IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

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

JEFFREY B. CLARK'S GENERAL AND SPECIAL DEMURRER AS TO COUNT 22

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

Harry W. MacDougald
Ga. Bar No. 463076
6 Concourse Pkwy.
Suite 2400
Atlanta, GA 30328
(404) 843-1956
hmacdougald@ccedlaw.com

BERNARD & JOHNSON, LLC

Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

Attorneys for Jeffrey B. Clark

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JEFFREY B. CLARK'S GENERAL AND SPECIAL DEMURRER AS TO COUNT 22

Comes Now Jeffrey Bossert Clark, co-defendant in the above-entitled matter, and, pursuant to O.C.G.A. § 17-7-110, submits this general and special demurrer with respect to Count 22 because it fails to allege a crime.

STATEMENT OF THE CASE

I. THE ALLEGATIONS AGAINST MR. CLARK

Mr. Clark is alleged in Count One, which runs from p. 13 through p. 71 of the Indictment, to have violated the Georgia RICO statute by endeavoring to conduct and participate in an enterprise through a pattern of racketeering activity. Mr. Clark's alleged participation in the enterprise through a pattern of racketeering activity is alleged in Acts 98, 99 and 111 to have been criminal attempted false writing. The same conduct is alleged as a separate free-standing crime in Count 22.

Mr. Clark is also alleged in Act 110 to have received a phone call from co-defendant Scott Hall on January 2, 2021. While receiving this call is alleged to be an act in furtherance

of the conspiracy, there are no facts alleged to explain or support how this might be so, and none can be inferred from the bare allegations of Act 110. There are no allegations identifying the content of the call, the purpose of the call, the result of the call, or what either Mr. Hall or Mr. Clark did or omitted to do as a result of the call. Nor are there any allegations explaining how the making or receiving of the call or what was said on the call operated to further the conspiracy. From the face of the Indictment, the call is a *tabula rasa* and fails to provide fair notice of anything, so that Mr. Clark can prepare his defense.

In Count 22, Mr. Clark is alleged to have prepared and on December 28, 2020 emailed a draft letter to the Acting Attorney General of the United States, Mr. Jeff Rosen, and the Principal Assistant Deputy Attorney General acting as the Deputy Attorney General, Mr. Rich Donoghue. The draft letter is alleged in Count 22 to contain certain false statements, the particulars of which are discussed below. The Indictment alleges that Mr. Clark "requested authorization to send said false writing and document to Georgia Governor Brian Kemp, Speaker of the Georgia House of Representatives David Ralston, and President Pro Tempore of the Georgia Senate Butch Miller."

The Indictment also alleges in Count 22 that on January 2, 2021 Mr. Clark met with Mr. Rosen and Mr. Donoghue and again "requested authorization to send" the draft letter.

The Indictment never alleges the letter was sent, and never refers to the letter as anything other than a draft. Thus, from the allegations of the indictment, there is no

allegation the letter was ever anything more than a draft, was ever approved, was ever sent to anyone outside the Department of Justice, or that anyone agreed to send it..

The Indictment alleges that emailing the draft letter to Mr. Rosen and Mr. Donoghue on December 28, 20202, and requesting approval to send it, and meeting with them on January 2, 2021 and requesting approval to send it "constituted substantial steps toward the commission of False Statements and Writings" sufficient to be a criminal attempt to commit false statements and writings.

The Indictment alleges in boilerplate fashion that that Mr. Clark made a false writing "in the County of Fulton and State of Georgia" but this is contradicted by the last paragraph of Count 22 which alleges that the conduct was committed outside the State, but is subject to Georgia criminal law because it constituted an attempt to commit a crime within the State within the meaning of O.C.G.A. § 17- 2-1(b)(2).

The circumstances under which the letter was not approved and not sent are well-established outside the four corners of the Indictment, having been the subject of three congressional investigations, each resulting in a report, and are certainly very well-known to the District Attorney. Nevertheless, those circumstances are entirely omitted from the Indictment as a matter of artful pleading, consistent with the State's frequent boasting, including in open court, about the cleverness of its pleading.

Count 22 defines the alleged falsity of the draft letter as being the difference between the position it ***proposed*** the Department of Justice take on the one hand and the

position that Mr. Rosen and Mr. Donoghue had taken with respect to alleged election irregularities in Georgia on the other:

> [T]he said accused, individually and as a person concerned in the commission of a crime, and together with unindicted co-conspirators, in the County of Fulton and State of Georgia, on and between the 28th day of December 2020 and the 2nd day of January 2021, unlawfully, with intent to commit the crime of False Statements and Writings, O.C.G.A. § 16-10-20, knowingly and willfully made a false writing and document knowing the same to contain ***the false statement that the United States Department of Justice had "identified significant concerns that may have impacted the outcome of the election in multiple States, including the State of Georgia."***

Of course, it is totally and knowingly false to allege that any of that occurred in Fulton County, and is contradicted by the other allegations of the Indictment that place all of the alleged conduct at the Main Justice Building in Washington, D.C., which as we explain in our immunity motion is the Seat of the Federal Government and thus is subject to the exclusive jurisdiction of Congress and cannot be regulated by Georgia.

Thus, the Indictment alleges that a confidential draft letter that was never sent and which merely proposed that DOJ take a position that it never took constitutes a crime within the jurisdictional scope of the State of Georgia, specifically, an attempted false writing in violation of O.C.G.A. § 16-10-20 and O.C.G.A. § 16-4-1. The conduct referred to in Count 22 is also alleged to have been part of the RICO Conspiracy in Count I.

II. ARTFUL PLEADING

The Indictment's allegations against Mr. Clark in overt acts 98-99, in 110-111 of Count 1, and in Count 22 are striking for their artful omissions of certain critical facts.

First and foremost, the Indictment never alleges that Mr. Clark was the Acting Assistant Attorney General for the Civil Division and the Senate-confirmed Assistant Attorney General for the Environment and Natural Resources Division and was thus a high-ranking official at the Department of Justice. No other Assistant Attorney General simultaneously ran two of DOJ's seven litigating divisions at Main Justice, having full national jurisdiction. These omissions are certainly intentional.

A second key and strategic omission is the complete silence of the Indictment on the January 3, 2021 meeting with the President in the Oval Office in which it has been reported that after a lengthy and contentious discussion among the President's most senior government legal advisors, the President decided not to send the draft letter. The District Attorney certainly knows of this meeting and its outcome and has filed papers in this Court in the Special Purpose Grand Jury case referring to them and heard testimony from a witness before the Special Purpose Grand Jury about the meeting. The omission is thus also fully intentional. This meeting and the President's decision were omitted from the Indictment because they are totally incompatible with the conspiracy charge in Count 1 against Mr. Clark. There can be no conspiracy with President Trump to unlawfully overturn the outcome of the election if the two of them did not agree on the letter. (Additionally, none of the other defendants in this case could have known about and somehow agreed to positions taken at this meeting as the meeting was confidential, being

protected by a host of privileges including executive and federal law enforcement privilege.)

The Indictment alleges that Mr. Clark's conduct in drafting and sending the draft letter to his superiors was an overt act in furtherance of the conspiracy. But the State omitted from the Indictment a fact that is irreconcilable with the existence of the conspiracy with which Mr. Clark is charged. "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); Conspiracy, GA. CRIMINAL OFFENSES AND DEFENSES C67 (2023 ed.) ("The essence of the offense of conspiracy is an agreement to pursue a criminal objective."). The State has always known that President Trump's decision not to send the letter definitively negates the existence of an unlawful conspiracy with respect to the letter, and yet indicted Mr. Clark for conspiracy anyway. This is prosecutorial misconduct, plain and simple. Georgia Rule of Professional Conduct 3.8(a) provides that "The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[1]

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[1] This Demurrer does not rest or rely upon these points as they are external to the four corners of the Indictment. Nevertheless, the Court should understand how the State has through artful and bad faith omissions attempted to evade substantive defenses. Additionally, we stand ready to put these points before the Court in any form that this Court directs in order to achieve substantial justice, which is to dismiss this Indictment as against Mr. Clark.

ARGUMENT AND CITATION OF AUTHORITY

I. GENERAL DEMURRER STANDARD OF REVIEW

The standard of review for a general demurrer is set forth in *Kimbrough v. State*:

> A general demurrer "challenges the sufficiency of the substance of the indictment." *Green v. State*, 292 Ga. 451, 452, 738 S.E.2d 582 (2013) (citation omitted; emphasis supplied). If the accused could admit each and every fact alleged in the indictment and still be innocent of any crime, the indictment is subject to a general demurrer. *See Lowe v. State*, 276 Ga. 538, 539 (2), 579 S.E.2d 728 (2003). If, however, the admission of the facts alleged would lead necessarily to the conclusion that the accused is guilty of a crime, the indictment is sufficient to withstand a general demurrer. *See id*.

Kimbrough v. State, 300 Ga. 878, 880 (2017).

II. COUNT 22 OF THE INDICTMENT FAILS TO CHARGE A COGNIZABLE CRIME OF ATTEMPTED FALSE WRITING AS A MATTER OF LAW.

Count 22 alleges that a Pre-Decisional Draft letter made false statements about certain positions or determinations of DOJ. In particular, it alleges that the draft letter contained:

> the false statement that the United States Department of Justice had "identified significant concerns that may have impacted the outcome of the election in multiple State's, including the State of Georgia" … .

The Indictment does not identify any other allegedly false statements in the draft letter. The State has hung the entirety of Count 22 on the alleged falsity quoted above, and not on anything else in the letter.

1. A DISCUSSION DRAFT LETTER THAT WAS NOT APPROVED AND WAS NEVER SENT CANNOT BE A CRIMINAL ATTEMPTED FALSE WRITING.

The Indictment plainly alleges that the letter was a ***draft*** for which Mr. Clark sought the approval of his superiors in the Department of Justice. Therefore, the proposed position that the Indictment alleges was a knowingly false statement was an inherently contingent ***proposal*** that DOJ adopt the position suggested in the draft. As alleged, t***hat proposal could never become operative unless and until it was approved by Mr. Clark's superiors***. A proposed position in a ***pre-decisional*** discussion draft that is inherently ***subject to approval*** by superiors by definition cannot be characterized as a false or dishonest statement with respect to the positions the draft proposes be adopted. Almost any lawyer has been presented with draft briefs, letters or memos for their signature and approval that contained statements of law or fact with which they disagreed. We venture that in the Court's experience as an Assistant United States Attorney, briefs were edited to remove statements or positions with which that superior authorities disagreed. It is unthinkable to imagine that such conduct could be criminalized when the proposals were made openly precisely in order that they could be debated, but that is precisely what State is attempting to do in this case.

Despite all of this, such a *non sequitur* is the irreducible essence of Count 22. As a mere draft proposed position subject to approval by superiors, the allegedly false statement cannot be either false or dishonest within the meaning of O.C.G.A. § 16-10-20,

nor an attempted false writing within the meaning of the attempt statute, O.C.G.A. § 16-4-1. Count 22 accordingly fails to state any cognizable violation of O.C.G.A. § 16-10-20 and O.C.G.A. § 16-4-1 and should be dismissed.

This defect in the attempted false writing charge is not saved by characterizing the challenged document as an "attempted" false writing. The statements were either false or not, and they cannot be false for the reasons stated above. A draft letter subject to approval of superiors that was never gained and was therefore never sent is not legally cognizable as an attempted false writing.

Arguing that the proposed position was imprudent as a matter of judgment or policy cannot save Count 22 from its legal and logical defects. The proposed position was a pure opinion or policy judgment about the weight and sufficiency of contested facts, their significance and what if anything ought to be done about them. O.C.G.A. § 16-10-20 requires a knowingly false statement of a "material fact." As an opinion, the proposed position is incapable of being a false statement of fact subject to the false writings statute. It is black-letter law that statements of opinion are not false statements of fact upon which a civil claim of fraud can be based. "Statements of opinion are not factual representations that are actionable as fraud." *ReMax N. Atlanta v. Clark*, 244 Ga. App. 890, 893–94 (2000), *citing Buckner v. Mallett*, 245 Ga. 245, 246(1) (1980); *R.L. Kimsey Cotton Co. v. Ferguson*, 233 Ga. 962, 966–967(4) (1975); *Wilkinson v. Walker*, 143 Ga. App. 838–839(1) (1977).

That opinions are not facts capable of being proved false is also firmly established by the opinion rule in the law of defamation. *See e.g., 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"), *citing Gettner v.* Fitzgerald, 297 Ga.App. 258, 261, (2009).[2]

The opinion defense also applies in certain criminal law contexts. In *Carr v. State*, 60 Ga. App. 590 (1939) a prosecution for cheating and swindling was dismissed because "one's false statement as to what is his opinion is not a statutory false pretence."

In *Martinez v. State*, 337 Ga. App. 374, 379 (2016) the Court held that "although OCGA § 16–10–20 does not specifically state that the defendant must have acted with "intent to defraud" as is stated in the forgery statute, OCGA § 16–10–20 requires proof of the same mens rea." Reading the statute and *Martinez* together, the textual requirement of a false statement of material ***fact***, and *Martinez's* requirement that there be the *mens rea* of intent to defraud together support rejecting the applicability of the statute to expressions of opinion.

The most that can be said is that Mr. Clark's draft letter took positions that on their face were not and could not be operative unless approved by higher authorities. If they

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[2] Other Georgia cases applying the opinion rule in defamation cases are *Webster v. Wilkins*, 217 Ga. App. 194, 196 (1995); *Gast v. Brittain*, 277 Ga. 340 (2003); *Collins v. Cox Enterprises*, 215 Ga. App. 679, 680 (1994); *Bloomberg v. Cox Enterprises*, 228 Ga. App. 178, 180 (1997); *Jaillett v. Georgia Television Co*., 238 Ga. App. 885, 890 (1999).

were not approved, they would be moot and would never become operative. Conversely, if they were approved, they would in that event have been true statements of DOJ's position. At most Count 22 alleges that Mr. Clark argued internally for DOJ to take certain positions and was overruled by his superiors. This is not a cognizable violation of the false writing statute, even if connected, tinker toy-style, to the attempt statute to create the conceptual enigma of an attempted false writing, whatever that is.

Moreover, the notion that it is a felony for lawyers to disagree about contested factual, legal, and policy issues is patently ridiculous (let alone a Georgia felony when the lawyers are high-ranking federal law enforcement officials sitting in the federal seat of government in D.C.). Indeed, the Rules of Professional Conduct require lawyers to put forth positions for consideration even when they suspect their clients—or superiors—will likely disagree with such positions:

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. ***However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.***

ABA Model Rule of Professional Conduct 2.1, at cmt. [1] (emphasis added). Thus, it was Mr. Clark's professional duty to give his honest assessment despite any disapproval of his superiors. Mr. Clark's conduct is thus not blameworthy but ethically appropriate.

It is not an "attempted false writing" for an attorney to prepare a confidential deliberative draft document with which his colleagues do not agree. Here the lawyers south of the President, according to the Indictment, did not agree. Such disagreement is specifically contemplated by Rule of Professional Conduct 1.13(b) for attorneys representing organizations, which further contemplates taking the disagreement to the ultimate decisionmaker, which in this case would be the President. Mr. Clark had a professional responsibility to exercise his own independent professional judgment.

The nonsensical nature of the charges against Mr. Clark is readily apparent upon brief reflection. If it were a felony attempted false writing to advocate in confidential internal deliberations for a legal position that is ultimately rejected, then, absent judicial immunity, draft judicial opinions that are discussed but rejected and not issued from the chambers of judges would be equally subject to state criminal prosecution as attempted false writings, even for federal judges. A dissenting judicial opinion from an appellate court would be a completed false writing because such a dissent takes different, sometimes radically different, views of the facts and the law as the sniping between majority and dissenting opinions frequently demonstrates.

A further illustration of the incoherence of Count 22 is presented by the example of draft legislation. When bills are introduced in Congress as a matter of form they begin with the following language:

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, …

See HOUSE OFFICE OF LEGISLATIVE COUNSEL, *Drafting Legislation*, https://legcounsel.house.gov/holc-guide-legislative-drafting (last visited August 30, 2023), *citing as an example*, H.R. 2568 (111th Congress), *available at* https://www.govinfo.gov/content/pkg/BILLS-111hr2568ih/pdf/BILLS-111hr2568ih.pdf (last visited Aug. 30, 2023). The statement in all such legislation that "Be it enacted by the Senate and House … in Congress assembled" ***is absolutely false*** because the bill has only been introduced, not enacted. It would be absurd to characterize proposed federal legislation as an attempted or actual false writing subject to criminal prosecution by the Fulton County District Attorney. Count 22 against Mr. Clark stands on equally absurd footing.

2. THE ATTEMPTED ACT CHARGED IN COUNT 22 WOULD NOT BE A CRIME IF IT HAD BEEN COMMITTED.

The falsity of the attempted false writing charged in Count 22 rests entirely on the alleged difference between the position the letter proposed DOJ take as compared to the position DOJ had taken up to that point. In other words, the draft letter is alleged to misrepresent DOJ's position. This framing suffers a second fatal logical defect in that the DOJ position in question was not an immutable objective empirical fact like the time of day or the make and model of a vehicle. DOJ's position could be changed, either by the Department's leadership changing their minds, or by changing the leadership to empower someone who agreed with the proposed change of position. Had the draft letter been approved and sent, then in that event the allegedly false statements of DOJ's

position would be true statements of DOJ's position because DOJ at that point would have adopted those positions. Mr. Clark's proposed positions would then have been DOJ's positions and would be true and accurate statements thereof. Therefore, the draft letter and seeking approval to send it are more accurately described as an attempted true writing than an attempted false writing. The alleged attempt was therefore not an attempt to commit a crime.

It is black-letter law that an attempt to commit an act which is not a crime cannot be a criminal attempt. Pursuant to OCGA § 16-4-1, "[a] person commits the offense of criminal attempt when, ***with intent to commit a specific crime***, he performs any act which constitutes a substantial step toward the commission of ***that crime***." (Emphasis added). Thus, the intent to commit a specific crime is a statutory element of the offense of attempt. If, as here, the attempted act is not a crime, then this statutory element is lacking as a matter of law and the charge should be dismissed. "[I]f the defendant intended to do something which he believed was against the law but which in fact was not unlawful, then he cannot be said to have engaged in a criminal attempt." LaFave & Scott, 2 SUBSTANTIVE CRIMINAL LAW (3d ed), § 11.3(a), *Intent to Commit a Crime*. *See also United States v. Riddle*, 44 M.J. 282, 286 (1996) ("[I]t is well established under the general law of attempt that an accused must intend to do an act which is criminal. Stated another way, he cannot be found guilty of attempting to do an act which is not criminal but which he merely believes is criminal.").

As the text of the attempt statute makes plain, this rule applies in Georgia. In *Yeamans v. State*, 366 Ga. App. 780 (2023), the defendant was charged with attempted child molestation. The Court of Appeals sustained a general demurrer to this count because the conduct alleged to be an attempt could not violate O.C.G.A. § 16-6-4 because the essential element of presence was lacking. "[T]he State must first charge the defendant with intent to commit some specific conduct that amounts to an act prohibited by the statute. And here, the State failed to do so. Accordingly, the trial court erred by denying Yeamans's demurrer to Count 4." *Id. at*, 786–87. *Cooks v. State*, 325 Ga. App. 426, 427 (1) (2013) ("[T]here can be no conviction for the commission of a crime an essential element of which is not charged in the indictment. If an accused individual can admit to all of the allegations in an indictment and still be not guilty of a crime, then the indictment generally is insufficient and must be declared void.") (punctuation omitted).

Mr. Clark is charged with attempting to make a false statement about DOJ's position. The Indictment does not allege that it would have been a crime for DOJ to take the position Mr. Clark proposed. Technically speaking, a true statement of DOJ's position would lack the essential element of falsity and could not therefore be a violation of the false writings statute, O.C.G.A. § 16-10-20. Therefore, Count 22 fails to allege an attempt to commit a crime and should be dismissed.

3. A Confidential Internal Draft Letter at the Department of Justice That Was Never Sent Was Not a "Matter Within the Jurisdiction of Any Department or Agency of State Government or of

THE GOVERNMENT OF ANY COUNTY, CITY, OR OTHER POLITICAL SUBDIVISION OF THIS STATE."

An essential element of a violation of the false writing statute, O.C.G.A. § 16-10-20, is that the allegedly false or fictitious writing contain a false, fictitious or fraudulent statement "in any matter within the jurisdiction of any department or agency of state government or of the government of any county, city or other political subdivision of this state."

This element cannot be satisfied by a confidential discussion draft of a letter that was never approved, was never sent, and never left the privileged confines of the senior levels of the Department of Justice. For a host of fundamental reasons, such confidential deliberations and draft documents at the Department of Justice are not "any matter" within the jurisdiction of the State of Georgia or any of its political subdivisions, especially when they are not approved, not sent, and no action is taken on them. Due to federal supremacy, the State of Georgia has no power to enforce its laws against those who participate in the federal government's internal confidential deliberations, especially those among the senior leadership of the Department of Justice that lead to no action. The charged conduct is far beyond the power of the State to prosecute and beyond the subject matter jurisdiction of this Court. Mr. Clark's contemporaneously filed General Demurrer, Plea in Bar, and Motion Quash Based on Federal Supremacy and Immunity and Lack of Subject Matter Jurisdiction argues this point in depth, and to avoid burdening the Court with repetitive briefing is incorporated herein by reference.

Tesler v. State, 295 Ga. App. 569 (2009), is not to the contrary. It interpreted the jurisdictional element of the statute by reference to case law interpreting 18 U.S.C. § 1001 as covering "all matters confided to the authority of an agency or department." *Id*. at 577, *citing United States v. Rodgers*, 466 U.S. 475, 479-482 (1984). As argued in Mr. Clark's Special Plea, under the Supremacy Clause, regulating and imposing state criminal law on confidential internal discussions within the headquarters of the Department of Justice, or in the Oval Office, is not a "matter confided to the authority" of the State of Georgia or any of its departments or agencies.

An analogy may help clarify the point. If the U.S. Attorney's Office in Atlanta were investigating and weighing whether to prosecute corrupt public officials in the governments of Fulton County or the City of Atlanta—hardly a unique event considering the conga line of such officials who have been sent to federal prison over the last 30 years—but ultimately decided not to proceed and closed the matter without any disclosure of their deliberations, neither the State of Georgia nor any of its political subdivisions would have any criminal jurisdiction over those deliberations. The Assistant U.S. Attorney who drafted a prosecution memo recommending prosecution but was overruled by the U.S. Attorney could not be prosecuted for "attempted false writing" because his boss disagreed with his analysis of the facts, law and appropriate policy.

It is also clarifying to focus on the language of the term "any matter" within the jurisdiction of the State. In *Haley v. State*, 289 Ga. 515 (2011), the Court at length construed

Section 16-10-20 in light of the defendant's overbreadth and First Amendment constitutional challenges. With respect to the requirement that the "matter" be within the jurisdiction of the state, the Court cited *Tesler v. State*, 295 Ga.App. 569, 577 (2009) (physical precedent only), as "holding that a department or agency has jurisdiction under OCGA § 16–10–20 "when it has the power to exercise authority ***in a particular situation***." (cleaned up) (emphasis added). In this "particular situation," the State has no jurisdiction over the charged conduct in Count 22. The draft letter never entered the State's jurisdiction because of federal supremacy, but even absent federal supremacy, it never entered the State's jurisdiction because it was never sent and never used in any Georgia "matter" within the jurisdiction of any state or local government entity.[3]

If a State could enforce its criminal law against such deliberations, the necessary implication would be that state law enforcement could use all necessary force to execute search and arrest warrants against senior federal officials. The thought experiment of a felony warrant squad of Deputies from the Fulton County Sheriff's Department kicking in the doors at Main Justice in Washington, D.C. to arrest an Assistant Attorney General ought to be sufficient to demonstrate how far off track the District Attorney has gone.

[3] Contrast this to the apparently false statements in Nathan Wade's Domestic Relations Financial Affidavit and interrogatory responses in his divorce. Those are unequivocally a "matter"—a pending lawsuit—that is within the jurisdiction of the Superior Court in Georgia and therefore within the scope of O.C.G.A. § 16-10-20.

This case should be dismissed for failure to state a cognizable violation of O.C.G.A. §§ 16-10-20 and 16-4-1.

III. THERE WAS NO FAIR WARNING THAT THE CHARGED CONDUCT WOULD VIOLATE THE LAW.

Even assuming the State of Georgia could criminalize confidential deliberations between and among senior DOJ lawyers and the President, the Indictment violates Mr. Clark's due process rights to fair notice of what the law prohibits. "[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Arthur Andersen, LLP v. United States*, 544 U.S. 696, 703-704 (2005) (cleaned up). "The due process clause thus 'prevents … deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires.' *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986)." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995). *See also id.* at 1329 ("Of course, it is in the context of criminal liability that this 'no punishment without notice' rule is most commonly applied. *See, e.g., United States v. National Dairy Corp.*, 372 U.S. 29, 32–33 (1963) ('[C]riminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed.')."). *United States v. Lanier*, 520 U.S. 259, 265 (1997) ("No man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). "Due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope…" *Id.* at 266

(citations omitted).

Georgia law enforces the same due process requirement. "Due process requires that criminal provisions "give a person of ordinary intelligence fair warning that his specific contemplated conduct is forbidden, so that he may conform his conduct to the law. [Cit.]" *Perkins v. State*, 277 Ga. 323, 325 (2003), *citing Thelen v. State*, 272 Ga. 81, 82 (2000). *See also* Georgia Const., art. I, § 1, ¶ 1.

To give meaning to these protections, the U.S. Constitution requires that criminal statutes be strictly construed:

> This Court has "'traditionally exercised restraint in assessing the reach of a federal criminal statute.'" *Marinello*, 584 U. S., at ——, 138 S.Ct., at 1109 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)); *see also Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–704 (2005); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). This restraint arises "both out of deference to the prerogatives of Congress and out of concern that a fair warning should be given to the world in language that the common world will understan[d] of what the law intends to do if a certain line is passed." *Marinello*, 584 U. S., at ——, 138 S.Ct., at 1106 (internal quotation marks omitted). ***After all, "[c]rimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language***." *Spears*, 729 F.3d at 758.

Dubin v. United States, 143 S. Ct. 1557, 1572–73 (2023) (emphasis added).

1. THERE ARE NO PREVIOUS CASES OF "ATTEMPTED FALSE WRITING."

As for fair warning, the extreme novelty of the charge of "attempted false writing" is especially striking. We frankly do not understand what an "attempted false writing" is or could be. The mere fact that the attempt statute can be stuck onto other criminal statutes does not mean that the joinder of an attempt with a false writing will necessarily

make sense. In this case, attaching the attempt statute to the false writing statute creates a legal jackalope. We have found no reported decisions in Georgia involving "attempted false writing." We have searched for cases under the federal false statements statute, 18 U.S.C. § 1001, and found only one case in a military court where the defendant had actually submitted false documents to get married pay. He was acquitted on the false statements charge but convicted on the lesser included offense of attempted false statements, perhaps out of mercy because there was no question that he had actually submitted the false documents and received the increased pay. Under the circumstances that was a purely notional offense and the case is distinguishable. *See U.S. v. Riddle*, 44 M.J. 282 (1996). In other words, the convicted of "attempted false statement" appeared to be a way to mitigate the penalty in light of the overall sense of the situation.

Relatedly, in Mr. Clark's bar case in Washington, D.C., we have not found any bar discipline case in the United States in which a lawyer was disciplined for attempted dishonesty over a draft letter that was never sent.

The absence of any precedent for the charge in Count 22 confirms that the wastebaskets of America's lawyers are not a repository for an infinity of attempted false writing felonies.

Since, insofar as we are aware, no one has ever been prosecuted or convicted in Georgia for the crime of "attempted false writing," the fair warning required by the Due

Process Clause is absent as a matter of law and Count 22 should be dismissed with prejudice.

2. THERE ARE NO PREVIOUS CASES OF LOCAL PROSECUTION OF AN ASSISTANT ATTORNEY GENERAL OVER CONFIDENTIAL DELIBERATIONS AT THE JUSTICE DEPARTMENT.

The relevant frame of reference for whether Mr. Clark, as a senior official in the Department of Justice, could have had fair warning in the sense required by the Due Process Clause is in light of federal supremacy and immunity, and not the intricacies of state criminal law in Georgia or any of the other 50 states. In *Cunningham v. Neagle*, 135 U.S. 1, 76 (1890), the Supreme Court held that a federal official engaging in his duties "is not liable to answer in the courts of California on account of his part in that transaction." "[I]f the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if, in doing that act, he did no more than what was necessary and proper for him to do, he cannot be guilty of a crime under the law of the state of California." *Id*. at 75. In *Johnson v. Maryland*, 254 U.S. 51, 56-57. (1920) the Supreme Court held that "even the most unquestionable and most universally applicable of state laws, such as those concerning murder, will not be allowed to control the conduct of a marshal of the United States acting under and in pursuance of the laws of the United States." And in *Ohio v. Thomas*, 173 U.S. 276, 283 (1899), the Court held that "when discharging [their] duties under Federal authority pursuant to and by virtue of valid Federal laws, [federal officers]

are not subject to arrest or other liability under the laws of the State in which their duties are performed."

Accordingly, the test of fair warning to a federal officer like Mr. Clark is not whether his conduct violated state law, but whether he could reasonably believe it fell within his federal authority such that he could reasonably expect to be sheltered by federal immunity or qualified immunity. *See* Seth P. Waxman and Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2233-2234 (2003) ("In short, a federal officer's entitlement to immunity from state criminal prosecution does not depend on an assessment of his conduct under state law. When discharging his federal duties, an officer need only ascertain (with what degree of accuracy we will discuss below) that his actions fall within his federal authority.") Simply put, federal immunity precludes there being any fair warning to Mr. Clark of a potential prosecution under state law for the charged conduct.

This can be seen in the practical and legal point that insofar as we are aware there has never before been a state prosecution of a Senate-confirmed Assistant Attorney General of the United States over his confidential and privileged legal advice to his superiors, and especially not on a cockamamie theory that a draft letter never sent was an "attempted false writing." Principles of federal supremacy and immunity make it impossible to have imagined a state prosecution over such confidential deliberations, nor,

for that matter, that Mr. Clark could be charged as a member of a state law RICO conspiracy, a topic addressed in a separate motion.

Since no one in Mr. Clark's position could have possibly understood that confidential deliberations inside the Justice Department, or the drafting of a letter never sent, could give rise to criminal charges in the State of Georgia, the Court should dismiss all charges against him, including Count 22.

The prosecution of Mr. Clark for "attempted false writing" has no precedent in two separate dimensions—(1) there have been no reported Georgia decisions on attempted false writing, nor can we find any analogous criminal case anywhere, and, (2) there has never been an Assistant Attorney General prosecuted under state law over confidential and privileged deliberations at the apex of the Justice Department. Fair warning is absent as a matter of law and Count 22 should therefore be dismissed.

IV. Special Demurrer to Count 22

If Count 22 is not dismissed outright for any of the reasons above or those set forth in Mr. Clark's other demurrers, pleas, and motions, Mr. Clark specially demurs to Count 22 on the grounds that it fails to allege in what way the preparation of a confidential draft letter concerning the exercise of Article II law enforcement authorities could be a "matter within the jurisdiction of any department or agency of state government or of the government of any county, city or other political subdivision of this state." For the reasons set forth in Mr. Clark's General Demurrer, Plea in Bar, and Motion Quash Based

on Federal Supremacy and Immunity and Lack of Subject Matter Jurisdiction, we are unable to discern from the Indictment how the charged conduct could be within the jurisdiction of any agency of state government or political subdivision of the state. The Indictment is defective in failing to allege this essential element of the offense charged in Count 22.

CONCLUSION

The drafting of a letter that was not approved and was never sent is not legally cognizable as a criminal attempted false writing. There is no such crime; the theory of Count 22 is a *non sequitur*. This is borne out by the fact that, insofar as we are aware, no one has ever been prosecuted for any such crime. Nor has any state or local government every prosecuted a former senior Justice Department official over a confidential draft letter that was never sent. The novelty of the *non sequitur* theory and federal supremacy and immunity make it impossible for anyone in Mr. Clark's position to have had fair warning their conduct was against the law. Count 22 should be dismissed with prejudice.

Respectfully submitted, this 5th day of February 2024.

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076
6 Concourse Pkwy., Suite 2400
Atlanta, GA 30328
(404) 843-1956
hmacdougald@ccedlaw.com

BERNARD & JOHNSON, LLC

/s/ Catherine S. Bernard
Catherine S. Bernard
Ga. Bar No. 505124
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Direct phone: 404.432.8410
catherine@justice.law

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February 2024, I electronically lodged the within and foregoing ***General and Special Demurrer as to Count 22*** 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:

Fani Willis, Esq.
Nathan J. Wade, Esq.
Fulton County District Attorney's Office
136 Pryor Street SW
3rd Floor
Atlanta GA 30303

CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP

/s/ Harry W. MacDougald
Harry W. MacDougald
Ga. Bar No. 463076

6 Concourse Pkwy.
Suite 2400
Atlanta, GA 30328
(404) 843-1956
hmacdougald@ccedlaw.com