IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THE STATE OF GEORGIA,	
v.	Case No.: 23SC188947
JOHN CHARLES EASTMAN, et al.	Judge: Scott McAfee

DEFENDANT JOHN EASTMAN'S REPLY IN SUPPORT OF SPECIAL DEMURRER ON COUNT I (RICO)

Defendant John Eastman, by and through undersigned counsel, hereby files this reply in support of his Special Demurrer on Count I.

In his Special Demurrer, Dr. Eastman made two principal points: First, that the indictment does not allege any facts to support its allegation of a conspiracy to operate a RICO "enterprise," relying on the Supreme Corut's holding in *Boyle v. United States*, 556 U.S. 938, 945 (2009) that an "Associated in Fact" enterprise "must have a structure"; and second, that the indictment does not allege any "nexus" to the supposed "enterprise." The State contends that both arguments are flawed. Their analysis is incorrect.

The State's primary argument in response to Dr. Eastman's contention that the indictment fails to properly allege an "enterprise" appears to be that Count I of the

indictment alleges merely a RICO *conspiracy* under O.C.G.A. § 16-14-4(c), rather than a violation of the substantive RICO provision found in O.C.G.A. § 16-14-4(b). *See* State Response at 2 (*"Boyle* was not a federal RICO conspiracy case—it was a substantive case involving a violation of 18 U.S.C. § 1982(c)");[1] *id.* ("an enterprise is not an element of a RICO conspiracy case"). While the State correctly notes that, unlike a substantive RICO count under Section 16-14-4(b), a RICO conspiracy count under Section 16-14-4(c) need not allege the *existence* of an enterprise, it is not true than an enterprise is irrelevant to a RICO conspiracy count when the alleged conspiracy is a conspiracy to violate Section 16-14-4(b).[2] For a RICO conspiracy, the defendants must have conspired *to establish* an enterprise through which they would conduct their pattern of racketeering activity, even if that enterprise did not actually get established.[3] The thing they must conspire to act through for a RICO

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[1] As an aside, it should be noted that the defendant in *Boyle* was convicted of *both* a substantive RICO count and a RICO conspiracy count. *See* 556 U.S. at 941 (noting that Boyle was indicted for both participation in a RICO enterprise through a pattern of racketing activity, in violation of 18 U.S.C. § 1962(c), and conspiracy to commit that offense, in violation of § 1962(d); *see also United States v. Boyle*, 283 F. App'x 825, 826 (2d Cir. 2007) ("Boyle was convicted following a jury trial of racketeering, racketeering conspiracy, bank burglary, bank burglary conspiracy, and attempted bank burglary.").

[2] A conspiracy under subsection (c) to violate subsection (a), in contrast, need not allege an enterprise because subsection (a) does not require that the pattern of racketeering activity be conducted through an enterprise. The indictment does not allege a conspiracy to violate subsection (a).

[3] It seems evident from the State's sleight of hand on this point that it is fully aware that a plan to operate *through an enterprise* is an element of a conspiracy under subsection (c) to violate subsection (b). "[I]f it is assumed that the *existence* of an enterprise is an essential

conspiracy count is the same thing that must exist for a substantive RICO account – an "enterprise," which must have at least some structure, per the Supreme Court's decision in *Boyle*.

The Second Circuit's decision in *United States v. Applins*, 637 F.3d 59 (2d Cir. 2011), relied on by the State, is not to the contrary. In fact, quite the opposite, as the case fully supports the distinction between the *existence* of an enterprise, which is not an element of a RICO *conspiracy* charge, and the existence of an *agreement* to establish an enterprise, which is. *See id.* at 74 ("We have held that for purposes of establishing a RICO conspiracy, 'the government [is] required to prove only the existence of an *agreement* to violate RICO's substantive provisions.'" (emphasis in original)). No such agreement is alleged in the indictment, which must therefore fail.

The Government also relies on a couple of federal district court decisions from the Eastern District of New York for the proposition that the *Boyle* sub-elements need not be alleged in an indictment, asserting that Dr. Eastman's contention is really "a challenge to the sufficiency of the government's evidence in the guise of a pre-trial motion to dismiss." District court decisions – particularly those in other

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element of a Georgia RICO conspiracy violation" is how the state frames the contention, State Response at 2. Conspiring to operate through an enterprise does not require that the enterprise had actually come into *existence*, only that such was attempted, and Dr. Eastman does not contend otherwise.

jurisdictions – have no precedential force, of course. *See Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case," quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1] [d], p. 134–26 (3d ed.2011)). But beyond that, Dr. Eastman does not in his Special Demurrer challenge the *sufficiency* of the Government's evidence, but the *lack* of any allegation in the indictment regarding an element of the RICO crime charged. Under Georgia law, that is a deficiency that can be challenged on special demurrer. *See Sanders v. State*, 313 Ga. 191, 195 (2022) ("[T]he test for determining the constitutional sufficiency of an indictment when faced with a special demurrer is whether it contains the elements of the offense intended to be charged [to] sufficiently apprise[] the defendant of what he must be prepared to meet").

The State also contends that Dr. Eastman's reliance on *Boyle* is flawed because "no Georgia court has adopted *Boyle*." But the two provisions of the federal RICO statute at issue in *Boyle* – the substantive provision at 18 U.S.C. § 1962(c) and the conspiracy provision at 18 U.S.C. § 1962(d) – are nearly identical to the two provisions at issue in this case – the conspiracy provision at O.C.G.A. § 16-14-4(c), and the substantive provision at O.C.G.A. § 16-14-4(b) which the conspiracy is alleged to have aimed to violate. As noted in Dr. Eastman's opening brief, Georgia

courts have regularly interpreted the Georgia RICO statute in line with federal court interpretation of the federal RICO statute for provisions that are nearly identical, as these are.

The State next discounts *Boyle* on the ground that it was a jury instruction case, not a challenge to an indictment. But jury instruction or not, *Boyle* described what the statutory elements are to establish a RICO count. In Georgia, an indictment that does not contain the necessary elements is subject to a special demurrer. *See Sanders*, *supra*, 313 Ga. at 195.

Finally, the State contends that under O.C.G.A. § 17-7-54(a), merely parroting the language of the statute is sufficient to withstand a demurrer. As noted in Dr. Eastman's opening brief, *Kimbrough* holds otherwise: "[A]n indictment not only must state the essential elements of the offense charged, ... but it also must allege the underlying facts with enough detail to sufficiently apprise[ ] the defendant of what he must be prepared to meet." *Kimbrough,* 300 Ga. at 881 (internal citations omitted). Because the indictment alleges nothing about an *agreement* to establish an enterprise through which racketeering activity would be conducted, the special demurrer must be granted.

The State's contentions in opposition to Dr. Eastman's claims regarding the lack of nexus to an "enterprise" suffer from the same flaw. Without any facts to support the allegation that there was an enterprise (or, more precisely, an *agreement*

to pursue unlawful conduct through an enterprise"), the indictment's effort to connect various acts to an "enterprise" falls flat. Instead, the indictment merely lists acts that are alleged to be contrary to various provisions of law, rather than offering any connection, or "nexus," of those acts to an *enterprise*.

United States v. Turkette, 452 U.S. 576 (1981), on which the State relies,[4] is germane. For the substantive RICO charge at issue in the case, the Court held that "the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'" *Id.* at 583. "The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit," the Court continued. *Id.* "The latter is proved by evidence of the requisite number of acts of racketeering committed *by the participants in the enterprise.*" *Id.* (emphasis added). In other words, for a count of RICO conspiracy to violate the substantive RICO provision, the acts alleged to have been committed must be in furtherance of the enterprise, by those who had entered into an agreement to participate in the enterprise. The indictment alleges a lot of acts but makes no allegation regarding any nexus of those acts with an "enterprise." The indictment is therefore deficient, and the special demurrer should be granted.

[4] It should be noted that *Turkette* is a substantive RICO case, not a RICO conspiracy case, but the State nevertheless relies on it despite its criticism, on the same grounds, of Dr. Eastman's reliance on *Boyle*.

WHEREFORE, based on the above and foregoing Defendant John Charles Eastman requests this Court to grant his Special Demurrer.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served the foregoing DEFENDANT JOHN EASTMAN'S REPLY IN SUPPORT OF SPECIAL DEMURRER ON COUNT 1 (RICO) by filing the same with the Clerk of Court using the Odyssey eFileGA electronic filing system, which will automatically send email notification of such filing to all parties of record.

This 9th day of April 2024.

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