IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

STATE'S RESPONSE TO DEFENDANT RAY SMITH'S DEMURRERS TO THE INDICTMENT

COMES NOW, the State of Georgia, by and through Fulton County District Attorney Fani T. Willis, and responds in opposition to Defendant Ray Smith's Demurrers to the Indictment. The Defendant seeks dismissal of the indictment issued against him by a Fulton County grand jury on multiple grounds, many of which have already been expressly rejected by the Court, and all of which are unsupported by law. For the reasons set forth below, the Defendant's motion to dismiss the indictment should be denied.

I. Count 1 of the indictment sufficiently alleges a RICO enterprise.

The Defendant's challenge to the State's enterprise allegations fails because it is based on a series of flawed arguments and mischaracterizations. First, the Defendant attempts to set up a straw man argument that relies on mischaracterizing the State's allegations. Contrary to the Defendant's mischaracterizations, the enterprise in this case does not include millions of Americans, nor does it seek to impose liability based upon mere belief. As regards the indictment, the State holds the pen, and the Defendant may not edit or alter the State's allegations. Contrary to the Defendant's straw man argument, the indictment charges persons who "knowingly and willfully joined a conspiracy to unlawfully change the outcome of the election in favor of Trump." Indictment at 14. This description does not encompass every person who voted for Trump, every person who believed Trump won, every person who was disappointed that he did not win, or every person who questioned the outcome of the election. It *does* apply to people who associated for the purpose of unlawfully changing the outcome of the election.

Attempting to build on his mischaracterizations of the indictment, the Defendant propounds an "American bank robber[]" analogy, stating that while "there are probably thousands of bank robbers in America, but the mere fact that they all rob banks and have the same goal and many of the same methods of operation, does not mean that all American bank robbers constitute one RICO enterprise … ." Def.'s Mot. at 3. The Defendant then tries to apply his "American bank robber[]" construct to the indictment in this case, contending that the State alleges an enterprise "comprised of millions of people throughout the country who engaged in various activities … to expose the fraud in the election and to overturn the election results." Def.'s Mot. at 4. Then the Defendant takes it to eleven, contending that the enterprise actually consists of all "American Citizens Challenging Election Results." Def.'s Mot. at 4. Depending upon which part of his

pleading one looks at, this means that (in ascending order of febrility) the enterprise he seeks to substitute for the one actually alleged in the indictment includes scores of United States Senators and Members of the House of Representatives, hundreds of legislators in various states, hundreds of thousands of Georgia citizens, and "millions of people" across the United States who the Defendant laments the State would turn into "[R]acketeers." Def.'s Mot. at 5. The Court has already heard and rejected similarly overwrought arguments from other defendants in this case, holding that the State need not "allege a 'hierarchical structure' or provide a full membership list." *See* Order on Def.'s Demurrers. at *11, Oct. 17, 2023. This Defendant's should receive the same treatment.

The Defendant's "American bank robber[]" construct is belied by the case upon which he most relies, *Boyle v. United States,* 556 U.S. 938 (2009). Defendant Boyle was an actual bank robber: one of a number of participants in a series of bank thefts that occurred in four states. 556 U.S. at 941. Participants in the bank thefts included a core group as well as others who were recruited from time to time for specific jobs. *Id.* The participants sometimes attempted bank robberies and burglaries of bank vaults, but they most often targeted cash-laden night-deposit boxes. *Id.* The group "was loosely and informally organized," without a leader or hierarchy. *Id.* The participants never formulated any long-term master plan or agreement. Boyle himself joined the group after it had been formed and committed a number of night-deposit-box thefts. After joining the group, Boyle participated in numerous attempted night-deposit-box thefts and at least two attempted bank-vault burglaries. *Id.*

Boyle was convicted of conspiracy to violate the federal RICO statute (18 U.S.C. § 1962(d)), a substantive violation of that statute (18 U.S.C. § 1962(c)) and other non-RICO federal offenses. *Id.* at 941-42. Boyle's challenge to his RICO convictions relied on his contention that the

trial court should have instructed the jury that the government was required to prove that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.* at 943. The trial court refused to give that instruction and the Supreme Court agreed, affirming Boyle's conviction.

Boyle specifically recognized that the definition of enterprise "is obviously broad, encompassing '*any* . . . group of individuals associated in fact.'" *Id.* at 944. The Court further emphasized that the RICO statute mandates its terms are to be "liberally construed to effectuate its remedial purposes," *id.* (quoting Pub. L. No. 91-452 § 904(a), 84 Stat. 947 (1970))[1], and referred to its own substantial body of decisions recognizing breadth of the statute.[2]

Boyle urged the Court to read a wish list of requirements into the RICO statute,[3] but the Court comprehensively rejected his "let's make up a requirement" approach to RICO, holding that:

> Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an *ad hoc* basis and by any number of methods–by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is

[1] Georgia RICO also contains a liberal construction mandate O.C.G.A. § 16-14-2(b).
[2] 556 U.S. at 944, citing *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise'"), *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) ("RICO is to be read broadly"); *Russello v. United States*, 464 U.S. 16, 21 (1983) (noting "the pattern of the RICO statute in utilizing terms and concepts of breadth").
[3] This included requirements of structural "hierarchy," "role differentiation," a "unique *modus operandi*," a "chain of command," "professionalism and sophistication of organization," "diversity and complexity of crimes," "membership dues, rules and regulations," "uncharged or additional crimes aside from predicate acts," and "internal discipline mechanism," "regular meetings regarding enterprise affairs," and "enterprise 'name,'" and "induction or initiation ceremonies and rituals." *Id.* at 949. The Court rejected each of these purported requirements, finding that they had "no basis in the language of RICO." *Id.*

> the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Id. at 948.

As noted above, *Boyle* actually did involve "American bank robbers." But the defendants in *Boyle* constituted an association-in-fact enterprise not just because they happened to rob banks, but because they *robbed the same banks and they robbed them together.* Even though not every member of the enterprise was involved in every robbery or attempted robbery, it was sufficient that there existed a group of persons who worked together to rob banks. People who robbed different banks, in different places, in association with different groups of people were not part of the enterprise at issue in *Boyle*, never mind that they were also "American bank robbers," i.e., persons who also robbed banks in America.

The Defendant's "American bank robber[]" construct relies on mischaracterizations of the indictment. In this case, the State is no more accusing everyone who ever doubted the outcome of the 2020 election of being a member of a RICO enterprise than the federal government accused every bank robber in America of being a member of the enterprise in *Boyle.*

Second, *Boyle* is not Georgia law. But if it were to become so, the indictment in this case satisfies its requirements. The indictment alleges that the defendants and other members and associates of the enterprise "had connections and relationships with one another and with the enterprise." Indictment at 15. The indictment further alleges that "[t]he enterprise constituted 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 15. The indictment also identifies as a common purpose "to unlawfully change the outcome of the election in favor of

Trump."[4] Indictment at 14. And finally, the indictment alleges that "[t]he enterprise operated for a period of time sufficient to permit its members and associates to pursue its objectives," Indictment at 15, describes the manner and method by which the defendants and other members and associates of the enterprise sought to further its goals and achieve its purposes, Indictment at 16-19, and then sets forth 161 overt acts committed to effectuate the objective of the enterprise. Indictment at 20-71. These allegations satisfy all requirements of existing Georgia law, as well as *Boyle*. 556 U.S. at 946. The Defendant's challenge to the State's enterprise allegations therefore fails.

II. The Defendant's apparent as-applied constitutional challenge to the indictment is not sufficiently particularized for the State to meaningfully respond, and, in any case, the purported issues are not yet ripe.

In what appears to be an as-applied constitutional challenge to the indictment, the Defendant alleges that "[u]sing RICO to prosecute Ray Smith patently violates his First Amendment right to challenge the legitimacy of the election … ." Def.'s Mot. at 7. He makes sweeping claims concerning filing lawsuits and lobbying the legislature, and he concludes that his prosecution has an inevitable chilling effect on the practice of law and violates his constitutional right to free speech. *Id.* Yet he fails to specify exactly which statute or statutes are unconstitutional as applied and in what specific way they are unconstitutional as applied. The Defendant makes no attempt to apply the law to the particular facts of this case with specificity, and the State cannot meaningfully respond. Should the Court allow this argument to proceed, the State respectfully requests that it require the Defendant to further particularize his arguments and allow the State the opportunity to respond in writing.

[4] This allegation that the objective of the enterprise was to *unlawfully* change the outcome of the election demonstrates that the indictment does not reach persons who merely supported Trump, voted for Trump, or questioned the result of the election. No defendant is charged based solely on such conduct.

In any case, the Defendant's apparent as-applied constitutional challenge to the indictment is not yet ripe because a factual record has not been sufficiently developed. "Because [an as-applied constitutional] challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) (citing *Siegel v. LePore*, 234 F.3d 1163, 1171 (11th Cir. 2000)). As this Court has already held, "Georgia precedent bars the consideration of an as-applied challenge here where the factual record, to the extent any yet exists, is incomplete and vigorously disputed. There have been no formal evidentiary hearings tested by cross-examination, and nothing is stipulated." Order on Def.'s Mots. to Dism. at *6, Oct. 18, 2023. "Thus, the caselaw and the circumstances of this case as it currently stands require a denial of the Defendants' request to consider an as-applied [constitutional] challenge." *Id.*

III. The Defendant's legal pleadings, though not the basis of any of the charges against him, are not "immunized from civil and criminal liability."

The Defendant contends that his legal pleadings "are immunized from civil and criminal liability regardless of their accuracy … ." Def.'s Mot. at 7. As a threshold matter, the indictment does not mention any pleadings made or filed by the Defendant. To be clear, as part of his participation in the RICO conspiracy, the Defendant is charged with soliciting members of the Georgia Senate to violate their oaths of office on December 3, 2020 (Ct. 1, Act 23; Ct. 2); making false statements to members of the Georgia Senate on December 3, 2020 (Ct. 1, Act 25; Ct. 4); soliciting members of the Georgia House of Representatives to violate their oaths of office on December 10, 2020 (Ct. 1, Act 55; Ct. 6); encouraging certain co-conspirators to act as fake electors on December 14, 2020 (Ct. 1, Act 78; Cts. 9, 11, 13, 15, 17, 19); soliciting members of the Georgia Senate to violate their oaths of office on December 30, 2020 (Ct. 1, Act 102; Ct. 23);

and making false statements to members of the Georgia Senate on December 30, 2020 (Ct. 1, Act 104; Ct. 25). None of these allegations involve legal pleadings.

In any case, the Defendant's contention that legal pleadings are immune from civil and criminal liability is incorrect, and the Defendant points to no authority in support of this claim. In an extreme example, a Georgia attorney was not only found civilly liable but also was disbarred for repeatedly filing frivolous motions and baseless appeals in a divorce action. *See In the Matter of Farmer*, 307 Ga. 307 (2019). Moreover, as the Georgia Supreme Court has noted, there are statutes such as O.C.G.A. § 51-9-11, creating a cause of action for defamation of title, and O.C.G.A. § 16-10-20.1, making it a felony offense to file false documents, which directly concern civil and criminal liability for filing certain pleadings. *Massey v. Duke Builders, Inc.*, 310 Ga. 152, 156 n.5 (2020). A prosecution under O.C.G.A. § 16-10-20.1 does not even require proof that a defendant had actual knowledge that a document was false. As alleged in Counts 14 and 15, a conviction can be sustained where a defendant simply has reason to know that a document is false or contains a materially false, fictitious, or fraudulent statement or representation. *See* O.C.G.A. §§ 16-10-20.1(b)(1) and 16-10-20.1(b)(2).

The Defendant's contention that legal pleadings are immune from civil or criminal liability is unsupported—and there are both civil and criminal statutes that directly contradict his position—and the Court should deny his motion as to this ground.

IV. Georgia's legislative privilege does not apply to the Defendant because he is not and never was a member of either house of the General Assembly.

The Defendant contends that Article III, § IV, Paragraph IX of the Georgia Constitution grants him "full privilege and immunity" from prosecution for his statements made before the General Assembly. Def.'s Mot. at 9. The relevant constitutional provision provides that "[n]o member [of the General Assembly] shall be liable to answer in any other place for anything spoken

in either house or in any committee meeting of either house." GA. CONST. art. III, § IV, para. IX. "We generally apply the ordinary signification to words in construing a [Georgia] constitutional provisional. This means we afford the constitutional text its plain and ordinary meaning, view the text in the context in which it appears, and read the text in its most natural and reasonable way, as an ordinary speaker of the English language would." *McInerney v. McInerney*, 313 Ga. 462, 464 (2022) (quoting *Ga. Motor Trucking Assn. v. Ga. Dept. of Revenue*, 301 Ga. 354, 365 (2017)). Furthermore, the "construction of similar federal constitutional provisions" is persuasive authority in determining the meaning of provisions of the Georgia Constitution. *Elliott v. State*, 305 Ga. 179, 187-188 (2019).

First, based on its plain and ordinary meaning and viewed in its most natural and reasonable way, Article III, § IV, Paragraph IX of the Georgia Constitution confers its privileges only to *members* of the General Assembly. Those privileges do not extend to members of the public dealing with members of the General Assembly, and they do not extend to witnesses appearing before legislative committees or subcommittees. The Defendant provides no support for his conclusion to the contrary because there is no support to be found. And the Defendant makes no argument as to how the purpose of legislative privilege—which he defines as to "foster the free exchange of ideas in legislative proceedings," Def.'s Mot. at 8—is furthered by allowing members of the public to lie to members of the General Assembly or to solicit members to violate their oaths of office. Clearly, such lies and solicitation are in direct conflict with that purpose.

Moreover, the Supreme Court's interpretation of the federal Speech or Debate Clause, U.S. CONST. Art. I, § 6, cl. 1, is persuasive in rebutting the Defendant's claim that he is entitled to the benefit of legislative immunity. In *Gravel v. United States*, the Court affirmatively ruled that the federal Speech or Debate Clause confers a privilege only upon United States Senators,

Representatives, and their aides to the extent that an aide's acts "would have been legislative acts, and therefore privileged, if performed by the Senator [or Representative] personally." 408 U.S. 606, 616 (1972) (quotations omitted). And that privilege only applies to "words spoken in debate[,] … [c]ommittee reports, resolutions, … acts of voting[, and] … things generally done in a session of" either house of Congress. *Id.* at 617.

Here, the Defendant was never a member of the Georgia General Assembly, and the Georgia Constitution's plain and ordinary meaning, viewed in its most natural and reasonable way, confers a privilege *only* to members. Accordingly, the Defendant's argument should be rejected.

V. Counts 4, 13, 19, and 25 of the indictment are sufficiently alleged to survive demurrer, and the corresponding acts in Count 1 are not required to be alleged with specificity.

The Defendant contends that Counts 4, 13, 19, and 25 and the corresponding acts in Count 1 are subject to general demurrer because they "all address false statements that were made to legislators [and] … [l]ying to a legislator is not a crime pursuant to O.C.G.A. § 16-10-20." Def.'s Mot. at 10. He further argues that he is immune from prosecution because certain statements made to the General Assembly were also part of legal pleadings filed in Fulton County Superior Court; that he is immune under Georgia's legislative privilege; and that Count 19 fails to allege that the false document was "used" anywhere or delivered to any person. Def.'s Mot. at 13. All of these arguments are without merit, and the Court should reject them.

As an initial matter, none of the individual overt acts alleged in Count 1 are, by themselves, subject to demurrer. The Defendant's contention that any individual overt act pled as part of a conspiracy charge could, for any reason, be demurred is fundamentally flawed for several reasons. First, overt acts are not required to be crimes. *See McCright v. State*, 176 Ga. App. 486, 487 (1985) ("Of course, the overt act need not be a crime in itself."); *Iannelli v. United States*, 420 U.S. 770,

785 n.17 (1975) ("The overt act requirement in the conspiracy statute can be satisfied much more easily. Indeed, the act can be innocent in nature, provided it furthers the purpose of the conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53 (1942) ("The overt act, without proof of which a charge of conspiracy cannot be submitted to the jury, may be that of only a single one of the conspirators and need not be itself a crime.") (citation omitted); *Pierce v. United States*, 252 U.S. 239, 243-44 (1920) ("[Y]et the overt act need not be in and of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.") (citation omitted). Since overt acts are not required to be crimes, there can therefore be no requirement that each individual overt act must allege all the essential elements of a crime or allege a crime with sufficient detail to survive special demurrer. The standards regarding demurrers simply do not apply to the pleading of individual overt acts within a conspiracy count.

Second, when a defendant is charged with a conspiracy violation, there is "no authority requiring the indictment to set forth the particulars of the overt act. … All that is required is a reference to the overt act alleged by the State." *Bradford v. State*, 283 Ga. App. 75, 78-79 (2006); *see also Causey v. State*, 154 Ga. App. 76, 79 (1980) (holding that a conspiracy indictment was not required to specify the exact date each overt act was committed or which conspirator committed each overt act). Accordingly, the remainder of this response will address only demurrers to whole counts, as the Defendant's contention that individual overt acts can themselves be demurred is entirely without support.

Next, the Defendant argues that Counts 4, 13, 19, and 25 address false statements made to legislators, O.C.G.A. § 16-10-20 cannot apply to statements made to legislators, and so the counts cannot survive a general demurrer. As alleged in the indictment, Counts 13 and 19 do not concern false statements made to legislators, so his argument is inapplicable and fails as to those counts.

"Georgia statutory law provides that a criminal indictment or accusation '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.'" *Tate-Jesurum v. State*, 368 Ga. App. 710, 711 (2023) (quoting O.C.G.A. § 17-7-54 (a)). "[D]eeply embedded within our case law is the concept that a charging instrument that tracks the statutory language of a criminal offense is sufficient to survive a general demurrer." *Id.* Put differently, if a defendant could admit to all of the facts alleged in the indictment and be guilty of a crime, the indictment is sufficient to withstand a general demurrer. *Kimbrough v. State*, 300 Ga. 878, 880 (2017).

As to counts 4 and 25, both counts allege (1) that the Defendant knowingly and willfully made at least one of a number of false statements and representations; (2) that the false statements concerned alleged fraud in the November 3, 2020, presidential election in Georgia; and (3) that alleged fraud in the November 3, 2020, presidential election in Georgia was within the jurisdiction of the Office of the Georgia Secretary of State and the Georgia Bureau of Investigation, departments and agencies of state government, and within the jurisdiction of county and city law enforcement agencies. The counts exactly track the statutory language of O.C.G.A. § 16-10-20, which provides that it is a felony (1) to knowingly and willfully make a false statement or representation; (2) in any matter; (3) within the jurisdiction of any department or agency of state or local government.

The Defendant relies on *Haley v. State*, 289 Ga. 515 (2011), arguing that "to support a conviction … using the theory that a defendant who lies to a non-covered entity about matters that are being investigated by another agency, the defendant must know and intend that his false statement will come to the attention of a state or local department or agency … ." Def.'s Mot. at 11. Citing *Haley*, the Defendant further argues that "the statute [requires] the defendant to have

made the false statement in some intended relationship to a matter within the state or local agency's jurisdiction…." *Id.* The Defendant confuses proof at trial required to support a conviction with allegations in an indictment sufficient to withstand a general demurrer. The two are not the same, as *Haley* itself demonstrates. The indictment in *Haley* charged that the defendant "did knowingly and willfully make a false and fictitious statement and representation in a matter within the jurisdiction of the Georgia Bureau of Investigation, a governmental agency, by calling himself the 'catchmekiller' and stating that he killed 16 people." *Id.* at 518. The Georgia Supreme Court affirmed that this was sufficient to allege a violation of O.C.G.A. § 16-10-20, and the proof at trial was sufficient to support the defendant's conviction. *Id.* at 529. *Haley* shows that, at this stage, the language of the indictment sufficiently alleges a violation of O.C.G.A. § 16-10-20, and the Defendant's arguments as to this issue would only be appropriate at trial after the presentation of the State's case—not in a demurrer.

The Defendant also argues that he cannot be criminally liable for false statements made to the General Assembly because those same false statements were "recitations of what was contained in legal pleadings filed in Fulton County Superior Court." Def.'s Mot. at 13. This argument is nonsensical and without support. As discussed *supra*, there is no authority for the proposition that statements made in legal pleadings are immune from criminal liability. Further, even if such statements were somehow immune from criminal liability, repeating a purportedly immunized statement in a non-immunized forum would vitiate that immunity. *See, e.g.*, *Hutchinson v. Proxmire,* 443 U.S. 111 (1979) (holding that while Speech or Debate immunity applies to libelous remarks made in Congress, the protection does not extend to republication of those same libelous remarks or to making those same libelous remarks in television and radio interviews). The

Defendant's argument that his statements made to the General Assembly are immune from prosecution because the same statements were made in legal pleadings must be rejected.

Finally, the Defendant's argument that Count 19 fails to allege that the false document was "used" anywhere or delivered to any person fails. The Defendant is charged in that count with conspiring to violate O.C.G.A. § 16-10-20. To survive a general demurrer, a conspiracy charge brought under O.C.G.A. § 16-4-8 must allege (1) that the defendant conspired with one or more persons to commit any crime (2) and any one or more of such persons committed any overt act to effect the object of the conspiracy. *Sanders v. State*, 313 Ga. 191, 200 (2022) ("The elements of conspiracy to commit a crime are conspiring and the performance of an overt act to effect the crime."). When a defendant is charged with a conspiracy violation, there is "no authority requiring the indictment to set forth the particulars of the overt. … All that is required is a reference to the overt act alleged by the State." *Bradford v. State*, 283 Ga. App. at 78-79. Count 19 alleges (1) that the Defendant and multiple co-conspirators entered into a conspiracy to knowingly and willfully make and use a false document in a matter within the jurisdiction of the Georgia Secretary of State and the Office of the Governor or Georgia and (2) that multiple co-conspirators committed overt acts to effect the object of the conspiracy. This is sufficient to withstand a general demurrer.

For the reasons set forth above, the Defendant's general demurrer to Counts 4, 13, 19, and 25 and the corresponding acts in Count 1 should be denied.

VI. Counts 2, 6, and 23 of the indictment are sufficiently alleged to survive demurrer.

The Defendant argues that Counts 2, 6, and 23 are subject to demurrer because "the indictment does not allege what the oath of office was, or what portion of the oath was violated"; because "it is not a violation of the oath of office for a legislator to enact legislation that is unconstitutional"; and because soliciting a legislator to take some action "that is inconsistent with

the constitution" does not constitute solicitation of violation of oath of office. Def.'s Mot. at 13-14. Each of these arguments fails.

a. For a solicitation charge, the State is not required to allege specifically how the solicited party would have committed a felony, but rather it must allege how the defendant committed the solicitation.

An indictment is not required to contain every detail of the crime to withstand a special demurrer; instead, it must state the essential elements of the crime charged and "must allege the underlying facts with enough detail to sufficiently apprise the defendant of what he must be prepared to meet." *Kimbrough v. State*, 300 Ga. at 881. Criminal solicitation has two essential elements: (1) that a person has intent that another person engage in conduct constituting a felony and (2) that he solicits, requests, commands, importunes, or otherwise attempts to cause that person to engage in that conduct." O.C.G.A. § 16-4-7 (a). Here, each of the challenged counts alleges that the Defendant "unlawfully solicited, requested, and importuned certain public officers then serving as elected members of the" General Assembly "to engage in conduct constituting the felony offense of Violation of Oath by Public Officer, O.C.G.A. § 16-10-1, by unlawfully appointing presidential electors from the State of Georgia, in willful and intentional violation of the terms of the oath of said persons as prescribed by law, with intent that said persons engage in said conduct." Each count sufficiently alleges the essential elements of the offense and survives a general demurrer.

The Defendant claims that, in order to survive a special demurrer, the State is required to allege in the indictment "the portion of the oath that Ray Smith was soliciting the legislators to violate." Def.'s Mot. at 14. He cites only to a trial court order from the Glynn County Superior Court—which was not reviewed on appeal, and which is in no way binding precedent upon this Court or any other court—to support his argument. Notwithstanding the lack of support for his position, the Defendant fails to recognize that the Defendant is charged not with violation of oath

of office, but with *solicitation* of violation of oath of office, which is an entirely different crime with entirely different elements. Accordingly, any case specifically analyzing pleading requirements for one cannot apply to the other.

Here, the indictment clearly alleges the underlying facts with enough detail to sufficiently apprise the Defendant of what he must be prepared to meet at a trial. In addition to the essential elements of the offenses, each count alleges the following details: (1) the date of the solicitation, which has been made a material element of each count (e.g., "on the 3rd day of December … said date being a material element of the offense"); (2) to whom the solicitation was made (e.g., "certain public officers then serving as elected members of the Georgia Senate … including [list of Senators]"); (3) the forum in which the solicitation was made (e.g., "at a Senate Judiciary Subcommittee meeting"); and (4) the manner in which the Defendant and his co-conspirators solicited the Senators to violate their oaths of office (e.g., "by unlawfully appointing presidential electors from the State of Georgia"). These details, which amount to far more than a barebones recitation of the statutory elements, clearly give the Defendant enough information to prepare his defense intelligently. *Cf. Sanders v. State*, 313 Ga. at 202 (granting special demurrer to criminal solicitation count based on possession of a controlled substance where the indictment did not even specify what drug the defendant requested another person to possess and in what amount).

There is also no support for the Defendant's contention that indictment must allege exactly which portion of the oath the Defendant solicited legislators to violate. Put differently, there is no authority suggesting that one who solicits another to commit a crime must know exactly how the crime would be committed by that person or what specific provision of a criminal statute would be violated. By way of example, there are at least four ways to commit aggravated assault in violation of O.C.G.A. § 16-5-21. If a defendant solicited another person to assault someone by

paying them $10,000 and stating, "I want you to 'take care' of them, rough them up good, and make sure they are never a problem for me again," it would not be a defense that the defendant did not specify or did not know exactly how the assault would be accomplished. Whether the solicited person accomplished the assault with intent to murder, with a deadly weapon, with an object that resulted in strangulation, or by staging a drive-by shooting—all separate and distinct ways of violating O.C.G.A. § 16-5-21—the defendant would clearly still be guilty of solicitation of aggravated assault. As a matter of law and of common sense, an indictment charging criminal solicitation does not require the level of specificity suggested by the Defendant here.

Moreover, when alleged deficiencies in one count of an indictment are addressed in another count, the indictment may be read "as a whole" to determine whether sufficient information has been pled to withstand a special demurrer. *Sanders v. State*, 313 Ga. at 196. Here, Count 1 of the indictment provides even more detail:

> Members of the enterprise, including several of the Defendants, appeared at hearings in Fulton County, Georgia, before members of the Georgia General Assembly on December 3, 2020, December 10, 2020, and December 30, 2020. At these hearings, members of the enterprise made false statements concerning fraud in the November 3, 2020, presidential election. The purpose of these false statements was to persuade Georgia legislators to reject lawful electoral votes cast by the duly elected and qualified presidential electors from Georgia. Members of the enterprise corruptly solicited Georgia legislators instead to unlawfully appoint their own presidential electors for the purpose of casting electoral votes for Donald Trump.

Indictment at 16. Accordingly, the Defendant's argument that the State must allege "what the oath of office was, or what portion of the oath was violated"[5] is misguided because the Defendant is charged with solicitation rather than violation of oath of office, and the indictment both alleges all

[5] It should be noted that no portion of the oath was ever violated, as it relates to these counts, because neither chamber of the Georgia General Assembly agreed to go along with the Defendants' criminal scheme.

of the essential elements of the offense and more than sufficiently apprises the Defendant of what he must be prepared to meet at trial.

b. The Defendant's argument that it is not unlawful for a legislator to enact unconstitutional legislation is irrelevant because the Defendant is not charged with soliciting anyone to simply pass legislation, impossibility is no defense to solicitation, and it is for the jury to determine whether the evidence is sufficient to convict the Defendant.

The Defendant argues that he cannot be guilty of solicitation of violation of oath of office because it is not a crime for legislators to pass unconstitutional legislation. This argument is irrelevant because, as alleged in the indictment, the Defendant is not charged with soliciting anyone to simply pass legislation. Each count, as alleged, charges him with soliciting certain legislators to violate their oaths of office by "unlawfully appointing presidential electors from the State of Georgia." The indictment does not specify the manner in which the legislators would have unlawfully appointed electors in violation of their oaths of office, and it is not required to. To survive general demurrer, the indictment must simply allege the essential elements of an offense as set forth by statute. *Tate-Jesurum v. State*, 368 Ga. App. at 711 (indictment that "tracks the statutory language" sufficient to survive general demurrer). As noted above, if a defendant could admit to all of the facts alleged in the indictment and be guilty of a crime, the indictment is sufficient to withstand a general demurrer. *Kimbrough v. State*, 300 Ga. at 880. The counts at issue survive that test, and they are not subject to demurrer.

Moreover, even if the legislators solicited could not have been guilty of violating their oaths of office because of legislative privilege or for any other reason, it is of no consequence here. "It is no defense to a prosecution for criminal solicitation that the person solicited could not be guilty of the crime solicited." O.C.G.A. § 16-4-7. That a person solicited might enjoy immunity from prosecution does not in any way grant immunity to one who solicits that person to commit a crime.

For the reasons set forth above, the Defendant's general demurrer to Counts 2, 6, and 23 should be denied.

VII. Counts 15 of the indictment is sufficiently alleged to survive demurrer.

The Defendant argues that Count 15 is subject to general demurrer because the indictment does not identify what was filed, by whom, "or whether it was included in the allegations in a pleading, or as an exhibit to a lawsuit" and because the false document was not a "document" within the meaning of O.C.G.A. § 16-10-20.1. These arguments fail.

First, the indictment does allege what the Defendant and his co-defendants *conspired* to file, enter, and record ("a document titled 'CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA'") and does allege by whom ("the Defendants named in Count 14, acting as co-conspirators, as described above and incorporated by reference as if fully set forth herein, placed in the United States mail said document"). Indictment at 79. Second, the Defendant's contention that the false document described in the indictment is not a "document" within the meaning of O.C.G.A. § 16-10-20.1 is without merit. The statute itself defines the term as "information that is inscribed on a tangible medium … ." O.C.G.A. § 16-10-20.1(a). Words typed onto paper obviously suffice.

Further, to survive a general demurrer, a conspiracy charge brought under O.C.G.A. § 16-4-8 must allege (1) that the defendant conspired with one or more persons to commit any crime (2) and any one or more of such persons committed any overt act to effect the object of the conspiracy. *Sanders v. State*, 313 Ga. at 200 ("The elements of conspiracy to commit a crime are conspiring and the performance of an overt act to effect the crime."). As noted above, when a defendant is charged with a conspiracy violation, there is "no authority requiring the indictment to set forth the particulars of the overt. … All that is required is a reference to the overt act alleged

by the State." *Bradford v. State*, 283 Ga. App. at 78-79. Count 15 alleges (1) that the Defendant and multiple co-conspirators entered into a conspiracy to knowingly file, enter, and record a false document in a court of the United States, having reason to know that the document contained a materially false statement, and (2) that multiple co-conspirators committed overt acts to effect the object of the conspiracy. This is sufficient to withstand a general demurrer.

For the reasons set forth above, the Defendant's general demurrer to Count 15 should be denied.

VIII. Counts 11 and 17 of the indictment are sufficiently alleged to survive demurrer.

The Defendant argues that Counts 11 and 17 are subject to general demurrer because they "fail to allege an essential element of the offense of forgery: that the document was used to defraud anybody in particular." Def.'s Mot. at 21. Counts 11 and 17 allege (1) that the Defendant and multiple co-conspirators entered into a conspiracy to, with intent to defraud, knowingly make a document, other than a check, in such manner that the writing as made purports to have been made by authority of one who did not give such authority, and (2) that multiple co-conspirators committed overt acts to effect the object of the conspiracy. This language tracks the statutory elements of a conspiracy charge and is sufficient to withstand a general demurrer.

Further, there is no requirement that the indictment must allege who was to be defrauded. The Defendant provides no support for his argument to the contrary because there is none. But even if there were such a requirement, the indictment, when read as a whole, sufficiently alleges who the Defendant and his co-conspirators intended to defraud. When alleged deficiencies in one count of an indictment are addressed in another count, the indictment may be read "as a whole" to determine whether sufficient information has been pled to withstand a special demurrer. *Sanders v. State*, 313 Ga. at 196. Counts 11 and 17 identify the Archivist of the United States as the target

of the Defendant's crimes, and Count 1 of the indictment explains that the false electoral college documents that are the subject of Counts 11 and 17 were transmitted to the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States in order to disrupt and delay the joint session of Congress on January 6, 2021. When read as a whole, the indictment sufficiently alleges who the Defendant and his co-conspirators intended to defraud.

For the reasons set forth above, the Defendant's general demurrer to Counts 11 and 17 should be denied.

IX. Each count of the indictment is sufficiently alleged to survive special demurrer.

The Defendant concludes with a section listing a series of cursory arguments regarding various special demurrers. Each argument fails, in turn, for the following reasons:

1. The Defendant contends that the indictment should be demurred because it fails to identify unindicted co-conspirators. Not only is it not required for the indictment to name unindicted co-conspirators, and the Defendant cites nothing to the contrary, persuasive federal authority suggests that naming unindicted co-conspirators is beyond the power of a grand jury and violates the due process rights of those who are named in an indictment but not charged. *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975).
2. The Defendant contends that the indictment should be demurred because acts and counts involving solicitation of violation of oath of do not specify the oath taken by legislators, the portion of the oath violated, and the Defendant's statements that amounted to solicitation. As set forth above, an indictment is not required to contain every detail of the crime to withstand a special demurrer; instead, it must state the essential elements of the crime charged and "must allege the underlying facts with

enough detail to sufficiently apprise the defendant of what he must be prepared to meet." *Kimbrough v. State*, 300 Ga. at 881. The indictment states the essential elements of the crimes and, when read as a whole, alleges sufficient underlying facts to apprise the Defendant of what he must defend at trial. The level of specificity suggested by the Defendant is not required to withstand special demurrer.

3. The Defendant contends that Count 1, Act 78 fails to identify "what was the act of 'encouragement.'" Def.'s Mot. at 22. As set forth above, individual overt acts are not subject to demurrer because they do not themselves have to be crimes, and there is "no authority requiring the indictment to set forth the particulars of the overt act." *Bradford v. State*, 283 Ga. App. at 78. The Defendant's argument fails.
4. The Defendant contends that Count 15 should be demurred because it fails to identify how the false document was placed in the federal court record. This argument is factually and legally wrong. As a legal matter, Count 15 is a conspiracy charge that sufficiently identifies the co-conspirators, the crime they conspired to commit, and overt acts committed in furtherance of that conspiracy. When read with the indictment as a whole, the count survives general and special demurrer. The indictment does not allege that a false document was ever "placed" in the federal court record because whether or not the object of the conspiracy was accomplished is irrelevant. Instead, the indictment alleges that co-conspirators placed the false document in the United States mail addressed to the Chief Judge of the Northern District of Georgia, which was an overt act to effect the object of the conspiracy. The Defendant's argument fails.
5. The Defendant contends that Count 19 should be demurred because it fails to identify how the false document was used or to whom it was delivered. Similar to above, Count

19 is a conspiracy charge that sufficiently identifies the co-conspirators, the crime they conspired to commit, and overt acts committed in furtherance of that conspiracy. The indictment is not required to specify how the false document was used or to whom it was delivered because there is "no authority requiring the indictment to set forth the particulars of the overt act." *Bradford v. State*, 283 Ga. App. at 78. Moreover, when read with the indictment as a whole, the Defendant is sufficiently placed on notice of what he must be prepared to defend at trial. Count 1 specifies that the false Electoral College documents were transmitted to various government entities for the purpose of disrupting and delaying the joint session of Congress on January 6, 2021. The Defendant's argument fails.

For the reasons set forth above, the Defendant's motion should be denied.

Respectfully submitted this 17th day of November 2023,

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	
	CASE NO.
v.	
	23SC188947
DONALD JOHN TRUMP,	
RUDOLPH WILLIAM LOUIS GIULIANI,	
JOHN CHARLES EASTMAN,	
MARK RANDALL MEADOWS,	
KENNETH JOHN CHESEBRO,	
JEFFREY BOSSERT CLARK,	
JENNA LYNN ELLIS,	
RAY STALLINGS SMITH III,	
ROBERT DAVID CHEELEY,	
MICHAEL A. ROMAN,	
DAVID JAMES SHAFER,	
SHAWN MICAH TRESHER STILL,	
STEPHEN CLIFFGARD LEE,	
HARRISON WILLIAM PRESCOTT FLOYD,	
TREVIAN C. KUTTI,	
SIDNEY KATHERINE POWELL,	
CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S RESPONSE TO DEFENDANT RAY SMITH'S DEMURRERS TO THE INDICTMENT upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 17th day of November 2023,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John W. "Will" Wooten
John W. "Will" Wooten
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