IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DONALD JOHN TRUMP, RUDOLPH WILLIAM LOUIS GIULIANI, JOHN CHARLES EASTMAN, MARK RANDALL MEADOWS, RAY STALLINGS SMITH III, and ROBERT DAVID CHEELEY.	INDICTMENT NO. 23SC188947

ORDER ON DEFENDANTS' SPECIAL DEMURRERS

The Defendants challenge Counts 2, 5, 6, 23, 28, and 38 of the indictment by way of special demurrer.[1] Demurrers provide a means for the criminally accused to ensure that the State's charging document satisfies the constitutional mandates of Due Process and the Sixth Amendment. *See* U. S. Const. Amend. VI ("the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation"); *State v. Mondor*, 306 Ga. 338, 341 (2019); *Everhart v. State*, 337 Ga. App. 348, 354 (2016). A special demurrer challenges the form of the indictment by claiming that the defendant is entitled to additional information or specificity. *Kimbrough v. State*, 300 Ga. 878, 881 (2017); O.C.G.A. § 17-7-54(a) (requiring that the offense be stated "with sufficient certainty"). Pre-trial, a charging document is expected to be "perfect in form as well as

[1] Directly or through adoption. (Trump Doc. 36, 9/11/23); (Giuliani Doc. 65, 11/28/23; Doc. 72, 1/4/24); (Eastman Doc. 57, 1/8/24); (Meadows Doc. 57, 11/30/23; Doc. 68, 2/5/24); (Smith Doc. 24, 9/11/23); and (Cheeley Doc. 48, 10/5/23).

substance." *Thomas v. State*, 366 Ga. App. 738, 739-40 (2023).[2] The challenged language of an indictment should be interpreted liberally in favor of the State, with any objections strictly construed against the Defendant. *Malloy v. State*, 293 Ga. 350, 360 (2013). Despite this, a pretrial challenge does not require a showing of prejudice, and the trial court should examine the indictment from the perspective that the accused is innocent, *i.e.*, lacking knowledge of any incriminating facts alleged by the State. *State v. Corhen*, 306 Ga. App. 495, 497 (2010).

Our appellate courts have provided a well-used standard for evaluating a special demurrer:

> [The test] is not whether [the indictment] could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

Sanders v. State, 313 Ga. 191, 195 (2022). Deploying a civil analogy, a special demurrer is akin to a "motion for a more definite statement" under O.C.G.A. § 9-11-12(e). *Kimbrough*, 300 Ga. at 881 n.12. The ultimate purpose is to put the Defendant on notice and protect against double jeopardy. *State v. English*, 276 Ga. 343, 346 (2003); *Dunn v. State*, 263 Ga. 343, 344 (1993) ("Due process is satisfied where the indictment puts the defendant on notice of the crimes with which he is charged

[2] The Defendants highlight this frequently cited provision to argue that an indictment must score a flawless 100% on a graded scale. The origin of this legal phrase does not appear to set such a high bar, limiting perfection to "time and place." *See Harris v. State*, 58 Ga. 332, 333-34 (1877). And as the Georgia Supreme Court has pointed out, imperfections are regularly overlooked when an indictment contains an immaterial defect such as a misnamed code section, the misspelling of a drug, or even the alleged date of the crime in some cases - indicating that perfection may be more of an aspirational statement than an exact working standard. *State v. Eubanks*, 239 Ga. 483, 485 (1977); *see also Green v. State*, 292 Ga. 451, 452 (2013) (listing immaterial defects); *Green v. State*, 109 Ga. 536, 540 (1900) ("We do not mean to say that this indictment is by any means perfect . . .").

and against which he must defend.").

Turning to the indictment itself, these six challenged counts charge various Defendants with Solicitation of Violation of Oath by Public Officer in violation of O.C.G.A. §§ 16-4-7 and 16-10-1. The crime of Violation of Oath by Public Officer, O.C.G.A. § 16-10-1, prohibits any public officer from willfully and intentionally violating the terms of his or her oath as prescribed by law. The term of the oath alleged to have been violated must be "expressly prescribed," meaning it is explicitly contained in the applicable statutory provisions. *Jowers v. State*, 225 Ga. App. 809, 812 (1997) (reversing when a police officer's oath did not expressly include a provision to uphold state law); *Bradley v. State*, 292 Ga. App. 737, 740 (2008) ("the State must present evidence that the defendant violated the terms of the oath actually administered and that those terms were from an oath 'prescribed by law'"); *see also State v. Greene*, 171 Ga. App. 329, 329 (1984) (indictment withstood a general demurrer by specifying the violated term). Criminal Solicitation, O.C.G.A. § 16-4-7, prohibits one from intentionally soliciting, requesting, commanding, importuning, or otherwise attempting to cause another person to engage in felony conduct.

The six counts are similarly structured and can be summarized as follows:

- Count Two alleges that multiple Defendants solicited elected members of the Georgia Senate to violate their oaths of office on December 3, 2020, by requesting or importuning them to unlawfully appoint presidential electors;
- Count Five alleges that Defendant Trump solicited the Speaker of the Georgia House of Representatives to violate his oath of office on December 7, 2020, by requesting or importuning him to call a special session to unlawfully appoint presidential electors;

- Count Six alleges that Defendants Smith and Giuliani solicited members of the Georgia House of Representatives to violate their oaths of office on December 10, 2020, by requesting or importuning them to unlawfully appoint presidential electors;
- Count 23 alleges that multiple Defendants solicited elected members of the Georgia Senate to violate their oaths of office on December 30, 2020, by requesting or importuning them to unlawfully appoint presidential electors;
- Count 28 alleges that Defendants Trump and Meadows solicited the Georgia Secretary of State to violate his oath of office on January 2, 2021, by requesting or importuning him to unlawfully influence the certified election returns; and
- Count 38 alleges that Defendant Trump solicited the Georgia Secretary of State to violate his oath of office on September 17, 2021, by requesting or importuning him to unlawfully decertify the election.

Defendants first argue that the indictment is defective because the charging language does not cite the oath each of these solicited public officers was required to take. This omission is legally harmless, as the Code provides only one option relevant to each category of public official. Each Georgia Senator and Representative must take the oath prescribed in O.C.G.A. § 28-1-4. The Governor in turn takes the oath prescribed in O.C.G.A. § 45-12-4. And the Secretary of State takes the oath prescribed in O.C.G.A. § 45-3-1. Without the possibility of alternative oaths prescribed by law, the Court agrees with the State that the Defendants are sufficiently apprised of which oath is

at issue in each indicted count.[3]

Even if the relevant oaths are apparent as a matter of law, the Defendants further contend that the counts do not detail the exact term of the oaths that are alleged to have been violated. The State first responds that the Defendants are only charged with solicitation, not violation of oath of office, and argues that the "great weight of authority" has never required charging language to reach beyond the elements of solicitation itself.[4] But *Sanders* tells us that the elements of the underlying, predicate felony that is alleged to have been solicited cannot be so easily ignored. In *Sanders*, the Georgia Supreme Court found a special demurrer should have been granted when an indictment failed to sufficiently allege the underlying felony solicited by the defendant. 313 Ga. at 202. In particular, for an allegation of solicitation of felony drug possession, the Court found the indictment should have averred the specific drug possessed and its quantity. *Id.* Without this information, the Defendant could not prepare a defense intelligently as the crime could be

[3] In a supplemental filing submitted February 9, 2024, the State details information provided in discovery concerning the exact oaths administered to the relevant public officials. The constitutionally sufficient notice provided by a sufficiently detailed indictment "may be supplemented [] by the pretrial discovery [a defendant] receives and any investigation his counsel conducts." *State v. Wyatt*, 295 Ga. 257, 263 (2014); *Sanders*, 313 Ga. at 196. This observation does not directly suggest that discovery, even if voluminous, is an adequate legal remedy to a special demurrer. *But see United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986) ("Nor is the defendant entitled to a bill of particulars with respect to information which is already available through other sources such as the indictment or discovery and inspection."). Given the conclusion though that only one oath of office exists for each relevant public official, the Court need not reach this argument.

[4] The State concedes, however, that Georgia appellate courts have only considered a single case applying a special demurrer to criminal solicitation - a case which sustained the demurrer. *Sanders*, 313 Ga. at 202.

committed "in a number of possible ways." *Id.* When charging other compound crimes,[5] such as felony murder, precedent is clear that the allegations must either include every essential element of the predicate offense or charge the predicate offense in a separate count. *See*, *e.g.*, *Mikenney v. State*, 277 Ga. 64, 65 (2003). In other words, a naked charge of solicitation cannot survive unless accompanied by additional elements establishing the solicited felony.

All three statutory oaths contain, with some linguistic variation, a provision that the oath-taker will support the Constitution of the United States and the Constitution of Georgia. The indictment, when detailing the manner and means of the criminal enterprise alleged in Count One, describes the Defendants as soliciting Georgia officials "to violate their oaths to the Georgia Constitution and to the United States Constitution."[6] Thus, reading the indictment as a whole, which the trial court is required to do, confirms that these are the prescribed terms at issue in the six challenged counts.

While the averments do contain a reference to the terms of the violated oaths, this Court finds that the incorporation of the United States and Georgia Constitutions is so generic as to compel this Court to grant the special demurrers. On its own, the United States Constitution contains hundreds of clauses, any one of which can be the subject of a lifetime's study. Academics and litigators devote their entire careers to the specialization of a single amendment. To further complicate the matter, the Georgia Constitution is not a "mere shadow[]" of its federal counterpart, and although some provisions feature similar language, the Georgia Constitution has

[5] Compound crimes, like solicitation, are those which rely on an underlying or predicate offense.
[6] (8/14/23 Indictment at 16).

been interpreted to contain dramatically different meanings. *See*, *e.g.*, Nels S.D. Peterson, *Principles of Georgia Constitutional Interpretation*, 75 Mercer L. Rev. 1, 11 (2023). This is in marked contrast with say, aggravated assault with a handgun, which can be perpetrated "in only a limited number of ways," and an indictment that merely refers to a handgun is "not too vague" because it infers that "the weapon was used either as a firearm or as a bludgeon." *Arthur v. State*, 275 Ga. 790, 791 (2002).[7]

The Court's concern is less that the State has failed to allege sufficient conduct of the Defendants – in fact it has alleged an abundance. However, the lack of detail concerning an essential legal element is, in the undersigned's opinion, fatal. As written, these six counts contain all the essential elements of the crimes but fail to allege sufficient detail regarding the nature of their commission, *i.e.*, the underlying felony solicited. *Kimbrough*, 300 Ga. at 884. They do not give the Defendants enough information to prepare their defenses intelligently, as the Defendants could have violated the Constitutions and thus the statute in dozens, if not hundreds, of distinct ways. *Id.* at 882. Under the standards articulated by our appellate courts, the special demurrer must be

[7] The State's supplemental citation to *Wiggins v. State*, 272 Ga. App. 414 (2005) (vacated on other grounds by *Wiggins v. State*, 280 Ga. 268 (2006)) makes this a closer call, but does not change the result. The indictment in *Wiggins* may not have listed the specific "crime against the State" that the defendant committed in violation of his oath, but it did include enough additional detail to create a much smaller universe of possibilities, in contrast to the reference in this indictment incorporating the entirety of both the state and federal constitutions.

granted, and Counts 2, 5, 6, 23, 28, and 38 quashed.[8] [9]

However, these pleading deficiencies do not apply to the corresponding overt acts listed in Count 1, specifically, overt acts 23, 42, 55, 102, 112, and 156. Overt acts alleged as part of a conspiracy are not held to the same pleading standards as statutorily based offenses. Instead, "[a]ll that is required is a reference to the overt act alleged by the State." *Bradford v. State*, 283 Ga. App. 75, 78-79 (2006); *see also State v. Pittman*, 302 Ga. App. 531, 535 (2010) (quoting *Bradford*). And even then, a defendant can be found guilty of conspiracy even after acquittal of any overt acts alleged to have been committed by that defendant, as long as at least one overt act is proven to have

---

[8] This does not mean the entire indictment is dismissed. *See State v. Cerajewski*, 347 Ga. App. 454, 457 (2018). The State may also seek a reindictment supplementing these six counts. *C.f.* O.C.G.A. § 17-7-53.1 (barring future prosecution after second quashal). Even if the statute of limitations has expired, the State receives a six-month extension from the date of this Order to resubmit the case to a grand jury. *See* O.C.G.A. § 17-3-3. Nor is it inevitable, presuming the State presents the appropriate motion, that the identity of future grand jurors will be publicly accessible. *See*, *e.g.,* Order to Seal Page 22 of Indictment, 2023-EX-001124 (Sep. 1, 2023) (granting ex parte motion to redact grand juror names).

This is an area of law where federal courts have achieved greater efficiency, and one might wish that future grand jurors could be spared this inconvenience for something so easily remedied. *See* Fed. R. Crim. P. 7(f) (allowing government filing of a bill of particulars to inform a defendant of the charges in sufficient detail to minimize surprise at trial). But Georgia law currently provides no such option. *See Ward v. State*, 188 Ga. App. 372, 373 (1988) ("A 'bill of particulars' is not a recognized pleading[.]").

Alternatively, the State may request a certificate of immediate review pursuant to O.C.G.A. § 5-7-2 which the Court would likely grant due to the lack of precedential authority. *See State v. Outen*, 289 Ga. 579, 581 (2011) (finding dismissal of less than all counts of indictment not a final order for purposes of State's automatic right to appeal).

[9] Defendant Cheeley goes further and claims Count 23 also fails because there is no nexus between the offense and the public officers' official duties. *See*, *e.g.*, *State v. Tullis*, 213 Ga. App. 581, 582 (1994). The Court disagrees and finds that the Georgia Senate can play a role in election contests and that the appointment of presidential electors relates to their official duties.

been committed by a co-conspirator. *Hall v. State*, 241 Ga. App. 454, 460 (1999); *Thomas v. State*, 215 Ga. App. 522, 523 (1994). Defendants have not provided any authority requiring that the particulars of an overt act be alleged or subjecting overt acts to the standards of general or special demurrers. The Defendants' challenge of these overt acts is therefore denied.

SO ORDERED, this 13th day of March, 2024.

Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit