Case No. 2D22-3725

IN THE SECOND DISTRICT COURT OF APPEAL

STATE OF FLORIDA

IN RE: THE SPECIAL PURPOSE GRAND JURY,

Appellee,

v.

WITNESS MICHAEL FLYNN,

Appellant.

On Appeal from the Twelfth Judicial Circuit

Sarasota County

BRIEF OF APPELLANT

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The State of Georgia seeks to force Lt. General Michael T. Flynn (ret.) to testify before its special purpose grand jury simply because he is a high-profile individual that was involved in the public discussion about the uncertain outcome of the 2020 election. This case of first impression will determine whether the citizens of Florida are subject to purely investigative appearances before special purpose grand juries in other states under the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings.

The answer should be a resounding no. As an initial matter, the State of Georgia has failed to carry its burden to show that Gen. Flynn is either material or necessary to its special purpose grand jury's investigation. Moreover, such grand juries are beyond the contemplation of the Uniform Act, and, therefore, the principles of the interstate compact underlying the Uniform Act do not apply to the special purpose grand jury. This Court should vacate the order of the lower court requiring Gen. Flynn's appearance and testimony.

STATEMENT OF THE FACTS AND CASE

Lt. General Michael T. Flynn (ret.)—a resident of Florida—was President Trump's first National Security Advisor and left that

position in January 2017. He did not hold a position under President Trump after that point. On January 2, 2021, former President Donald Trump had a conference call with Georgia Secretary of State Brad Raffensperger.[1] Gen. Flynn was not a party to the January 2nd conference call, nor does he have any special knowledge of it.

On January 20, 2022, the Fulton County, Georgia, District Attorney, Fani T. Willis ("DA Willis"), requested the empaneling of a "Special Purpose Grand Jury" ("SPGJ") to investigate possible criminal disruptions in the 2020 presidential election. Appellant's Br. App. at 28-29. Four days later, the Fulton County Superior Court granted the request, empaneling the SPGJ to sit from May 2, 2022, to May 1, 2023, for the specific purpose of investigating possible criminal disruptions in the 2020 presidential election in Fulton County, Georgia. *Id.* at 13-14.

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[1] Amy Gardner, *Here's the full transcript and audio of the call between Trump and Raffensperger*, WASHINGTON POST (Jan. 5, 2021), https://www.washingtonpost.com/politics/trump-raffensperger-call-transcript-georgia-vote/2021/01/03/2768e0cc-4ddd-11eb-83e3-322644d82356_story.html.

The State of Georgia waited until October 7, 2022, to file a Petition for Certification of Need for Testimony of Gen. Flynn, which was certified by Fulton County Superior Court Judge McBurney the same day. *Id.* at 19-23. This petition was based entirely on publicly available information—available prior to the beginning of the SPGJ on May 2, 2022, about Gen. Flynn. The State of Georgia's claim that Gen. Flynn is a material and necessary witness rests solely on an unsworn letter by DA Willis asserting that Gen. Flynn has met with and spoken with President Trump and others about the 2020 election. *Id.* at 28-29.

After its initial delay, the State of Georgia further delayed presenting this Certification to the 12th Judicial Circuit Court until November 1, 2022, when it filed a motion to compel Gen. Flynn's appearance before the SPGJ on November 22, 2022. Appellant Br. App. at 31-33. The State of Georgia claims authority for this pursuant to the Uniform Act to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings (the "Uniform Act"). *Id.*

On November 15, 2022, the trial court heard argument and ordered that Gen. Flynn appear and testify in Georgia on November 22, 2022. *Id.* at 63-102. In that hearing, Gen. Flynn raised two

specific arguments for the Court's consideration: (1) whether a special investigative body like Georgia's SPGJ, created in 1974 and without indictment power, qualifies as a grand jury under the Uniform Act and (2) whether the State of Georgia had carried its burden to show that Gen. Flynn is a necessary and material witness to the SPGJ investigation into potential and unspecified election crimes within and without the State of Georgia.

Gen. Flynn expeditiously filed his Notice of Appeal on November 15, 2022. *Id.* at 103. On November 16, 2022, Gen. Flynn filed for review of the trial court's order on his emergency oral motion for stay pending appeal in the lower court. On November 17, 2022, this Court provisionally stayed this matter pending additional filings with this Court. On November 23, 2022, this Court denied Gen. Flynn's motion for an emergency stay but granted his request for an expedited appeal.

On November 30, 2022, the lower court heard argument about the State of Georgia's request to reschedule Gen. Flynn's appearance to December 6, 2022. After this hearing, the lower court ordered Gen. Flynn to appear on December 8, 2022, in the middle of this Court's

briefing schedule. The lower court also denied Gen. Flynn's oral motion to stay the order of the lower court pending appeal.

If Gen. Flynn is required to appear on December 8, 2022, it would moot this appeal. Therefore, Gen. Flynn will be filing a motion to either expedite this briefing schedule even further to resolve this case on the merits before his appearance date or, in the alternative, to stay the order requiring his appearance on December 8, 2022.

SUMMARY OF ARGUMENT

Gen. Flynn raises two specific arguments for the Court's consideration: (1) whether the State of Georgia has carried its burden to show that Gen. Flynn is a necessary and material witness to the SPGJ investigation into potential and unspecified election crimes within and without the State of Georgia and (2) whether a special investigative body like Georgia's SPGJ, created in 1974 and without indictment power, qualifies as a grand jury under the Uniform Act. If the answer to either question is no, then this Court must vacate the lower court's order requiring Gen. Flynn appear and testify before the SPGJ in Georgia.

First, the lower court abused its discretion in finding that Gen. Flynn is a necessary and material witness. The Court's written order itself exemplifies that Gen. Flynn is not necessary, because it clearly indicates that the SPGJ may conclude early without Gen. Flynn's testimony. Appellant's Br. App. at 105. ("based upon the proffer of counsel for the State of Georgia" … "a stay would either delay a final report from the special purpose grand jury or prevent the witness's testimony altogether should the special purpose grand jury be dissolved upon the issuance of a final report pursuant to Section 15-12-101(b) of the Official Code of Georgia"). This is only possible if the SPGJ does not view Gen. Flynn's testimony as necessary to its work.

In addition, the SPGJ has not presented sufficient evidence to support its claim that Gen. Flynn is a material witness to its investigation. Even during the argument to the lower court, the State of Georgia's counsel represented that their entire argument that Gen. Flynn is a necessary and material witness is mostly based on the timing of his actions and public statements. *Id.* at 85, 83-88.

The simple fact is, the State of Georgia did not cite a single criminal action it is investigating of which Gen. Flynn may have unique, personal knowledge. This, combined with the obvious fact

that Gen. Flynn's testimony is not necessary, is fatal to the State of Georgia's request that Gen. Flynn appear and testify.

Second, the lower court abused its discretion when it failed to consider the latent ambiguity created by Georgia's SPGJ. The State of Georgia adopted a law that creates an entity styled as a "special purpose grand jury", but that does not have the same functions, protections, or features of a typical grand jury as contemplated by the Florida Legislature when it adopted the Uniform Act.

Rather than consider this latent ambiguity, the lower court found that because the SPGJ has "grand jury" in its title that it must therefore be a grand jury. In doing so, the lower court failed to conduct a meaningful statutory analysis of Florida's Uniform Act, simply echoing the reasoning advanced by the State of Georgia. The lower court did not adequately consider the public interest of Floridians to be free from process in other states except for specific exemptions outlined in the Uniform Act. The lower court also placed the burden on the Florida legislature to play catch-up with sister states—who, under this ruling below, may create new and alien variations on the grand jury—to decide whether these new entities

qualify as a grand jury to extradite Florida citizens. This is an untenable result.

ARGUMENT

The standard of review for a decision of a lower court that an out-of-state witness must appear and testify is whether the lower court abused its discretion. *Skakel v. State*, 738 So. 2d 468, 470 (Fla. 4th Dist. Ct. App. 1999). The standard of review, however, for "the trial court's conclusions of law is *de novo*." *Bailey v. Covington*, 317 So. 3d 1223, 1227 (Fla. Dist. Ct. App. 2021), review denied, No. SC21-885, 2021 WL 4314040 (Fla. Sept. 23, 2021) (citing *MetroPCS Commc'ns, Inc. v. Porter*, 273 So. 3d 1025, 1027 (Fla. 3d DCA 2018)).

The lower court's determination that Gen. Flynn was a necessary and material witness without requiring sufficient evidence be presented by the movant State of Georgia is reviewed for an abuse of discretion. But the lower court was also incorrect as a matter of law when it determined that the SPGJ was a grand jury within the Uniform Act. This is a conclusion of law that is reviewed *de novo.*

I. Gen. Flynn is not a necessary or material witness.

Even if the Uniform Act applied to Georgia's SPGJ, the State of Georgia bears the burden of showing that Gen. Flynn is both a necessary and a material witness to the SPGJ investigation. *See* 81 Am. Jur. 2d *Witnesses* §§ 43–44 (2021); *see also Chesser v. State*, 168 Ga. App. 195, 196 (1983) (noting that Georgia requires the moving party to bear the burden of proof), *abrogated on other grounds by Davenport v. State*, 289 Ga. 399, 402 (2011). The Uniform Act also requires the lower court make an independent determination as to whether the requested witness is both material *and* necessary to the out-of-state grand jury investigation. Fla. Stat. § 942.02(2) (emphasis added). The State of Georgia has not and cannot meet this burden.

a. The State of Georgia conceded that Gen. Flynn is not necessary.

By Georgia's own admission (that a stay could prevent the SPGJ from hearing Gen. Flynn's testimony simply because the SPGJ is "likely" to wrap up testimony and issue a report by the end of the year) Gen. Flynn's testimony is not necessary to the investigation. Appellant's Br. App. at 96-98. If Gen. Flynn's testimony was truly

necessary, the SPGJ could simply wait for this expedited appeal to conclude before issuing a final report or concluding.

Moreover, the counsel for the State of Georgia proffered and the lower court accepted in its order denying Gen. Flynn's motion for a stay pending review that "a stay would *either* delay a final report from the special purpose grand jury or prevent the witness's testimony altogether should the special purpose grand jury be dissolved upon the issuance of a final report pursuant to Section 15-12-101(b) of the Official Code of Georgia." *Id.* at 94 (emphasis added). Again, counsel for the State of Georgia proffered to the lower court that the SPGJ could conclude its work and issue a final report without Gen. Flynn's testimony.

Under the Uniform Act—assuming *arguendo* that it applies—the lower court was required to make an independent finding that Gen. Flynn's testimony was *both* material and necessary to the investigation. By admitting that Gen. Flynn is not necessary to the SPGJ issuing its final report and potentially terminating before its May 1, 2023, expiration, the State of Georgia has admitted that Gen. Flynn's testimony is not necessary. This plainly demonstrates the lower court's error and that the lower court abused its discretion

when it found that the State of Georgia had carried its burden of proof that Gen. Flynn is a necessary witness.

Even ignoring Georgia's fatal concession, the State of Georgia utterly failed to present evidence of Gen. Flynn's necessity or materiality, and the trial court abused its discretion in finding otherwise. *Delit v. State* is directly on point and requires that Florida courts deny applications for extradition under the Uniform Act if the supporting certificate from the foreign state fails to allege sufficient facts to show that the Florida resident is a material and necessary witness. *See Delit v. State*, 583 So. 2d 1083, 1084–85 (Fla. 4th Dist. Ct. App. 1991).

In *Delit*, the court considered whether the trial court's order that Delit testify in New York before a grand jury should be upheld. *Delit v. State,* 583 So. 2d 1083, 1084 (Fla. Dist. Ct. App. 1991). The court determined that the decision of the lower court should be reversed because the lower court could not have found sufficient facts to determine that Delit was a material and necessary witness to the New York grand jury because the reliance was placed solely on an insufficient affidavit. *Id.* at 1085.

Specifically, the *Delit* court held the supporting affidavit was "almost entirely based on hearsay, and the hearsay on which it [wa]s based, even if true, d[id] not establish appellant's materiality and necessity as a witness in the grand jury proceeding." *Id.* at 1085. The court further found that "[a]lthough the information sought may be material and necessary, the witness is not material and necessary pursuant to [the Uniform Act] if there is no showing whatsoever that he possesses that information." *Id.*

By contrast, the court did find sufficient facts alleged to support extradition under the Uniform Act in *Skakel v. State*. *Skakel*, 738 So. 2d at 471. In *Skakel,* the court found that the affidavits submitted in support of the claim of materiality and necessity contained specific allegations about Skakel's knowledge of the suspected murder weapon (a golf club that matched a set owned by Skakel's daughter), that he was present for a school meeting where his son made admissions as to his involvement in the murder, and that he had made statements to his neighbor on a specific occasion where he stated his "concerns about members of his family's possible involvement in the murder." *Id.* at 469–70.

The detailed and sworn statements supporting the materiality and necessity of Skakel's testimony are a far cry from the sparse allegations found in the State of Georgia's motion, supported only by the certification of a Georgia Judge, just like in *Delit*.

Moreover, unlike the present case, the certification of materiality and necessity in *Skakel* was supported by allegations of a specific crime—murder—and detailed affidavits from both the state's attorney and an inspector of the judicial district. *Id.* In this case, the State of Georgia has made no attempt to provide any Florida Court with evidence of any form in addition to its certification. Even in the argument before the lower court, the State of Georgia only proffered vague allegations in support of the certification. It offered no additional specific facts, nor did it make any allegations with specific information related to specific crimes potentially committed by any person.

Indeed, it would be unthinkable to imagine that the *Skakel* court would extradite Skakel if the allegations in that case were as sparse as they are here: that Skakel had (1) received a gift from his children the month before the murder, (2) had unspecified conversations with his children around the time of the murder, (3)

made public statements about his children's legal options, and (4) allegedly went to the home of one of his son's friends at unspecified dates. This is, in essence, what Georgia has alleged in support of extraditing Gen. Flynn, without even specifying a crime committed by any individual or articulating what Gen. Flynn supposedly knows about these crimes. Georgia's protest—that they are not seeking a purely investigative interview—therefore rings particularly hollow. *See* Appellee's Response to Emerg. Mot. to Stay, Doc. No. 161394203, at 8, n.2.

This case is much more akin to *Delit*, where the Florida courts found that the evidence presented was inadequate, than to the *Skakel* case, where specific evidence was presented showing the crime being investigated and the evidence that was likely possessed by the requested witness.

Not only does the subpoena fail Florida law, but it also fails Georgia's law. Georgia law on materiality under the Uniform Act accords with Florida's and shows that the State of Georgia's request is facially deficient because it rests entirely on the unsworn proffer of counsel and contains no facts to show the materiality of Gen. Flynn's testimony. *See Young v. State*, 324 Ga. App. 127 (2013).

In *Young*, multiple defendants facing DUI charges attempted to utilize the Uniform Act to obtain the source code to the breathalyzer used by their arresting officers. *Young*, 324 Ga. App. at 127. The court found that the source code was not material because the defendants did not provide sufficient evidence to show materiality. *Id.* at 130-131. Specifically, the Georgia Court of Appeals found that a certificate of materiality, pursuant to the Uniform Act, "requires evidence of facts to show that the proposed witness is material." and that it cannot rely solely on proffers of counsel. *Young*, 324 Ga. App. at 132.

In this case, the State of Georgia has made no showing that Gen. Flynn actually has any material or necessary information, only the supposition and speculation that he might have information possibly related to official actions that were never taken or unspecified election crimes that may have been committed by unspecified persons. As noted above, even the State of Georgia's counsel admitted before the lower court that "most of this is related because of timing." Appellant's Br. App. at 85.

Nothing was presented to the lower court other than the certificate of material witness signed by Judge Robert McBurney in

Georgia. This certificate contains 5 alleged reasons that Gen. Flynn is material: (1) his pardon from President Trump; (2) a public statement Gen. Flynn made during an interview on Newsmax; (3) Gen. Flynn's attendance at a December 18, 2020, White House meeting, the alleged substance of which is based on hearsay media reports; (4) a draft executive order that was never issued nor was it drafted by Gen. Flynn; and (5) Gen. Flynn's alleged attendance at unspecified meetings at the Lin Wood estate, the alleged substance of which is also based on a hearsay media report and unsupported characterization by the State of Georgia.

Taking these one at a time, and based on the holding of *Delit*, and supported by the cases of *Skakel* and *Young,* this is insufficient as none of the allegations specify what information the witness has or how it would be relevant to any specific crime, and some allegations do not even rise to a level of specificity that would allow a court to determine if the witness would be material.

First, Gen. Flynn was pardoned for a criminal information that was filed based on making alleged false statements to the FBI regarding a phone call during the 2016 election. The Department of Justice eventually withdrew the criminal information and dropped

the case. The pardon simply released Gen. Flynn from the remaining legal hassles attendant to final dismissal. This is all irrelevant to the 2020 election, which is the sole scope of the SPGJ. Further, based on the certificate of material witness filed in the lower court, the pardon was not furnished to the Georgia court or the Florida court and therefore cannot constitute evidence for materiality.

Second, Gen. Flynn's interview on Newsmax touching on issues of public concern, expressing his First Amendment-protected opinion on legal options the President might have—options that were never exercised—are irrelevant and immaterial to the SPGJ's investigation. Actions that were not taken by President Trump are not alleged to be criminal acts by the State of Georgia. Further, based on the certificate of material witness filed in the lower court, the interview was not furnished to the Georgia court or the Florida court and therefore cannot constitute evidence for materiality.

Third, the December 18, 2020, White House meeting is alleged by media reports to have discussed many potential options, none of which were actually implemented. Therefore, these discussions are entirely irrelevant and immaterial to the SPGJ's investigation of potential disruptions to the 2020 Georgia election. Further, based on

the certificate of material witness filed in the lower court, the news articles this claim is based upon were not furnished to the Georgia court or the Florida court and therefore cannot constitute evidence for materiality. Even if provided, the reports themselves are hearsay.

Fourth, the draft executive order is also irrelevant to the SPGJ's investigation as it was never executed by the President, nor was it drafted by Gen. Flynn. Therefore, it cannot be the subject of an investigation because it cannot be the foundation for any criminal act in the State of Georgia. Further, based on the certificate of material witness filed in the lower court, the draft executive order was not furnished to the Georgia court or the Florida court and therefore cannot constitute evidence for materiality.

Fifth, the certificate of material witness fails to identify when the meetings at Lin Wood's planation occurred, what was discussed at these meetings other than a vague assertion that they were "for the purpose of exploring options to influence the results of the November 2020 elections in Georgia and elsewhere." Appellant's Br. App. at 9. The certificate of material witness, as if to make the lack of specificity of this allegation clear, fails to provide the date of the alleged statement by Lin Wood and does not cite the CNBC report on

which it is based. Further, based on the certificate of material witness filed in the lower court, the articles that this claim is based upon was not furnished to the Georgia court or the Florida court and therefore cannot constitute evidence for materiality.

While the CNBC report and Lin Wood's statements therein would be hearsay, the body of the apparent article makes no mention of anyone discussing "options to influence the results of the November 2020 elections in Georgia and elsewhere" as characterized by the State of Georgia. Brian Schwartz, *Pro-Trump lawyer says his plantations were go-to spots for those aiming to overturn the 2020 election*, CNBC (Dec. 30, 2021), https://www.cnbc.com/2021/12/30/pro-trump-lawyer-says-his-plantations-were-go-to-spots-for-election-conspiracy-theorists.html. Indeed, the only mention by Wood in the article of what was discussed was "investigations" into the 2020 election. *Id.*

Based on Georgia's characterization of the article, it appears to have read only the headline, and used that as the basis for their proffer to the trial court.

The lower court therefore abused its discretion when it found that Gen. Flynn is a necessary and material witness to the SPGJ

investigation based solely upon insufficient allegations consisting entirely of filed statements of Georgia counsel, which are based on public information that was not provided to the court and makes unsupported characterizations. If such evidence is found to constitute materiality, then it would upend the well settled caselaw requiring evidence of facts that the witness is material.

II. The SPGJ is not a grand jury pursuant to the Uniform Act.

The lower court both abused its discretion and was incorrect as a matter of law when it concluded that the SPGJ is within the Uniform Act simply because it contains the words grand jury in its title.

a. The plain language of Fla. Stat. § 942.02(2) does not include a special purpose grand jury.

This matter involves statutory interpretation of an interstate compact, and the legislative history and intent of the Florida legislature in adopting the Uniform Act in 1941. This is an issue of first impression that this Court reviews *de novo*. *See E.A.R. v. State*, 4 So. 3d 614, 629 (Fla. 2009). The Uniform Act does *not* apply to a "*special purpose* grand jury" by plain application of the statute, and

this is reinforced by the legislative history and intent of the legislature in adopting the Act.

Georgia contends that Florida's Uniform Act is unambiguous because it contains the words "grand jury" and Georgia has empaneled a "special purpose grand jury," ergo, Florida must compel its citizens to testify before its inquisitorial body. The plain language of the statute, however, does not include the words "special" or "special purpose," so this argument is unavailing.

Moreover, Georgia's argument places the burden on the Florida legislature to play catch-up with sister states—who may create their own diluted or distorted variations on the "grand jury"—to protect its own citizenry. This is an untenable result.

If sister states wish to alter the terms of interstate compacts, binding all other states, it should be *their* burden to seek legislative adoption or approval by the Florida Legislature. Georgia cannot simply create a diluted "*special purpose* grand jury" that lacks the essential characteristics and protections of a grand jury—as understood for centuries—and expect sister states to be bound by their idiosyncratic laws. As noted by the U.S. Supreme Court, the

Uniform Act serves a "self-protective function" for the adopting states and "is not eleemosynary." *New York v. O'Neill*, 359 U.S. 1, 9 (1959).

b. Georgia cannot avoid an ambiguity of its own making.

Even ignoring the lack of "special purpose" in Fla. Stat. § 942.02, the language of the Uniform Act is *not* plain and unambiguous in this case, because Georgia caused a latent ambiguity by creation of the "*special purpose* grand jury" in 1974. While Georgia previously cited *Forsythe v. Longboat Key Beach Erosion Control District* to support its plain language argument, that case also includes the following key language:

> [I]f from a view of the whole law, or from other laws *in pari materia* the evident intent is different from the literal import of the terms employed to express it in a particular part of the law, that intent should prevail, for that, in fact is the will of the Legislature.

Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 798–99 (1918)). Therefore, this Court must conduct an analysis of the legislative intent.

The case at bar is unique because the Florida statute in question is part of an interstate compact, requiring reciprocity, and

there is ambiguity created by Georgia's idiosyncratic laws passed after adoption of the compact. When considering an interstate compact, courts may utilize principles of contract law. *Tarrant Reg'l Water Dist. v. Herrmann,* 569 U.S. 614, 628, 133 S. Ct. 2120, 2130, 186 L. Ed. 2d 153 (2013) (citing *Texas v. New Mexico,* 482 U.S. 124, 128, 107 S. Ct. 2279, 96 L.Ed.2d 105 (1987)). Therefore, the relevant *in pari materia*—or in contract terms, extrinsic evidence—includes Georgia's Uniform Act, Georgia's statutory and case law on grand juries and special purpose grand juries, the model act as drafted by the National Conference of Commissioners on Uniform State Laws in 1931 and amended in 1936, Florida's legislative history in adopting the Uniform Act, Florida's own laws on grand juries, and the history and understanding of the term "grand jury" at the time of adopting the Uniform Act.

The model for the Uniform Act drafted by the National Conference of Commissioners on Uniform State laws in 1931 and subsequently amended in 1936 is similar to that adopted by Florida. As the Supreme Court recognized, "[b]y enacting this law, the Florida Legislature authorized and enabled Florida courts to employ the

procedures of other jurisdictions for the obtaining of witnesses needed in criminal proceedings in Florida." *O'Neill*, 359 U.S. at 9.

The *O'Neill* court went on to confirm that "forty-two States and Puerto Rico may facilitate criminal proceedings, otherwise impeded by the unavailability of material witnesses[.]" *Id.* It is important to note, that the *O'Neill* court made repeated reference to "criminal" proceedings because that case dealt with the Florida Supreme Court's contention that the Uniform Act violated the United State Constitution because it impaired the right of Americans to ingress and egress from states at will. The *O'Neill* court was able to overcome this argument, in part, due to its reliance on the argument that each state on its own may restrain the movement of a person accused of a crime. *See O'Neill,* 359 U.S. at 7 ("Florida undoubtedly could have held respondent within Florida if he had been a material witness in a criminal proceeding within that State"). This sharp reliance on the criminal nature of the Uniform Act cuts against the State of Georgia's allegation that it is irrelevant if their SPGJ has the characteristics of grand jury as understood in 1941 Florida.

Moreover, in 1941 Florida, the concept of a special purpose grand jury did not yet exist. The federal legislation allowing the

United States Attorney General to empanel a special grand jury was not passed until 1970. *See* 18 U.S.C. § 3331. Some States followed suit and passed their own special grand jury legislation, like the State of Georgia in 1974.

Given the passage of more than thirty years from the drafting of the model uniform act and almost thirty years from Florida's adoption of its Uniform Act before a special grand jury was a known concept, it is difficult to believe that the State of Florida could have intended to include such a grand jury within its Uniform Act.

The State of Georgia has argued that there is no reason to distinguish between the SPGJ and other grand juries in Georgia. Yet, as discussed in more detail below, Georgia law, guidance, and caselaw all counsel that there are significant differences between regular grand juries and special purpose grand juries.

The State of Georgia Grand Jury Handbook specifically distinguishes special purpose grand juries. *See GRAND JURY HANDBOOK – STATE OF GEORGIA 13 (2017)*, https://pacga.org/wp-content/uploads/2019/02/2017_gjh_singles.pdf ("Special Purpose Grand Juries are similar to *regular* grand juries in terms of the procedures that must be followed for the selection of grand jurors")

(emphasis added). Moreover, the Georgia Court of Appeals has previously determined that special purpose grand juries do not return indictments and conduct only civil investigations. *See Kenerly v. State*, 311 Ga. App. 190, 193–95 (2011).

In opposition, the State of Georgia has previously relied upon a Georgia trial court opinion—one that does not dispute the lack of indictment power and disregards the relevant Georgia appellate opinions. *See* Appellant's Br. Appendix at 44-49. In this opinion, a Georgia trial level court claims that "[i]t is incorrect to say that the [Georgia] Court of Appeals in *Bartel* in any way concluded that the *only* purpose a special purpose grand jury can have is civil." *Id.* at 47.

Yet, the Georgia Court of Appeals in *Kenerly* specifically found that the *Bartel* court had "concluded that special purpose grand juries conduct only civil investigations." *Kenerly,* 311 Ga. App. at 193–95 (citing *State v. Bartel*, 223 Ga. App. 696 (1996)). In essence, the State of Georgia is asking that a Georgia trial court's reasoning be binding over a directly contradictory appellate court ruling.

The extensive *in pari materia* in this case weighs heavily against Georgia's attempt to apply the Uniform Act to its purely inquisitorial SPGJ.

1. Florida's statute on extradition of witnesses applies only to criminal proceedings.

When the State of Florida adopted the Uniform Act, there was no such thing as a Special Purpose Grand Jury. *See O'Neill* at 4 (noting that Florida enacted the Uniform Act in 1941). Florida's grand jury was—and remains to this date—an "investigating, reporting, *and* accusing agency of the circuit court" with the power to issue criminal indictments or to refuse indictment. FLORIDA GRAND JURY HANDBOOK, Supreme Court Committee On Standard Jury Instructions In Criminal Cases, Chapter 30, https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-30/. It could not, therefore, have been contemplated in 1941, that sister states would later create "special" or "special purpose" investigative entities without the power of indictment and call them grand juries. Even Florida's statewide grand jury system, created in 1973, has the explicit purpose of

enhancing "the ability of the state to detect and eliminate organized criminal activity" and has indictment power. Fla. Stat. §§ 905.32, 34. The Uniform Act, therefore, should apply only to grand juries as understood at the time of its enactment in Florida, to *criminal proceedings*, not to special investigating entities like the SPGJ.

Florida codified the Uniform Act within Title XLVII, Criminal Procedure and Corrections. *See* Fla. Stat. §§ 942.01–06. This placement is entirely consistent with the purpose of the Uniform Act, which is to facilitate extradition of witnesses in *criminal proceedings*. *See Ulloa v. CMI*, 133 So. 3d 914, 921 (Fla. 2013). Indeed, the Florida Supreme Court, in *Ulloa*, quotes the Georgia Supreme Court's own opinion on the purpose of the Uniform Act:

> The Uniform Act to Secure the Attendance of Witnesses from Without the State in *Criminal Proceedings*, approved by the National Conference of Commissioners on Uniform State Laws in 1931 and amended in 1936, is intended to provide a means for state courts to compel the attendance of out-of-state witnesses at *criminal proceedings*.

Ulloa, 133 So. 3d at 921 (quoting *Yeary v. State*, 289 Ga. 394, 395 (2011)) (emphasis added and internal quotations and citations omitted).

2. Georgia law is unambiguous: the SPGJ has no indictment power and is civil in nature.

The Georgia legislature created the SPGJ in 1974, giving it the power to investigate alleged violations of law and to issue reports—nothing more. *See* Ga. Code § 15-12-100. *See also* GRAND JURY HANDBOOK – STATE OF GEORGIA, at 13 ("In 1974, the General Assembly authorized the Superior Courts in designated counties to impanel Special Purpose Grand Juries if requested to do so by an elected public official."). There is no question that the Georgia SPGJ has no indictment power. *Kenerly v. State*, 311 Ga. App. 190, 193–95 (2011) (holding that the SPGJ has no indictment power and explaining that a prior Georgia court of appeals decision had "concluded that special purpose grand juries conduct only civil investigations.") (citing *State v. Bartel*, 223 Ga. App. 696 (1996)). The pertinent question is whether such a civil investigative body can compel Florida witnesses to cross state lines under the Uniform Act.

The only court to address this question, albeit in a dissenting opinion, has been the Texas Court of Criminal Appeals. *In re Pick*, No. WR-94,0661-01, 2022 WL 4003842, *2 (Tx. Ct. Crim. App. Sept. 1, 2022) (Yeary, J., dissenting). The *Pick* decision, while not

authoritative, is particularly instructive for two reasons. First, while Judge Yeary wrote in dissent, the majority of the court did not disagree with him. Rather, the majority of the court found that the subpoena was unenforceable on procedural grounds and did not reach the question that Judge Yeary chose to write about separately due to its legal significance. Second, the facts of *Pick* arise out of the exact same Georgia SPGJ investigation, and it involves application of Texas's Uniform Act, which is materially identical to Florida's.

In *Pick*, the majority dismissed the Texas witness's mandamus action as moot, but Judge Yeary's dissent points out that when Texas adopted the Uniform Act in 1965, it did not contemplate sister states creating "special" investigative entities like the SPGJ. *Id.* at *1, *5–6 (Yeary, J., dissenting). Judge Yeary further observed that without indictment power, the SPGJ lacked an essential characteristic of a grand jury as understood by the Texas legislature in adopting the Uniform Act. *Id.* at 6 (Yeary, J., dissenting). The exact same logic applies here, as Florida enacted the Uniform Act in 1941.

Georgia's SPGJ might be able to investigate crimes—as can any number of official or unofficial bodies—but it cannot issue or refuse to issue indictments. *Kenerly*, 311 Ga. App. at 193–95. The assertion

by Fulton County DA Willis—repeated verbatim by Superior Court Judge McBurney—that the SPGJ is "criminal in nature" and equivalent to a grand jury as contemplated by the Uniform Act, is simply incorrect and contrary to Georgia's controlling authority.

While the State of Georgia has normal criminal grand juries, the SPGJ is without the restraints of due process that hamper those grand juries. *See* Ga. Code § 15-12-100. SPGJs are not subject to the same level of secrecy as ordinary grand juries as they can issue public reports and they are free to interrogate targets of their investigation. *Id.* A Georgia SPGJ is allowed to operate with this lower level of due process because it is not a criminal proceeding. Georgia's SPGJ cannot issue indictments or special presentments and is authorized only to issue a written report summarizing its investigation. *Kenerly*, 311 Ga. App. at 193–95; *accord State v. Lampl* (*Lampl II*), 296 Ga. 892, 893 (2015) (affirming that, unlike a grand jury, a Georgia SPGJ is statutorily limited to the investigations outlined in the formation order and cannot issue indictments).

Another important distinction between Georgia's SPGJ and a traditional grand jury is the traditional grand jury is not just a sword of justice, but also a shield. Along with the power to indict comes the

power to refuse indictment if the grand jury believes that the prosecution does not have probable cause to allege a specific crime. Yet another power of a grand jury in a criminal proceeding, lacking in the SPGJ, is to grant immunity for compelled testimony. Ga. Code § 24-5-507 (allowing a grant of immunity for compelled grand jury testimony only in a "*criminal proceeding*"). These powers protect citizens from overzealous prosecutors. The SPGJ affords none of these protections and need not be countenanced by this Court.

Georgia has argued that Ga. Code § 15-12-102 makes the SPGJ equivalent to a normal grand jury because it incorporates "Part 1" of the code section dealing with standard grand juries. The *Kenerly* decision shows this is not the case. *See Kenerly*, 311 Ga. App. at 193–95. More critically, however, it fails to incorporate the common law restrictions on the grand jury, such as the protections afforded by the *Thompson* case. *Thompson v. Macon-Bibb Cnty. Hosp. Auth.*, 246 Ga. 777 (1980). The Georgia Supreme Court noted in *Thompson*:

> When an indictment is returned the accused has the right of an open hearing in which to be tried and thereby assert his innocence. Reports of the kind that we are dealing with here offer no such right to the one defamed. The failure to provide some statutory mechanism by which identifiable individuals referred to in the report may respond to the charges against them raises serious questions of due

> process and fairness. Several courts have pointed out that injury to an individual can arise not only from the grand jury proceeding, but also from the public's belief that the grand jury speaks with judicial authority.

Thompson, 246 Ga. at 778 (internal quotations and citations omitted). Georgia's restriction against publishing reports that defame an individual without indicting them is entirely within the common law and is not incorporated into Georgia's law on SPGJs.

3. Florida has no parallel to the Georgia Special Purpose Grand Jury.

The State of Georgia argues that the purely investigative nature of its SPGJ—and the fact that it did not come into existence until 1974—does not matter because Florida grand juries also perform civil investigations. This is irrelevant. Florida's grand jury performs the critical function of investigation, reporting, *and* accusing. *See* FLORIDA GRAND JURY HANDBOOK. The fact that a Florida grand jury may also investigate and report on a non-criminal matter does not make it equivalent to the SPGJ because a Florida grand jury always retains its power of indictment.

Moreover, unlike Georgia's SPGJ—particularly this one—Florida grand juries are limited in scope. The Florida Grand Jury Handbook describes the civil function of a grand jury as follows:

> The grand jury may investigate as to whether public institutions are being properly administered and conducted. It has the power to inspect those institutions and, if necessary, may call before the grand jury those in charge of the operations of public institutions as well as any other person who has information and can testify concerning them. If the grand jury finds that an unlawful, improper, or corrupt condition exists, it may recommend a remedy.

FLORIDA GRAND JURY HANDBOOK. The "remedy" that a Florida grand jury may recommend is indictment. *See* Fla. Stat. § 104.43. For example:

> The grand jury in any circuit shall, upon the request of any candidate or qualified voter, make a special investigation when it convenes during a campaign preceding any election day to determine whether there is any violation of the provisions of this code, and *shall return indictments* when sufficient ground is found.

Id. (emphasis added). Florida's civil grand jury instructions caution that:

> [A] grand jury investigation shall not be made the tool of any group in order to harass or oppress any individual or institution or to pry into private affairs without good cause. *Indictments* based on street rumors or common gossip will not be permitted. No person should be singled out by the grand jury for the purpose of censure or to hold

> them up to scorn or criticism by imputation or innuendo. It is improper to make a presentment using words of censure or reprobation so that a public official or any other person is impugned or embarrassed *unless you return a "true bill."*

FLORIDA GRAND JURY INSTRUCTIONS, Supreme Court Committee On Standard Jury Instructions In Criminal Cases, Chapter 31, § 3.3 https://www.floridabar.org/rules/florida-standard-jury-instructions/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-31/ (emphasis added). Therefore, even when performing a civil investigation, a Florida grand jury always has the power of indictment, unlike the SPGJ.

Florida's strict prohibition against publishing a grand jury report that "embarrasses, ridicules, criticizes, censures, or defames any person" without indicting that person for a crime is noteworthy here, because Georgia has a similar restriction for its standard grand juries—but not for the SPGJ, as noted above. *See In re Grand Jury (Freedom School Project) Winter Term 1988*, 544 So. 2d 1104, 1106 (Fla. 1st Dist. Ct. App. 1989); *accord Thompson*, 246 Ga. at 778. *Thompson* highlights the essential nature of the indictment power to a grand jury and the limitations that come with that power, both in Florida and Georgia grand juries—but not so with the SPGJ.

Another key difference is that a Florida grand jury is limited in its scope and authority, unlike this SPGJ, and can "only investigate those matters that are within its jurisdiction, geographic and otherwise." *See* FLORIDA GRAND JURY HANDBOOK. Florida civil grand juries are limited to investigating public officials and employees to determine if they are incompetent or lax in their duties—specifically offenses affecting the morals, health, sanitation, and general welfare of their respective counties. *See Freedom School Project*, 544 So. 2d at 1106; FLORIDA GRAND JURY INSTRUCTIONS, §§ 3.1–2. The Georgia SPGJ at issue goes far beyond the scope of Fulton County or the performance of its public officials.

In her application for a Georgia SPGJ, DA Willis vaguely asserts, in an unsworn letter, that her office "has received information indicating a reasonable probability that the State of Georgia's administration of elections in 2020, including the State's election of the President of the United States, was subject to possible criminal disruptions." Appellant's Br. App. at 16-17. She asks that the SPGJ be authorized to investigate "the facts and circumstances relating *directly or indirectly* to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia." *Id.*

(emphasis added). This extreme breadth has led to the instant claim that Gen. Flynn is a "material witness," a proposition based upon inuendo, speculation, and hearsay, as discussed above.

c. Florida owes no comity to this Special Purpose Grand jury.

The underlying justifications for the Uniform Act are comity and reciprocity. *See O'Neill*, 359 U.S. at 11–12 (upholding the constitutionality of the Uniform Act); *Ulloa*, 133 So. 3d at 922. Sister states grant comity to one another's laws, with the assurance that there are reciprocal protections for their citizens. *See id.* In the case of Georgia's SPGJ, there is no reciprocity, and there should be no comity. Georgia cannot constitute a so-called "grand jury" that affords none of the protections and limitations traditionally recognized and codified in grand juries and expect other states to extradite their citizens to participate. As noted by Judge Yeary in *Pick*, "[s]uch an action by a co-adoptee state would, in my view, at least be an abuse of the comity intended by the mutual adoption of the Uniform Act." *Pick*, 2022 WL 4003842 at *6.

The Southern District of Florida case of *Miccosukee Tribe of Indians of Florida v. United States*, while not authoritative, is also

instructive on the issue of comity. No. 00-3453CIV, 2000 WL 35623105, *11 (S.D. Fla. Dec. 15, 2000). In that case, the State Attorney sought to serve subpoenas on Miccosukee tribe members who were potential witnesses relevant to a murder committed by another tribe member. *Id.* at *5. Importantly, the subpoenas sought to compel appearance at the State Attorney's office to find out what their testimony might be. *Id.* The court noted Florida's adoption of the Uniform Act, and stated that "[t]here is no provision in the Florida statute allowing another state to request a witness simply for an investigative interview, as the State Attorney seeks to do here." *Id.* at *11 (citing Fla. Stat. § 942.02).

DA Willis similarly seeks to compel Gen. Flynn for a purely investigative interview, not contemplated by the Uniform Act. She has provided no information about what facts Gen. Flynn might know that are relevant to her inquiry. She has presented no affidavit to show that Gen. Flynn has knowledge of President Trump's phone call to Mr. Raffensperger, nor that any of his conversations with President Trump or anyone else had anything to do with Fulton County, Georgia or even the State of Georgia. Her assertion that Gen. Flynn is a material witness is based on nothing more than innuendo,

speculation, and hearsay. The extreme breadth and unlimited scope of her investigation highlights the importance of the reciprocal protections afforded by the Uniform Act, the purpose of which, as noted by the U.S. Supreme Court, "is not eleemosynary" and serves a "self-protective function." *O'Neill*, 359 U.S. at 9.

This Court need not grant comity to Georgia's SPGJ for the extradition of witnesses, because it does not afford the reciprocal protections contemplated by the Uniform Act.

CONCLUSION

The lower court abused its discretion when it found that Gen. Flynn was both a necessary and material witness to the SPGJ's investigation in the State of Georgia. Further, the lower court abused its discretion and was incorrect as a matter of law when it determined that the SPGJ falls within the Uniform Act such that the State of Georgia may compel the State of Florida to require Gen. Flynn to appear and testify in Georgia.

WHEREFORE, for the foregoing reasons, Lt. Gen. Michael T. Flynn (ret.), by counsel, respectfully requests that this Court vacate

the lower court's order requiring Gen. Flynn to appear and testify in the State of Georgia.

Dated: November 30, 2022

Respectfully submitted,

/s/Jared J. Roberts

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CERTIFICATE OF SERVICE

I certify that on November 30, 2022, a copy of the foregoing was filed electronically with the Clerk of the Court, which will deliver to all counsel of record.

/s/Jared J. Roberts
Jared J. Roberts

Attorney for Michael T. Flynn

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, submitted in Bookman Old Style 14-point font, complies with the font and word limitation requirements of Fla. R. App. P. 9.210(a)(2) and Fla. R. App. P. 9.045(b).

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