (in the version as codified prior to post-2020 amendments to the statutory scheme), provide for lawful contests in Congress of electoral college elections, as briefed by Defendant David Shafer. Election contests by definition seek to overturn the outcome of elections but are a perfectly lawful activity to achieve a lawful result, not a criminal activity to achieve an unlawful result. Therefore, an agreement to gather evidence for, prepare, file, and prosecute an election contest through any of the legally available methods under the Georgia election contest statutes, the Electoral Count Act or the Twelfth Amendment is not a criminal conspiracy, nor can agreements to pursue such remedies be a criminal conspiracy.

The Legislature has defined 48 separate criminal offenses pertaining to elections in Article 15 of Chapter 2 of Title 21, O.C.G.A. §§ 21-2-560 – 21-2-604. Among that number,

there is no such offense as "unlawfully change the outcome of an election." There are crimes for interfering with a primary or election, § 21-2-566, conspiracy to commit election fraud, § 21-2-603, and criminal solicitation to commit election fraud, § 21-2-604, but there is no such crime as "unlawfully chang[ing] the outcome of an election."

Therefore, it cannot be unlawful without more to merely challenge the outcome of an election or seek to "overturn" it,[1] or to plot, plan, and scheme to do so (all loaded terms written for media consumption). Lawful conduct cannot be made into a crime merely by prosecutors tacking the adverb "unlawfully" onto some set of acts and adorning it with a series of pejorative adjectives.

The Indictment on page 13 alleges that the defendants conspired in violation of O.C.G.A. § 16-14-4(c) to violate § 16-14-4(b). But in the entire 98-page Indictment the only mentions of § 16-14-4(c) apart from the table of contents is this single reference on page 13.

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[1] Not only is "unlawfully chang[ing] the outcome of an election" not a defined crime, the word "overturn" is also not defined in Georgia statutory law. By using the word "overturn," we take the prosecutors to mean that, at some undefined point in time, the Georgia election was sufficiently decided in favor of Joseph Biden such that somehow undefined efforts attempting to use Georgia legislative processes or federal congressional processes to "change" that "outcome" were "unlawful[]." We point this out because we resist not just the idea that the Indictment imagines a conspiracy to commit a non-crime, but also frequent use by prosecutors and the mainstream media of the loaded term "overturn," which we do not accept. If election contests are legal, if state legislatures have plenary control over the manner of appointing electors (*McPherson v. Blacker*, 146 U.S. 1, 35 (1892)), and if the Electoral Count Act contemplates a process for Congress to question cast Electoral College votes—all of which are true, the election is not being "overturned" if those processes change a pre-inauguration day tentative election result.

The conspiracy about which the State really cares, and the gravamen of Count One, which is mentioned four times as often as § 16-14-4(c), is the alleged conspiracy to "unlawfully change" the outcome of the election, which is not a crime. *See* pp. 14; 16 ¶ 2, 17; ¶s 3 & 4.

By express incorporation, the alleged conspiracy in violation of § 16-14-4(c) to violate § 16-14-4(b) is modified to conform to the core allegation that the object of the conspiracy was the non-existent crime of engaging in a "conspiracy to unlawfully change the outcome of the election in favor of Trump."

Count One thus fails to allege a legally cognizable criminal conspiracy and should be dismissed on general demurrer.

Moreover, this purported crime as alleged fails to allege any criminal intent. "[C]riminal intent is an essential element of every crime where criminal negligence is not involved." *Tate-Jesurum v. State*, 368 Ga. App. 710, 713 (2023), *reconsideration denied* (July 12, 2023)). Whether viewed against the crimes actually defined in the Georgia Code, or those within the sweep of conspiring to engage in the non-crime of "unlawfully" changing the outcome of the election in favor of Trump, the Indictment is defective and should be dismissed.

"'An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged.'" J*ackson v. State*, 301 Ga. 137, 139 (2017), quoting *Henderson v. Hames*, 287 Ga. 534, 538 (2010). "'[D]ue process of law requires that the

indictment on which a defendant is convicted contain all the essential elements of the crime." *Jackson v. State* 301 Ga. at 139, *quoting Borders v. State*, 270 Ga. 804, 806(1) (1999). Upon these principles, the Court in *Jackson* held that merely alleging a violation of the statute but failing to allege the essential elements of the offense was insufficient to overcome a general demurrer. "Withstanding such a challenge requires more than simply alleging the accused violated a certain statute." *Id*. at 140.

> An indictment that alleges the accused violated a certain statute, without more, would simply state a legal conclusion regarding guilt, and not an allegation of facts from which the grand jury determined probable cause of guilt was shown. Likewise, it would not allege sufficient facts from which a trial jury could determine guilt if those facts are shown at trial. A valid indictment "[uses] the language of the statute, includ[ing] the essential elements of the offense, and [is] sufficiently definite to advise [the accused] of what he must be prepared to confront." *Davis v. State*, 272 Ga. 818, 819 (1), 537 S.E.2d 327 (2000).

Id. at 141. "Unless every essential element of a crime is stated in an indictment, it is impossible to ensure that the grand jury found probable cause to indict. Consequently, 'there can be no conviction for the commission of a crime an essential element of which is not charged in the indictment.'" *Smith v. Hardrick*, 266 Ga. 54, 56 (1995), *citing Russell v. United States*, 369 U.S. 749, 770 (1962), *and O'Brien v. State*, 109 Ga. 51, 52 (1900).

The State cannot redeem the failure to allege criminal intent by inserting "unlawfully" as a prefix to "change the outcome of the election." While in *Tate-Jesurum*, the majority opinion held that "in the absence of an express, statutorily defined *mens rea* element, 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.'" 890 S.E.2d at 81. This does not help the State because the offense of "unlawfully changing the outcome of an election" is not charged in the language of the statute because there is no such statute. Accordingly, Count One fails to allege a conspiracy to commit a crime and should be dismissed.

2. LACK OF DISTINCTION BETWEEN ENTERPRISE AND CONSPIRACY.

The Indictment alleges the defendants were associated in fact in an "enterprise" "whose members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." *See* Indictment at 15-16. The Indictment never expressly identifies the "objectives of the enterprise" or the "goals and purposes" of the enterprise. If the objectives, goals and purposes of the enterprise are the same as those of the conspiracy, then those goals were also to "unlawfully change the outcome of the election," which is not a statutorily defined crime in the State of Georgia. Moreover, if the goals of the enterprise and the conspiracy are the same, what is the difference between the enterprise and the conspiracy? ***The enterprise and the conspiracy are separate essential elements of the charged crime, so there should be some meaningful distinction between them.*** If there is no distinction between them as charged, the Indictment fails to properly allege the essential elements of the charged crime. If a proper indictment posits no ascertainable distinction between the enterprise and the conspiracy, the statute is an indecipherable semantic puzzle that no person of ordinary intelligence

could possibly understand in the sense required for fair warning under the Due Process Clause.

The objectives of the enterprise, whatever they are, are not alleged at all and so are not alleged to be criminal. It is not unlawful for persons to associate in fact to pursue an enterprise whose objects goals and purposes are lawful. The Indictment should therefore be dismissed.

3. THE INDICTMENT FAILS TO ALLEGE A COGNIZABLE PATTERN OF RACKETEERING ACTIVITY

a. Lack of Continuity

The court in *Dover v. State*, 192 Ga.App. 429 (1989), held that the Georgia RICO statute did not impose any continuity requirement like that found in federal law. This Court in its October 17, 2023 Order rejected other Defendants' arguments that the pattern element of a Georgia RICO violation required continuity. The foundation of this holding is the difference between the terms "means" and "requires" as used in the federal and state definitions of the pattern element. Those provisions are as follows:

Georgia Definition, O.C.G.A. § 16-14-3(4):

> (4) "Pattern of racketeering activity" means:
>
> > A. Engaging in at least two acts of racketeering activity …

Federal Definition, 18 U.S.C. § 1961(5)

> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity …

While this Court cited *Dover v. State* in its choice to afford considerable analytical weight

on the difference between "means" and "requires," the Court in *Dover v. State* placed no weight on any such difference. The word "means" does not appear anywhere in the opinion, and the word "requires" was never used in relation to the continuity issue. The two terms were never compared at any point in the opinion. Instead, the continuity requirement was rejected because the Georgia definition of pattern of racketeering activity has an interrelatedness requirement not found in the federal definition. *See Dover*, 192 Ga.App. at 431-432. The asserted difference between "means" and "requires" is no part of the *Dover* opinion, and the opinion simply does not stand for that proposition.

As a matter of statutory interpretation, the asserted difference between "means at least two acts" in the Georgia statute and "requires at least two acts" in the federal statute cannot bear the weight placed upon it. The asserted difference is supported by citation to *Sedima v. Imrex Co*., 473 U.S. 479, 496 n.14 (1985) (emphasis added), which said:

> the 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.***

Had the Georgia RICO statute provided that "[p]attern of racketeering activity" means … [e]ngaging in two acts of racketeering activity" (but that is not what it actually says), we would be in a different world. This is because the federal RICO formulation of "[r]equires ***at least*** two acts" is different than the hypothetical version of Georgia RICO using the term "means two acts" because the "means" version is missing the emphasized

"***at least***." We have no quarrel that "requires ***at least*** two acts" is different than "means two acts," nor with the obverse, that "requires two acts" would be different than "means ***at least*** two acts." The inclusion of "at least" in one but not the other would create a real, palpable difference. But we do insist, however, that there is no meaningful difference between "requires ***at least*** two acts" and "means ***at least*** two acts" and, on that basis, there is logical or conceivable reason that the federal continuity requirement should be applied in Georgia. The Georgia Supreme Court has not weighed in on this issue, and the federal district court decisions cited in the Court's October 17, 2023 Order are not persuasive because they never address the "means" v. "requires" issue at all.

The Georgia RICO statute should be strictly construed as required by the Due Process Clause and by the constitutional avoidance canon to narrow its unconstitutional imprecision, especially where the plain text of the statute is already indistinguishable in relevant part from federal RICO, which has been interpreted to include a continuity requirement:

> To top it all off, the Government's interpretation of the statute would attach criminal penalties to a breathtaking amount of commonplace computer activity. Van Buren frames the far-reaching consequences of the Government's reading as triggering the rule of lenity or constitutional avoidance. That is not how we see it: Because the text, context, and structure support Van Buren's reading, neither of these canons is in play. Still, the fallout underscores the implausibility of the Government's interpretation. It is extra icing on a cake already frosted.

Van Buren v. United States, 141 S. Ct. 1648, 1661 (2021) (internal quotation marks omitted). *See generally Ashwander v. TVA*, 297 U.S. 288 at 341 (1936) (Brandeis, J., concurring)

("'Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.' *Blair v. United States*, 250 U.S. 273, 279 [(1919)]."); *Haley v. State*, 289 Ga. 515 (2011) (applying constitutional avoidance canon of construction). The continuity requirement serves that purpose should be applied and the Indictment dismissed for failure to meet it.

To the extent there is any ambiguity in the meaning of "means at least two acts" after applying the rules of construction, the rule of lenity should be applied and the statute interpreted to include the federal continuity requirement:

> But to the extent that, after applying the usual tools of statutory construction, it is uncertain or ambiguous whether OCGA § 16-8-12(a)(5)(A) applies to a riding lawnmower, the rule of lenity would require us to give the benefit of that doubt to the accused. *Fainter* [*v. State*], 174 S.W.3d [718] at 720 [(Mo. App. 2005)]. *See Fleet Finance, Inc. v. Jones*, 263 Ga. 228, 231, 430 S.E.2d 352 (1993) (criminal statute "must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted"); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 284-285, 98 S.Ct. 566, 54 L.Ed.2d 538 (1978) ("At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, 'where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.'") (citation omitted).

Harris v. State, 286 Ga. 245, 253, 686 S.E.2d 777, 783 (2009)

b. <u>The Indictment Fails to Allege that Mr. Clark Engaged in a Pattern of Racketeering Activity.</u>

By explicit statutory text, at least two acts of racketeering activity are required to make out a pattern. O.C.G.A. § 16-14-4(b). State and federal courts have recognized this requirement: "Georgia courts have held that '[a] pattern requires at least two interrelated predicate offenses,' *Brown v. Freedman*, 222 Ga.App. 213, 474 S.E.2d 73, 77 (1996)." *McGinnis v. American Home Mortgage Servicing, Inc.*, 817 F.3d 1241, 1252 (11th Cir. 2016).

Georgia imposes a further requirement that the "acts must be linked, but distinguishable enough to not be merely 'two sides of the same coin.'" *Id.*, *citing S. Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F. Supp. 2d 1337, 1359 (*quoting Raines v. State*, 219 Ga.App. 893, 467 S.E.2d 217, 218 (1996)). This is a Goldilocks rule, under which the acts must be neither be too related nor too unrelated, but instead have just the right amount of relatedness and unrelatedness at the same time.

In order to satisfy the pattern requirement, the Indictment attempts to parse and split the circumstances surrounding the draft letter that is pleaded as to Mr. Clark into a sufficient number of predicate acts to constitute a pattern. Thus, Count 22 alleges in three separate paragraphs that (1) Mr. Clark drafted the letter, (2) emailed the draft to his colleagues, (3) discussed it with his superiors and December 28, 2023, and (4) discussed it with his superiors on January 2, 2021. This stratagem is also evident in the pleading of Acts 98, 99, and 111 in which the same micro-splitting of events is proffered.

Here, the acts alleged surrounding the letter are only a single transaction—two sides of the same coin—or, perhaps more accurately given the stratagem of the Indictment as to Mr. Clark, just pictures of the self-same coin taken from four different perspectives. That kind of approach is unlawful and improper:

> [I]t still falls to courts to inquire into whether a defendant has committed two or more predicate acts in order to determine if the defendant has engaged in a pattern of such acts—as opposed to an isolated act. However, even speaking in these terms, the concern still remains that "the two alleged predicate incidents must be sufficiently 'linked' to form a RICO pattern, but nevertheless sufficiently distinguishable so that they do not become 'two sides of the same coin.'" *S. Intermodal Logistics, Inc.*, 10 F.Supp.2d at 1359 (*quoting Raines*, 467 S.E.2d at 218). ***Hence, while alleged predicate acts can be too dissimilar and disconnected to constitute a pattern of racketeering activity, such acts can also be too indistinguishable to give rise to such a pattern—even if a court could technically ascribe more than one criminal offense to different aspects of the conduct.***

McGinnis, 817 F.3d at 1253 (emphasis added).

Here, drafting the letter, sending it to his superiors for approval, and discussing it with his superiors over a five-day span of time are all indistinguishable parts of the same thing, or two sides of the same coin—seeking approval of the letter—and cannot properly be cut into razor-thin slices to create a pattern where none really exists. *See Stargate Software Int'l, Inc. v. Rumph*, 224 Ga.App. 873, 877 (1997) (the taking and wrongful use of computer equipment and records is one single transaction even though the "elements of two crimes may have been present at two separate points in time"); *Raines v. State*, 219 Ga.App. 893, 894 *cert. denied* (1996) (the sale of timber land by a single deed cannot be broken down into two predicate acts of theft—taking and filing of fraudulent documents;

the issue is not whether party could have been charged with two separate criminal offenses); *Emrich v. Winsor*, 198 Ga.App. 333 (1991) (the sale of a single investment to a plaintiff and co-investor did not constitute a pattern but simply a single transaction with two victims).

It follows, therefore, that the Indictment's allegations regarding the draft letter fail to satisfy the pattern requirement as to Mr. Clark and that Mr. Clark should be dismissed from Count One.

The State's answer to challenges to the pattern of racketeering activity element is that the Defendants are charged with conspiracy to violate RICO, which requires only one overt act in furtherance of the conspiracy. But as noted above, the conspiracy allegations fail because the object of the alleged conspiracy was not a crime, and as to Mr. Clark, as discussed below and in the accompanying special demurrers to Count One, no one is alleged to have agreed with Mr. Clark about the draft letter referred to in Acts 98, 99, and 111, so it cannot serve as the point of agreement to join the conspiracy.

4. ABSENCE OF PECUNIARY GAIN OR ECONOMIC OR PHYSICAL THREAT OR INJURY.

The Indictment fails to allege that anything that Mr. Clark did or failed to do was motivated by or had the effect of pecuniary gain or economic or physical threat or injury.

O.C.G.A. § 16-14-2 explicitly states the legislature's intent in adopting the RICO statutes:

> 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***.

(Emphasis added.)

Georgia courts have construed the RICO statutes consistent with the Legislature's statement of intent. ""[I]t is clear that RICO applies to a pattern of criminal activity where it is directed towards acquiring or maintaining something of pecuniary value." *Sec. State Bank v. Visiting Nurses Ass'n of Telfair Cnty., Inc.*, 256 Ga. App. 374, 375 (2002), *citing Sevcech v. Ingles Markets*, 222 Ga.App. 221, 222(1) (1996). In *Security State Bank*, a ***civil*** RICO claim against the bank was dismissed because "the record in this case includes absolutely no evidence that the bank profited from Williamson's crimes … ." 256 Ga.App. at 375. "VNA therefore cannot prove an essential element necessary for recovery under its RICO claim" and the bank was entitled to summary judgment. *Id*. at 376.

In *Sevcech*, another civil case, the Court of Appeals held that "Construing OCGA § 16–14–4 in light of the legislative intent, it is clear that RICO applies to a pattern of criminal activity ***where it is directed towards acquiring or maintaining something of pecuniary value***." 222 Ga. App. at 222-223 (emphasis added). Finding the alleged conduct was not intended to derive a pecuniary gain, the Court affirmed summary judgment for the defendant. *See id*. *See also Jefferson v. Houston Hosps., Inc.*, 336 Ga. App. 478, 487 (2016) ("In the absence of any cognizable physical, pecuniary, or emotional injury, the trial court properly granted summary judgment on appellants' RICO claims.") *See* also *Waldschmidt*

v. Crosa, 177 Ga.App. 707(2) (1986) ("It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct be prosecuted under [OCGA § 16–14–4] but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain.").

The Court of Appeals holding in *State v. Shearson Lehman Brothers*, 188 Ga. App. 120, 121 (1988), 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" neither suggests nor requires a different result, as the State has argued in response to other motions making the same argument. ***First***, *Shearson* was a civil case, and the statute is to be liberally construed in the civil context pursuant to O.C.G.A. § 16-14-2(b), while the Due Process Clause and the rule of lenity require criminal statutes be strictly construed. ***Second***, the explicit statement of legislative intent cannot, by interpretive gymnastics, be simply ignored, especially on a topic as full of semantic riddles and as subject to the constitutional infirmities of vagueness and overbreadth as Georgia RICO. The RICO statutes have long been criticized for their overbreadth and striking lack of clarity. *See, e.g., H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 255-256 (1989) (Scalia, J., concurring) ("RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws, *FCC v. ABC*, 347 U. S. 284, 347 U. S. 296 (1954) …. That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that [constitutional

vagueness] challenge is presented.") To borrow a phrase, it is "a riddle wrapped in a mystery inside an enigma."[2]

The State has argued in response to other motions or demurrers attacking Count One that they have in fact sufficiently alleged a pecuniary motive because being President is relatively well-paying job as government jobs go, and the President gets to live in a big, fancy house, and fly around in an extremely nice airplane. While the President's salary of $400,000 is indeed more even than the $350,654.09 that the DA paid Nathan Wade in 2023, for President Trump it was such a trifle that he donated most if not all of his salary back to various federal programs and charities during his term in office.[3] He owns his own $100 million Boeing 757 jet, a Cessna Citation X Jet, and a fleet of Sikorski helicopters.[4] He has six homes altogether, but resides in a home that is much larger and more luxurious than the White House, Mar-a-Lago. He owns or is in partnerships that own 17 of the most renowned and beautiful golf courses in the world, and is building three more world-class golf courses and resorts in Bali, Dubai, and Indonesia.[5] As

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[2] Pascal Tréguer, *Notes On 'A Riddle Wrapped In A Mystery Inside An Enigma'*, WORLD HISTORIES, *available at* https://wordhistories.net/2019/07/28/riddle-wrapped-mystery-enigma/ (last visited Sep. 11, 2023) (quoting Winston Churchill in a 1939 radio speech).

[3] See Sudiksha Kochi, *Fact check: Trump donated portions of presidential salary to agencies, contrary to viral claim*, USA TODAY, Feb. 2, 2023, *available at* https://www.usatoday.com/story/news/factcheck/2023/02/02/fact-check-partly-false-claim-trump-tax-returns-salary-donation/11132712002/ (last visited Jan. 31, 2024).

[4] *See Trump Aviation*, THE TRUMP ORGANIZATION, *available at* https://www.trump.com/lifestyle/aviation (last visited Jan. 31, 2024).

[5] *Trump Golf*, THE TRUMP ORGANIZATION, *available at* https://www.trump.com/golf (last visited Jan. 31, 2024).

President Trump declared when he first announced his candidacy, "I'm really rich."[6] His net worth reportedly declined during his presidency, in part due to a wide-ranging lawfare campaign against him which has only accelerated post-presidency (as evidenced by this very Indictment).[7] Obviously, President Trump is not in it for the money and the State is disingenuous to suggest otherwise.

More to the point as to Mr. Clark, it is wild overreach to apply the Georgia RICO statute to confidential deliberations among senior DOJ officials about contested factual, legal, and policy questions that ultimately, through a decision of the President, resulted in no action taken. There is no allegation of pecuniary motive, nor of any conduct that would cause or threaten economic or physical injury, nor is any implied. Strict construction in the criminal context pursuant to the rule of lenity, application of the doctrine of constitutional avoidance, and the explicit statement of legislative intent provide a robust basis upon which to construe the statute as having no application to the charged conduct of Mr. Clark.

The provision of O.C.G.A. § 16-14-2(b) that "[t]his chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions" is not to the contrary. First, the chapter's "remedial purposes" can refer only to civil

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[6] *See* https://www.youtube.com/watch?v=adMmLMvcS0s (last visited Jan. 31, 2024).

[7] Justin Harper, BBC, *Donald Trump's Wealth Takes Tumble During Presidency*, March 18, 2021, *available at* https://www.bbc.com/news/business-56438914 (last visited Jan. 31, 2024).

applications of the statute. By contrast, the criminal provisions are penal by nature. And, of course, the Due Process Clause requires fair notice and its handmaiden, the rule of lenity, require strict construction of criminal statutes. *See, e.g., Bittner v. United States*, 598 U.S. 85, 102 (2023) ("Two additional features of this case make it a particularly appropriate candidate for the rule of lenity. First, the rule exists in part to protect the Due Process Clause's promise that 'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.' *McBoyle v. United States*, 283 U.S. 25, 27 (1931).").

5. THE REQUIRED NEXUS BETWEEN THE ENTERPRISE AND THE PATTERN OF RACKETEERING ACTIVITY IS MISSING.

The Indictment, especially as to Mr. Clark, fails to allege a sufficient nexus between the pattern of racketeering activity on the one hand and the enterprise on the other. *See*, e.g., *Kimbrough v. State*, 300 Ga. 878 (2017).

The alleged enterprise is claimed to be an association in fact between the individuals who engaged in the predicate acts alleged in the Indictment. But there is no allegation that explains how the disparate activities of these disparate and disconnected individuals could comprise an association in fact. Arm-waving and conclusory allegations of an unidentified common purpose are not sufficient. The Indictment must be appropriately grounded on the assertion of a common ***unlawful*** purpose and there is no such allegation as to Mr. Clark or any other defendant that is sufficient to plead the

necessary nexus between the alleged enterprise and the alleged pattern of racketeering activity.

6. The Indictment Fails to Allege How Mr. Clark Agreed to Join any Conspiracy.

The State has failed to allege that Mr. Clark conspired with anyone to do anything. On the face of the Indictment, Mr. Clark's participation in the conspiracy is alleged to consist of his conduct relating to the draft letter. But there is no allegation that any other person agreed with him about the letter. Agreement is an essential element of a conspiracy and it is missing as to Mr. Clark. *See* O.C.G.A. § 16-4-8; Conspiracy, Ga. Criminal Offenses and Defenses C67 (2023 ed.) ("The essence of the offense of conspiracy is an agreement to pursue a criminal objective."); *Chavers v. State*, 304 Ga. 887, 891–92 (2019) ("For a conspiracy to exist under OCGA § 16-4-8, there must be an agreement to commit a crime …").

The allegations about receiving a phone call from Scott Hall in Act No. 110 are likewise devoid of any allegation of being part of any agreement. There is no allegation about the content of the call, the purpose of the call, the result of the call, or any actions that either Mr. Clark or Mr. Hall took or failed to take as a result of the call.

The Indictment thus fails to allege that anyone agreed with Mr. Clark about anything and therefore fails to allege the agreement element of the conspiracy claim against Mr. Clark. Count One against Mr. Clark should therefore be dismissed.

7. The Charges Violate Mr. Clark's First Amendment Rights.

Other defendants have ably and at length argued that the charges against them violate their First Amendment rights. Mr. Clark adopts those argument as applicable to the charges against him. *See* Clark Adoption of Cheeley and Shafer motions). Though a government employee at all relevant times, Mr. Clark remained a U.S. Citizen and as such retained his constitutional rights, including those arising under the First Amendment while employed by the government. Government employees have First Amendment rights to speak up to their superiors about matters of public concern and cannot be retaliated against for doing so, as the charges against him in this case do. Whistleblower case law bears this out. *See, e.g., Beckwith v. City of Daytona Beach Shores, Florida*. 56 F.3d 1554 (11th Cir. 1995) (elements of retaliatory discharge claim); *Connick v. Meyers*, 461 U.S. 138, 103 S. Ct. 1684 (1983) (court considers the content, form, and context of the speech in question before determining whether it relates to a matter of public concern).

If the speech is found to relate to a matter of public concern, then a balancing of interests is required. *See Pickering v. Board of Education*, 391 U.S. 563, 568, 588 (1968) and *Connick v. Meyers* , 461 U.S. 138, 147-48 (1983).

While this is not a retaliatory discharge case, the penalty of imprisonment sought by the State is far greater than in an case involving an adverse employment action, and so this should weigh in the balance in favor of Mr. Clark. As for the countervailing government interests, according to the allegations of the Indictment, the draft letter was

discussed internally and confidentially and was never sent and was thus ultimately a non-event with no effect in Georgia or anywhere else outside the Department of Justice or beyond the White House. The State of Georgia has no cognizable interest in confidential discussions about matters of federal law and policy among the senior leadership of the Justice Department and with the President of the United States.

As for the phone call from Mr. Hall, he had a First Amendment right to petition the government for redress of grievances, and Mr. Clark did nothing wrong by receiving his petition, nor is there any explanation in the Indictment of how either Mr. Hall or Mr. Clark did anything wrong in relation to the phone call.

In First Amendment terms, the case against Mr. Clark is retaliation by criminal prosecution for advancing opinions and positions in a confidential setting that the District Attorney does not like but which are none of the District Attorney's business. The charges against Mr. Clark violate his First Amendment rights and should be dismissed. And to be clear, we are claiming that the attempt to criminalize his non-criminal actions violates (1) his rights of free expression, (2) his rights of association, and (3) his rights to petition the federal government for a redress of grievances. Mr. Clark also asserts that his parallel rights under the Georgia Constitution are being violated as well if the Indictment is allowed to stand. *See* Georgia Const., art. I, § 1, ¶ V (freedom of speech), ¶ IX (rights to assemble (carrying with it a freedom to associate via assembly) and petition).

In prosecuting Mr. Clark over a draft letter never sent, the DA has ventured into the prosecution of thought crimes. On the State's theory, a text message drafted but thought better of, an email drafted in anger but not sent, or any document drafted but on further reflection not sent, could be subject to criminal prosecution. This is barely removed from merely conceiving of such communications, but never writing them down. The State has gotten carried away in this case and has gone too far.

CONCLUSION

The general demurrer should be granted and Count One of the Indictment dismissed because the Indictment fails to charge a cognizable violation of the RICO statute.

Respectfully submitted, this 5th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2024, I electronically filed the within and foregoing ***General Demurrers and Motion to Quash to Count One*** with the Clerk of Court using the PeachCourt eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia:

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