IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA, v. JEFFREY B. CLARK, ET AL., Defendants	Case No. 23SC188947

JEFFREY B. CLARK'S SPECIAL DEMURRERS AS TO COUNT ONE

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SPECIAL DEMURRERS AS TO COUNT ONE

Comes Now Jeffrey Bossert Clark, and brings these special demurrers to Count One of the Indictment against him.

I. SPECIAL DEMURRERS

1. FIRST SPECIAL DEMURRER TO COUNT ONE

Mr. Clark demurs specially to Count One on the grounds that it fails to allege how or why it was unlawful to seek to change the outcome of the election such that Mr. Clark cannot know how to intelligently prepare his defense.

2. SECOND SPECIAL DEMURRER TO COUNT ONE

Mr. Clark demurs specially to Count One on the grounds that it fails to specify the objectives, goals and purposes of the RICO enterprise.

3. THIRD SPECIAL DEMURRER TO COUNT ONE

Mr. Clark demurs specially to Count One on the grounds that it is impermissibly vague and confusing as to the difference between the “conspiracy” and the “enterprise” elements of the charged offense.

4. Fourth Special Demurrer to Count One

Mr. Clark demurs specially to Count One on the grounds that there is no sufficient allegation that he conspired with anyone regarding the draft letter referred to in Acts 98, 99, and 111 in that no one is identified who agreed with Mr. Clark about the letter. Absent agreement with another regarding the letter, the charged conduct regarding letter cannot be an act in furtherance of the alleged conspiracy.

5. Fifth Special Demurrer to Count One

Mr. Clark demurs specially to Count One on the grounds the Indictment fails to allege how the phone call referred to in Act 110 reflected any agreement between Mr. Clark and Scott Hall, or how it related to the alleged overarching conspiracy.

6. Sixth Special Demurrer to Count One

Mr. Clark demurs specially to Count One on the grounds that the Indictment fails to allege that anyone conspired with Mr. Clark to commit the offence of attempted false writing.

7. Seventh Special Demurrer to Count One

Mr. Clark demurs specially to Count One on the grounds that the enumeration of the alleged acts in furtherance of the conspiracy contains numbering errors, to wit, there are two Act 12s, two Act 52s and two Act 123s. The Indictment is therefore imperfect in form and should be dismissed.

ARGUMENT AND CITATION OF AUTHORITY

I. STANDARD OF REVIEW

The standard of review for a special demurrer is set out in *Kimbrough v. State,* 300 Ga. 878 (2017):

> A special demurrer, on the other hand, "challenges the sufficiency of the form of the indictment." *Green*, 292 Ga. at 452, 738 S.E.2d 582 (citation and punctuation omitted; emphasis supplied). By filing a special demurrer, the accused claims "not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information." *State v. Delaby*, 298 Ga.App. 723, 724, 681 S.E.2d 645 (2009) (punctuation and citation omitted).
>
> "Where a defendant challenges the sufficiency of an indictment by the filing of a special demurrer before going to trial, [s]he is entitled to an indictment perfect in form." *State v. Grube*, 293 Ga. 257, 259 (2), 744 S.E.2d 1 (2013). Even so, an indictment does not have to contain "every detail of the crime" to withstand a special demurrer. *State v. English*, 276 Ga. at 346 (2) (a), 578 S.E.2d 413 (2003).
>
> According to OCGA § 17-7-54 (a), an indictment "shall be deemed sufficiently technical and correct" if it "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." Subsection 17-7-54 (a) also requires, however, that an indictment state the offense "with sufficient certainty." *See also Cole v. State*, 334 Ga. App. 752, 755 (2), 780 S.E.2d 406 (2015). Consistent with these statutory directives, we have held that an indictment not only must state the essential elements of the offense charged, *see Henderson v. Hames*, 287 Ga. 534, 538 (3), 697 S.E.2d 798 (2010), ***but it also must allege the underlying facts with enough detail to "sufficiently apprise[ ] the defendant of what he must be prepared to meet."*** *State v. English*, 276 Ga. 343, 346 (2) (a), 578 S.E.2d 413 (2003) (citation and punctuation omitted). *See also Delaby*, 298 Ga. App. at 726, 681 S.E.2d 645; *Stone v. State*, 76 Ga.App. 96, 98 (2), 45 S.E.2d 89 (1947). As we have explained, when a court considers whether an indictment is sufficient to withstand a special demurrer, "[i]t is useful to remember that [a] purpose of the indictment is to allow [a] defendant to

> prepare [her] defense intelligently." *English*, 276 Ga. at 346 (2) (a), 578 S.E.2d 413 (citation and punctuation omitted).

Id. at 880-882 (footnote omitted) (emphasis added) (one paragraph break added).

Where a count incorporates other allegations by reference, it is read as a whole:

> As to the offenses set forth in an indictment, "each count must be complete within itself and contain every allegation essential to constitute the crime." *State v. Jones*, 274 Ga. 287, 288 (1), 553 S.E.2d 612 (2001). Nonetheless, "one count [of an indictment] may incorporate by reference portions of another, and the indictment is read as a whole." Id. at 289 (1), 553 S.E.2d 612.

Daniels v. State, 302 Ga. 90, 99 (2017), *overruled on other grounds* by *State v. Lane*, 308 Ga. 10 (2020).

II. FIRST SPECIAL DEMURRER TO COUNT ONE – THERE IS NO SUCH CRIME AS "UNLAWFULLY CHANGE THE OUTCOME OF AN ELECTION."

If Count One is not dismissed on general demurrer, the Court should sustain, in the alternative, a special demurrer because the allegation that defendants conspired in violation of § 16-14-4(c) to violate § 16-14-4(b) is expressly and by its own terms modified by incorporation of the allegations that defendants "conspired to unlawfully change the outcome of the election in favor of Trump," which is not a crime. Even if the boilerplate conspiracy allegations on page 13 of the Indictment were sufficient as against a general demurrer, they are rendered insufficient as against a special demurrer by their modification through incorporation by reference of an alleged conspiracy to do something that is not a crime.

It would be idle to discuss a failure to allege the essential elements of the crime of "conspiracy to unlawfully change the outcome of the election" because there is no such crime, but even assuming *arguendo* that such a crime does exist, the Indictment falls to a special demurrer because it fails to allege any facts sufficient to show that Defendant acted with criminal intent.

The Indictment here fails to allege that Defendants acted with criminal intent, and pursued an unlawful conspiracy to overturn the results of the election in that it fails to allege (1) that the election was free from any material irregularity or fraud sufficient to have affected the outcome; (2) that Mr. Clark (or any Defendant) knew the election was free of any such material irregularity or fraud sufficient to have affected the outcome; and (3) that Mr. Clark (or any Defendant), with such knowledge and with criminal intent, nevertheless sought to unlawfully overturn the results of the election. "If the intent is material, it is necessary to allege it.'" *Smith v. Hardrick*, 266 Ga. at 56 (1995), citing *O'Brien v. State*, 109 Ga. 51. Count One contains no sufficient allegation of criminal intent to unlawfully overturn the election. Therefore, Count One of the Indictment is defective and should be dismissed.

Here, the Indictment does not make sufficient specific allegations necessary to show allege criminal intent and distinguish lawful questioning or contesting an election from unlawful criminal attempts to "overturn" elections.

Mr. Clark is at a loss to prepare to defend himself because the State's allegations are so devoid of sufficient detail to "sufficiently apprise" Mr. Clark "of what he must be prepared to meet" in defending the allegation that he "unlawfully tried to change the outcome of the election," nor do they allege anything that would constitute criminal intent. There is no allegation that the election was free of any material irregularity. There is no allegation or reference to any facts or details showing that Mr. Clark knew the election was free of any material irregularity. That Mr. Rosen and Mr. Donoghue, as alleged in the Indictment, had a different opinion than Mr. Clark is not enough, as opinions are not facts and Mr. Clark was entitled to draw his own conclusions as a matter of law and consistent with his First Amendment rights (as we invoke in our general demurrer on Count One). *See Cottrell v. Smith*, 299 Ga. 517, 523 (2016) ("a statement that reflects an opinion or subjective assessment, as to which reasonable minds could differ, cannot be proved false."); *Webster v. Wilkins*, 217 Ga.App. 194, 196 (1995) (woman "unfit" to be a mother constituted a protected opinion); *Gast v. Brittain*, 277 Ga. 340 (2003) (statement that plaintiff was "immoral" and did not live his life according to the "ideals of Scouting" constituted a protected opinion). There is no allegation or reference to any facts or details showing that, notwithstanding such knowledge, Mr. Clark acted with criminal intent to unlawfully "overturn" a valid election.

If such allegations had been made, Mr. Clark would know whether he should defend himself with, for example, evidence that the election was marred in Fulton County

alone by (1) 17,852 votes for which there is no corresponding ballot image (which is supposed to be impossible, as the system cannot count votes without ballot images); (2) the presence of at least 3,125 duplicate ballots; and (3) the complete failure of Fulton County to carry out any signature verification as required by the then-applicable version of O.C.G.A. § 21-2-386(a)(1)(B) and (C) on the 146,029 absentee ballots that it accepted, a massive irregularity in the conduct of the election that legally precluded lawful certification of the result. Many other material irregularities in the election in Fulton County and elsewhere in Georgia have been found. Mr. Clark and the other Defendants are entitled to know what evidence might be suitable to their defense, as the Court has recognized in its rulings on subpoenas issued by co-defendant Harrison Floyd.

Mr. Clark's special demurrer should be sustained and the State should be required to allege sufficient details for Mr. Clark and the other Defendants to intelligently prepare their defense.

III. SECOND SPECIAL DEMURRER TO COUNT ONE – UNSPECIFIED OBJECTS OF THE ENTERPRISE

The second special demurrer relies upon the fact that the Indictment makes repeated reference to the objectives, goals and purposes of the enterprise, but fails to ever specify what those objectives, goals, and purposes were.

The Indictment alleges that the defendants were associated in fact into an "enterprise" within the meaning of O.C.G.A. § 16-14-3(3) and then refers to the objectives, goals, or purposes of the enterprise as follows:

> (1) "The 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." Page 15.
>
> (2) "The enterprise operated for a period of time sufficient to permit its members and associates to pursue its objectives." *Id.*
>
> (3) "[T]he Defendants and other members and associates of the enterprise committed overt acts to effect the objectives of the enterprise. Page 20.
>
> (4) "The manner and methods used by the Defendants and other members and associates of the enterprise to further the goals of the enterprise and to achieve its purposes included, but were not limited to, the following:" *Id*.

(Emphasis added).

Despite these multiple references to the objectives, goals, and purposes of the enterprise, the Indictment never says what those objectives, goals, and purposes were. The Indictment is defective in this respect because the Defendants are not informed of what those objectives, goals, and purposes were, leaving them unable to prepare a defense against the allegations regarding the unspecified objectives, goals, and purposes of the enterprise. Defending against a criminal indictment in Georgia cannot be made a matter of guesswork.

IV. THIRD SPECIAL DEMURRER TO COUNT ONE – IMPERMISSIBLY VAGUE AND OVERLAPPING ALLEGATIONS OF ENTERPRISE AND CONSPIRACY

The third special demurrer to Count One challenges the vagueness and overlap between the alleged "conspiracy" and the alleged "enterprise." Under the RICO statute, the RICO conspiracy and the RICO enterprise are separate elements of the RICO conspiracy offense under O.C.G.A. § 16-14-4(c). Subsection (c) makes it a crime to

"conspire" to violate subsection (a) or (b) and to commit one or more overt acts to effect the object of the conspiracy. The indictment alleges both that Mr. Clark conspired to violate subsection (b) and that he was part of the enterprise. And, as noted above, the Indictment alleges the object of the conspiracy was the non-crime of seeking to change the outcome of an election, but also confusingly alleges that the enterprise had unidentified objects, goals, and purposes. The result is an indecipherable semantic hall of mirrors in which the conspiracy, the objectives of the conspiracy, the enterprise, and the objects of the enterprise are a hopeless, overlapping, and circular muddle. The defendant is entitled to an indictment perfect in form from which he can intelligently prepare his defense. He should not have to resort to interpreting runes or reading goat entrails to discern the meaning of the charges against which he must defend. Mr. Clark's third special demurrer to Count One should be sustained.

V. FOURTH SPECIAL DEMURRER TO COUNT ONE – NO AGREEMENT AS TO LETTER

Mr. Clark is alleged to have participated in the RICO conspiracy alleged in Count One through various acts surrounding the draft letter that are alleged in Acts 98, 99, and 111. However, at no point does the Indictment identify anyone who agreed with Mr. Clark about the letter or anything related to the letter. Since, according to the Indictment no one agreed with Mr. Clark about letter, and the letter was never sent, the charged conduct regarding letter cannot constitute an act in furtherance of the alleged conspiracy or be an act evidencing that he joined the conspiracy. A conspiracy by definition requires

an agreement between one or more persons. "A person commits the offense of conspiracy to commit a crime when he together with one or more persons ***conspires to commit any crime*** and any one or more of such persons does any overt act to effect the object of the conspiracy." O.C.G.A. § 16-4-8 (emphasis added). "The essence of the offense of conspiracy is an agreement to pursue a criminal objective." Conspiracy, GA. CRIMINAL OFFENSES AND DEFENSES C67 (2023 ed.).

The agreement element of a conspiracy can be shown in various ways, but must be shown one way or the other:

> For a conspiracy to exist under OCGA § 16-4-8, there must be an agreement to commit a crime, but that agreement need not be express. "'The State may prove a conspiracy by showing that two or more persons tacitly came to a mutual understanding to pursue a criminal objective.'" *Shepard v. State*, 300 Ga. 167, 170, 794 S.E.2d 121 (2016) (citation omitted). *See also Grissom v. State*, 296 Ga. 406, 409, 768 S.E.2d 494 (2015) ("'Conduct which discloses a common design ... may establish a conspiracy.'" (citation omitted)); *Griffin v. State*, 294 Ga. 325, 327, 751 S.E.2d 773 (2013). "Where there is no evidence of an express agreement, an inference that two or more people tacitly came to a mutual understanding to commit a crime can be drawn from 'the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances.'" *Brown v. State*, 304 Ga. 435, 441, 819 S.E.2d 14 (2018) (citation omitted).

Chavers v. State, 304 Ga. 887, 891–92 (2019).

Here there is nothing from which even an inference of tacit agreement between two or more people can be drawn regarding the draft letter, nor is there any person who is alleged to have been in agreement with Mr. Clark, tacit or express, regarding the letter.

There is no "common design" with respect to the letter. It is a one-off that literally no one agreed with and therefore cannot be part of or an act in furtherance of a conspiracy.

VI. Fifth Special Demurrer to Count One – Empty Allegations as to Phone Call From Scott Hall.

The Indictment alleges in Act 110 that Mr. Clark received a phone call from Scott Hall. There are no allegations about the purpose, content, or result of the call, nor anything that explains how it fits into the State's conspiracy theory. The Indictment is bereft of any allegations that would allow Mr. Clark to intelligently defend the allegation.

VII. Sixth Special Demurrer – No Conspiracy to Attempt a False Writing.

Mr. Clark's alleged participation in the conspiracy revolves around the draft letter referred to in Acts 98, 99, and 111 that is also the subject of Count 22, which charges attempted false writing. But the Indictment has no allegations that anyone conspired with Mr. Clark to attempt a false writing. The alleged attempted false writing cannot be part of the conspiracy alleged in Count One unless someone agreed with Mr. Clark regarding it, and there are no allegations sufficient to state such a claim nor to permit Mr. Clark to intelligently defend the accusation.

VIII. Seventh Special Demurrer – Numbering Error in the Indictment.

The Indictment has numbering errors in the enumeration of the Acts in furtherance of the conspiracy. There are two Act 12s, two Act 52s, and two Act 123s. According to the State, the original Indictment is said not to have these errors. The State suggests the error

was introduced by the OCR software used by the Clerk's Office's contractor, Tyler Technologies. For the reasons stated in Mr. Clark's Response to the State's Motion to Re-Scan the Indictment, this is ***extremely*** unlikely to be correct.

On a special demurrer, a defendant is entitled to an Indictment that is "perfect in form." Where a defendant challenges the sufficiency of an indictment by the filing of a special demurrer before going to trial, [s]he is entitled to an indictment perfect in form." *State v. Grube*, 293 Ga. 257, 259 (2), (2013); *Kimbrough v. State,* 300 Ga. 878, 882 (2017). This Indictment is imperfect in form according to the motion to re-scan filed by the State. The State thinks the issue important enough to warrant seeking an order purporting to re-scan the Indictment. If it were merely a clerical error, the State would move to amend to correct the clerical error and argue the errors have no material effect, but they did not.

CONCLUSION

For the reasons stated above, Mr. Clark's special demurrers to Count One should be granted.

Respectfully submitted, this 5th day of February 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February 2024, I electronically filed the within and foregoing ***Special Demurrers as to Count One*** with the Clerk of Court using the PeachCourt eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia:

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