IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DAVID JAMES SHAFER *et al.* Defendants.	Case No. 23SC188947

DEFENDANT DAVID J. SHAFER'S SPECIAL DEMURRER AND MOTION TO STRIKE LEGAL CONCLUSIONS CONCERNING UNITED STATES PRESIDENTIAL ELECTORS FROM THE INDICTMENT

Defendant David J. Shafer files this Special Demurrer and Motion to Strike Legal Conclusions Concerning United States Presidential Electors from the Indictment, and moves to strike the phrase "duly elected and qualified presidential electors" from pages 16, 18, 24, 38, 40, 42, 48, 49, 57, 58, 61, 62, 63, 76, 77 and 80 of the Indictment; the phrase "false Electoral College votes" from page 17 of the Indictment; and the phrase "lawful electoral votes" from page 16 of the Indictment, and also moves to dismiss Counts 8, 10 and 16 of the Indictment as to Defendant. The prosecution's Indictment is riddled with conclusory legal assertions regarding the Democratic Party of Georgia's 2020 allegedly "duly" "qualified Presidential Electors" and references allegedly "lawful" versus allegedly "false" "Electoral College votes," which are questions for the Court or for the jury at trial. *See* Indictment, pp. 16, 17, 18, 24, 38, 40, 42, 48, 49, 57, 58, 61, 62, 63, 76, 77, 80. Mr. Shafer disputes the prosecution's prejudicial and conclusory allegations relating to Presidential Electors, and shows that if the prejudicial legal conclusions are stricken from its Indictment, Counts 8, 10 and 16 of the Indictment must be dismissed as well.

I. INTRODUCTION

The State has brought criminal charges against Defendant David J. Shafer and other defendants on the basis of Mr. Shafer's and the other defendants' meeting and voting as United States Presidential Electors on or about December 14, 2020, and sending a certificate of their votes to the United States Congress. *See* Indictment, pp. 40. The prosecution repeatedly refers to the "Trump presidential elector nominees in Georgia" in its Indictment. *Id*. at 28, 31, 35, 36, 37, 38, 71, 97. It also makes allegations regarding an alleged scheme to "unlawfully appoint" Presidential Electors in November and December of 2020. *Id*. at 16, 21, 22, 23, 24, 25, 30, 33, 45, 46, 57, 72, 74, 84.

The Indictment, however, also repeatedly and improperly charges that the Democratic Party of Georgia's 2020 nominee Presidential Electors, in contrast to the Georgia Republican Party's 2020 nominee Presidential Electors, were allegedly the "*duly elected and qualified presidential electors*." *See* Indictment, pp. 16, 18, 24, 38, 40, 42, 48, 49, 57, 58, 61, 62, 63, 76, 77, 80 (emphasis added). The prosecution furthermore erroneously charges in the Indictment that Mr. Shafer and the other 2020 Georgia Republican nominee Presidential Electors allegedly cast "*false* Electoral College votes," while the 2020 Georgia Democratic nominee Presidential Electors allegedly cast "*lawful* electoral votes." *Id*. at 16, 17 (emphasis added). The Indictment charges Mr. Shafer in Count 8 with allegedly impersonating a public officer in violation of O.C.G.A. § 16-10-23 76, and in Counts 10 and 16 with alleged forgery in the first degree in violation of O.C.G.A. § 16-9-1(b). *See* Indictment, pp. 76, 77, 80.

II. ARGUMENT

"'An allegation in an indictment that is wholly unnecessary to constitute the offenses charged is mere surplusage.'" *State v. Corhen*, 306 Ga. App. 495, 498–499 (2010) (quoting *Fair v. State*, 284 Ga. 165, 167(2)(a), 664 S.E.2d 227 (2008). However:

> "[A]verments in an indictment as to the specific manner in which a crime was committed are not mere surplusage, and such averments must be proved as laid, or the failure to prove the same will amount to a fatal variance and a violation of the defendant's right to due process of law."

Butler v. State, 352 Ga. App. 579, 583 (2019) (quoting *Smith v. State*, 340 Ga. App. 457, 464 (2017)).

A. Qualifications Of, and Voting By, United States Presidential Electors

At the time of the conduct charged in the Indictment, Georgia law expressly provided that candidates for Presidential Elector "may *qualify* for an election… (3)… [through] nomination as prescribed by rules of a political party and subsection (f) of Code Section 21-2-153." O.C.G.A. § 21-2-130 (emphasis added). The Constitution of the United States mandates that Presidential Electors meet and vote by ballot for a candidate for President of the United States and for a candidate for Vice President of the United States, to make a list of the persons voted, and to certify the list and transmit the list to the United States Congress. *See* U.S. Const. Art. II § 1, cl. 3; Amend. XII.

During the time of the charged conduct, the federal the Electoral Count Act, 3 U.S.C. § 1 *et seq*., furthermore stated that if a State has provided for final determination of a controversy or contest concerning the appointment of electors, and there is a final determination made at least six (6) days before the date of the meeting of the electors, the final determination "shall be conclusive and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the

ascertainment of the electors appointed by such State is concerned." 3 U.S.C. § 5 (2020). As the U.S. Supreme Court has recognized, Section 5 of the Electoral Count Act "creates a 'safe harbor' for a State insofar as congressional consideration of its electoral votes is concerned." *Bush v. Palm Beach Cnty. Canvassing Bd.*, 531 U.S. 70, 77 (2000). As the U.S. Supreme Court has observed:

> The 3 U. S. C. § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in the Congress under 3 U. S. C. § 15. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no State is required to conform to § 5 if it cannot do that (for whatever reason); *the sanction for failing to satisfy the conditions of § 5 is simply loss of what has been called its "safe harbor." And even that determination is to be made, if made anywhere, in the Congress*.

Bush v. Gore, 531 U.S. 98, 130 (2000) (Souter, J., dissenting) (emphasis added). December 8 was the Safe Harbor date under the Electoral Count Act in 2020. Georgia law provides for determination a controversy or contest concerning the appointment of electors at O.C.G.A. §§ 21-2-520 *et seq*.

The Electoral Count Act also provided, at the time of the charged conduct, that:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, *all the certificates and papers purporting to be certificates of the electoral votes*, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient

declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. *If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate*, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and *in such case of more than one return or paper purporting to be a return from a State*, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

3 U.S.C. § 15 (2020) (emphasis added).

B. <u>The Indictment's Disputed and Unproven References to "Qualified Presidential Electors" and "Lawful" and "False" Electoral Votes Should Be Stricken</u>

The Indictment makes repeated references to the Democratic Party of Georgia's 2020 Presidential Electors as the alleged "duly elected and qualified presidential electors." *See* Indictment, pp. 16, 18, 24, 38, 40, 42, 48, 49, 57, 58, 61, 62, 63, 76, 77, 80. The term "duly" has been defined as "'[i]n a proper manner; in accordance with legal requirements…'" *In Re Shek*, 947 F.3d 770, 780 (11th Cir. 2020). Similarly, "qualified" means "'fitted… for a given purpose,' [ ] 'having complied with the specific requirements or precedent conditions (as for office or employment,' [or] 'nominated and confirmed.'" *Swan v. Clinton*, 100 F.3d 973, 986 (D.C. Cir. 1996) (quoting *Webster's Third New International Dictionary*, p. 1858 (1976); *Mackie v. Clinton*, 827 F.Supp. 56, 56 (D.D.C. 1993), *vacated as moot*, 1994 WL 163761 (D.C. Cir. Mar.9, 1994)).

The Indictment's repeated, disputed and unproven references to the Democratic Presidential Electors as the "duly" "qualified presidential electors" or the "qualified presidential electors" constitutes a legal conclusion that the Democratic Presidential Electors were the legal or lawful Presidential Electors while the Republican Presidential Electors were, by implication, allegedly illegal or unlawful Presidential Electors. Mr. Shafer was nominated by the Georgia Republican Party as a Presidential Elector entirely consistent with State law. *See* O.C.G.A. § 21-2-130. The Electoral Count Act furthermore provided for, and did not prohibit, Mr. Shafer and the other Republican Presidential Electors meeting, casting their votes, certifying their votes, and transmitting their certificates to the United States Congress. *See* 3 U.S.C. § 15 (2020). "[T]he charge that an

act intrinsically lawful was done unlawfully, without more, is not a statement of fact, but a mere conclusion of the pleader." *Roughlin v. State*, 17 Ga. App. 205, 86 S.E. 452, 453–454 (1915) (citing *Dukes v. State*, 9 Ga. App. 537 (1911)). The State possesses no legal ground whatsoever to charge in its Indictment that the Democratic Presidential Electors were allegedly "duly qualified" while knowingly refusing to make similar allegations relating to the Republican Presidential Electors. The prosecution's references to the Democratic Presidential Electors as the alleged "duly elected and qualified presidential electors" are erroneous and should be stricken from its Indictment.

The Indictment also charges in Count 1 that Mr. Shafer and the other defendant 2020 Georgia Republican Presidential Electors allegedly cast "false" United States Electoral College votes, while the "duly qualified" 2020 Georgia Democratic Presidential Electors alleged cast "lawful electoral votes." *See* Indictment, pp. 16, 17. These legal conclusions are erroneous and are subject to being stricken. As set forth above, pursuant to the federal Electoral Count Act, the determination of whether Electoral College votes are allegedly "lawful" or "false" is reserved to Congress.

"The inclusion of clearly unnecessary language in an indictment that could serve only to inflame the jury, confuse the issues, and blur the elements necessary for conviction under the separate counts involved surely can be prejudicial." *United States v. Bullock*, 451 F.2d 884, 889 (5th Cir. 1971) (citing *United States v. Bufalino*, 285 F.2d 408 (2nd Cir. 1960); *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969)). The legal conclusions in the Indictment that the Democratic Presidential Electors were the alleged lawful Presidential Electors pursuant to law, who cast "lawful" Electoral College votes, while Mr. Shafer and the other defendant Republican Presidential Electors cast "false" Electoral College votes, are erroneous and prejudicial and the allegations should be struck from the Indictment.

The issue of whether Mr. Shafer and the other defendant Republican Presidential Electors were allegedly qualified Presidential Electors, and whether their votes were allegedly "false," are issues to be determined by the trier-of-fact at trial. The prosecution's conclusory statements in its Indictment regarding alleged qualified Presidential Electors and lawful versus false Electoral Votes constitute an improper and prejudicial comment on Mr. Shafer's and the other defendant Republican Presidential Electors' guilt or, in the alternative, an improper attack in the Indictment on the defendants' defenses that they were legitimate Presidential Electors whose votes could be accepted by the United States Congress as lawful electoral votes. The prosecution's erroneous and prejudicial references to "qualified Presidential Electors" and "lawful" and "false" "Electoral College votes" should properly be stricken from the Indictment.

C. Counts 8, 10 and 16 of the Indictment Should Be Dismissed As to Mr. Shafer

The prosecution's allegations regarding alleged "qualified Presidential Electors" and "lawful" versus "false" "Electoral College vaults in the Indictment cannot constitute "mere surplusage" for the reason that the allegations are disputed and evidence may be introduced to refute the allegations. *See Hamby*, 76 Ga. App. at 554 (quoting *Henderson*, 113 Ga. at 1149). Yet, even if the majority of the prosecution's references to "qualified Presidential Electors" are held to be surplusage, the references in Counts 8, 10 and 16 relate to the specific manner in which the alleged offenses were committed and are not surplusage.

Count 8 charges that Mr. Shafer and others allegedly "unlawfully [and] falsely held themselves out as the duly elected and qualified presidential electors from the State of Georgia, public officers…" Indictment, p. 76, in violation of O.C.G.A. § 16-10-23, *id.*

Section 16-10-23 provides that "[a] person who falsely holds himself or herself out as a peace officer, officer of the court, or other public officer or employee with intent to mislead another into believing that he or she is actually such officer commits the offense of impersonating an officer…" O.C.G.A. § 16-10-23. While the Code does not define a "public officer" for the purposes of Section 16-10-23, the Georgia Election Code, O.C.G.A. §§ 21-2-1 *et seq*., defines a "public officer" as:

> (A) The Governor, Lieutenant Governor, Secretary of State, Attorney General, Commissioner of Labor, Commissioner of Agriculture, Commissioner of Insurance, and State School Superintendent;
> (B) Every other elected state official not listed in subparagraph (A) of this paragraph;
> (C) The executive head of every state department or agency, whether elected or appointed;
> (D) Each member of the General Assembly;
> (E) The executive director of each state board, commission, council, or authority and the members thereof;
> (F) Every elected county official and every elected member of a local board of education; and
> (G) Every elected municipal official.

O.C.G.A. § 21-5-3(22). A United States Presidential Elector may accordingly be held not to be a "public officer" for the purposes of Section 16-10-23. Pursuant to the foregoing authorities, if the allegation regarding the defendants allegedly holding themselves out as "duly… qualified presidential electors" is stricken from the Indictment, Count 8 lacks an essential element of the alleged offense, and is subject to dismissal. Presidential Electors are furthermore not "public officers" for the purposes of Section 16-10-23 under any interpretation of Georgia law.

Counts 10 and 16 of the Indictment charge Mr. Shafer with alleged forgery in the first degree in violation of O.C.G.A. § 16-9-1(b), alleging that Mr. Shafer and others:

> [U]nlawfully and with the intent to defraud, knowingly made a document titled _____ a writing other than a check, in such manner that the writing as made purports to have been made by the authority of the duly elected and

> qualified presidential electors from the State of Georgia, who did not give such authority…

Indictment, pp. 77, 80. Section states, in relevant part, that:

> (b) A person commits the offense of forgery in the first degree when with the intent to defraud he or she knowingly makes, alters, or possesses any writing, other than a check, in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

O.C.G.A. § 16-9-1(b). The requirement that the writing "purport[ ] to have been made by authority of one who did not give such authority…" is an essential element of the offense. *See McClure v. State*, 234 Ga. App. 304, 304 (1998) (citing O.C.G.A. § 16-9-1(a)). "'There may be forgery by the use of a fictitious name as well as by the use of a person's own name, if the intent exists to commit a fraud by deception as to the identity of the person who uses the name.'" *Mobley v. State*, 101 Ga. App. 317, 323 (1960).

The prosecution cannot prove by evidence beyond a reasonable doubt—or any evidence—that Mr. Shafer and the other Republican Presidential Elector defendants allegedly made, altered or possessed any writings which purported to be made by the Georgia 2020 Democratic Presidential Electors. "Having filed a timely special demurrer objecting to the form of the indictment, appellant is entitled to an indictment perfect in form and substance." *Malloy v. State*, 293 Ga. 350, 360 (2013) (citing *State v. Corhen*, 306 Ga. App. 495, 498 (2010). Mr. Shafer is entitled to an indictment "perfect in form and substance," without improper and prejudicial conclusory allegations regarding Presidential Electors by the State. The striking from the Indictment of the identity of the person whose identity was allegedly forged renders the forgery in the first-degree charges in Counts 10 and 16 fatally deficient, and makes dismissal of the Counts appropriate.

CONCLUSION

Based upon the facts and authorities set forth herein, Defendant David J. Shafer respectfully requests that the Court grant his Special Demurrer and Motion to Strike Legal Conclusions Concerning United States Presidential Electors from the Indictment, and strike the phrase "duly elected and qualified presidential electors" from pages 16, 18, 24, 38, 40, 42, 48, 49, 57, 58, 61, 62, 63, 76, 77 and 80 of the Indictment; the phrase "false Electoral College votes" from page 17 of the Indictment; and the phrase "lawful electoral votes" from page 16 of the Indictment, and dismiss Counts 8, 10 and 16 of the Indictment as to Defendant David J. Shafer.

Respectfully submitted, this 5th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 5th day of February, 2024, filed the foregoing filing with the Court using the Court's Odyssey eFileGa system, serving copies of the filing on all counsel of record in this action, and furthermore have sent a copy of the filing to the parties and the Court.

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