

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

Case No. 23SC188947

v.

DAVID JAMES SHAFER *et al.*

Defendants.

**DEFENDANT DAVID J. SHAFER'S
GENERAL AND SPECIAL DEMURRER
TO THE INDICTMENT**

Defendant David J. Shafer respectfully files this General and Special Demurrer to the Indictment, requesting that the Court dismiss Counts 1, 8, 10, 12, 14, 16, 18 and 40 of the State's Indictment against him.

I. INTRODUCTION

The Indictment against the defendants alleges that, on December 14, 2020, David Shafer and other 2020 nominee United States Presidential Electors convened and cast allegedly false United States Electoral College votes at the Georgia State Capitol. *See* Indictment, p. 17. The prosecution alleges that Mr. Shafer made phone calls and sent or received emails and text messages, none of which form the basis for any substantive charge. *Id.* at 20, 28, 31, 32, 36, 37, 38, 39. It alleges that, on December 14, 2020, at the meeting of the 2020 Republican nominee United States Presidential Electors for the State of Georgia, Mr. Shafer encouraged persons to sign a document entitled "Certificate of the Votes of the 2020 Electors from Georgia" (Certificate). *Id.* at 35. On the basis of this alleged conduct, the prosecution has charged Mr. Shafer and other Republican nominee Presidential Electors with alleged violations of the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. §§ 16-14-1 *et seq.*; allegedly

impersonating a public officer; alleged forgery; alleged false statements and writings; and alleged criminal attempt to commit filing false documents. *Id.* at 13, 76, 77, 78, 79, 80, 81, 96.

The State seeks to punish as criminal conduct by Mr. Shafer which was lawful at the time. In nearly all of the charged conduct, Mr. Shafer was attempting to comply with the advice of legal counsel and the express requirements of the former federal Electoral Count Act 3 U.S.C. §§ 1 *et seq.* Mr. Shafer was furthermore following the historical precedent of the 1960 presidential election in the State of Hawaii. As the United States Supreme Court has observed:

[I]n 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College, 22 J. Legis. 145, 166, n. 154 (1996)...

Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

Bush v. Gore, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting). The Supreme Court has also held that “*peaceable assembly for lawful discussion cannot be made a crime.*’ And “*those who assist in the conduct of such meetings cannot be branded as criminals on that score.*” *Thomas v. Collins*, 323 U.S. 516, 539 (1945) (emphasis added) (quoting *Jonge v. Oregon*, 299 U.S. 353 (1937)). Mr. Shafer’s challenges to the charges against him on the grounds of lack of notice that his conduct would allegedly violate the statutes charged against him is the subject of Mr. Shafer’s Plea in Bar and Motion to Quash the Indictment.

However, even if the Indictment is considered on its face, the charges against Mr. Shafer omit essential and important elements of the alleged offenses. Based upon these fatal defects, the charges are subject to dismissal or demurrer. Mr. Shafer is entitled to an Indictment perfect in form, setting forth all essential elements of the alleged offenses. The prosecution's Indictment falls woefully short of these standards. Based upon the authorities set forth herein, Mr. Shafer respectfully asks that the Court grant his General and Special Demurrer to the Indictment, and dismiss Counts 1, 8, 10, 12, 14, 16, 18 and 40 of the Indictment against him.

II. ARGUMENT

A. Sufficiency Standards Relating to Indictments

O.C.G.A. § 17-7-54 provides that “[e]very indictment of the grand jury which states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury shall be deemed sufficiently technical and correct.” O.C.G.A. § 17-7-54(a). It follows that an indictment “must either ‘(1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish violation of a criminal statute.’” *Strickland v. State*, 349 Ga. App. 673, 675 (2019) (quoting *Jackson v. State*, 301 Ga. 137, 141 (2017)).

The rule that a grand jury indictment must set forth all the essential elements of the charged offense serves to satisfy the Sixth Amendment's due process requirement that the defendant “be informed of the nature and cause of the accusation,” and the Fifth Amendment's indictment requirement ensuring that a grand jury return an indictment only when it finds probable cause to support all the essential elements of the offense.

Sneiderman v. State, 336 Ga. App. 153, 154 (2016) (citing *Smith v. Hardrick*, 266 Ga. 54, 54–55 (1995)). “Unless every essential element of a crime is stated in an indictment,

it is impossible to ensure that the grand jury found probable cause to indict.” *Everhart v. State*, 337 Ga. App. 348, 355 (2016) (quoting *Smith*, at 55).

The purpose of an indictment “is to allow [the] defendant to prepare his defense intelligently and to protect him from double jeopardy.” *Sanders v. State*, 313 Ga. 191, 195 (2022) (quoting *Jones v. State*, 289 Ga. 111, 116 (2011)). The test for determining the sufficiency of an indictment:

“[I]s not whether it 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.”

Id. (quoting *State v. Wyatt*, 295 Ga. 257, 260 (2014); citing *State v. Grube*, 293 Ga. 257, 258 (2013)). “A defendant is entitled to be tried on a perfect indictment...” *Id.* (quoting *Jones*, at 115). “[E]ach count must be complete within itself and contain every allegation essential to constitute the crime... [although] the indictment is read as a whole.” *Id.* at 196 (quoting *State v. Jones*, 274 Ga. 287, 288-289 (2001); *Hester v. State*, 283 Ga. 367, 368 (2008)). Finally, a court must dismiss an indictment when there is a defect on its face. *See State v. Remy*, 308 Ga. 296, 301 (2020) (citing *State v. Bachan*, 321 Ga. App. 712, 714 (2013)).

B. The State’s Georgia Racketeer Influenced and Corrupt Organizations Act Charge, Count 1, Is Subject to Dismissal as to Mr. Shafer

Count 1 of the prosecution’s Indictment charges that, between November 4, 2020, and September 15, 2022, the defendants and others allegedly “while associated with an enterprise, unlawfully conspired and endeavored to conduct and participate in, directly and indirectly, such enterprise through a pattern of racketeering activity in violation of O.C.G.A. § 16-14-4(b)...” Indictment, p. 13. The Indictment alleges that the

defendants allegedly “knowingly and willfully joined a conspiracy to unlawfully change the outcome of the election in favor of Trump.” *Id.* at 14. It alleges that the defendants and others constituted “an enterprise as that term is defined in O.C.G.A. § 16-14-3(3)...” *Id.* The prosecution proceeds to charge that the defendants and others allegedly used various manners and methods to further the goals of the alleged enterprise and achieve its alleged purposes. *Id.* at 15-19. It then sets forth various alleged “overt acts to effect the objectives of the enterprise...” *Id.* at 20. The Indictment avers that the alleged overt acts were “in furtherance of the conspiracy alleged above and had the same and similar intents, results, accomplices, victims, and methods of commission and otherwise were interrelated by distinguishing characteristics and were not isolated acts.” *Id.* at 71.

The Georgia General Assembly enacted the Georgia Racketeer Influenced and Corrupt Organizations (RICO) Act, O.C.G.A. §§ 16-14-1 *et seq.*, to “apply to an interrelated pattern of criminal activity motivated by or the effect of which is pecuniary gain or economic or physical threat or injury.” O.C.G.A. § 16-14-2(b). The General Assembly did not intend “that isolated incidents of misdemeanor conduct or acts of civil disobedience be prosecuted under [the Act].” *Id.*

The Act provides, in relevant part, that “[i]t shall be unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.” O.C.G.A. § 16-14-4(b). It defines “racketeering activity” as any of the criminal offenses listed in O.C.G.A. § 16-14-5(5). *See* O.C.G.A. § 16-14-5(5). The Act is modeled on the federal RICO statute, and Georgia courts may rely upon federal decisions for guidance in interpreting the Georgia RICO Act. *See Martin v. State*, 189 Ga. App. 483, 485 (1988).

Section 16-14-2(b) is similar to, although narrower than, 18 U.S.C. § 1962(c). *See Dover v. State*, 192 Ga. App. 429, 430 (1989). “[T]he ‘crime’ proscribed by § 1962(c) is ‘the individual patterns of racketeering engaged in by a defendant...’” *United States v. Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995) (quoting *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987)). The basic elements of section 1962(c) are “(1) the existence of an enterprise... (2) that the defendant associated with the enterprise; (3) that the defendant participated in or conducted the enterprise’s affairs; and (4) that the participation in or conduct of the enterprise’s affairs was through a pattern of racketeering activities.” *United States v. Goldin Indus., Inc.*, 219 F.3d 1271, 1274 (11th Cir. 2000) (quoting *United States v. Weinstein*, 762 F.2d 1522, 1536 (11th Cir. 1985), quoting *United States v. Phillips*, 664 F.2d 971, 1011 (5th Cir. Unit B 1981)). To “participate in” means to “take part in.” *Reves v. Ernst & Young*, 507 U.S. 170, 178 (1993).

The requirement that a defendant participate in the enterprise “through a pattern of racketeering activity” has two sub-requirements: “(1) that the defendants’ predicate acts were related to the enterprise charged; and (2) that the predicate acts formed a pattern.” *Starrett*, 55 F.3d at 1542 (citing *United States v. Carter*, 721 F.2d 1514, 1527 (11th Cir. 1984); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14 (1985)). The predicate acts must be “related to each other and have continuity.” *Id.* at 1543 (citing *Sedima, S.P.R.L.*, at 496 n. 14; *Jones v. Childers*, 18 F.3d 899, 911 (11th Cir. 1994); *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1397 (11th Cir. 1995); *United States v. Church*, 955 F.2d 688, 693-694 (11th Cir. 1992)). “A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a

few weeks or months and threatening no future criminal conduct do not satisfy this requirement” *Id.* (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242 (1989)).

Even viewing the allegations in Count 1 in a manner most favorable to the State, the RICO charge is fatally defective in regard to Mr. Shafer for failure to allege a “pattern” of alleged racketeering activity. The specific facts alleged in the Indictment are:

1. That Mr. Shafer received or sent emails from or to alleged co-conspirators on or about November 20, 2020; December 7, 2020; December 10, 2020 and December 12, 2020, *see* Indictment, pp. 20, 28, 31, 37;
2. That Mr. Shafer telephoned alleged co-conspirators on or about December 10, 2020 and December 12, 2020, *id.* at 32, 36;
3. That Mr. Shafer received or sent text messages from or to alleged co-conspirators on or about December 13, 2020, *id.* at 38, 39;
4. That Mr. Shafer reserved a room at the Georgia State Capitol on or about December 11, 2020, *id.* at 35;
5. That Mr. Shafer encouraged individuals to sign a document entitled “Certificate of the Votes of the 2020 Electors from Georgia” (Certificate) during a meeting of Presidential Elector nominees on or about December 14, 2020, *id.* at 35;
6. That Mr. Shafer signed the Certificate during the meeting on or about December 14, 2020, *id.* at 40, 41;
7. That Mr. Shafer instructed an alleged co-conspirator to deliver a document entitled “RE: Notice of Filing of Electoral College Vacancy” during the meeting on or about December 14, 2020, *id.* at 42; and

8. That Mr. Shafer allegedly made certain statements to investigators for the Fulton County District Attorney's Office on or about April 25, 2022, *id.* at 69, 96.

Neither the emails or text messages, nor Mr. Shafer's reservation of a room at the State Capitol, constitute "racketeering activity" for the purposes of RICO. None of the alleged conduct constitutes an offense under 16-14-5(5). The prosecution has furthermore not charged any of the emails or text messages sent or received by Mr. Shafer, or the reservation of the room, as an alleged substantive offense.

Setting aside the prosecution's decision to charge Mr. Shafer with alleged false statements during his voluntary interview by investigators for the Fulton County District Attorney's Office—all alleged criminal conduct attributed to Mr. Shafer would have occurred on a single date—the meeting of the 2020 nominee Georgia Republican Presidential Electors at the Georgia State Capitol on December 14, 2020. *See* Indictment, pp. 35, 40, 41. The Indictment therefore fails to allege the essential RICO elements of (1) Mr. Shafer's participation in, or conducting of, the alleged enterprise through a pattern of racketeering activity, or (2) that any alleged enterprise that Mr. Shafer was purportedly involved in possessed "continuity." Furthermore, the prosecution's RICO charge also fails to allege either that the defendants were allegedly motivated by pecuniary gain or economic or physical threat, or that their conduct resulted in any alleged gain or economic or physical injury. Accordingly, Count 1 fails to charge a RICO offense, as contemplated by the General Assembly. *See* O.C.G.A. § 16-14-2(b).

Failure by the prosecution to allege an essential element of the offense is fatal to a charge by the prosecution. *See Woods v. State*, 361 Ga. App. 844, 853 (2021), *reconsideration denied* (Nov. 12, 2021), *cert. denied* (June 22, 2022) (reversing one of

the defendant's convictions, finding that the accusation against the defendant did not contain an essential element of the offense and that the accusation was therefore subject to a general demurrer); *Heath v. State*, 349 Ga. App. 84, 87, 825 S.E.2d 474 (2019) (where counts charging compound offenses in indictment against the defendant did not contain the essential elements of predicate offenses of reckless driving and driving under the influence of alcohol, and did not allege the facts necessary to establish violations of the predicate offenses, finding that the defendant's convictions should be reversed); *Jackson v. State*, 301 Ga. 137, 142, 800 S.E.2d 356 (2017) (reversing the defendant's conviction for failure to register as a sex offender where, although the indictment cited the statute that the defendant was accused of violating and it referenced some of the language of the statute, it failed to recite a sufficient portion of the statute to set out all the elements of the offense, and did not allege all the facts necessary to establish a violation of the statute); *Everhart v. State*, 337 Ga. App. 348, 354, 355 (2016) (reversing the defendant's conviction charge of cruelty to children in the first degree pursuant to O.C.G.A. § 16-5-70 where the State's indictment omitted essential elements of the offense); *Cooks v. State*, 325 Ga. App. 426, 428, 750 S.E.2d 765 (2013) (where the indictment of the defendant for robbery failed to allege a necessary element, concluding that the court was constrained to find that the indictment was void, that the trial court erred in overruling the defendant's general demurrer, and that defendant's conviction was required to be reversed); *State v. Daniels*, 281 Ga. App. 224, 225 (2006) (holding that the trial court properly quashed an indictment against the defendant because it failed to set forth the elements of aggravated assault). The Indictment's failure to allege Mr. Shafer's participation in the charged enterprise through a pattern of racketeering activity, or to allege an enterprise with continuity, are

serious and dispositive defects in the prosecution's RICO charge. The Court should accordingly dismiss Count 1 of the Indictment.

C. The Impersonating a Public Officer Charge, Count 8, Is Subject to Dismissal as to Mr. Shafer

Count 8 of the prosecution's Indictment fails to allege an offense of impersonating a public officer in violation of O.C.G.A. § 16-10-23. *See* Indictment, p. 76.

It alleges that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, unlawfully falsely held themselves out as the duly elected and qualified presidential electors from the State of Georgia, public officers, with intent to mislead the President of the United States Senate, the Archivist of the United States, the Georgia Secretary of State, and the Chief Judge of the United States District Court for the Northern District of Georgia into believing that they actually were such officers by placing in the United States mail to said persons a document titled "CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,"...

Id.

The prosecution's Count 8 is highly susceptible to dismissal. O.C.G.A. § 16-10-23 prohibits a person from "falsely hold[ing] 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..." O.C.G.A. § 16-10-23. Section 16-10-23 does not define the term "public officer," however.

The term is, however, defined in the Georgia Government Transparency and Campaign Finance Act, O.C.G.A. §§ 21-5-1 *et seq.*

(22) "Public officer" means:

- (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.

A United States Presidential Elector, even the “the duly elected and qualified presidential electors” whom Mr. Shafer and the other nominee Republican Presidential Electors were purportedly impersonating, are not “public officers” under Georgia law, as a matter of law. Furthermore, while the prosecution repeatedly makes allegations regarding “unlawfully” appointed Presidential Electors, nowhere in the Indictment does it allege how or when Mr. Shafer was appointed as a nominee Presidential Elector and how the appointment was allegedly “unlawful.” *See* Indictment, pp. 16, 21-25, 30, 33, 45, 46, 57, 72, 74, 84. The prosecution’s impersonating a public officer charge is fatally defective for failing to allege the essential element of a public officer and fails to allege an offense. Count 8 of the Indictment should properly be dismissed.

D. The Forgery Charges, Count 10 and Count 16, Are Subject to Dismissal as to Mr. Shafer

Pursuant to Georgia law:

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...

O.C.G.A. § 16-9-1(b). The prosecution charges in Count 10 of the Indictment that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, unlawfully and with the intent to defraud, knowingly made a document titled “CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,” a writing other than a check, in such manner that the writing as made purports to have been made by authority of the duly elected and qualified presidential electors from the State of Georgia, who did not give such authority, and uttered and delivered said document to the Archivist of the United States...

Indictment, p. 77. It furthermore alleges in Count 16 that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, unlawfully and with the intent to defraud, knowingly made a document titled “RE: Notice of Filling of Electoral College Vacancy,” 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, and uttered and delivered said document to the Archivist of the United States and the Office of the Governor of Georgia...

Id. at 80.

The elements of forgery in the first degree are “(1) knowingly making, altering, or possessing any writing (2) in such manner that the writing as made or altered purports to have been made by authority of one who did not give such authority and (3) uttering or delivering such writing (4) with the intent to defraud.” *McClure v. State*, 234 Ga. App. 304, 304 (1998) (citing O.C.G.A. § 16-9-1(a)). As the Court of Appeals has held, the “essence” of a forgery charge based upon a document purporting to have been made by another person, “is that ‘the writing must purport to be the writing of another than the person making it.’” *Jackson v. State*, 277 Ga. App. 801, 803 (2006) (quoting *Pope v. State*, 179 Ga. App. 739, 741 (1986)).

The prosecution’s forgery charges are devoid of any allegation that Mr. Shafer allegedly purported to be another person in the writings. *See Loden v. State*, 199 Ga. App. 683, 690 (1991) (reversing the defendant’s conviction for first degree forgery where

the State failed to prove that the name used by the defendant was “fictitious” or that the name was used in a “fictitious manner”). The prosecution has furthermore knowingly omitted from its Indictment the evident and highly inconvenient fact that Mr. Shafer’s actual name was used in both alleged writings. The failure of Counts 10 and 16 to state the alleged person “with authority” whom Mr. Shafer was allegedly purporting to be is fatal to the Counts, and warrants dismissal of the Counts.

E. The False Statements and Writings Charges, Count 12, Count 18 and Count 40, Are Subject to Dismissal as to Mr. Shafer

The Indictment charges Mr. Shafer with alleged false statements and writings under O.C.G.A. § 16-10-20. Count 12 alleges that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, knowingly, willfully and unlawfully made and used a false document titled “CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,” with knowledge that said document contained the false statement, “WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following,” said document being within the jurisdiction of the Office of the Georgia Secretary of State and the Office of the Governor of Georgia, departments and agencies of state government...

Indictment, p. 78. Similarly, in Count 18 the prosecution charges that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, knowingly, willfully, and unlawfully made and used a false document titled “RE: Notice of Filling of Electoral College Vacancy,” with knowledge that said document contained the false statements that DAVID JAMES SHAFER was Chairman of the 2020 Georgia Electoral College Meeting and SHAWN MICAH TRESHER STILL was Secretary of the 2020 Georgia Electoral College Meeting, said document being within the jurisdiction of the Office of the Georgia Secretary of State and the Office of the Governor of Georgia, departments and agencies of state government...

Id. at 81. And finally, in Count 40, the prosecution charges that Mr. Shafer allegedly:

[O]n or about the 25th day of April 2022, knowingly, willfully, and unlawfully made at least one of the following false statements and representations in the presence of Fulton County District Attorney's Office investigators:

1. That he "attended and convened" the December 14, 2020, meeting of Trump presidential elector nominees in Fulton County, Georgia, but that he did not "call each of the individual members and notify them of the meeting or make any of the other preparations necessary for the meeting";
2. That a court reporter was not present at the December 14, 2020, meeting of Trump presidential elector nominees in Fulton County, Georgia;

said statements being within the jurisdiction of the Fulton County District Attorney's Office, a department and agency of the government of a county of this state, contrary to the laws of said State, the good order, peace and dignity thereof.

Id. at 96.

O.C.G.A. § 16-10-20 prohibits:

[K]nowingly and willfully falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact; mak[ing] a false, fictitious, or fraudulent statement or representation; or mak[ing] or us[ing] any false writing or document, knowing the same to contain any false, fictitious, or fraudulent statement or entry, 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..

O.C.G.A. § 16-10-20. As the Georgia Supreme Court has held, "OCGA § 16-10-20 requires proof that the defendant knowingly and willfully made a false statement and that he knowingly and willfully did so in a matter within the jurisdiction of a state or local department or agency." *Haley v. State*, 289 Ga. 515, 527 (2011). "A defendant makes a statement in a matter within a state or local department or agency where the defendant contemplates that the statement would come to the attention of an agency with the authority to act on it." *Id.*

Counts 12 and 18 allege that the documents created on December 14, 2020, were allegedly in a matter within the jurisdiction of the Office of the Georgia Secretary of

State and the Office of the Governor of Georgia, however, the Counts fail to allege how the Secretary of State's Office or the Governor's Office possessed any authority to act on the documents. The version of the ECA at the time expressly provided at the time that two certificates of votes by United States Presidential Electors:

[S]hall be delivered to the secretary of state of the State, one of which shall be held subject to the order of the President of the Senate, the other to be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection.

3 U.S.C. § 11 (2020). Section 11 of the ECA is clear that the Secretary of State's duties with regard to certificates of Presidential Electors are limited to mere recordkeeping. The former ECA did not confer any authority over the votes or certificates of United States Presidential Electors on either state governors or secretaries of state.

Neither the Secretary of State nor the Governor possessed any authority over the certificates following the safe harbor date in section 5 of the former ECA, which in 2020 was December 8. Following the safe harbor date, the determination of what certificates to accept "is to be made, if made anywhere, in the Congress." *Bush*, 531 U.S. at 130 (Souter, J., dissenting). Counts 12 and 18 of the Indictment fail to allege what authority the Governor or Secretary of State allegedly possessed over the certificates. The Counts are fatally deficient, and should be dismissed. Furthermore, Count 40 should also be dismissed for the reason that it contains alleged statements which are true, and furthermore misrepresents other alleged statements by Mr. Shafer during his interview by investigators for the District Attorney's Office.

F. The Criminal Attempt to Commit Filing of False Documents Charge, Count 14, Is Subject to Dismissal as to Mr. Shafer

The prosecution has charged Mr. Shafer and others in Count 14 of the Indictment with alleged "criminal attempt to commit filing false documents" under O.C.G.A. § 16-4-

1 and O.C.G.A. § 6-10-20.1(b)(1). *See* Indictment, p. 79. It charges that Mr. Shafer and others allegedly:

[O]n or about the 14th day of December 2020, unlawfully, with intent to commit the crime of Filing False Documents, O.C.G.A. § 16-10-20.1(b)(1), placed in the United States mail a document titled “CERTIFICATE OF THE VOTES OF THE 2020 ELECTORS FROM GEORGIA,” addressed to Chief Judge, U.S. District Court, Northern District of Georgia, 2188 Richard D. Russell Federal Office Building and U.S. Courthouse, 75 Ted Turner Drive, SW, Atlanta, GA 30303, a substantial step toward the commission of Filing False Documents, O.C.G.A. § 16-10-20.1(b)(1), with intent to knowingly file, enter, and record said document in a court of the United States, having reason to know that said document contained the materially false statement, “WE, THE UNDERSIGNED, being the duly elected and qualified Electors for President and Vice President of the United States of America from the State of Georgia, do hereby certify the following,” ...

Id.

“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.” O.C.G.A. § 16-4-1. “An attempt to commit a crime consists of three elements: first, the intent to commit the crime; second, the performance of some overt act towards the commission of the crime; and third, a failure to consummate its commission.” *Wittschen v. State*, 259 Ga. 448, 4487 (1989) (quoting *Howell v. State*, 157 Ga.App. 451, 454 (1981); quoting *Alexander v. State*, 66 Ga.App. 708, 711 (1942)). Other “essential elements of the offense are: ‘(1) The act must be such as would be proximately connected with the completed crime. (2) There must be an apparent possibility to commit the crime in the manner proposed.’” *Groves v. State*, 116 Ga. 516, 42 S.E. 755, 756 (1902) (quoting Clark & M. *Crimes*, § 123, p. 126 (2d Ed.)). “Attempt is a specific intent crime in that it requires a showing that the actor intended to commit

the substantive offense.” *Jenkins v. State*, 354 Ga. App. 674, 676 (2020) (quoting Kurtz, *Ga. Criminal Offenses and Defenses, Attempt and Solicitation* (2019 ed.)).

The prosecution’s Count 14 suffers from defects and is susceptible to dismissal. It alleges that Mr. Shafer, his co-defendants and others allegedly attempted to send a Presidential Elector certificate to the District Court to file and record, but omits the essential allegation that Mr. Shafer and the others allegedly failed in the attempt. Furthermore, section 6-10-20.1(b)(1) states that it is unlawful for “*any person* to (b) [k]nowingly file, enter, or record any document in a public record or court of this state or of the United States knowing or having reason to know that such document is false or contains a materially false, fictitious, or fraudulent statement or representation.” O.C.G.A. § 6-10-20.1(b)(1). The Count fails to specify which “person” allegedly sent the certificate to the District Court. The defects and omission of essential elements in the prosecution’s Count 14 warrant dismissal of the Count as to Mr. Shafer.

CONCLUSION

Based upon the arguments and authorities set forth herein, Defendant David J. Shafer respectfully requests that the Court grant his General and Special Demurrer to the Indictment and dismiss Counts 1, 8, 10, 12, 14, 16, 18 and 40 of the State’s Indictment against him.

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.

/s/ Craig A. Gillen

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