IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. JOHN CHARLES EASTMAN, and SHAWN MICAH TRESHER STILL.	INDICTMENT NO. 23SC188947

ORDER ON DEFENDANTS' CHALLENGES TO COUNT ONE

By way of general and special demurrers, the Defendants seek dismissal of Count One.[1] [2] They argue the indicted violation of the Georgia RICO ("Racketeer Influenced and Corrupt Organizations") Act, as currently alleged, fails on a number of grounds: specifically pointing to a lack of averments or proof recognizing the legislative intent of the RICO statute, a lack of continuity in the alleged pattern of racketeering activity, insufficient allegations of predicate acts, lack of an alleged nexus between the enterprise and criminal activity, and further contending that the indictment and RICO statute itself are constitutionally void for vagueness. The Court heard

[1] On June 5, 2024, the Court of Appeals sua sponte issued a stay of all proceedings pending the outcome of an interlocutory appeal granted for nine co-defendants. *See* A24A1595 through A24A1603. In response to her direct request, the Court of Appeals also granted a stay for co-defendant Hampton on June 26, 2024. These orders did not apply to Defendants Eastman and Still, and both Defendants have informed this Court that they have not requested and do not currently desire a similar stay of proceedings.

[2] (Eastman Doc. 57, 1/8/24 (adopting in whole or in part Chesebro Doc. 30, 9/7/23; Smith Doc. 24, 9/11/23; Still Doc. 51, 10/2/23; Still Doc. 70, 1/5/24; Floyd Doc. 116, 1/8/24; Trump Doc. 105, 1/8/24)); (Eastman Doc. 58, 1/8/24); (Still Doc. 51, 10/2/23 (adopting in part Shafer Doc. 46, 9/27/23)); (Still Doc. 70, 1/5/24); (Still Doc. 71, 1/5/24); (Still Doc. 73, 1/5/24) (adopting Chesebro Doc. 30, 9/7/23; Smith Doc. 24, 9/11/23; Chesebro Doc. 63, 9/26/23; Cheeley Doc. 48, 10/5/23)); (Still Doc. 77, 1/8/24 (adopting Trump Doc. 105, 1/8/24)); (Still Doc. 102, 4/18/24 (adopting Eastman Doc. 58, 1/8/24; Floyd Doc. 116, 1/8/24; Shafer Doc. 86, 2/5/24)).

argument from counsel for several co-defendants (adopted by Eastman and Still) on December 1, 2023. After considering the briefing and the arguments of counsel, the Court finds Count One is facially sound and constitutionally sufficient as alleged. The motions are therefore denied.[3]

Legal Standard

As already detailed in previous orders, an indictment may be challenged before trial by a general or special demurrer. Demurrers provide a means for the criminally accused to ensure that the State's charging document satisfies the constitutional mandates of Due Process and the Sixth Amendment. *See* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation"); *State v. Mondor*, 306 Ga. 338, 341 (2019); *Everhart v. State*, 337 Ga. App. 348, 354 (2016). A defendant must allege "some flaw on the face of the indictment itself, and a court cannot go beyond the four corners of the indictment in considering a demurrer." *Powell v. State*, 318 Ga. 875, 879 (2024). This Court can determine the sufficiency (or insufficiency) of each count by drawing on details provided anywhere within those four corners, including other counts, and reading the indictment "as a whole." *Id.* at 882. In addition, the indictment's factual allegations must be accepted as true, but this presumption does not protect any legal conclusions. *Id.* at 883 n.6.

A general demurrer challenges the substance of an indictment by asserting its legal invalidity, specifically that the indictment fails to allege elements or facts that constitute a crime. To survive

[3] The United States Supreme Court's decision in *Trump v. United States*, 144 S. Ct. 2312 (2024) will likely affect the allegations of Count One, particularly the overt acts contained within. However, unlike the many other challenges raised by the Defendants, the impact of Presidential immunity has not been fully briefed or argued by the parties, and this order does not reach that issue. Similarly, this Order does not address Defendants' arguments brought under the Supremacy Clause or a theory of federal officer immunity.

a general demurrer, the "deeply embedded" test within our caselaw instructs us to compare the charging document to the statutory language and ensure every essential element is included. *Tate-Jesurum v. State*, 368 Ga. App. 710, 711 (2023); O.C.G.A. § 17-7-54(a) ("[e]very 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"). Simply invoking the violation of a criminal statute is not enough. *See Jackson v. State*, 301 Ga. 137, 140 (2017) (general demurrer granted when the indictment did not allege all the essential elements and facts necessary to establish a violation). Put another way:

> 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. 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.

Kimbrough v. State, 300 Ga. 878, 880 (2017); *Newman v. State*, 63 Ga. 533, 534 (1879) ("if all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good"). By way of analogy to civil practice, a general demurrer is appropriately characterized as "a motion to dismiss for failure to state a claim" under O.C.G.A. § 9-11-12(b)(6). *Mondor*, 306 Ga. at 340. More than a "fussy technicality," this standard enables a defendant to prepare a defense and establishes the scope of prosecution for double jeopardy purposes. *Everhart*, 337 Ga. App. at 355.

On the other hand, a special demurrer challenges the form of the indictment by claiming that the defendant is entitled to additional information or specificity. *Kimbrough*, 300 Ga. at 881; O.C.G.A. § 17-7-54(a) (requiring that the offense be stated "with sufficient certainty"). Pre-trial, a charging document is expected to be "perfect in form as well as substance." *Thomas v. State*, 366

Ga. App. 738, 739-40 (2023).[4] The challenged language of an indictment should be interpreted liberally in favor of the State, with any objections strictly construed against the Defendant. *See Malloy v. State*, 293 Ga. 350, 360 (2013). Despite this, a pretrial challenge does not require a showing of prejudice, and the trial court should examine the indictment from the perspective that the accused is innocent, i.e., lacking knowledge of any incriminating facts alleged by the State. *See State v. Corhen*, 306 Ga. App. 495, 497 (2010). Again, our appellate courts have provided a well-used standard for evaluating a special demurrer:

> [The test] is not whether [the indictment] could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Sanders v. State, 313 Ga. 191, 195 (2022). Continuing the civil analogy, a special demurrer is akin to a "motion for a more definite statement" under O.C.G.A. § 9-11-12(e). *Kimbrough*, 300 Ga. at 881 n.12. The ultimate purpose is to put the Defendant on notice and protect against double jeopardy. *See State v. English*, 276 Ga. 343, 346 (2003); *Dunn v. State*, 263 Ga. 343, 344 (1993) ("Due process is satisfied where the indictment puts the defendant on notice of the crimes with which he is charged and against which he must defend.").

[4] The origin of this legal phrase does not appear to set such a high bar, limiting perfection to "time and place." *See Harris v. State*, 58 Ga. 332, 333-34 (1877). And as the Georgia Supreme Court has pointed out, imperfections are regularly allowed when an indictment contains an immaterial defect such as a misnamed code section, the misspelling of a drug, or even the alleged date of the crime in some cases — indicating that perfection may be more of an aspirational statement than an exact working standard. *State v. Eubanks*, 239 Ga. 483, 485 (1977); *see also Green v. State*, 292 Ga. 451, 452 (2013) (listing immaterial defects); *Green v. State*, 109 Ga. 536, 540 (1900) ("We do not mean to say that this indictment is by any means perfect . . .").

Legislative Intent (Punishment of Civil Disobedience, No Allegation of Pecuniary Gain)

The Defendants challenge Count One through a general demurrer for unlawfully punishing acts of civil disobedience. They further contend this indictment fails to allege predicate acts encompassing any motive of pecuniary gain or economic threat or injury. These arguments are based on the opening of the Georgia RICO Act, which begins with a broad statement of legislative intent:

> 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.

O.C.G.A. § 16-14-2(b). Two sections later, the reader finds the operative provisions describing exactly how one commits a violation. *See* O.C.G.A. § 16-14-4(a)-(c). These provisions make no mention of pecuniary gain as an element of the crime and do not include civil disobedience as an affirmative defense. Nor does the definition section in O.C.G.A. § 16-14-3 attempt to explain or set parameters on what it means to be civilly disobedient in the context of Georgia RICO. Defendants contend that reading the whole text of the Act and construing these two statutes together harmoniously, *in pari materia*, requires the State to explicitly satisfy the General Assembly's expressed intent in the indictment's allegations.

At a minimum, the Defendants have not established that the legislative intent of O.C.G.A. § 16-14-2(b) regarding pecuniary gain or the absence of civil disobedience is an essential element which must be alleged somewhere in the indictment, rather than only an element of proof necessary at trial. The indictment tracks the statutory language of the operative section, and the Defendants could not admit to these allegations and still be innocent. The State is not required to allege the

absence of any affirmative defense, such as whether the alleged acts were in fact civil disobedience. *See Budhani v. State*, 306 Ga. 315, 323 (2019) ("whether those affirmative defenses [to the Controlled Substances Act] are available at trial is a distinct issue from what the State is required to allege in the indictment"). In addition, a "pattern of criminal activity" has been alleged, and the particular flavor of motivation for this pattern is only a "necessary characteristic of the evidence used to prove the existence of a pattern." *United States v. Palumbo Bros.*, 145 F.3d 850, 877 (7th Cir. 1998) (finding continuity not an essential element of federal RICO); *see also State v. Forthe*, 237 Ga. App. 134, 136 (1999) (State not required to allege specific amount taken in an indictment for theft because this is not an essential element: "The amount may vary the degree, but it does not change the character of the crime.").

Regardless, the Court finds the final sentence of the preamble to be determinative. The directive that the entire chapter should be "liberally construed" by empowering the "operative provisions" echoes the general interpretative principle that a purpose clause cannot override the operative language. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 34, at 217 (2012) ("an expression of specific purpose in the prologue will not limit a more general disposition that the operative text contains"); *see also FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 280 n.6 (2016) (acknowledging a broad "declaration of policy" contained within a statutory scheme but concluding "[t]he operative provision is what counts"); *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 258 (1994) (focusing on the operative provisions of federal RICO, instead of the prefacing congressional statement of findings, to conclude that usage of the term "enterprise" did not require proof of an economic motive). If the General Assembly wanted to make the preamble binding, it could have done so by welding its intent to the provisions that follow. *Cf.* O.C.G.A. § 16-15-7 (limiting the real property abatement section of the Georgia Street Gang Terrorism and Prevention Act by requiring that "[n]o judgment shall be awarded unless the finder

of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2"). But it did not. *Cf.* N.C. Gen. Stat. § 75D-2(c) (containing a similar legislative intent section limiting North Carolina's RICO to unlawful activity motivated by pecuniary gain but — unlike Georgia RICO — without a concluding sentence that refocuses the section on the statute's "liberal construction" and operative provisions); *White v. State*, 319 Ga. 367, 399 (2024) (Peterson, J., concurring) (suggesting that a lack of sophistication on the part of the criminal RICO enterprise, as referenced in the legislative findings of O.C.G.A. § 16-14-2(a), may impact a defendant's constitutional right to a fair trial).

Judicial exploration of any further indicators of statutory intent is typically unnecessary in the face of an unambiguous text. However, a particularly persuasive one exists here: the Georgia RICO Act's 1997 amendment to the preamble expressly loosened the applicability of O.C.G.A. § 16-14-2(b) in apparent reaction to appellate interpretation. Instead of continuing to end the preamble with "This chapter shall be construed to further that intent," the General Assembly altered the final sentence to read "This chapter shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions." O.C.G.A. § 16-14-2(b). The existing law at the time, as interpreted by *Sevcech v. Ingles Mkts.*, required that Georgia RICO apply "to a pattern of criminal activity where it is directed towards acquiring or maintaining something of pecuniary value." 222 Ga. App. 221, 222 (1996) ("Mere evidence that a person's criminal conduct constitutes a pattern of racketeering activity is insufficient[.]"); *but see State v. Shearson Lehman Bro.*, 188 Ga. App. 120, 121 (1988) (interpreting the prior version of the preamble and finding 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") (emphasis omitted); *Reaugh v. Inner Harbour Hosp.*, 214 Ga. App. 259, 265 (1994) (same); *Cotton, Inc. v. Phil-Dan Trucking*, 270 Ga. 95, 95 (1998) (approving Shearson). By amending the preamble to address the decision in *Sevcech* and refocus the Act on its operative provisions, the

General Assembly indicated that the expressed intensions of O.C.G.A. § 16-14-2(b) are not a required element. *See Jones v. Peach Trader Inc.*, 302 Ga. 504, 514 (2017) ("changes in statutory language generally indicate an intent to change the meaning of the statute"); *see also Glass v. Faircloth*, 354 Ga. App. 326, 331 (2020) ("When a statute is amended, from the addition of words it may be presumed that the legislature intended some change in the existing law.").

To be clear, this interpretation does not simply disregard a codified statement of legislative intent. *See, e.g., Harrison v. McAfee,* 338 Ga. App. 393, 400 n.5 (2016) (noting that a "codified preamble becomes part of the statutory context in which we read individual passages"). It instead recognizes the reality that the General Assembly has not, either in the definitional section (O.C.G.A. § 16-14-3) nor in the operative language (O.C.G.A. § 16-14-4), required that the State allege — or prove — a pecuniary motive or the absence of civil disobedience. *See, e.g., H.J. Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 248 (1989) ("Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."). As a result, the undersigned concludes that the State is not required to plead these elements in a RICO indictment. Furthermore, the State will not be required to prove or disprove these facts at trial. The demurrers on these grounds are denied.

Continuity

The Defendants argue that Count One fails to allege an essential element: continuity, i.e., the threat of continuing criminal activity on behalf of the enterprise. Continuity is not a term found in the Georgia RICO statute, instead originating from the United States Supreme Court's analysis of federal RICO. Relying heavily on legislative history to interpret the definition of a "pattern of racketeering activity" found in 18 U.S.C. § 1961(5), the Court held that the predicate acts must amount to or pose a threat of continued criminal activity to establish a pattern. *H.J. Inc.*, 492 U.S. at 240.

As with the arguments on legislative intent, the Defendants have not specified how the indictment is subject to a demurrer. Even assuming continuity applies to a Georgia RICO violation, the argument does not clarify whether continuity is an element that must be particularly alleged in an indictment or merely deduced from the alleged facts contained within. *See, e.g.*, *Palumbo Bros., Inc.*, 145 F.3d at 878 ("[e]ven though explicit allegations of continuity are not required to initially charge a criminal violation of RICO, an indictment must include supplemental facts that reasonably substantiate the existence of continuity").

Turning to the merits, the undersigned is not convinced that the State can avoid the continuity argument entirely by focusing on the distinction between a substantive RICO violation (O.C.G.A. § 16-14-4(b)) versus the allegation in this case of a conspiracy (O.C.G.A. § 16-14-4(c)(1)). It is certainly true that a conspiracy violation does not require proof that multiple substantive crimes — the predicate acts of racketeering activity that form a pattern — were ever committed. *See United States v. Pepe*, 747 F.2d 632, 660 n.44 (11th Cir. 1984) ("The finding of a [federal] RICO conspiracy, of course, does not require that two predicate acts of racketeering activity actually occurred . . . There need only exist an agreement to perform these acts."). And it is equally true that one may be convicted of committing a conspiracy even if acquitted of the substantive offense. *See Salinas v. United States*, 522 U.S. 52, 62-64 (1997). But the "pattern of racketeering activity" necessary to prove substantive violations cannot be disregarded entirely. A conspiracy violation requires an agreement to violate the substantive provisions. *See* O.C.G.A. § 16-14-4(c)(1) ("he or she . . . conspires to violate any of the provisions of subsection (a) or (b)"). In other words, O.C.G.A. § 16-14-4(c)(1) incorporates the pattern element by requiring the existence of an agreement that would satisfy O.C.G.A. § 16-14-4(a) and (b). This is certainly the case with federal RICO, which contains a similar reference to the substantive provisions. *See Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1269 (11th Cir. 2004) ("The district court properly dismissed the

plaintiffs' RICO conspiracy claims precisely because the plaintiffs failed to allege an illegal agreement to conduct acts of a sufficiently continuous nature to constitute a pattern of racketeering activity."); *United States v. Gonzalez*, 921 F.2d 1530, 1546 (11th Cir. 1991) (holding that a federal RICO conspiracy requires proof of the continuity of racketeering activity). Similarly, the Court of Appeals recognized this aspect of federal law when defining a RICO conspiracy violation and including a reference to "two or more predicate acts." *Cotman v. State*, 342 Ga. App. 569, 585 (2017) ("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") (citing *Rosen v. Protective Life Ins. Co.*, 817 F. Supp. 2d 1357, 1382 (N.D. Ga. 2011)).[5] Because a pattern must be part of the alleged conspiracy in O.C.G.A. § 16-14-4(c)(1), from which the federal continuity requirement flows, the analysis cannot stop here.

Ultimately, the federal requirement of continuity established by *H.J. Inc.* cannot be so cleanly grafted onto violations of Georgia's RICO. Our courts have long recognized that Georgia's RICO has a "number of significant differences" when compared to its federal counterpart. *Interagency, Inc. v. Danco Fin. Corp.*, 203 Ga. App. 418, 419 (1992). Most relevant here, while the federal definition of a "pattern of racketeering activity" is preceded by "requires at least," Georgia's definition instead utilizes the word "means" to introduce the pattern definition. A cursory look may not suggest that "requires" and "means" are materially different, but the legislature's use of the word "means" indicates the definition that follows is "complete and self-contained." *Comput.*

[5] Even though the undersigned does not agree with the State that "a pattern of racketeering activity is not an element of a RICO conspiracy violation" (Shafer Doc. 99 at 12, 2/23/24), due to the previously noted distinction between what must be alleged as opposed to proven at trial, the State still prevails on this issue because it included an allegation of a sufficient pattern in the indictment. *See United States v. Glecier*, 923 F.2d 496, 500 (7th Cir. 1991) ("[T]o list adequately the elements of [federal RICO conspiracy], an indictment need only charge — after identifying a proper enterprise and the defendant's association with that enterprise — that the defendant knowingly joined a conspiracy the objective of which was to operate that enterprise through an identified pattern of racketeering activity[.]").

Concepts Profit Sharing Plan v. Brandt, 310 Ore. 706, 719 (1990) (superseded by statute); *see also People v. Chaussee*, 880 P.2d 749, 757 (Colo. 1994). The United States Supreme Court itself recognized this distinction in the decision that provided the foundation for its subsequent holding establishing the continuity requirement. *See Sedima v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985) ("[T]he 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), not that it 'means' two such acts. The implication is that while two acts are necessary, they may not be sufficient.") (emphasis in original) (superseded by statute on other grounds).

This certainly appears to be the understanding adopted by our appellate courts. In *Dover v. State*, the court characterized the defendant's appeal as a challenge to the "requirement of 'continuity' to establish a pattern." 192 Ga. App. 429, 431 (1989). The eventual holding stated that Georgia's definition of pattern did not include "the added burden of showing that defendant would continue the conduct or had been guilty of like conduct before the incidents charged[.]" *Id.* at 432. While much of *Dover*'s analysis centered on the single vs. multiple scheme standard contested among federal circuits at the time, the *Dover* court also rejected any continuity requirement by explicitly stating that the recently decided *H.J. Inc.* standard of continuity "ignores the differences between the federal and Georgia statutes." *Id.* Federal courts applying Georgia RICO have not hesitated to follow that interpretation. *See, e.g.*, *Wade Park Land Holdings, LLC v. Kalikow*, 522 F. Supp. 3d 1341, 1354 (N.D. Ga. 2021); *Murphy v. Farmer*, 176 F. Supp. 3d 1325, 1346 n.20 (N.D. Ga. 2016); *Chesapeake Employers' Ins. Co. v. Eades,* 77 F. Supp. 3d 1241, 1256 (N.D. Ga. 2015) (citing *Dover* to find that "unlike the federal RICO statute, Georgia does not require a showing of continuity to demonstrate a 'pattern of racketeering'"); *see also* Michael P. Kenny & H. Suzanne Smith, *A Comprehensive Analysis of Georgia RICO,* 9 Ga. St. U. L. Rev. 537, 551 (1993) ("The Georgia courts' refusal to require a showing of continuity between or among the predicate acts is

significant . . . ."). One may quibble with just how explicit the Court of Appeals has been in rejecting the concept of continuity, but not with the State's ultimate conclusion.

The fact remains that our Supreme Court has provided a binding definition of a "pattern of racketeering activity" that does not include continuity: "proof of two but separate related acts is sufficient[.]" *Dorsey v. State*, 279 Ga. 534, 541 (2005). Defendants have not sufficiently shown how this precedent can be disregarded, or why Georgia RICO requires an additional element. The demurrers are denied. The State is not required to allege continuity nor prove its existence at trial.

Pattern of Racketeering Activity and Predicate/Overt Acts

Similarly, the Defendants attack Count One as defective because it fails to allege sufficient predicate acts against them. A defendant need not personally commit or be "connected" to any of the underlying predicate offenses to be convicted under O.C.G.A. § 16-14-4(c), as conspirators are responsible for overt acts committed by all co-conspirators. The State need not have asserted that any Defendant personally participated in even a single predicate offense to sufficiently allege the RICO count laid out against them. *Pasha v. State*, 273 Ga. App. 788, 790 (2005) ("[E]ach actor in a [RICO] conspiracy is responsible for the overt actions undertaken by all the other co-conspirators in furtherance of the conspiracy. . . . [T]here is no requirement in a [RICO] conspiracy case that the State prove that [a defendant] personally committed the underlying predicate offenses."); *see also Faillace v. Columbus Bank & Trust Co.,* 269 Ga. App. 866, 870 (2004) (citing *Salinas v. United States*, 522 U.S. 52 (1997) to reject defendant's contention that each charged participant must have committed "at least two predicate acts . . . to have the requisite intent for RICO conspiracy"); *Cotman*, 342 Ga. App. at 585 ("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'"). Nor have our appellate courts created any requirement that an indictment must identify unindicted co-conspirators.

Defendants also contend that the acts listed in Count One cannot constitute sufficient "overt acts" because none meet the definition of "racketeering." No authority is provided for this point. O.C.G.A. § 16-4-14(c) plainly requires an overt act to prove a RICO conspiracy violation. But nothing else in the statutory scheme or decades of precedent applying conspiracy law requires that the overt act be the substantive crime alleged as the object of the conspiracy or that the overt act even be criminal in nature. *See, e.g., Yates v. United States,* 354 U.S. 298, 334 (1957) (overruled on other grounds by *Burks v. United States*, 437 U.S. 1, 16–17 (1978)). It is sufficient for the overt act to "simply [] manifest that the conspiracy is at work[.]" *Id.* (quotations omitted); *McCright v. State*, 176 Ga. App. 486, 487 (1985) ("the overt act need not be a crime in itself"). In addition, the undersigned finds that as to each overt act, the Defendants have not provided any authority subjecting overt acts to the pleading standards of a demurrer, and upon review, each act alleged contains sufficient detail to withstand a special demurrer. *See, e.g.*, *Sanders*, 313 Ga. at 197.

Enterprise and Nexus

The Defendants also claim Count One must be dismissed due to the State's failure to allege a sufficiently detailed enterprise or a nexus between the enterprise and the pattern of racketeering. Similar to the previous findings on continuity, the undersigned first rejects the State's initial argument that an enterprise is not a relevant allegation in a RICO conspiracy. While the establishment of an enterprise may not be required to prove a conspiracy, an agreement to form one must exist. *See United States v. Applins*, 637 F.3d 59, 74 (2d Cir. 2011) ("the government necessarily has to establish that the defendant agreed with his criminal associates to form the RICO enterprise") (cleaned up); *United States v. Pizzonia*, 577 F.3d 455, 463-64 (2d Cir. 2009) ("To understand the scope of the jointly undertaken scheme, one must also consider the enterprise that the conspirators agreed to conduct through a pattern of racketeering.").

Moving onward, O.C.G.A. § 16-14-3(3) defines a RICO "enterprise" as any "person, sole proprietorship, partnership, corporation, business trust, union chartered under the laws of this state, or other legal entity; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and [including] illicit as well as licit enterprises and governmental as well as other entities." Primarily citing *Boyle v. United States*, 556 U.S. 938 (2009), the Defendants contend the indictment here does not detail an exact structure.[6] While *Boyle* has not yet been recognized in Georgia law, the undersigned disagrees with the State that this fact alone allows one to entirely disregard its holding as the federal definition of "enterprise" mirrors ours. *Cf.* 18 U.S.C.S. § 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity").

Regardless, the United States Supreme Court did not impose a requirement on the prosecution through *Boyle* to allege a "hierarchical structure" or provide a full membership list. The indictment here, using the exact language of *Boyle*, broadly defines the association-in-fact enterprise as having the common purpose of "unlawfully chang[ing] the outcome of the election in favor of Trump[,]" that its members "had connections and relationships with one another and with the enterprise[,]" and that the enterprise was "an ongoing organization whose members and associates functioned as a continuing unit for a common purpose of achieving the objectives of the enterprise." (Indictment at 14-15); *Boyle*, 556 U.S. at 946 ("it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose"). The indictment goes on to describe the manner and means used to advance this

[6] It is worth noting, again, that the authority relied on by the Defendants was considered in the post-trial context (the denial of requested jury instructions in *Boyle*), and not through the pleading standards of a demurrer or motion to dismiss.

purpose, (Indictment at 16-19), and 161 different overt acts. The undersigned concludes that these allegations and detail are sufficient to survive a general or special demurrer challenging the allegations of an enterprise. *See, e.g.*, *Boyle*, 556 U.S. at 951 (approving jury instruction that "the existence of an association-in-fact is oftentimes more readily proven by what [it] does, rather than by abstract analysis of its structure"); *Grant v. State*, 227 Ga. App. 88, 90–91 (1997) ("The requisite predicate acts and enterprises comprising the charges . . . are precisely described and named . . . No greater detail was required to allege the RICO offense under Georgia law.").

As for a nexus, by using the word "through" in O.C.G.A. § 16-14-4(b), proof of a "connection or nexus between the enterprise and the racketeering activity" is an essential element for this type of RICO violation. *Kimbrough*, 300 Ga. at 882 (analyzing substantive RICO count and citing *United States v. Welch*, 656 F2d 1039, 1062 (5th Cir. 1981)).[7] An offense under O.C.G.A. § 16-14-4(c) incorporates this same requirement as part of the conspiratorial agreement. Although "pages and pages of extensive detail" are not required, merely identifying the enterprise and particularly describing the predicate acts of racketeering is not enough. *Id.* at 884. There must be a connection. Here, the indictment avers that the overt acts were committed to "further the goals of the enterprise and achieve its purposes." (Indictment at 16). Each overt act is described in detail for each Defendant and is alleged to be related to the activities of the enterprise. *See, e.g.*, *United States v. Carlisle,* 287 F. App'x 516, 519 (6th Cir. 2008). While additional detail is nearly always possible, after reviewing the indictment and comparing it to the one struck in *Kimbrough*, the undersigned finds that Count One sufficiently alleges a connection between the Defendants' alleged crimes and the enterprise to satisfy the nexus requirement under our demurrer standards.

[7] As part of the record, co-Defendant Smith helpfully compiled for comparison four indictments previously analyzed on appeal, including the one in *Kimbrough*. (Smith Doc. 83, filed 1/22/24).

Vagueness

Finally, Defendants contend that a "pattern of racketeering activity" as defined in O.C.G.A. § 16–14–3(4) is unconstitutionally vague and ambiguous as-applied, which deprived them of fair notice that the charged conduct was prohibited in violation of the due process clauses of the Fifth and Fourteenth Amendments.[8] "Due process requires only that a statute define the offense in terms that advise people of ordinary intelligence of the conduct sought to be prohibited, and that provide sufficient guidelines to prevent arbitrary enforcement." *State v. Miller*, 260 Ga. 669, 674 (1990) (citing *Kolender v. Lawson*, 461 U.S. 352 (1983)). "If 'men of common intelligence' must guess at the meaning of a statute, the statute violates due process of law." *Chancey v. State, 256 Ga. 415*, 428 (1986) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)); *see also Smallwood v. State*, 310 Ga. 445, 447 (2020) ("Vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand[, and] if a challenger's as-applied vagueness challenge fails, then his facial challenge also fails.") (citations omitted). Further, a statute may not "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." *Satterfield v. State*, 260 Ga. 427, 428 (1990) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

This issue is already settled as a matter of binding law. The Georgia Supreme Court rejected a vagueness challenge to the pattern definition in *Chancey*, 256 Ga. at 427, stating that "the quoted

[8] To the extent the Defendants' arguments blend into vagueness and overbreadth challenges brought under the First Amendment, the Court incorporates its findings outlined in its Order on Defendants' Motions to Dismiss Under the First Amendment (Trump Doc. 158, filed 4/4/24) and denies the motions.

statutory language serves to limit the definition of that term, rather than rendering the 'pattern' definition vague and overbroad." Defendants counter that *Chancey* is not controlling because it was decided before a 2001 amendment altering the "pattern of racketeering activity" definition.[9] Prior to this amendment, a pattern of racketeering activity was defined as "engaging in at least two incidents of racketeering activity that have same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." O.C.G.A. § 16–14–3(8) (2000). The post–2001 version defines a pattern as "engaging in at least two acts of racketeering activity *in furtherance of one or more incidents, schemes, or transactions* that have the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated incidents." O.C.G.A. § 16–4–3(4)(A) (emphasis added). Defendants argue that "one or more incidents, schemes, or transactions" directly conflicts with the subsequent text providing that "isolated incidents" are insufficient to constitute a pattern.

The language added post–*Chancey* does not render the pattern definition vague or ambiguous. "One or more incidents, schemes, or transactions" describes the objective of the racketeering activity. On the other hand, the restriction of "isolated incidents" refers to the acts of racketeering activity, which requires "at least two interrelated predicate offenses [that] must be linked, but distinguishable enough to not be merely 'two sides of the same coin.'" *McGinnis v. Am. Home Mortg. Servicing, Inc.*, 817 F.3d 1241, 1252 (11th Cir. 2016) (first quoting *Brown v. Freedman*, 222

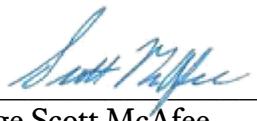
[9] Defendants also note that *Chancey* did not address Justice Scalia's concurrence in *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229 (1989), expressing vagueness concerns regarding the pattern definition in the federal RICO statute. These points, however, are dicta which have not been recognized by Georgia's appellate courts in the decades that have since passed.

Ga. App. 213 (1996); and then quoting *S. Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F.Supp.2d 1337, 1359 (1998)) ("With the amended language, the definition appears to break down the notion of 'at least two incidents of racketeering activity' into two separate components: (1) 'at least two acts of racketeering activity,' and (2) 'in furtherance of one or more incidents, schemes, or transactions.'"). These terms are not at odds, and the General Assembly's addition of "in furtherance of one or more incidents, schemes, or transactions" only further specifies the types of ventures that Georgia's RICO seeks to prohibit. *See McGinnis*, 817 F.3d at 1252 ("[T]he newer language breaks the concepts down and demands more precision from courts in determining the number of predicate acts and the number of transactions at issue."). Because O.C.G.A. § 16-14-3(4) defines a pattern of racketeering activity with sufficient particularity, it provides fair notice to persons of ordinary intelligence as to the conduct prohibited by the statute.

Conclusion

The Defendants' demurrers challenging Count One, including any based on arguments not specifically addressed in this Order, are denied.

SO ORDERED, this 12th day of September, 2024.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit