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**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

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| **STATE OF GEORGIA** | ) | |
| | ) | **INDICTMENT NO. 16SC144430** |
| **v.** | ) | |
| | ) | |
| **DAVID COHEN, JOHN BUTTERS** | ) | |
| **AND MYE BRINDLE,** | ) | **JUDGE NEWKIRK** |
| **Defendants.** | ) | |

**ORDER DISMISSING ALL COUNTS OF THE ABOVE-REFERENCED INDICTMENT WITH PREJUDICE**

On Tuesday, November 8, 2016, this Court heard argument on Defendants' Motions to Dismiss All Counts of the above-referenced Indictment.[1] After hearing argument from counsel and reading all Motions and Briefs filed on this issue, this Court grants Defendants' Motions to Dismiss all Counts of the above-referenced Bill of Indictment.[2]

**Count One**

Count One charges Defendants with the crime of Conspiracy to Commit Theft by Extortion, O.C.G.A. § 16-8-16. A violation of O.C.G.A. § 16-8-16 is punishable by imprisonment for ten years.[3] A conspiracy to commit that offense is punishable by imprisonment for up to five years.[4] The Bill of Indictment, and statements made by the prosecution, establish that the overt acts of this alleged conspiracy to commit Theft by Extortion

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[1] The prosecution was represented by Chief Deputy District Attorney Paige Whitaker, of the Fulton County District Attorney's Office as well as other members of the Fulton County District Attorney's Office. David Cohen was represented by Brian Steel; John Butters was represented by Bruce Morris and Jimmy Berry; and Mye Brindle was represented by Reid Thompson.

[2] The Court also incorporates and relies upon relevant arguments made at the Motions hearing as well as the written Motions and Briefs filed by the parties. See State v. Jung, 337 Ga. App. 799, 803, 788 S.E.2d 884 (2016).

[3] O.C.G.A. § 16-8-16(d).

[4] O.C.G.A. § 16-4-8.

relate to the Defendants' representation of their client, Ms. Brindle, in threatening to file a civil law suit. (See Bill of Indictment, Count One).

First, Georgia courts have consistently refused, in both the criminal and civil contexts, to read the word "threat" to include a threat to file civil litigation or the filing of civil litigation itself. See, e.g., Brown v. State, 322 Ga. App. 446, 454-455, 745 S.E.2d 699 (2013); DeLong v. State, 310 Ga. App. 518, 523–24, 714 S.E.2d 98 (2011); Markowitz v. Wieland, 243 Ga. App. 151 (fn. 11), 532 S.E.2d 705 (2000); Rolleston v. Huie, 198 Ga. App. 49, 50–51, 400 S.E.2d 349 (1990) ("However, it is clear that the mere filing of a lawsuit is not the type of humiliating, insulting or terrifying conduct which will give rise to a claim for the intentional infliction of emotional distress" and "[t]he 'threats' associated with institution of a civil action cannot and do not constitute duress and are not actionable in tort."). Federal courts have done the same. See, e.g., Town of Gulf Stream v. O'Boyle, No. 15-13433, 2016 WL 3401681, 654 Fed. Appx. 439 (11th Cir. June 21, 2016) (unpublished Opinion); Raney v. Allstate Ins. Co., 370 F.3d 1086 (11th Cir. 2004); United States v. Pendergraft, 297 F.3d 1198 (11th Cir. 2002); Buckley v. DirecTV, Inc., 276 F. Supp. 2d 1271 (N.D. Ga. 2003) ("the Court is not aware of any authority holding that a demand to settle a claim before pursuing litigation amounts to extortion. In fact, such demand letters do not fit the legal definition of extortion.").[5]

Second, another reason for adopting this reading is the recognition that criminalizing a threat to file civil litigation, or the filing of civil litigation itself, would violate the state and federal constitutions. First Amendment jurisprudence demonstrates that a settlement demand

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[5] See also, Atlantic Recording Corp. v. Raleigh, No. 4:06-CV-1708 CEJ, 2008 WL 3890387 at *5 (E.D. Mo. August 18, 2008) ("[E]ven a groundless, bad-faith threat to sue does not instill 'fear' within the meaning of the criminal statute prohibiting extortion. A majority of federal jurisdictions have held that a threat to file a lawsuit unless a settlement demand is accepted, regardless of whether the threat was made in good faith, is not a wrongful threat within the meaning of extortion statutes.") (citations omitted).

letter, even if it spells out the ancillary consequences of potential litigation, is protected speech. See, e.g., DeLong, 310 Ga. App. at 525 n.35, 714 S.E.2d at 104 n.35 ("even assuming arguendo that the threat of filing a lawsuit (and its attendant potential consequences) was sufficient to support a conviction for influencing a witness, *we have grave reservations as to whether such a law could be upheld under the Georgia or United States Constitutions*," citing the First and Seventh (protecting the right to trial by jury in civil proceedings) Amendments to the United States Constitution and Article I, Section 1, ¶¶ V and XII of the Georgia Constitution.).[6] The federal courts have expressed the same concern. See, e.g., Town of Gulf Stream, 654 F. App'x at 444 ("Moreover, citizens have a constitutional right to petition the government for redress.") (quoting Pendergraft, 297 F.3d at 1206).

Therefore, Count One of the Bill of Indictment fails to set forth a crime as pled and as argued by the prosecution.[7]

The Court notes, however, that the State insists that "Georgia's definition... specifically contemplates that litigation can or threatened litigation can amount to extortion...."[8] If O.C.G.A. § 16-8-16(a)(3) must be read to encompass a threat to file civil litigation, then that provision is unconstitutional because it violates the United States and Georgia Constitutions.[9]

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[6] 310 Ga. App. at 525 n.35 (emphasis added).

[7] The prosecution made proffers and representations at this motions hearing. These proffers and representations by counsel will be treated as evidence when they were not objected to. See Anthony v. State, 298 Ga. 827(2), 785 S.E.2d 277 (2016); Rank v. Rank, 287 Ga. 147(2), 695 S.E.2d 13 (2010).

[8] Hrg. Trans. at 53 (morning session).

[9] "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and petition the Government for a redress of grievances." Constitution of the United States, Amendment 1. "No law shall be passed to curtail or restrain the freedom of speech or of the press. Every person may speak, write, and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." Georgia Constitution, Article I, Section 1, Paragraph V. "The people have the right to assemble peaceably for their common good and to apply by petition or remonstrance to those vested

O.C.G.A. § 16-8-16(a)(3) is overbroad as written and applied because this statute sweeps within its ambit a substantial amount of constitutionally-protected lawful speech and activity involving petitions for redress of grievances:[10] such a statute is unconstitutionally overbroad,[11] and has a "chilling" effect on expression protected by these Constitutional provisions. Doran v. Salem Inn, Inc., 422 U.S. 922, 933, 95 S. Ct. 2561, 2568 (1975); Virginia v. Hicks, 539 U.S. 113, 119, 123 S. Ct. 2191, 2196 (2003); Johnson v. State, 264 Ga. 590, 591, 449 S.E.2d 94 (1994).

Generally speaking, "[t]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." West v. State, ____ Ga. ____, ____ S.E.2d ____, 2016 WL 6407321, *1 (Oct. 31, 2016), quoting Ashcroft v. American Civil Liberties Union, 535 US 564, 573, 122 S. Ct. 1700, 1707 (2002).

Statutes which criminalize activity otherwise protected by the First Amendment are subject to strict scrutiny. Laws purporting to prohibit or regulate speech falling outside the narrow bounds of the few carefully defined forms of expression that are categorically excluded from First Amendment protection (such as obscenity) are subject to exacting scrutiny. West, 2015 WL 640732, *1. "Such restrictions are valid only if they are 'narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.'" Id., quoting Broadrick v. Oklahoma, 413 US 601, 611, 93 S. Ct. 2908, 2915 (1973). Accord, State v. Fielden, 280 Ga. 444, 445, 629 S.E.2d 252 (2006)

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with the powers of government for redress of grievances." Id., Article I, Section 1, Paragraph IX. *See also*, Georgia Constitution, Article I Section 1, Paragraph XXII ("No person shall be denied the right to prosecute or defend, either in person or by an attorney, that person's own cause in any courts of this state.").

[10] The First Amendment rights of free speech and petition are inseparable. Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323 (1945).

[11] Johnson v. State, 264 Ga. 590, 591, 449 S.E.2d 94 (1994).

("'[B]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.'" (Citations omitted)). Consequently, the courts "have the obligation to insure that in its zeal to promote this worthy aim our legislature has not unwittingly curtailed legitimate modes of expression in a real and substantial way." 299 Ga. at 574, 788 S.E.2d at 475.

"To respect this 'breathing space' and avoid deterring expression that may tend towards the outer boundaries of what is protected, the First Amendment overbreadth doctrine permits courts to invalidate laws burdening protected expression on their face, without regard to whether their application might be constitutional in a particular case." West, 2016 WL 6407321 at *1, quoting Scott v. State, ____ Ga. ____, ____, 788 S.E.2d 468 (2016). Criminalizing threats to litigate is not a least restrictive means. See, e.g., Pendergraft, 297 F.3d at 1206 (Litigants may be sanctioned with civil remedies, but only for the most frivolous of actions. Even then, the civil remedies of tort actions for malicious prosecution, abuse of process or recovery of attorney's fees "are heavily disfavored because they discourage the resort to courts.").

Section 16-8-16(a)(3) is not drawn with narrow specificity and it fails to provide the breathing space necessary for First Amendment speech and petitioning activity. Instead, Section 16-8-16(a)(3) criminalizes a threat to disseminate any information tending to subject any person to hatred, contempt or ridicule, or that tends to impair a person's credit or "business repute." The exposure created by § 16-8-16(a)(3) is clearly based on the content of the threatened communication or, if as in this case, a lawsuit is actually filed, the communication itself. Moreover, on its face, the statute criminalizes a threat to file an entirely legitimate and justified lawsuit. In fact, the exposure to prosecution under 16-8-16(a)(3) increases the more meritorious the lawsuit threatened. In our civil justice system, the stronger the claim against a person, the

more likely it is to subject that person to hatred, contempt or ridicule, or to impair that person's credit or "business repute." Thus, the very criteria that must be satisfied to authorize the recovery of punitive damages also tend to subject a person to such disapprobation. See O.C.G.A. § 51-12-5.1 (listing criteria for award of punitive damages, including willful misconduct, malice and entire want of care). The stronger an injured person's claim for a redress of grievances, the greater their exposure to criminal prosecution for threatening to seek such redress.

O.C.G.A. § 16-8-16(a)(3) is so vague that it leaves open the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against.[12] This chills exercise of the constitutionally-protected rights mentioned above because of fear of prosecution. Botts v. State, 278 Ga. 538, 540, 604 S.E.2d 512 (2004) (statute unconstitutional where its language was "so vague and expansive that persons of common intelligence must necessarily guess at its meaning and differ as to its application.").

The State's counter-arguments for constitutionality are unpersuasive. The State's argument that the right to petition for redress of grievances has no application to suits between private individuals is incorrect. Borough of Duryea, Pa. v. Guarnieri, 564 U.S. 379, 387 (2011)("our precedents confirm that the petition clause protects the right of individuals to appeal to courts and other forms established by the government for resolution of legal disputes.").

Also unpersuasive is the State's contention that § 16-8-16(a)(3) is constitutional because it is limited to threats to file baseless, bad faith, or sham lawsuits and does not apply to

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[12] For example, an individual who makes a demand based in part upon a threat to seek treble or punitive damages must guess at his peril whether he will be able to assert a defense under subsection (c), because damages of those types do not appear to constitute "restitution" or "indemnification" within the meaning of § 16-8-16(c).

constitutionally protected petitioning activity. This argument fails for three reasons. First, nothing in the text of § 16-8-16(a)(3) limits the application of the statute to a threat to file a baseless, bad faith, or sham lawsuit.[13] The statute does not contain any such limitations and this Court may not rewrite the statute to supply them. West v. State, ____ Ga. ____, ____ S.E.2d, 2016 WL 6407321, *4 (Oct. 31, 2016); Final Exit Network, Inc. v. State, 290 Ga. 508, 511, 722 S.E.2d 722 (2012); State v. Fielden, 280 Ga. 444, 448, 629 S.E.2d 252 (2006). Second, the indictment does not allege that the litigation is a sham, is baseless or filed in bad faith. Third, courts have repeatedly refused to criminalize the filing of a baseless, bad faith or sham lawsuit. See, e.g., Brown; DeLong; Pendergraft. And, as noted above, courts have likewise rejected civil RICO actions and tort actions based upon allegations of improperly filed lawsuits. Meadow Springs Recovery, LLC v. Wofford, 319 Ga. App. 79, 82, 734 S.E.2d 100 (2012) ("[T]he abusive litigation statute provides the exclusive remedy for claims of abusive litigation...." This prevents "the proliferation of unnecessary causes of action for the alleged improper filing of lawsuits [which] would have a chilling effect on the exercise by citizens of their right of access to the courts.").[14]

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[13] The absence of any such limitation in the text of the statute demonstrates its overbreadth.

[14] Quoting Phillips v. MacDougald, 219 Ga. App. 152, 155, 464 S.E.2d 390 (1995). See also, Town of Gulfstream, 654 F. App'x at 443–44 ("Our judicial system, and the Act in particular, encourages citizens to use the courts to resolve public records disputes. Moreover, citizens have a constitutional right to petition the government for redress. We believe that regardless of the scope and scale of the litigation, the courts are amply equipped to deal with frivolous litigation...thus, Pendergraft and Raney control, and the alleged misconduct cannot as a matter of law constitute the predicate act of extortion for purposes of the plaintiff's civil RICO claim."); Raney, 370 F.3d at 1088 n. 2 ("In light of our decision in *Pendergraft*, we doubt that the filing of a lawsuit could ever be 'wrongful' for the purposes of RICO."); Atlantic Recording Corp., 2008 WL 3890387 at *5 (even a groundless, bad-faith threat to sue is not a wrongful threat within the meaning of extortion statutes).

The prosecution's argument that O.C.G.A. § 16-8-16 is saved from unconstitutionality by O.C.G.A. § 16-8-16(c) is also unavailing. O.C.G.A. § 16-8-16(c) does not save O.C.G.A. § 16-8-16 from being unconstitutional because the affirmative defense created by O.C.G.A. § 16-8-16(c) does not eliminate the unconstitutional "chilling" effect discussed above. See Ashcroft v. American Civil Liberties Union, 542 U.S. 656, 670–71, 124 S. Ct. 2783, 2793-94 (2004) ("where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of trial. There is a potential for extraordinary harm and a serious chill upon protected speech."). This is particularly so in matters involving First Amendment rights, because affirmative defenses "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." Smith v. People of California, 361 U.S. 147, 151, 80 S. Ct. 215, 217 (1959).

The United States Supreme Court has long recognized that the prospect of a successful affirmative defense is not sufficient to rescue a statute that chills First Amendment rights. Dombrowski v. Pfister, 380 U.S. 479, 487 (1965) ("The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure."). In other words, an affirmative defense that burdens otherwise protected First Amendment activities cannot save an overbroad statute. Am. Civil Liberties Union v. Ashcroft, 322 F.3d 257, 257–61 (3d Cir. 2003), aff'd, Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 124 S. Ct. 2783 (2004). As the United States Supreme Court held in New York Times Co. v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964)

> Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—*and especially one that puts the burden of proving truth on the speaker.*

376 U.S. at 271, 84 S. Ct. at 721 (emphasis added). While the State argues that the affirmative defense does not unduly burden constitutionally-protected petitioning activity and speech because the State has the ultimate burden of proof, that argument ignores the fact that the burden of presenting evidence in support of the affirmative defense falls upon a defendant. If the defendant sits silent, the affirmative defense has no application and the defendant may be convicted. Placing this burden upon a defendant clearly has the potential to substantially chill protected activity, a potential that is only increased by the extraordinarily vague nature of the affirmative defense itself.

The State's arguments demonstrate why subsection (c) is insufficient to render the statute constitutional. For example, the State argues that a settlement demand could fall within the scope of subsection (a)(3), but not be subject to the affirmative defense of subsection (c), if it was too large.[15] This argument apparently refers to the language in subsection (c) that would require every defendant to prove he or she "honestly" claimed property as restitution or indemnification for harm done. O.C.G.A. § 16-8-16(c). Thus, the State argued that a demand that was too high would not constitute an "honest" demand, subjecting the party making the demand to prosecution.

The State's argument illustrates both the overbreadth of the statute and the vagueness of the affirmative defense itself. Almost every settlement demand that is rejected by the party to whom it is made is rejected because that party felt the demand was too large. But negotiations are fluid and hard to predict: a demand that is rejected in one case may be accepted in another very similar case, or even later accepted in the same case if that demand is subsequently renewed at a different stage of the litigation, after discovery and court rulings, or perhaps the seating of a

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[15] This is apparently what led the State to allege the amount of the settlement demand made on behalf of Ms. Brindle. See Indictment Count One, Overt Act 15.

jury, have changed a party's risk tolerance. Whether a demand is "honest," if read to mean reasonable or fair, is a highly subjective question, and the vague language of § 16-18-16(c) "impermissibly delegates 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." Botts v. State, 278 Ga. 538, 540, 604 S.E.2d 512, quoting Thelen v. State, 272 Ga. 81, 82–83, 526 S.E.2d 60 (2000). Statutes that criminalize speech and petitioning activity must be narrowly drawn to prevent the supposed evil, and a conviction for an utterance "based on a common law concept of the most general and undefined nature" is not permitted. Ashton v. Kentucky, 384 U.S. 195, 200, 86 S. Ct. 1407, 1411 (1966). O.C.G.A. § 16-8-16(a)(3) is not narrowly drawn to prevent the supposed evil and the affirmative defense provided by § 16-8-16(c) is of the most general and undefined nature.

Based upon the above, Count One of this Bill of Indictment fails to set forth a crime that could be lawfully prosecuted in the State of Georgia and therefore, Count One is **DISMISSED**, with prejudice, against all Defendants.

**Counts Two, Three and Four**

Counts Two, Three and Four charge the Defendants with variations of the crime of unlawful surveillance by making a video/audio recording of the alleged victim(s) in his/her home without his/her knowledge and consent. For the following reasons, Counts Two, Three and Four must be dismissed as no prosecutable crime is set forth.

First, it is not illegal in the State of Georgia for a party to record both audio and video of another party so long as one party consents to this recording. This is the one party consent rule.[16] See O.C.G.A. §§ 16-11-62(2) and 16-11-66(a); Lucas v. Fox News Network, No. 1:99-CV-2638-

[16] The State concedes that the recording consists of both video and audio. Hrg. Trans. at 87 (morning session).

CAM, 2000 U.S. Dist. LEXIS 22834 (N.D. Ga. June 27, 2000), aff'd, 248 F.3d 1180 (11th Cir. 2001) (one party consent rule of O.C.G.A. § 16-11-66 applies to audio and video recordings; interception of oral communications through video recording is not a violation of privacy interests); State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011) (if video recording also captured audible or inaudible oral communications, the one-party consent rule of O.C.G.A. § 16-11-66(a) may apply); Sims v. State, 297 Ga. 401, 774 S.E.2d 620 (2015) (affirming trial court's admission into evidence, over objection, of a video recording taken in a concededly private place with consent of only one party).

Therefore, Counts Two, Three and Four fail to set forth a crime that can be prosecuted in the State of Georgia.

Second, a material element of Counts Two, Three and Four is that the alleged illegal video/audio recording occurred in a private place. The term "a private place" under O.C.G.A. § 16-11-62(2) is given the same scope in Georgia as under the Fourth Amendment. Quintrell v. State, 231 Ga. App. 268, 270, 499 S.E.2d 117 (1998) ("[i]n discerning the scope of the statutory meaning of 'private place,' we ascribe the same scope as has been given to the Fourth Amendment protections."). Mr. Rogers did not have an expectation of privacy at the time of the recording. The very nature of the activity recorded establishes that he knew Ms. Brindle was present and that she was not a member of his family or household. He then willingly participated in the sexual activity with her that was recorded. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Thomas v. State, 263 Ga. 85, 87, 428 S.E.2d 564 (1993). See also, Katz v. United States, 389 U.S. 347, 351, 88 S. Ct. 507, 511 (1967) ("the Fourth Amendment protects people,

not places" and therefore what "a person knowingly exposes to the public, *even in his own home* or office, is not subject to Fourth Amendment protection.") (emphasis added).

A covert video made by a person whose presence is known to the person recorded does not violate a person's Fourth Amendment reasonable expectation of privacy. United States v. Thompson, 811 F.3d 944, 949–50 (7th Cir. 2016) (collecting cases). Fourth Amendment decisions consistently demonstrate that an individual has no expectation of privacy as to persons the presence of whom the individual is aware, even when those persons make secret video recordings, and even when those recordings take place in a private residence:

> It is firmly established that audio recordings, obtained without a warrant and through hidden recording devices by an invited guest, do not violate the Fourth Amendment. The rationales for permitting warrantless audio recordings . . . apply with equal force to the video surveillance at issue in this case...
>
> Once Davis invited Lorenzo into his residence, Davis forfeited his privacy interest in those activities that were exposed to Lorenzo. We therefore hold that, as with the audio recordings in Davis and Lopez, the videotape evidence, which merely showed scenes viewable by Lorenzo, did not violate Davis's Fourth Amendment right . . . . Lorenzo was inside 35 Rose Avenue with Davis's consent and the hidden camera merely memorialized what Lorenzo was able to see as an invited guest.

United States v. Davis, 326 F.3d 361, 362–63 (2d Cir. 2003) (internal citations omitted); United States v. Brathwaite, 458 F.3d 376, 381 (5th Cir. 2006) (collecting cases) (no expectation of privacy sufficient to bar videotaping when the person who made the videotape was invited into the home and could see all of the areas ultimately captured on film); United States v. Lee, 359 F.3d 194 (3d Cir. 2004) ("What is significant is not the type of room in which the surveillance occurred but Lee's actions in admitting Beavers to the room. Although Lee had an expectation of privacy in the hotel suite so long as he was alone there, when Lee allowed Beavers to enter, any expectation of privacy vis-a-vis Beavers vanished."); United States v. Vanover, 2016 WL 2943818 (W.D. N.C. 2016) ("Here where Mr. Moon was an invited guest of the Defendants, his status as either a government agent or private citizen is irrelevant. By welcoming Mr. Moon into

their home, the Defendants voluntarily forfeited any expectation of privacy in what their guests saw or heard.").

The prosecution conceded that Mr. Rogers consented to Ms. Brindle's presence in the bedroom and bathroom at the time of this recording.[17] Thus, Mr. Rogers knowingly exposed to the public his bathroom, bedroom and other parts of his home, rendering those places no longer private places for Fourth Amendment or O.C.G.A. § 16-11-62 protection. Because Ms. Brindle's presence was known and consented to by Mr. Rogers, he lost any right to privacy in these areas and it was lawful for Ms. Brindle to video/audio record these places.[18]

Furthermore and separately, Mr. Rogers converted his bathroom and bedroom into a public place by appearing nude before Ms. Brindle. Greene v. State, 191 Ga. App. 149, 381 S.E.2d 310 (1989) ("[Greene] by his own behavior removed the barrier and converted his bedroom and bath from a private zone to a public place, where his nudity might reasonably be expected to be viewed by people other than members of his family or household [babysitters].").

Based upon the above and because Mr. Rogers consented to Ms. Brindle's presence in his home, including in his bedroom and bathroom while he was nude, any expectation of privacy was forfeited and the bedroom, bathroom and other relevant locations were not private places. Thus, no crime is charged in these Counts.

Third, the fact that there was an extramarital relationship mandates that the person engaged in the extramarital relationship loses his right to privacy as to the extramarital conduct. See Cawood v. Haggard, 327 F. Supp. 2d 863 (E.D. Tenn. 2004), aff'd sub nom. Cawood v.

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[17] Hrg. Trans. at 37 (afternoon session).

[18] The prosecution's reliance on Gavin v. State, 292 Ga. App. 402, 664 S.E.2d 797 (2008), is not persuasive. See State v. Madison, supra ("Gavin does not hold and cannot be reasonably understood to hold that the participant's exception set forth in O.C.G.A. § 16-11-66(a) has no application to video recordings that satisfy the criteria of that statutory exception.").

Booth, 125 F. App'x 700 (6th Cir. 2005). Therefore, Counts Two, Three and Four set forth no crime and these counts must be dismissed as no prosecution can lawfully go forward.

Fourth, if needed to be reached, the Court finds O.C.G.A. §§ 16-11-62 and 16-11-66 to be unconstitutionally vague. When a statute is challenged as being unconstitutionally vague, the Court must determine whether the statute conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Payne v. State, 275 Ga. 181(2), 563 S.E.2d 844 (2002). If a statute is vague, so that a person of common intelligence must necessarily guess at its meaning and differ as to its application, then the statute is void for vagueness. Rouse v. Department of Nat. Resources, 271 Ga. 726, 728–29, 524 S.E.2d 455 (1999). If a statute is void for vagueness, it is deemed unconstitutional and a person shall not be held criminally responsible under that unconstitutional statute. State v. Eastwood, 243 Ga. App. 822, 535 S.E.2d 246 (2000).

The Due Process Clause of the United States Constitution as well as the Georgia Constitution require that the law give a person of ordinary intelligence fair warning of the specific conduct that is unlawful or mandated. Vagueness may invalidate a criminal law on either of the following two bases: (1) a statute may fail to provide notice sufficient to enable an ordinary person to understand what conduct it prohibits or requires; or (2) the statute may authorize and encourage arbitrary and discriminatory enforcement. See Youmens v. State, 291 Ga. 754(1), 732 S.E.2d 441 (2012).

In the case at bar, the Defendants timely challenged the constitutionality of O.C.G.A. §§ 16-11-62(2) and 16-11-66(a). It is unconstitutional to prosecute purported crimes as alleged in this Indictment (taking into consideration the unobjected to proffers by counsel at the Motions

hearing) as courts cannot interpret, uniformly, what this statute prohibits or permits, as shown below.

In Lucas v. Fox News Network, supra, the District Court ruled that under O.C.G.A. §§ 16-11-62(2) and 16-11-66(a), only the consent of one party is necessary to audio/video record another in a private place. In Lucas, a Fox News reporter misrepresented her identity to gain access and film "confidential" Bible study sessions including a "Sin and Repentance Study" that was alleged to be as private as "a Catholic confession." The reporter audio/video recorded the sessions in the "private apartment" and "bedroom" of a Women's Campus Ministry Leader, and the recordings were later broadcasted by Fox News. Id. at **2, 13. In granting the Motion to Dismiss on all claims, including an invasion of privacy claim, the District Court, applying Georgia law, ruled the audio/video recording did not violate O.C.G.A. § 16-11-62:

> Georgia follows the one-party consent rule, which provides that any party to a conversation may record and divulge its contents. *See* O.C.G.A §§ 16-11-62 (governing eavesdropping, surveillance, or 'intercepting communication' which invades the privacy of another) and 16-11-66 (stating that '[n]othing in Code Section 16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication.'). *See also Fetty v. State,* 268 Ga. 365, 366–67, 489 S.E. 2d 813, 815–16 (1997) (noting that section 16-11-62 'prohibits the clandestine recording' of another's private conversations, but that "it is established that [it] does not apply to one who is a party to such conversations); *Mitchell v. State,* 239 Ga. 3, 4-6, 235 S.E. 2d 509, 511-12 (1997) (same). *Id.* at *19.

The ruling was affirmed by the Eleventh Circuit. Lucas, 248 F.3d 1180 (11th Cir. 2001)

Similarly, in State v. Madison, 311 Ga. App. 31, 714 S.E.2d 714 (2011), the Chatham County District Attorney asserted—in diametric opposition to the position taken by the Fulton County District Attorney in the case at bar—that only the consent of one party was necessary to video record another in a private place because of the participant exception of O.C.G.A. § 16-11-66(a). Significantly, the Court of Appeals ruled that the one-party participant exception of O.C.G.A. § 16-11-66(a) applied to video recordings generally:

> Madison posits that *Gavin* stands for the proposition that there can never be a participant's exception to O.C.G.A. § 16-11-62(2). We do not read *Gavin* as making that sweeping a pronouncement. Moreover, to do so would be flatly at odds with the plain meaning of O.C.G.A. § 16-11-66(a), which makes it explicitly clear that the participant's exception applies to O.C.G.A. § 16-11-62 in its entirety . . . *Gavin* does not hold and cannot be reasonably understood to hold that the participant's exception set forth in O.C.G.A. § 16-11-66(a) has no application to video recordings that satisfy the criteria of that statutory exception.

311 Ga. App. at 34 (internal punctuation and citations omitted).[19]

More recently in Sims v. State, 297 Ga. 401, 774 S.E.2d 620 (2015), the State, through the Rockdale County District Attorney, unequivocally asserted that under the participant exception of O.C.G.A. § 16-11-66(a), only the consent of one party is necessary in Georgia to video record another person in a private place so long as the video also captures audio and the person making the recording is a participant. Sims v. State, 2014 Ga. S. Ct. Briefs LEXIS 1468 (Dec. 31, 2014). More specifically, although the State conceded that the iPhone in question was a "device" and appellant's apartment was a "private place" within the contemplation of O.C.G.A. § 16-11-62 (2), Id. at *12, it went on to explain:

> Without question, the participant exception of OCGA § 16-11-66 (a) exempts the audio portion of the recording made by [individual's iPhone] from being inadmissible under OCGA § 16-11-67 for violation of § 16-11-62 (2) regardless whether Appellant consented to the recording of the conversation. **What may be less obvious is the fact that the participant exception of O.C.G.A. § 16-11-66 (a) extends also to the images captured by the recording.**

Id. at *15 (emphasis added). Relying on State v. Madison, the State went on to explain, "The plain meaning of the phrase 'Nothing in Code Section 16-11-62' includes the consent-of-all-persons-observed provision of O.C.G.A. § 16-11-62(2). Thus, the consent-of-all-persons-

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[19] On the specific facts in Madison where the video did not also contain audio, the Court affirmed the suppression of the video, but even then qualified its ruling: "[I]f the video recordings made by [victim] had actually captured audible oral communications or inaudible but otherwise discernible oral communications, (e.g. in which the speaker's words could be discerned from reading his or her lips), and if the State were seeking to admit such communications, this might require a different result" under the one-party consent of § 16-11-66(a). Id. at 34.

observed provision of O.C.G.A. § 16-11-62(2) cannot render unlawful [the warrantless iPhone] recording of visual images of his conversation with Appellant." Id. at *16. The Supreme Court of Georgia did not reject that position and *affirmed* the Trial Court's admission of the video recording into evidence, noting that the audio portion of the video would be admissible even were the video portion not. Sims v. State, 297 Ga. at 403 n. 2, 774 S.E.2d at 623 n. 2.[20]

The fact that the Chatham County District Attorney, the Rockdale County District Attorney, the Court of Appeals of Georgia in Madison, and both the District Court and the Eleventh Circuit in Lucas, have all argued or held that the one-party participant exception of O.C.G.A. § 16-11-66(a) applies to video recordings made under § 16-11-62(2)—the direct opposite of position the Fulton County District Attorney takes—indicates *at a minimum* that the statute is sufficiently vague that reasonable persons—including in this case district attorneys—will interpret it in fundamentally different and irreconcilable ways. The Fulton County District Attorney's position cannot be reconciled with Sims, Madison and Lucas, demonstrating that Courts, prosecutors, counselors and persons of ordinary intelligence cannot be expected to determine what is permitted and prohibited by these statutes. Consequently, O.C.G.A. §§ 16-11-62(2) and 16-11-66(a) are vague and must be deemed unconstitutional.

In the above-referenced cases, courts and district attorneys from across this state cannot agree on what is prohibited or permitted by O.C.G.A. § 16-11-62(2) as well as O.C.G.A. § 16-11-66(a). Therefore, these code sections must be deemed unconstitutional and, if this issue needs to be reached, the Court finds that Counts Two, Three and Four cannot be prosecuted as the statutes they rely upon as crimes are unconstitutionally vague.

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[20] The position taken here by the Fulton County District Attorney cannot be reconciled with that of the Rockdale County District Attorney in Sims or the Chatham County District Attorney in State v Madison.

After consideration of the motions, briefs, and arguments of the Parties, all Counts are hereby **DISMISSED.**

So **ORDERED** this 29th day of November 2016.

THE HONORABLE HENRY NEWKIRK
Judge, Fulton County Superior Court

Prepared this ____ day of November, 2016 by:

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