IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

v.

HARRISON FLOYD

Indictment No.
23SC188947

ORDER DENYING DEFENDANT'S PLEA

On October 31, 2023, Defendant Floyd filed a Plea in Bar contending this prosecution should be permanently ended. (Doc. 82). The Defendant argues that because the State Election Board ("SEB") has exclusive authority to initiate and refer criminal investigations concerning elections, the Fulton County District Attorney lacked authority to indict him and violated the Due Process Clause of the Fourteenth Amendment by ignoring the prerequisite of an SEB referral. The State responded in writing on November 17, 2023, to which the Defendant replied on December 14, 2023. (Docs. 97, 105). Accepting the Defendant's factual assertions for the purposes of this Order, namely that the SEB did not refer any investigation concerning the Defendant to the Fulton County District Attorney's Office, the Court nevertheless finds the Defendant's argument lacks legal merit and denies the plea without a hearing.

But first, a procedural detour. Defendant refers to his filing as a Plea in Bar and chides the State for mischaracterizing it as a general motion to dismiss or demurrer. The filing of "special pleas" in response to an indictment has long been a feature of Georgia law. *See* O.C.G.A. § 17-7-110 (setting deadlines for filing of "special pleas"); O.C.G.A. § 17-7-111 (requiring pleas in abatement or "any other special plea in bar" to be filed in writing); *c.f.* Fed. R. Crim. P. 12 (ending the use of special pleas and demurrers in federal practice). A product of intricate common-law pleading practices, a

plea in bar "challenges the validity of the indictment." *Davis v. State*, 307 Ga. 784, 786 (2020). More specifically, a plea in bar introduces facts extrinsic to the indictment to "defeat [prosecution] absolutely and entirely." *Carter v. Solomon*, 54 Ga. App. 517 (1936); *State v. Land-O-Sun Dairies*, 204 Ga. App. 485, 486 (1992); *see also Davis*, 307 Ga. at 786 (citing Joel P. Bishop, *Commentaries on the Law of Criminal Procedure* § 420 (1866) ("[through] a plea in bar the defendant shows, by matter extrinsic of the record, that the indictment is not maintainable"); Black's Law Dictionary (11th ed. 2019) (defining a "special plea in bar" as one "that, rather than addressing the merits and denying the facts alleged, sets up some extrinsic fact showing why a criminal defendant cannot be tried for the offense charged"). Routine, modern-day applications include challenges based on the statutory right to a speedy trial (*Smith v. State*, 313 Ga. 752 (2022)), the passing of the statute of limitations (*Davis*, 307 Ga. 784), and violation of double jeopardy principles (*Schrader v. Stat*e, 364 Ga. App. 631 (2022)).

Defendant's argument does not attack the merits of the charges returned against him, and if accepted, would not permanently end his exposure to prosecution by the Fulton County District Attorney. Even if this indictment is dismissed as procedurally defective, nothing would prevent the SEB from initiating an investigation for identical conduct and referring the matter to the Attorney General or a district attorney, the end result being an identical indictment. The Defendant's challenge is one based on process rather than substance. Therefore, this plea is more appropriately characterized as a plea in abatement. *See* Daniel's Georgia Criminal Trial Practice (2021-22 ed.), § 15-49 ("if a plea will not prevent a later prosecution for the same offense . . . the plea is one in abatement"). A plea in abatement is a dilatory plea, meaning it "suspend[s] or put[s] it off for the present." *Carter v. Solomon*, 54 Ga. App. 517 (1936); *Davis v. City of Forsyth*, 275 Ga. App. 747, 751

(2005). Regardless, the substance of a motion controls, not the title. *Forest City Gun Club v. Chatham Cty.*, 280 Ga. App. 219, 220 (2006) ("[P]leadings, motions, and orders are construed according to their substance and function and not merely by nomenclature.").

Whether a plea in bar or plea in abatement, and in marked contrast to a demurrer, a special plea can entitle the defendant to a pretrial evidentiary hearing and even become a jury issue.[1] *See Jenkins v. State*, 278 Ga. 598, 603 (2004) ("This Court's decision in *Bell v. State* [249 Ga. 644, 645 (1982)] seems to suggest that a plea in bar involving factual issues must be presented to a jury."); *Moore v. State*, 64 Ga. App. 171, 173 (1940) (finding plea in abatement should have been presented to the jury); *McWilliams v. State*, 110 Ga. 290, 290 (1900) ("the jury should be required to return a special verdict on the plea of former jeopardy"). But after considering the Defendant's argument as a matter of law, it functionally makes no difference here. *See Harrell v. State*, 196 Ga. App. 101, 103 (1990) ("As no question of fact was at issue here, it was unnecessary to have a jury hear the plea. The trial judge could rule on the plea as a matter of law."); *Dennard v. State*, 154 Ga. App. 283, 284 (1980) ("[t]here was no contest as to the facts giving rise to the issue, only a question of the legal application of the fact[s]").

To the point at hand, our Supreme Court has described the duties of a district attorney as "broad" with an as-yet undetermined scope. *Luangkhot v. State*, 292 Ga. 423, 428 n.4 (2013)

[1] Not to be confused with a motion to quash, which our appellate courts appear to treat as a misnomer for a demurrer. *Smith v. State*, 366 Ga. App. 399, 401 (2023) ("[a] motion to quash an indictment is essentially the same as a demurrer thereto") (citing *Baskin v. State*, 137 Ga. App. 840, 841 (1976)); *Jackson v. State*, 64 Ga. 344, 346-47 (1879) ("A motion to quash an indictment is in the nature of a demurrer, and ought to be rested upon some matter apparent upon the face of the indictment or elsewhere in the record. Such a motion cannot bring to the attention of the court a fact disconnected with the prior proceedings and the truth of which depends upon evidence dehors the record.").

(superseded by statute); *Wiggins v. Lemley*, 256 Ga. 152, 154 (1986) ("no extant statute or constitutional provision purports to deal with the scope of a district attorney's authority"). The Georgia Constitution provides that a district attorney represents the state "in all criminal cases" in the superior court of the circuit. Ga. Const. Art. VI, § VIII, Para. I(d). The Code further enumerates that a district attorney is expected "to prosecute all indictable offenses" and "such other duties as are or may be required by law or which necessarily appertain to their office." O.C.G.A. § 15-18-6(5) & (13). Even more pertinent, special grand juries, such as the one that returned the indictment in this case, may investigate "any alleged violation of the laws of this state or any other matter subject to investigation by grand juries as provided by law." O.C.G.A. § 15-12-100(a).

On the other hand, the State Election Board ("SEB") is assigned a range of duties with a general focus on the "fair, legal, and orderly conduct of primaries and elections." O.C.G.A. § 21-2-31(10). It is currently designed to contain five members, two of whom are appointed by the major political parties. O.C.G.A. § 21-2-30(a).[2] As of March 25, 2021, only the chairperson of the board "shall be nonpartisan." O.C.G.A. § 21-2-30(a.1)(2). Before the 2021 amendment, the Secretary of State was designated chairperson. Central to the Defendant's argument is this enumerated duty:

> To investigate, or authorize the Secretary of State to investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution. Nothing in this paragraph shall be so construed as to require any complaining party to request an investigation by the board before such party might proceed to seek any other remedy available to that party under this chapter or any other provision of law[.]

[2] Theoretically more than two political parties could be eligible to nominate SEB members. *See* O.C.G.A. § 21-2-2 (defining "political party").

O.C.G.A. § 21-2-31(5).

The Court finds that these statutory schemes (O.C.G.A. § 15-12-100(a), O.C.G.A. § 15-18-6, and O.C.G.A. § 21-2-31) are not in conflict and can be read harmoniously. *See State v. Hudson*, 303 Ga. 348, 353 n.5 (2018) ("statutes should be construed in harmony") (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 27, at 180 (2012)). Contending otherwise by emphasizing the investigative referral process, the Defendant claims to have divined the purpose of the SEB's statutory scheme as "remov[ing] politics from the calculus" and preventing local factions from prosecuting political opponents. This theory cannot be found in the text itself. In its original form, the SEB consisted entirely of partisan actors. Even now, while the nonpartisan chairperson could theoretically be the deciding vote in a partisan deadlock, nonpartisan outcomes are by no means a guarantee should both houses of the General Assembly be controlled by the same political party.[3] Defendant believes concurrent authority "frustrates the purpose" of the SEB's creation. But based on the statutory language actually used, the General Assembly could have just as easily intended to take a "more the merrier" approach and ensured an extra set of eyes would vigilantly monitor election fraud.

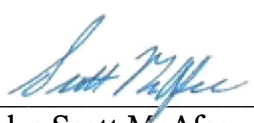
Defendant further marshals the general/specific and surplusage canons of statutory interpretation to support his argument. As to the former canon, before a specific statute will prevail over a general statute, the two must be in conflict. *See*, *e.g.*, *Bellsouth Telecoms., LLC v. Cobb Cty.*, 305 Ga. 144, 151 (2019) ("Where two statutes are in conflict, the later-enacted statute prevails over the one enacted earlier, and the more specific statute governs over the more general one."); Scalia

[3] A feature of Georgia's political landscape for all but two of the last 150 years. *See* Charles S. Bullock & Ronald Keith Gaddie, *Georgia Politics in a State of Change* 55 (2nd ed. 2012).

& Garner, § 27, at 180 (explaining that only if two statutes cannot be read harmoniously do the principles governing conflicting provisions apply). As for the latter, the various provisions cited by the Defendant are not rendered meaningless through a finding of concurrent jurisdiction. All aspects of O.C.G.A. § 21-2-31(5) remain in full force, just not in the way the Defendant would prefer.

Lacking any statutory justification for his claim, Defendant also refers to general correspondence issued by the Governor's Deputy Executive Counsel and a report issued by the investigative division of the Secretary of State. These have no legal bearing and were not written to offer an opinion on the question at hand. Concurrent jurisdiction is not an unusual feature within our state government. *See*, *e.g.*, *Byers v. State*, 311 Ga. 259, 265 n.4 (2021) (recognizing "overlapping statutory responsibilities" of the Attorney General and district attorneys over capital felony actions); *compare* O.C.G.A. § 45-15-17(a) ("The Attorney General . . . is authorized to institute and conduct investigations at any time into the affairs of the state[.]"), *with* O.C.G.A. § 45-12-212(1) (noting the Office of Inspector General shall "investigate complaints from any source alleging fraud, waste, abuse, or corruption that has been committed or is being committed against an agency of the state"). Finding no statutory basis to conclude that the SEB as enacted impedes a district attorney's authority in any way or creates exclusive jurisdiction, the motion is denied as a matter of law.

SO ORDERED, this 9th day of January, 2024.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit