In the Court of Appeals of the State of Georgia

MICHAEL A. ROMAN, DAVID J. SHAFER, ROBERT DAVID CHEELEY, MARK RANDALL MEADOWS, DONALD JOHN TRUMP, CATHLEEN LATHAM, RUDOLPH WILLIAM LOUIS GIULIANI, JEFFREY BOSSERT CLARK, HARRISON FLOYD, *Appellants*,	)	Case Nos. A24A1595, A24A1596, A24A1597, A24A1598, A24A1599, A24A1600, A24A1601, A24A1602, A24A1603
versus	)	
THE STATE OF GEORGIA, *Appellee*.	)	

BRIEF OF APPELLEE

The State of Georgia, by and through Atlanta Judicial Circuit District Attorney Fani T. Willis, hereby files its Brief of Appellee.

INTRODUCTION

The Appellants sought to disqualify District Attorney Fani T. Willis by persuading the trial court that she had engineered the present case, which involves issues of national importance and daily public scrutiny, as a scheme for her personal enrichment. They failed. After giving the Appellants every opportunity to provide evidence and argument in support of their theory, the trial court decided that their central witness had provided no information of value and that their central theory did

not add up. The court declared that the Appellants had failed to demonstrate that the District Attorney's conduct had negatively affected their rights or the case at all. It credited the District Attorney's testimony on crucial aspects of the facts at issue, found that she had not acquired an improper personal stake in the case, and determined that her public statements about the case would not affect any future trials.

Where the trial court criticized the District Attorney, it was not about actual prejudice to the Appellants or actual effects upon the case, but about appearances. Having failed to adequately support their chosen theories or persuade the trial court on their central point, the Appellants still received the boon of the withdrawal of a special prosecutor. The trial court determined that although no true conflict of interest existed in this case, either the District Attorney or the special prosecutor had to exit the case in order to correct the appearance of impropriety that it perceived.

Unsatisfied, the Appellants now seize upon the trial court's criticisms of the District Attorney to distort its actual findings and overstate their case. They ask this Court to second guess the trial court's factual conclusions and apply standards of disqualification that no Georgia court has ever authorized or employed. Despite receiving an

order from the trial court that goes out of its way to safeguard not just fairness but the *appearance* of fairness, the Appellants would have this Court declare that the trial court should have shown less concern for the case's facts and circumstances and abandon its discretion rather than put it to use. Because they again fail to persuade, the State asks that this Court affirm the trial court's order.

SUMMARY OF THE ARGUMENT

This brief is comprised of three sections with each addressing one of the primary arguments proffered by the Appellants. The first section outlines why the trial court did not abuse its discretion in declining to disqualify the District Attorney for either an actual conflict of interest or the appearance of impropriety. Despite the Appellants' suggestion that this determination is to be reviewed *de novo*, the decisions of this Court and the Georgia Supreme Court indicate that whether an actual conflict of interest exists is a factual finding subject to a clear error or "any evidence" standard of review. With that understanding, the evidence, particularly the trial court's assessment of the District Attorney's testimony at the hearing on this matter, supports the trial court's

conclusion that the District Attorney has not acquired a personal stake in the outcome of this case.

The second section demonstrates that the trial court did not abuse its discretion in declining to disqualify the District Attorney based solely upon the appearance of impropriety, particularly where, as the trial court found here, the circumstances at issue in this appeal have had no actual impact on the case. While there is support for the notion that Georgia courts need not apply the appearance standard at all, the trial court certainly did not abuse its discretion in applying it with consideration for the specific facts and circumstances of this case. Precedent specifically forbids the mechanical, *per se* rule of disqualification encouraged by the Appellants, while it encourages the weighing of competing interests demonstrated in the trial court's order.

The third section discusses why the trial court did not abuse its discretion in declining to disqualify the District Attorney for "forensic misconduct" on the basis of various public statements she has made. Again, the Appellants encourage this Court to adopt a *per se* rule of disqualification on these grounds that has never been adopted or approved. The authorities on the subject indicate that the inquiry should

focus on an appraisal of prejudice and fundamental fairness, the precise factors which the Appellants argue should simply be presumed. The trial court did not abuse its discretion in finding that none of the District Attorney's statements were capable of permanently impairing the fundamental fairness of any future trial and that, as a result, disqualification was not appropriate.

PROCEDURAL HISTORY

On August 14, 2023, a Fulton County grand jury returned an indictment charging the above-named Appellants and other defendants on a total of forty-one felony counts relating to a conspiracy to unlawfully change the outcome of the 2020 presidential election. (R. at 66).[1] On January 8, 2024, Appellant Roman filed his "Motion to Dismiss Grand Jury Indictment as Fatally Defective and Motion to Disqualify the District Attorney, Her Office and the Special Prosecutor from Further Prosecuting This Matter." (R. at 704). The remaining Appellants joined and supplemented this motion later. (Latham R. 872; Shafer R. 1673;

[1] Citations to the record are designated "(R. at [page number])," taking the page numbers from the record in the docket of Appellant Michael Roman, A24A1595. When a citation is to the record in another Appellant's docket, the citation will indicate that Appellant's name. Citations to the transcript of the evidentiary hearing in this matter are designated "(T. [page number])."

Trump R. 1059; Floyd R. 1085; Clark R. 998; Meadows R. 804; Cheeley R. 1087; Giuliani R. 825).

After denying motions to quash filed by Appellee, the trial court conducted an evidentiary hearing that spanned three days, February 15, 16, and 27, 2024. The trial court heard closing argument on March 1, 2024. On March 15, 2024, the trial court entered its Order on Defendant's Motions to Dismiss and Disqualify the Fulton County. District Attorney. (R. at 1708). The Defendants submitted a joint motion for a certificate of immediate review on March 19, 2024, which was granted the next day by the trial court. (R. at 1731-44).

On March 29, 2024, Appellants filed their Application for an Interlocutory Appeal. (See the docket of *Trump v. State*, A24I0160). This Court granted the Application for Interlocutory Appeal on May 8, 2024. The Appellants filed timely notices of appeal. (R. at 33). This appeal follows.

STATEMENT OF FACTS

Appellant Michael Roman's motion to disqualify the District Attorney declared that she had hired Nathan Wade to lead the defendant's prosecution as part of a scheme intended to enrich herself.

The motion was premised largely upon information Appellant claimed to have received from Wade's former law partner, Terrance Bradley. At the hearing on this matter, Terrance Bradley failed to substantiate or corroborate nearly any fact whatsoever, to the extent that the trial court discarded his testimony in its entirety. With Bradley's testimony disregarded except for where it provides context to the statements of other witnesses, the hearing and record established the following facts.

On November 1, 2021, the District Attorney hired Nathan Wade as a Special Assistant District Attorney (SADA) to lead the anti-corruption investigation that resulted in the indictment in this case. (T. 185). Prior to Wade's hiring, the District Attorney had asked former Georgia Governor Roy Barnes to lead the investigation at a meeting on October 26, 2021, and Governor Barnes declined for reasons related to his law practice and security concerns.[2] (T. 418, 437). Wade was also present at that meeting. (T. 418-19).

[2] D.A. Willis also approached Gabriel Banks prior to hiring Wade. *See* Michael Isikoff & Daniel Klaidman, *Find Me The Votes: A Hard-Charging Georgia Prosecutor, a Rogue President, and the Plot to Steal an American Election*, 227 (2024).

The District Attorney had met Wade in 2019 at a municipal court conference where Wade taught a class. (T. 103, 260-63). After that class, D.A. Willis was talking to a friend outside the room. (T. 103, 260-63). Wade also knew the person speaking with D.A. Willis, so he approached to speak to her, and the mutual friend introduced him to D.A. Willis. (T. 103, 263). They exchanged information, and Wade left the conference by himself in his car.[3] (T. 103, 263). During 2019, D.A. Willis would call Wade on the phone with questions about serving as a municipal court judge or starting her private legal practice. (T. 104). At the time, Wade was a district representative for municipal court judges. (T. 104).

They spoke more frequently the next year but less during her campaign for District Attorney in Fulton County. (T. 106). In 2020, Wade was undergoing treatment for cancer and could not be in unsterile environments. (T. 233, 350). This limited their in-person contact, but D.A. Willis went to see Wade at his office "once or twice." (T. 351). D.A. Willis recalled picking up lunch so that the two could eat together at her office

[3] Appellant Roman's counsel claimed that witness Terrance Bradley had told her Wade and D.A. Willis began a romantic relationship at the conference. However, in a reversal that would characterize all of Bradley's sworn testimony, he testified that he was merely confirming that the District Attorney and Wade met at the conference. (T. 653).

because Wade could not go to restaurants. (T. 352). Due to his cancer diagnosis, Wade was not dating in 2020 and early 2021. (T. 233).

After D.A. Willis won the election for District Attorney, Wade participated in her "transition team" and participated in personnel interviews. (T. 145). The District Attorney went to Wade's office once for a meeting with her staff. (T. 352). Austin Dabney, an associate at Wade, Bradley, and Campbell, testified that he might have seen the District Attorney once in passing. (T. 555, 632-33).

After Governor Barnes declined to lead the investigation and Wade agreed to take the role, his initial contract began on November 1, 2021. (R. at 982-85). It was renewed on November 15, 2022, and again on June 12, 2023. (R. at 982-96). Wade's contracts with Fulton County as special prosecutor paid him $250 an hour.[4] (R. at 982). The contracts capped the hours that he could work. (T. at 225). His first contract limited his work to sixty hours maximum per month, and he would not be compensated by the County for any hours worked above the cap. (R. at 983; T. 225). The

[4] In comparison, the District Attorney had knowledge that her predecessor in office paid outside lawyers up to $375 an hour. (T. 363). The District Attorney caps payments to outside lawyers at $250 an hour. (T. 363). Special prosecutor Anna Cross is compensated at $250 an hour. (R. 1032). Special prosecutor John Floyd is compensated at $150 an hour. (R. 1037).

first renewal contract raised the cap to no more than six hundred hours total for the duration of the contract (November 15, 2022, to May 15, 2023). (R. at 993-94). Wade's second contract renewal on June 12, 2023, kept the same hourly rate but raised his cap to no more than 120 hours in a calendar month. (R. at 987).

Wade would submit invoices reflecting his work beyond the cap but did not submit these hours for compensation. (T. 226; R. at 1003). While Wade often worked more hours than the contract cap, he testified that he understood this case required more than the contract authorized, and his professional responsibility obligated him to perform this work despite not being compensated for those hours. (T. 227-28). Wade testified that his income decreased as a result of working on this case, as he spent "ninety-nine percent" of his time working as a special prosecutor from November 2021 to January 2023. (T. 222-24). In January 2022, Wade reported an income of about $14,000 a month and in January 2023, he reported about $9000 a month. (T. 223). He earned about half of his income from his work as a SADA, and the other half from the profit sharing from his law practice. (T. 222).

D.A. Willis explained that, in contrast to suggestions made by Appellant Roman in his motion to disqualify, she had not been destitute prior to her election as District Attorney. In 2019, she lived in the home that she had bought and paid for in South Fulton. (T. 300). In interviews included in the book *Find Me the Votes*, discussed below, she told the authors she had been in a financial predicament; however, that issue related to having to give up the dual salaries she earned while serving as a municipal court judge and maintaining a private law practice, as well as the personal loss of $50,000 which she put into an unsuccessful campaign for a Superior Court judgeship in 2018. (T. 310-13). As the District Attorney put it, while she probably did have some clients who did not pay their bills, she did not live month to month. (T. 315). As District Attorney, she earns a salary of over $200,000 a year. (T. 311). Willis acknowledged that she did not keep a ledger for cash expenditures. (T. 317).

The District Attorney and Wade began a relationship in early 2022, during which they took four trips together. The first trip was a cruise that began in Miami followed by a stay in Aruba in October of 2022. (T. 275-78). On this trip, Wade placed the expenses on his credit card, but

the District Attorney reimbursed him for her share of the trip in cash. (T. 137-43, 280). The next trip was a cruise to the Bahamas that began in Miami over New Years. (T. 142, 287). The District Attorney paid for the plane tickets to Miami, but Wade paid for the cruise expenses. (T. 275). The third trip was to Belize in celebration of Wade's 50th birthday and was paid for by the District Attorney. (T. 127). Even though Wade put expenses on his credit card, D.A. Willis reimbursed him in full, recalling that she gave him $2500.00 in cash and carried more cash to pay for expenses there. (T. 230, 284, 353). The final trip was to Napa Valley. (T. 127). For that trip, Wade paid for the plane tickets, hotel, and transportation, and D.A. Willis paid Wade for roughly half of the trip's cost by paying for wine tastings, food pairings, and activities, while also giving cash directly to Wade. (T. 130-31, 285). In addition to these overnight trips, D.A. Willis and Wade took day trips to Tennessee, Alabama, South Carolina, and other places in Georgia. (T. 134-35, 272, 288).

In testimony that the trial court credited, (R. at 1714), the District Attorney and Wade consistently testified that they always carried cash and would reimburse each other with cash or by paying for other, similar

expenses. (T. 129, 132, 282). Wade testified that the District Attorney was an independent woman who insisted that she carry her own weight, which was a point of contention between the two. (T. 131). D.A. Willis also testified that this insistence to pay her own bills caused tension in the relationship. (T. 344). She further emphasized that she never let a man, other than her father, foot her bills. (T. 344).

Wade testified the costs and expenses would balance themselves out and "there was never a time when [Wade] would say, 'Hey, I bought dinner. Dinner cost $25. You need to give me $25.'" (T. 131). The District Attorney explained that the two of them would alternate who paid for meals, rather than splitting individual checks. (T. 304). She estimated that over the course of the relationship, she never ate over $100 at a single meal; she testified that whatever the total cost of her meals with Wade, they were split between them. (T. 364).

As for the trips, Wade explained that he often booked or paid for flights with his credit card, with the District Attorney reimbursing him in cash. (T. 109). D.A. Willis maintained that she kept cash on hand where she lived, a practice she learned from her father, John Floyd (no relation to the special prosecutor of the same name) (T. 281). This was

corroborated by her father's testimony that he was also taught to carry cash on him and that the practice was a form of cultural prudence. (T. 462). In particular, Floyd recalled going with his wife and daughter to a restaurant in Cambridge, Massachusetts, which refused to take his credit cards or traveler's checks to pay for the meal. (T. 462). He also kept safes in his house, and he bought D.A. Willis a lock box for her house as well. (T. 281, 463).

The evidentiary foundation for the Appellants' motions was intended to be the testimony of Terrance Bradley. However, as Bradley failed to substantiate nearly any allegation proffered by the Appellants, their strategy changed. As observed by the trial court, over the course of the hearing on this matter, the Appellants "pivoted" from attempting to prove a financial benefit to attempting to disprove the District Attorney's and Wade's testimony about when their relationship started. (R. at 1723). Both testified that their romantic relationship started in early 2022. (T. 102, 335). Moreover, Floyd testified that he had met his daughter's prior boyfriend but had not met Wade in 2019, 2020, or 2021. (T. 446). The trial court found that the testimony elicited by the Appellants failed to credibly contradict Floyd's, Wade's, or the District Attorney's testimony,

ultimately finding that "neither side was able to conclusively establish by a preponderance of the evidence when the relationship evolved into a romantic one." (R. at 1723).

Over three days of testimony, Bradley repeatedly told the trial court that he had no personal knowledge of the relationship. (T. 37, 510, 653). Although numerous text messages from Bradley were proffered by counsel for the Appellants, Bradley testified that his messages were based on mere speculation. (T. 669, 709). Ultimately, as noted above, the trial court entirely disregarded the testimony from Bradley, the Appellants' star witness. (R. at 1723).

The District Attorney had rented witness Robin Yearti's Hapeville condominium beginning in April 2021, but they had known each other since the early 1990s. (T. 53-54, 263-67). Yearti did not live at the condo with Willis, as she had moved to another house with her husband. (T. 54, 65, 267). While Yearti claimed she had personal knowledge of the relationship based on an observation from prior to November 1, 2021, her testimony "ultimately lacked context and detail." (T. 63; R. at 1723). She testified that her observation was prior to November 1, 2021, and said she observed "hugging, kissing, [and] just affection"; however, she could

not provide a tighter date range, the location where she observed what she claimed to have seen, or any other details. (T. 63). Equally vague was Yearti's testimony that DA Willis told her about the relationship. (T. 69). When pressed on both cross-examination and redirect, Yearti could not give an approximate date or even how the conversation came about when asked. (T. 69, 71). Yearti was also evasive about being forced out of employment at the DA's office, first claiming that she resigned before admitting on cross examination that she was not welcome to stay after being warned multiple times about her poor performance. (T. 61, 68).

Both the District Attorney and Wade denied living together, which Appellant Roman claimed had occurred. (T. 145). Wade had not been to the District Attorney's South Fulton house. (T. 300). Wade had not even known the address of the South Fulton house until the District Attorney was doxxed. (T. 144). Wade had been to the Hapeville condo but testified that he did not spend the night there. (T. 144-45). Willis recalled their going to eat at a nearby restaurant. (T. 328). Yearti had no information that Wade lived with D.A. Willis at the condo and never observed anything indicating he did so. (T. 66). Bradley was asked whether he

knew of Wade having a garage door opener to the Hapeville condo, and yet again, he testified that he had no personal knowledge.

Wade filed for divorce in Cobb County on November 2, 2021, after being separated for several years, and the Appellants obtained many of his financial records from sealed divorce filings. (T. 76). Wade testified that his marriage was broken in 2015 after his wife had an affair. (T. 98). He testified that he and his wife decided to separate but not file for divorce until the children were out of school. (T. 97-98). In his mind, the marriage was irretrievably broken and over in 2015, and he was free to see other women. (T. 98). Wade testified that he and his wife had an initial agreement, but the divorce became contentious, requiring him to wait for her to return to Georgia in the fall of 2021 to file and serve her with the divorce. (T. 208-09).

Wade first responded to interrogatories in the divorce case on December 27, 2021. (T. 77). In the first response, he answered that he had no documents relating to gifts purchased for members of the opposite sex with whom he had romantic relationship. (T. 77). The interrogatories were updated on May 30, 2023, and December 22, 2023, with receipts. (T. 82, 87). While Wade was in a romantic relationship with DA Willis in

2022 and 2023, he testified that he did not feel that he had lied in his response because he considered the marriage to be over as of 2015. (T. 97-98). He updated these responses after the motion to disqualify to assert the privilege afforded to him under O.C.G.A. § 24-5-505. (T. 88). He told the court that he did not want his divorce proceedings to bleed into this case. (T. 89).

The trial court was emphatic that the procedural history of the investigation and case shows that the State has not prolonged the case to enrich any party. The State dissolved the Special Purpose Grand Jury's investigation on January 9, 2023, nearly four months prior to the expiration of its mandate on May 2, 2023. (R. at 947, 950). The State indicted over twenty fewer defendants than those recommended by the Special Purpose Grand Jury. (R. at 955-63). After indictment, the State requested that trial begin in October of 2023. (R. at 166). After two defendants chose to demand a statutory speedy trial, the State opposed severance of defendants who did not join in demanding a speedy trial, so that one trial would occur. (R. at 176-79). After the proceedings with the speedy trial defendants ended, the State again asked for trial to begin less than one year after the indictment had been returned. (R. at 680-83).

After the trial court issued its order on this motion to disqualify and dismiss the indictment, Wade resigned from the case. (Clark R. at 1548).

Find Me the Votes

On January 30, 2024, a book titled *Find Me The Votes: A Hard-Charging Georgia Prosecutor, a Rogue President, and the Plot to Steal an American Election* was published about the investigation that resulted in this indictment. *See* Michael Isikoff & Daniel Klaidman, *Find Me The Votes: A Hard-Charging Georgia Prosecutor, a Rogue President, and the Plot to Steal an American Election* (2024). Despite the Appellants' claims that the authors had full access to the District Attorney and the prosecution team, D.A. Willis sat with the authors for about two hours of interviews in total, (T. 269-70), while Wade never met with the authors of the book. (T. 180).

The book contained a chapter on D.A. Willis's biography and another on her campaign for district attorney. Isikoff at 9-53. Much of the information from within the grand jury process appears to be taken from interviews given by Emily Kohrs, the SPGJ foreperson. Isikoff at 236. Further, in the comment identified by Appellants as "injecting race," into the case, Willis did not claim that the defendants were racist or made

racist comments but that the comments in general about this case, without regard to being positive or negative, were racist. Isikoff at 223. Also, Appellants again pointed to four pages in a 295-page book to state that she used to book to say that she had been chosen to God to do this investigation. Isikoff 272-75. The book recounts that an elderly woman who once worked in the DA's office under the previous administration had reached out to Willis that the woman received a message from God about fasting and praying with Willis before a "big announcement." *Id.* at 272. In the week prior to the indictment's presentation to the grand jury, Willis recounted that she would read Bible verses and mark those that resonated with her. *Id.* at 273. Willis recounted that verses that talked about "receiving protection" from God resonated with her as if that was what God wanted her to hear. *Id.* at 273. On the day of the indictment, the verse she read was "Let patience have its perfect work, that you may be perfect and complete." *Id.* at 272-73.

Speech given on January 14, 2024

On January 14, 2014, the day prior to Martin Luther King Day, the District Attorney gave a speech during Sunday services at Big Bethel AME Church in which she addressed some of the challenges of her office

and responded to criticisms aimed both at her and at the qualifications of SADA Wade.[5] The briefs of Appellants Trump and Shafer each transcribe portions of the speech. (Trump Br. at 8-11, Shafer Br. at 7-9). The District Attorney addressed questions about her practice of hiring special prosecutors, naming in particular Fulton County Commissioner Bridget Thorne. The District Attorney defended Wade's qualifications and her choice to hire him, and she did not name any of the Appellants or any other individual, nor did she discuss the facts, charges, or any other substantive information related to the case. She made general statements about the decrease of homicides and crime in general, as well as the reduction of the backlog of cases, during her tenure as district attorney.

[5] No recording or transcript of this speech was introduced into the record. The trial court noted that the speech had been extensively quoted in the motions and there was YouTube recording. (T. 390-93).

STANDARD OF REVIEW

In Georgia, appellate courts review a trial court's ruling on a motion to disqualify a prosecutor for an abuse of discretion. *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2012) (citing *Head v. State*, 253 Ga. App. 757, 758 (2002)). "Such an exercise of discretion is based on the trial court's findings of fact which we must sustain if there is any evidence to support them." *Neuman v. State*, 311 Ga. 83, 88 (2021) (quoting *Ventura v. State*, 346 Ga. App. 309, 310 (2018)). This means that determinations concerning matters of credibility or evidentiary weight will not be disturbed unless they are flatly incorrect.

> As we review the decision of the trial court [on a conflict-of-interest claim], we owe no deference to its application of the law to the facts of this case. We owe substantial deference, however, to the way in which the trial court assessed the credibility of witnesses and found the relevant facts. To that end, we must accept the factual findings of the trial court unless they are clearly erroneous, and we must view the evidentiary record in the light most favorable to the findings and judgment of the trial court.

Adams v. State, 317 Ga. 342, 352 (2) (2023) (brackets in original) (quoting *Tolbert v. State*, 298 Ga. 147, 151 (2015)). "In Georgia, it is well-settled that the 'clearly erroneous' standard for reviewing findings of fact is equivalent to the highly deferential 'any evidence' test." *Reed v. State*,

291 Ga. 10, 13 (2010) (collecting cases). Appellate courts thus will not—indeed, may not—substitute their own appraisal of the factual record for the trial court's so long as there is "any evidence to sustain them." *LaFont v. Rouviere*, 283 Ga. 60, 61 (2008). Both the Georgia Supreme Court and this Court have reiterated this principle. *Pauldo v. State*, 317 Ga. 433, 441 (2023) *Morrell v. State*, 313 Ga. 247, 251 (2022); *Mathenia v. Brumbelow*, 308 Ga. 714, 716 (2020); *Neuman*, 311 Ga. at 88; *Ventura*, 346 Ga. App. at 310. "As the party seeking disqualification, [the appellants] had the burden to demonstrate to the superior court that disqualification was warranted[.]" *Cardinal Robotics v. Moody*, 287 Ga. 18, 21 (2010).

Finally, disqualifications are not favored. Reviewing courts "approach motions to disqualify with caution due to the consequences that could result if the motion is granted," including cost, inevitable delays, and the loss of "specialized knowledge of the disqualified attorney," as well as the potential for such motions to serve as a dilatory tactic. *Ga. Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207, 213 (2021) (citing *Hodge v. URFA-Sexton*, 295 Ga. 136, 138-39 (2014)). These hardships exist for the public in their choice of elected prosecutor as they

do for private citizens in their choice of counsel. "Accordingly, we view disqualification as an extraordinary remedy that should be granted sparingly."[6] *Id.* "Rather than mechanically applying rules for the disqualification of counsel, 'we should look to the facts peculiar to each case in balancing the need to ensure ethical conduct on the part of lawyers appearing before the court and other social interests, which include the litigant's right to freely chosen counsel.'" *Id.* (citing *Cohen v. Rogers*, 338 Ga. App. 156, 170 (2016)). Trial courts thus have broad and flexible authority to address circumstances as needed: a trial court "has a wide discretion in framing its sanctions to be just and fair to all parties involved." *United States v. Miller*, 624 F.2d 1198, 1201 (3rd Cir. 1980).

Actual conflicts of interest

One aspect of the standard of review requires additional examination. Among the trial court's most crucial factual findings is its ultimate determination of whether a conflict of interest or "actual impropriety" exists. The determination of whether an actual conflict of interest exists is a factual finding that will not be disturbed if there is

[6] Relatedly, an opinion of this court has indicated that disqualification allegations require a "high standard of proof." *McGlynn v. State*, 342 Ga. App. 170, 173 (2017). The trial court declined to attach any significance to this language. (R. at 1711 n.2).

any evidence to support it, while a trial court's "use of the disqualification sanction"—its application of disqualification as a remedy—is reviewed "for abuse of discretion." *Blumenfeld v. Borenstein*, 247 Ga. 406, 410 (1981).

> It has been suggested that the trial court's order of disqualification should not be disturbed on appeal absent an abuse of discretion. *The trial court's finding of fact was that there was no actual impropriety.* We do not disturb this finding. The disqualification is in the nature of a conclusion of law rather than a finding of fact. *United States v. Miller*, 624 F.2d 1198 (3rd Cir. 1980). This conclusion, based as it is solely on an appearance of impropriety due to status, cannot stand.

Id. (emphasis added).

"Such an exercise of discretion is based on the trial court's findings of fact which we must sustain if there is any evidence to support them." *Whitworth v. State*, 275 Ga. App. 790, 791 (2005) (physical precedent). *See also Ventura*, 346 Ga. App. at 310 (quoting *Whitworth*); *Neuman*, 311 Ga. at 88 (same); *McLaughlin v. Payne*, 295 Ga. 609, 614 (2014) ("Accordingly, the habeas court did not clearly err in finding that McDade had a disqualifying conflict of interest in Payne's prosecution in that he had 'acquired a personal interest or stake in the defendant's conviction.'"). Indeed, in cases involving claims of ineffective assistance

of counsel, this Court has routinely reviewed a trial court's determination of whether an actual conflict of interest exists as a factual finding subject to an "any evidence" standard. *See Burnett v. State*, 367 Ga. App. 285, 292 (2023) ("Viewing the evidence in the light most favorable to the trial court's findings, the trial court did not clearly err in finding there was no actual conflict."); *Earley v. State*, 310 Ga. App. 110, 115 (2011) ("some evidence supported the trial court's determination that no conflict existed" because the trial court "was satisfied with counsel's testimony" that possible conflict would not affect him); *Holsey v. State*, 291 Ga. App. 216, 221 (2008) ("as evidence supported its determination, the trial court did not clearly err" in finding no conflict of interest leading to ineffective assistance of counsel; evidence consisted of subject counsel's own testimony).

Despite this, citing the Fifth Circuit case of *U.S. v. Lanier*, 879 F.3d 141, 150 (5th Cir. 2018), the Appellants suggest to this Court that "the existence of a conflict of interest is a legal question subject to *de novo* review." (*See* Cheeley Br. at 19; Roman Br. at 9-10; Trump Br. at 19 n.15; Meadows Br. at 9; Clark Br. at 29). Obviously, this is not what the preceding authority says and is not binding authority in Georgia, any

more than any other foreign case would be. Nevertheless, the Appellants write as if it is and attempt to support their inaccurate standard by deceptively citing piecemeal language from Georgia cases.

As an example, Appellant Cheeley cites only one sentence of the above-cited portion of *Blumenfeld*. (Cheeley Br. at 19) ("The disqualification is in the nature of a conclusion of law rather than a finding of fact."). The citation of the sentence without its surrounding context conveys precisely the *opposite* conclusion than the one stated by the Supreme Court in *Blumenfeld*: that the existence of an actual impropriety is a "finding of fact" while the application of disqualification is a "conclusion of law." Cheeley makes this fragmentary citation in support of another one, from this Court's decision in *Cohen*, 338 Ga. App. at 168: "This Court has said it is 'a matter of law whether a lawyer has a conflict of interest requiring disqualification.'" (Cheeley Br. at 19). This quotation is even more misleading and divorced from context. What *Cohen* actually says is, "whether an exception to the attorney-client privilege applies does not determine as a matter of law whether a lawyer has a conflict of interest requiring disqualification." 338 Ga. App. at 168. Taken together, these incomplete citations deceptively suggest that, as a

matter of Georgia law, "whether a lawyer has a conflict of interest requiring disqualification" is reviewed *de novo*, as a legal conclusion, rather than for clear error, as a factual conclusion. Appellants Trump, Roman, and Meadows each cite *Lanier* and *Cohen* in precisely the same misleading way as Cheeley.[7] (Roman Br. at 9-10; Trump Br. at 19 n.15; Meadows Br. at 9). The State will further discuss the Appellants' obfuscation on this point below.

[7] Appellant Clark cites to *Lanier* but does not refer to the fragmentary citations from *Blumenfeld* or *Cohen*.

ARGUMENT

I. The trial court correctly found that no actual conflict of interest existed.

One of the two recognized grounds for disqualifying prosecutors is a conflict of interest. "A conflict of interest has been held to arise … where the prosecutor has acquired a personal interest or stake in the defendant's conviction." *Williams v. State*, 258 Ga. 305, 314 (1988). As the trial court summarized in its order, the theory proposed in Appellants' motion to disqualify was that "the District Attorney obtained a personal stake in the prosecution of this case by financially benefitting from her romantic relationship with SADA Nathan Wade, whom she personally hired to lead the State's prosecution team." (R. at 1708). The purported financial benefit to her stemmed from meals and travel that Wade paid for while he acted as SADA in this case. Appellants argued that the case was initiated, and then unnecessarily prolonged, in order for the District Attorney to enrich herself via Wade's employment.

After bringing their motion, the Appellants "were provided an opportunity to subpoena and introduce whatever relevant and material evidence they could muster" and allowed to present it at a hearing that featured "two and a half days of testimony." (R. at 1709). After

considering the evidence and "all the surrounding circumstances," the trial court found that the Appellants had failed to demonstrate that an actual conflict of interest existed in this case. (R. at 1709). In support of its conclusion, the trial court specifically cited the District Attorney's testimony, which "withstood direct contradiction" and "was corroborated by other evidence." (R. at 1714). The trial court found that the Appellants had not met their burden of proof. "Simply put, the Defendants have not presented sufficient evidence indicating that the expenses were not 'roughly divided evenly,' or that the District Attorney was, or currently remains, 'greatly and pecuniarily interested' in this prosecution." (R. at 1715) (citing *Nichols v. State*, 17 Ga. App. 593, 606 (1916)).

A. The trial court did not abuse its discretion.

As noted above, the trial court's ruling on a motion for disqualification is "an exercise of discretion [that] is based on the trial court's findings of fact which we must sustain if there is any evidence to support them." *Neuman*, 311 Ga. at 88. In this instance, the primary evidence is the testimony of the District Attorney herself, which the court characterized as both "corroborated" and withstanding "direct contradiction." The trial court reached its conclusion by appraising her

testimony against the evidence submitted by the Appellants, such as receipts and Wade's credit card statements. (*See* R. at 1713-14).

Indisputably, the trial court was critical of the District Attorney in its order, and the Appellants employ this criticism to overstate their case. Their arguments read as if the trial court found that the District Attorney lied about her finances—which it did not—and they assign clear error to the trial court's conclusion that she and Wade divided their mutual expenses roughly evenly thanks to her cash payments. "Given that there was a $13,342 difference in the documented expenses paid by SADA Wade and the documented expenses paid by D.A. Willis, these three or four cash payments [of between $500 and $2500][8] come nowhere close to being 'roughly divided equally.'" Cheeley Br. at 10. Obviously, this arithmetic is not a basis for a finding of clear error, as it represents a value at a minimum of $3500 and a maximum of $8500, already within a "roughly divided equally" range. The figure also does not account for other expenditures that the District Attorney testified to handling

[8] The District Attorney testified that she made "three or four" cash reimbursements directly to Wade (T. 317), with highest amount being $2500 (T. 284), the lowest between $500 and $1000 (T. 305), and the remainder somewhere between. This makes the absolute minimum a total of $3500 in cash reimbursements to Wade and the absolute maximum $8500.

directly during her time with Wade, such as hotels, flights, and cabs, (T. 353), which could account for hundreds or thousands more in "comparable, related expenses." (R. at 1714).

Particularly when viewed in the light most favorable to the findings and judgment of the trial court, these facts support the trial court's finding that the Appellants failed to show the District Attorney and SADA Wade did not equally divide their expenses, and that as a result, the District Attorney had no significant and improper financial interest in this case.[9] As noted above, this ultimate finding—that there was no actual conflict of interest—is a factual finding that must stand if there is any evidence to support it. Because there is indeed evidence to support it, it cannot be disturbed. The Appellants have incorrectly suggested,

[9] Some Appellants suggest that the calculus for determining a "personal stake in the outcome" of a prosecution can be found in the Fulton County Code of Ordinances. They argue that the Code's requirement that officials report "gifts" worth more than $100 operates as a definition of what a "material" benefit must be and is a bright-line rule to be applied in questions of disqualification. However, the ordinance they cite does not actually contain the word "material" at all. Fulton County Code of Ordinances, Sec. 2-69. In deciding that the District Attorney did not "materially benefit" from her relationship with SADA Wade, the trial court appears to have employed the "global" or "totality of the circumstances" approach to materiality suggested by counsel for Appellant Roman. (T. 781-85). The trial court was not persuaded that any benefit was significant, had any actual impact on the District Attorney's prosecution of the case, or indicated a private interest that affected the case's fairness.

either intentionally or inadvertently, that in Georgia the existence of a conflict of interest is a legal finding reviewed *de novo*. While this is not true, even if it were, the trial court's ruling would still not represent an abuse of discretion because it is based upon factual findings with support in the evidence. *See Neuman*, *Ventura*, *Whitworth*, *supra*.

The Appellants make much of a portion the trial court's description of the District Attorney's financial testimony as "not so incredible as to be inherently unbelievable." (R. at 1714). However, that description comes as the trial court, assessing all of the evidence and circumstances before it, *credits* the District Attorney's testimony sufficiently to find the Appellants' evidence inadequate. *Id.* What is left is the trial court's assessment of credibility (sufficient) against the Appellants' evidence (insufficient), leading to the ultimate conclusion that the District Attorney had not acquired a personal financial stake in the Appellants' convictions by hiring Wade and having a relationship with him. The trial court's assessment of credibility, like its factual findings and ultimate conclusion regarding the absence of an actual conflict, is not subject to disturbance on review.

As a practical matter, this case is also readily distinguishable from those cases with demonstrable financial conflicts of interest. These cases tend to involve "private prosecutors" who are either being paid by contingency fees related to seized property (*Amusement Sales,* 316 Ga. App. 727) or who simultaneously serve as private attorneys for the victims in the very cases being prosecuted (*Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *Nichols*, 17 Ga. App. at 606). The prosecutors in those cases had conflicts inextricably tied to the conviction of the defendants, as well as the initiation and pursuit of charges against them. The District Attorney in this case has neither.

There is no evidence whatsoever that this case was initiated as part of a scheme to enrich the District Attorney. The trial court credited her testimony concerning her salary and lack of "excessive expenses or debts." Additionally, this indictment was brought after a months-long Special Purpose Grand Jury investigation into events with nationwide implications and considerable public scrutiny, after which the SPGJ recommended seeking dozens of indictments. The idea that the District Attorney investigated and sought indictment in this particular case in order to enjoy occasional vacations or meals is—in addition to being

unsupported by any evidence—unconvincing, to say the least. And a scheme to enrich herself by pursuing this case would obviously involve unnecessary prolonging it, an accusation that the Appellants made before the trial court. Citing the procedural history of this case both before and after indictment,[10] the trial court found that "there is no indication the District Attorney is interested in delaying anything. Indeed, the record is quite to the contrary." (R. at 1715). The Appellants' theory of conflict was utterly contradicted by the record. "In sum, the District Attorney has not in any way acted in conformance with the theory that she arranged a financial scheme to enrich herself (or endear herself to Wade) by extending the duration of this prosecution or engaging in excessive litigation." (R. at 1716).

While the Appellants are not required to show prejudice in order to prove an actual conflict of interest, they were unable to provide evidence to even demonstrate a coherent theory of conflict. Their evidence does not demonstrate that the District Attorney has a financial "stake" in their

[10] Specifically, the trial court referenced the District Attorney's decision to indict far fewer defendants than the number recommended by the Special Purpose Grand Jury; her initial request for a trial by October of 2023; her resistance to severance of the defendants; and her later request for a trial date within a year of indictment. (R. at 1715-16).

convictions such that her public duties are compromised, much less a "great[] pecuniary interest" in their case. *Nichols*, 17 Ga. App. at 606. Viewing the evidence in the light most favorable to the trial court's findings of fact, and leaving those findings undisturbed if there is any evidence to support them, the trial court did not clearly err in finding that no actual conflict of interest existed in this case, and it did not abuse its discretion in declining to disqualify the District Attorney.

B. The public trustee clause does not alter the analysis.

While the Appellants argue that the District Attorney's position as a public trustee should create a higher standard, the trustee standard is not meaningfully different from the conflict of interest standard to which prosecutors are already held. As explained by the Georgia Supreme Court, the trustee clause, in Ga. Const. Art. I, § II, Para I, applies "when a public officer ha[s] definitely benefitted financially (or definitely [stands] to benefit financially) as a result of simply performing their official duties." *City of Columbus v. Ga. Dep't of Transp.*, 292 Ga. 878, 882 (2013) (quoting *Ianicelli v. McNeely,* 272 Ga. 234, 236 (2000)) (declining to declare a statute unconstitutional because it did not cause a public officer to reap personal financial gain at public expense). The

concept is the same in the conflict of interest cases in which prosecutors have been disqualified for having a personal financial stake in a conviction, such as by a contingency fee. *See Amusement Sales*, *Inc.*, 316 Ga. App 727, and *Greater Ga. Amusements, LLC v. State*, 317 Ga. App. 118. Other than broad statements, none of the Appellants explain how this constitutional clause creates a higher standard than those found in disqualification cases. Rather, this clause does the reverse: it places the professional and ethical standards of prosecutors onto other public officials. *See Ga. Ports Auth. v. Harris*, 274 Ga. 146, 146 (2001) (declining to impose a *per se* rule of disqualification of lawyers who are also public officers from representing clients against the State because other mechanisms, such as the attorney professionalism rules, can be used to avoid conflicts of interest). The public trustee does not impose any higher standard than the one already applicable to prosecutors. In any event, as found by the trial court, the Appellants failed to show that the District Attorney benefitted from her relationship with SADA Wade in a manner sufficient to create a conflict of interest.

Similarly, some appellants point to cases where prosecutors were referred to as "quasi-judicial officers" for the purposes of qualified

immunity analysis (*Holsey v. Hind*, 189 Ga. App. 656 (1988)) or equal protection and campaign finance analysis (*Fortson v. Weeks*, 232 Ga. 472 (1974)). These cases do not provide any meaningful analysis or information for matters of disqualification of a prosecutor in a criminal case.

C. Non-monetary benefits

After Appellants could not prove a disqualifying financial benefit at the trial court level, they now speculate that publicity inures to the District Attorney's personal interest sufficiently to disqualify her. This new ground is not properly before this court because Appellants failed to raise this before the trial court. Appellant Roman points to a media monitoring report that was not tendered into evidence at the hearing. There was no testimony about how media attention and publicity motivated the prosecution case or pursuit of a certain outcome.

Even if this ground of disqualification had been properly raised or considered below, Appellants fail to show that media attention or publicity led or affected the prosecution of this case. As noted by Appellant Trump, the ABA promulgation of standards for prosecutors to interact with the media recognizes the prosecutor may attract publicity

from her work. It is not surprising that prosecutors can receive publicity generated by high-profile cases, and it does not somehow create a disqualifying conflict of interest.

D. A prior ruling concerning Burt Jones has no bearing on this case.

Appellant Latham advances that the disqualification of District Attorney Willis from investigating Burt Jones should apply to all the defendants. Latham Br. at 49. This is a red herring, and an argument that the Appellant has raised, and lost, before Superior Court Judge Robert McBurney. Burt Jones is not present in this indictment and faces no liability from the District Attorney's prosecution of the indicted parties. Contrary to her assertion, *McLaughlin* does not preclude a prosecutor from prosecuting other defendants who do not have conflict; it merely precludes the prosecutor and her office from participating in aspects of the conflicted defendant's prosecution. 295 Ga. at 613. As previously found by Judge McBurney, the Appellants are in an entirely different position that Jones regarding this prosecution, and the District Attorney's Office's disqualification as to Jones has no relationship to its prosecution of the Appellants. *See* Exhibit 1 at 6 n.12.

II. The trial court did not abuse its discretion in refusing to disqualify the District Attorney based upon an appearance of impropriety with no actual conflict of interest.

After finding no actual conflict of interest existed in this case, the trial court turned to the question of whether an "appearance of impropriety" existed, and if so, whether such an appearance required the disqualification of the District Attorney or SADA Wade. Concluding that an appearance of impropriety did exist, the trial court ruled that although the relationship between the District Attorney and Wade had not resulted in any prejudice to the Appellants and had no actual impact upon the case, the perception of the case in the future would be hampered by their combined involvement. The trial court ordered that either the District Attorney, as well as her entire office, would have to step aside, or SADA Wade could withdraw from the case, "allowing the District Attorney, the Defendants, and the public to move forward without his presence or remuneration distracting from and potentially compromising the merits of this case." (R. at 1714).

The Appellants argue that the trial court abused its discretion in ordering such a "forced election" rather than disqualifying both Wade and the District Attorney based solely upon an appearance of impropriety.

The Appellants are incorrect. Georgia courts have not found that a trial court's refusal to disqualify a prosecutor based solely on an appearance of impropriety constitutes an abuse of discretion, and the Georgia Rules of Professional Conduct no longer even employ the "appearance" standard. Certainly, no Georgia authority indicates that the existence of an appearance of impropriety requires disqualification regardless of whether such an appearance can be dispelled, as the trial court found was possible in this case. Ultimately, the decision not to disqualify the District Attorney—where there was no actual conflict of interest, no prejudice or effect upon the Appellants' case, and no permanent circumstance incapable of being addressed by a remedy aside from her disqualification—was within the trial court's discretion, and its order should be affirmed.

A. Defining "appearance of impropriety"

While *Williams* instructs that an actual conflict of interest arises when a prosecutor "acquires a personal interest or stake in the case," no Georgia case has ever provided a definition of "appearance of impropriety." The trial court relied upon Black's Law Dictionary, stating that such an appearance is "is generally considered 'conduct or status

that would lead a reasonable person to think that the actor is behaving or will be inclined to behave inappropriately or wrongfully.'" (R. at 1718).

> Borrowing from federal judicial recusal standards, a reasonable person is not an uninformed member of the public with only a passing knowledge of the facts at hand. *See Cheney v. United States Dist. Court for Dist. of Columbia*, 541 U.S. 913, 924 (2004) (Scalia, J., sitting alone). This must be the standard, as otherwise in this case a casual, uninformed, or misinformed observer might believe the District Attorney must recuse herself merely because her father shares a last name with a co-defendant. Nor is a reasonable person "hypersensitive or unduly suspicious" without an understanding of the "relevant legal standards and judicial practice." *In re Sherwin-Williams Co.*, 607 F.3d 474, 478 (7th Cir. 2010) (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

(R. at 1719). The question is therefore whether an informed person with actual, competent knowledge of these proceedings and an understanding of the relevant law would decide that a given lawyer is acting wrongfully or will do so in the future.

Obviously, this definition is unwieldy. Largely for this reason, it has disappeared from most codes of professional conduct. As the trial court observed, lawyers were once instructed by the Code of Professional Responsibility to "avoid even the appearance of impropriety" in all aspects of their lives, but substantial criticism about the standard's

"vague and varying application" led the American Bar Association to eliminate the standard from its 1983 Model Rules of Professional Conduct. (R. at 1718 n.3). "Georgia eventually followed suit, supplanting its professional code in 2001 with the adoption of the Georgia Rules of Professional Conduct. *See*, *e.g.*, *Herrmann v. Gutterguard, Inc.*, 199 F. App'x 745, 755 (11th Cir. 2006) (labeling the appearance of impropriety standard as "outdated")." (R. at 1718 n.3).

Jurisdictions across the country vary in their approach to the role that the appearance of impropriety standard should take in the context of motions for disqualification, but as of 2007 "only a few" still did so, as "[t]he current trend among states which have adopted the Rules of Professional Conduct is to abandon the 'appearance of impropriety' standard for review [of] motions to disqualify counsel, deeming it 'too vague and subjective.'" *Ark. Valley State Bank v. Phillips*, 171 P.3d 899, 909 (S.Ct. Ok. 2007). "[M]any jurisdictions have used the 'appearance of impropriety' test to review motions to disqualify counsel while the phrase appeared in pertinent ethical standards in effect at the time of the

decision,[11] but usually the showing of an 'appearance of impropriety' alone does not support a motion to disqualify counsel." *Id.* (citing *Board of Education v. Nyquist*, 590 F.2d 1241, 1247 (2nd Cir. 1979) ("when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases") (also cited by trial court at R. 1720-21)).

The "vague," "varying," and "subjective" nature of the appearance standard is reflected in the variety of approaches the states have taken to it. Some states have created tests for its application (*State v. Marner*, 487 P.3d 631, 633 (S.Ct. Ariz. 2021)); others have simply noted that it should only be applied to prosecutors in "rare" instances (*People v. Adams*, 987 N.E.2d 272, 274 (Ct. App. N.Y. 2013)); and still others have

[11] Among the decisions cited in *Phillips* as using the standard "when it appeared in pertinent ethical standards in effect at the time" is *Love v. State*, 202 Ga. App. 889 (1992). 171 P.3d at 909 n.42. The trial court also cites *Love* in its order for the proposition, "Thus it is that sometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administration of justice." (R. at 1720). Obviously, *Love* was citing to professionalism standards that no longer apply and have been revised not to include the appearance of impropriety, and even where this passage has been quoted in more recent cases, it appears in the analysis of *actual conflict of interest* scenarios contemplated under the modern Rules of Professional Conduct. *See First Key Homes of Georgia, LLC v. Robinson*, 365 Ga. App. 882, 885 (2022) (construing Rule 1.9(a)); *Registe v. State*, 287 Ga. 542, 548 (2010) (same). *Love*'s precedential value, particularly on the specific point cited by the trial court, is therefore questionable.

categorically rejected its application to prosecutors (*State v. Giese*, 900 S.E.2d 881, 886 (S.Ct. N.C. 2024); *Desmond v. State*, 141 N.E.3d 1052, 1063 (Ct. App. Ohio 2020); *Farmer v. Cook Cty. Attorney's Office*, 138 N.E.3d 176 (Ct. App. Ill. 2019)). The approach in Georgia does not relieve the impression that the appearance of impropriety standard is vague and difficult to actually apply fairly and objectively.

B. The use of "appearance of impropriety" in Georgia

Within the nationwide trend away from the standard, Georgia's approach to the appearance of impropriety standard is muddled. As the trial court observed, the Rules of Professional Conduct make no reference to the standard at all, but occasionally, appellate cases still make use of the phrase. (R. at 1717-18 n.3). While the trial court refers to the continued "application" of the standard, the State submits, as it did below, that Georgia courts are not actually *applying* the appearance of impropriety standard rather than merely *mentioning* it in the context of review for actual conflicts of interest.[12] This is particularly true in cases decided since Georgia adopted the Rules of Professional Conduct.

[12] *See, e.g.*, *Greater Ga. Amusements v. State*, 317 Ga. App. 118 (2012) (physical precedent) (mentioning appearance of impropriety but deciding case on grounds of public policy); *Amusement Sales, Inc. v. State*, 316 Ga. App. 727 (2012) (calling

However, even before the Rules eliminated the appearance of impropriety standard due to its vagueness and variability, the Georgia Supreme Court created a presumption against its application to disqualify an attorney *without* an actual conflict of interest in its *Blumenfeld* opinion. Even in 1981, when *Blumenfeld* was decided, the Supreme Court could not find an example of the mechanical enforcement of the standard that the Appellants urge is required in this case.

> Appellees have not shown us a case where a *per se* rule was applied to disqualify an attorney on the basis of an appearance of impropriety alone. The Georgia cases cited by appellee do not stand for the proposition that a trial judge is authorized in Georgia to disqualify an attorney solely on the basis of an appearance of impropriety.

247 Ga. at 409. The Court went on to note that the cases cited by the parties' briefs all involved disqualification for actual conflicts of interest due to divided loyalties or the violation of client confidences. *Id.* This

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Greater Ga. Amusements "persuasive" but deciding on actual conflict of interest grounds, as prosecutors paid by contingency fee had acquired stake in the outcome of the case); *Battle v. State*, 301 Ga. 694, 698 (2017) (mentioning the appearance of impropriety but refusing to disqualify where no actual conflict of interest existed due to lack of close personal relationship to victim or "personal interest in obtaining the sought convictions"); *Young*, 481 U.S. 787 (prosecutors in contempt action also represented plaintiff in underlying civil action); *Nichols*, 17 Ga. App. 593 (prosecutor in perjury case represented opposing party in underlying civil action). Indeed, in *Young*, the Supreme Court observed that it was the presence of an "interested prosecutor" that gave rise to the "appearance of impropriety" in the first place.

understanding has persisted to the present day. *See Cohen*, 338 Ga. App. at 164 ("In contrast to the prima facie finding necessary to compel discovery in the face of an attorney-client privilege, there must be proof of an actual impropriety to disqualify an attorney from representing a client.").[13] And of course, the Rules of Professional Conduct no longer mention the appearance of propriety standard at all. There is clearly support for the position that it is *never* an abuse of discretion for a trial court to decline to disqualify an attorney based solely on appearances.

Certainly, no criminal cases indicate that the sort of *per se* rule rejected in *Blumenfeld* applies, particularly after the adoption of the Rules of Professional Conduct. In a case decided mere weeks before the trial court issued its order on this matter, the Georgia Supreme Court held that a "trial court did not abuse its discretion … by failing to disqualify the assistant district attorney absent an actual conflict of interest." *Lee v. State*, 318 Ga. 412, 412-13 (2024). In a post-conviction setting, it is quite clear that an appearance of impropriety alone would never suffice to demonstrate that a prosecutor should have been

[13] *See also Ga. Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207 (2021); *Befekadu v. Addis Int'l Money Transfer, LLC*, 339 Ga. App. 806 (2016); *Stinson v. State*, 210 Ga. App. 570, 436 S.E.2d 765 (1993); *Jones v. Jones*, 258 Ga. 353 (1988)

disqualified and a conviction overturned. "The Supreme Court of Georgia has repeatedly held that an 'actual conflict of interest' is required to warrant reversal [of a conviction] for failure to disqualify. A 'theoretical or speculative conflict' is simply not sufficient." *Whitworth*, 275 Ga. App. at 796 (citing *Pruitt v. State*, 270 Ga. 745, 753 (2000)). *See also Lyons v. State*, 271 Ga. 639, 640 (1999). No case has ever indicated or even hinted that, before trial rather than after, the standard should be altered to *require* disqualification. Indeed, if the generally understood purpose of applying an appearance of impropriety standard is to safeguard the public's perception of the integrity of a case (and thereby the justice system and the government itself), it is not clear at all why such a purpose would diminish in importance *after* a person has been found guilty and subjected to a criminal sentence.[14] Logically, the standard would occupy the same space before a trial as after it, and it is clear that in Georgia the standard does not suffice on its own to disqualify attorneys. All of the above combines to suggest that, in this case, the trial

[14] Indeed, before trial has occurred, there are still other remedies available to a trial court to ensure fundamental fairness, including *voir dire* and, in extreme circumstances, changes in venue.

court likely would not have abused its discretion in declining to apply the appearance of impropriety standard at all.

C. The trial court's application of the standard and the Appellants' claims of abuse of discretion.

Of course, the trial court did choose to apply the appearance of impropriety standard, stating that it felt bound to do so because of the continued presence of the phrase in Georgia appellate opinions. The relevant question is whether the trial court abused its discretion in doing so. The Appellants' contention is that, in allowing the District Attorney and SADA Wade to decide which of them would withdraw from the case, it did not employ the standard stringently enough. However, the trial court did not abuse its broad discretion in refusing to take a *per se*, mechanical approach to disqualification and instead crafting a remedy that it felt was in the best interests of the case, the public, and the Appellants. Such an approach is not merely authorized but encouraged, by courts in Georgia and elsewhere.

1. The trial court's decision on appearance of impropriety.

The trial court concluded that an appearance of impropriety existed in this case because, although it was unpersuaded that evidence

demonstrated an actual conflict of interest, the District Attorney's prior relationship with Wade created "the possibility and appearance that the District Attorney benefited—albeit non-materially—from a contract whose award lay solely within her purview and policing." (R. at 1722). Given the District Attorney's indication that her relationship with Wade, while no longer romantic, remained a friendship that was "stronger than ever," and given the court's dissatisfaction with Wade's explanation for his answers to interrogatories in his divorce case, the trial court expressed particular concern for the perception of the case *moving forward* if Wade remained a part of a prosecution led by the District Attorney (R. at 1722-23). Having already held that the case had not been affected in any tangible way by the issues at hand, the case's future legitimacy, and by extension that of the justice system, was what concerned the trial court.

The trial court noted that any negative, ongoing perception of the fairness of this case would be "unnecessary," (R. at 1723), since, again, none of the circumstances at issue in the Appellants' motions to disqualify actually had any effect on their rights or the case. The trial court's remedy was therefore to remove the possibility that the public or

the Appellants could wonder whether any kind of financial benefit or romantic relationship was occurring as the case progressed. The option ultimately taken, Wade's withdrawal, was intended to "allow[] the District Attorney, the Defendants, and the public to move forward without his presence or remuneration distracting from and potentially compromising the merits of this case." (R. at 1724).

The "unnecessary" quality of the appearance of impropriety identified by the trial judge in this case sets it apart from essentially every case cited by the Appellants. Those cases (and the cases cited by the trial judge in his order) involve either situations of "divided loyalty" where a prosecutor or defense attorney used to have a professional association with either the State or a defendant[15]; "relationship" scenarios where a member of the prosecution team had a pre-existing personal relationship (friendly, familial, etc.) with either the victim or a

[15] *See*, *e.g.*, *Brown v. State*, 256, Ga. 603, 607 (2002) (citing to former Code of Professional Responsibility); *Reeves v. State*, 231 Ga. App. 22, 24 (1998) (applying same where defense attorney had accepted employment with prosecutor's office before trial even began and did not inform defendant); *Billings v. State*, 212 Ga. App 125, 129 (1994) (former defense attorney had become prosecutor).

witness in the case[16]; or they are simply cases of actual conflicts of interest[17].

This case is entirely different. There is no conflict of interest, and the relationship that the trial court felt could be detrimental to the future perception of the case existed solely *within* the prosecution team, meaning that the presence of both prosecutors was what created the issue. Removing just one of them removes the appearance issue in turn. This is exactly what the trial court recognized when it stated that "disqualification of a constitutional officer [is not] necessary when a less drastic and sufficiently remedial option is available." (R. at 1724). Obviously, this type of solution is not possible when an appearance arises from a prosecutor's prior representation of a former client who is now a defendant; the defendant certainly cannot withdraw from the case, so if an appearance of impropriety must be dispelled, the prosecutor has to be

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[16] *See, e.g.*, *Battle*, 301 Ga. at 698 (mentioning appearance of impropriety but basing analysis on lack of personal interest in conviction for prosecutor); *Head*, 253 Ga. App. at 758 (reviewing for personal relationship to victim).

[17] *See, e.g.*, *Greater Ga. Amusements* and *Amusement Sales, Inc.*, *supra* (prosecutors paid by contingency fee were personally interested in outcome and violated public policy); *Davenport v. State*, 157 Ga. 704, 705 (1981) (due process analysis of clear conflict of interest scenario where prosecutor represented victim in divorce case and sat at counsel table during prosecution of victim's wife for shooting him).

disqualified or withdraw. Similarly, when a prosecutor has a prior personal relationship with a witness or victim, it is not as if either of those parties can "withdraw" from their association with a particular case, so again it is the prosecutor who must be removed to dispel any improper appearances.

It was not an abuse of discretion for the trial court to apply the disqualification remedy in the manner it chose. In fact, this type of case-specific, considered approach is exactly what is encouraged in disqualification cases. "[M]echanically applying rules for the disqualification of counsel" is explicitly discouraged and should be entirely forbidden where the appearance of impropriety standard has been removed from the Rules of Professional Conduct altogether. Even when the standard did exist in Georgia's professionalism rules, as made clear above, Georgia courts never approved of a *per se* rule of disqualification based solely on an appearance of impropriety. Likewise, in the federal system, where "disqualification is ordinarily the result of a finding that disciplinary rule prohibits an attorney's appearance in a case, disqualification is never automatic," and a district court "has a wide discretion in framing its sanctions to be just and fair to all parties

involved." *Miller*, 624 F.2d at 1201. As one court in a jurisdiction that actually *does* apply the appearance of impropriety standard has observed, broad discretion makes particular sense where appearances are concerned. "As the trial court has the greatest familiarity with the facts and visibility of a case before it, it is in the best position to determine whether an appearance of impropriety is sufficient to undermine public confidence and whether disqualification is appropriate under the circumstances." *Marner*, 487 P.3d at 633.

The trial court neatly summarized the above principles with its observation that, in appearance of impropriety scenarios without actual conflicts of interest, "the remedy can vary." (R. at 1720). Following our Supreme Court's direction in *Blumenfeld* "that disqualification should rarely occur where there is no danger that the actual trial of the case will be tainted," (R. at 1720) (citing 247 Ga. at 407-08), the court did not hesitate to explore "alternative solutions to cure the appearance of impropriety." In so doing, it cited extensively from *Blumenfeld*'s description of appearances of impropriety as a "continuum," with actual conflicts at one end, requiring disqualification regardless of prejudice, and "mere status" appearances of impropriety on the other, which never

authorize disqualification. "Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney" which generally does not suffice to authorize disqualification. *Id.* at 409-10.

The Appellants dispute the applicability of *Blumenfeld*'s continuum to this case as well as the trial court's authority to craft a case-specific remedy within its discretion. They insist the trial court erred in relying upon *Blumenfeld*, primarily for two reasons. First, they note that *Blumenfeld*'s general skepticism of disqualification for appearances of impropriety based on conduct makes mention of a "client's interest in counsel of choice," and, therefore, is premised upon concerns not pertinent to prosecutors. Naturally, District Attorneys do not have precisely the same relationship with the people and entities they represent that privately retained attorneys do. However, in the context of disqualification, Georgia courts are encouraged to consider any social interests that might be relevant, not merely the interest in counsel of one's choice. *Hodge*, 295 Ga. at 138-39. Many of the same consequences that have been identified by Georgia courts as resulting from the disqualification of private counsel would also apply to public prosecutors.

They include delays, additional costs, and of course the "specialized knowledge of the disqualified attorney."[18] *Id.* There is also no doubt that the public retains an interest in retaining its elected, constitutionally-mandated prosecutor of choice. As another state's Supreme Court recently explained, disqualification of a District Attorney requires balancing "the respective interests of the defendant, the government, and the public." *Giese*, 900 S.E.2d at 886. A defendant's obvious interest in due process and fair proceedings is balanced against the role of the District Attorney as a representative of the people and advocate for the State, a vessel for "constitutional and statutory duties," and the public's elected choice of attorney to prosecute "with energy and skill" to "seek justice above all other ends." *Id.* at 886-87. A "*per se* disqualification rule" is therefore inappropriate, and "the mere appearance of impropriety cannot justify disqualification," which requires "more than a *possibility* that an *impression* of conflict of interest[] might arise at some *future* time." *Id.* at 888 (emphasis original). While the interests are not precisely the same as the Sixth Amendment interests mentioned in most Georgia

[18] In the District Attorney's case, that "specialized knowledge" extends to an entire office, not simply one lawyer, due to the vicarious disqualification rule announced in *McLaughlin*.

cases, they are not somehow invalid, and they do not counsel against flexible applications of a trial judge's discretion.

This leads to the Appellants' second contention, which is that a prosecutor's specific role within the justice system requires a *per se* rule of disqualification. As the *Giese* opinion ably explains, that is not the case. A case-specific, careful weighing of interests and options is required not in spite of a District Attorney's position of public trust, but because of it. And neither this Court nor the Georgia Supreme Court have ever indicated, in cases such as *Lyons* or *Whitworth*, that a prosecutor's public role countenanced a wholly different, *per se*, mechanical application of the appearance of impropriety standard to disqualification.

Ultimately, the question is whether the trial court abused its discretion in crafting the remedy it applied in this case. It seems unlikely that the trial court would have abused its discretion by disregarding the appearance of impropriety standard entirely, but where it chose to apply the standard in a case-specific, considered manner, there can certainly be no abuse of discretion. Georgia courts have long counseled against any *per se* rule of disqualification due to an appearance of impropriety alone, and such a standard has been explicitly rejected in post-conviction

settings. The trial court's unique perspective puts it in the best position to understand how a case will be perceived in the future, and the circumstances of this case allowed it to craft a remedy that has not been available or appropriate in other cases. In so doing, it sought to balance the interests of the Appellants, the public, and the case itself, and doing so was not an abuse of discretion. The Appellants' arguments otherwise are unsupported and meritless.

Finally, some Appellants argue, as they did below, that the indictment in this case should be dismissed. The trial court addressed this argument when it observed that the Appellants had "failed to demonstrate that the District Attorney's conduct has impacted or influenced the case to the Defendants' detriment," (R. at 1715) and that there had "not been a showing that the Defendants' due process rights have been violated or that the issues involved prejudiced the Defendants in any way." (R. at 1724). The Appellants fail to show how this finding could be clearly erroneous, and the trial court was correct to disregard their request for such an "extreme sanction." (R. at 1724) (quoting *Olsen v. State*, 302 Ga. 288, 294 (2017)).

III. The trial court correctly refused to disqualify the District Attorney on grounds of forensic misconduct.

The Appellants also attempted to disqualify the District Attorney on grounds that she made improper public comments about the case. Such claims, which the Appellants characterize as "forensic misconduct," are rarely litigated, a reality acknowledged by the trial court as it analyzed Appellants' various arguments urging disqualification. However, the relevant authorities demonstrate that the trial court considered the appropriate factors and correctly arrived at the conclusion that disqualification was not appropriate.

Forensic misconduct, as the name implies, is traditionally associated with behavior that occurs in the courtroom, in the midst of a trial. Such misconduct is behavior that encourages a jury to decide a case based on something other than the properly admitted evidence before it. The misconduct can result in disqualification of the offending attorney if it makes a fundamentally fair trial impossible, and the inquiry is focused upon the impact of the statements on a jury. On rare occasions, out-of-court statements have been analyzed as possible forensic misconduct as well, with the analysis turning on whether a fair trial is still possible.

The Appellants' claims of forensic misconduct reference nearly every public statement the District Attorney has ever made that either directly or indirectly references the 2020 presidential election, her office's subsequent investigation into criminal activity related to that election, or the present case. Nearly all of these statements were raised in a prior motion for disqualification brought by Appellants Trump and Latham in 2023. After Superior Court Judge Robert McBurney rejected Appellants' arguments and denied their motion, and despite vows to seek appeal of his order, Appellants Trump and Latham abandoned their claims. Approving of the reasoning in Judge McBurney's prior order, the trial court focused its analysis almost entirely upon statements contained in a speech delivered by the District Attorney on January 14, 2024, in which she addressed criticisms made about the relevant experience of SADA Wade. After first examining the nature of forensic misconduct and the sparse precedent found in Georgia law, the trial court held that, while it disapproved of the District Attorney's statements, they did not constitute disqualifying forensic misconduct. As will be discussed below, both the seminal Georgia case on forensic misconduct and the authorities cited in

that case support the trial court's rejection of disqualification, and it did not abuse its discretion.

Below, the State will look to the law of forensic misconduct in Georgia to determine the concept's definition and principles; examine the trial court's application of those principles using the seminal case of *Williams* as a guide; explain how the cases and sources cited in *Williams* support the trial court's reasoning; and outline how the Appellants' arguments either ignore or contradict the relevant guidance in their attempts create an anomalous, hair-trigger standard for disqualification.

A. Standing

As an initial matter, the trial court pointed to an issue which the Appellants have chosen to ignore: standing. In a footnote discussing the District Attorney's speech, the trial court observed:

> Worth noting is that there may be an issue of standing for the other five Defendants' challenge of this speech. Although counsel for Defendant Trump expressed in open court the possibility that he would join the motion after conducting his own investigation, each Defendant only formally joined Defendant Roman's motion challenging the hiring of SADA Wade after the speech had been made.

R. at 1628 n.20. None of the other Appellants had joined Appellant Roman in moving for disqualification at the time the speech was made.

Even as the trial court expressed criticism of portions of the District Attorney's speech, it found that the pertinent comments referenced Appellant Roman indirectly at most, responding to the State's arguments by saying, "Maybe so. But maybe not." The trial court ultimately found that Appellant Roman could have been included in the District Attorney's sole reference to "so many others" or her use of the pronoun "they" when discussing those who were publicly critical of SADA Wade's credentials to lead the prosecution of this case.

The Appellants complain that the District Attorney made these comments in response to their motions to disqualify. However, at the time the speech was delivered, only Appellant Roman had actually filed such a motion, and none of the other Appellants had joined it. For the trial court, the use of "so many others" and "they" only encompassed Appellant Roman because of his motion. This tenuous connection cannot be extended to the other Appellants, who had not filed or joined in any similar motions on January 14.

The Appellants ignore this issue. Joining in the motion after the speech was delivered does not change the content of the District Attorney's statements at the time they were made, and the other

Appellants lack standing to challenge the speech in the trial court or in this appeal. As a result, the arguments of the Appellants regarding the District Attorney's speech, apart from Appellant Roman, should be disregarded.

B. Definition of "forensic misconduct" and general principles

As the trial court recognized, *Williams v. State*, 258 Ga. 305 (1988), provides the foundation for understanding forensic misconduct and attempts to disqualify prosecutors generally under Georgia law. (R. at 1724-25). In *Williams*, a defendant was being tried for a third time after two prior trial convictions had each been overturned. Following a mistrial due to a hung jury, a prosecutor indicated that prior juries had convicted the appellant, that jurors so far were "35-to-1 for conviction," that upon retrial he believed the next jury would reach "the right result," and said, "In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged." 258 Ga. at 310. The defendant moved to disqualify the prosecutor, and although the Georgia Supreme Court concluded that the prosecutor's statement was not proper, it declined to disqualify him, saying it was "quite clear" that disqualification was not appropriate. *Id.* at 315.

The case's discussion of the concept forensic misconduct is brief, but certain principles are clear from the language employed in the opinion and from the cases and sources cited within it.

> There are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as "forensic misconduct." *In re J.S.*, 436 A2d 772, 774 (Vt. 1981) (Billings, J., dissenting), citing Note, *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case*, 54 Colum. L. Rev. 946 (1954) … One of the primary examples of "forensic misconduct" consists of the improper expression by the prosecuting attorney of his personal belief in the defendant's guilt. *See Vermont v. Hohman*, *supra*. In determining whether an improper statement of the prosecutor as to the defendant's guilt requires his disqualification, the courts have taken into consideration whether such remarks were part of a calculated plan evincing a design to prejudice the defendant in the minds of the jurors, or whether such remarks were inadvertent, albeit improper, utterances. *Cf. Pierce v. United States*, 86 F.2d 949 (6th. Cir. 1936), with *Dunlop v. United States*, 165 U.S. 486 (17 S. Ct. 375, 41 L. Ed.799) (1897).

Williams, 258 Ga. at 314-15. Thus, the Supreme Court in *Williams* clarified that (1) forensic misconduct is one of the two recognized grounds for disqualification of a prosecutor; (2) that the basis for the Court's understanding of the concept comes from a dissenting opinion by Judge Billings in the Vermont case of *In re J.S.*, as well as a work of scholarship from the Columbia Law Review; (3) that a "primary" example of forensic

misconduct is a prosecutor expressing a personal belief in a defendant's guilt; and (4) that one relevant factor in evaluating a prosecutor's expression of such a belief is whether the statement was inadvertent or a deliberate attempt to prejudice a defendant by improperly influencing a jury, with examples provided by two federal cases, *Pierce* and *Dunlop*. As the trial court observed in its order, *Williams* also made clear that (5) "while a prosecutor's comments may be considered improper, they must be 'egregious[ly]' so to justify disqualification." R. at 1629, citing *Williams*, 258 Ga. at 315. The Supreme Court stated in *Williams* that "it is a quantum leap from any conclusion that extrajudicial statements made by the prosecutor were improper, to the holding that disqualification of the prosecutor is required as a result thereof." *Id.* at 314.

The bar, in other words, is extremely high—so high, in fact, that no prosecutor has ever been disqualified in Georgia for forensic misconduct. As the trial court acknowledged, there is no other Georgia case meaningfully examining forensic misconduct, nor is there any Georgia case where forensic misconduct has actually resulted in the disqualification of a prosecutor. (R. at 1725). It therefore restricted its

analysis to the language of *Williams* alone, reaching the conclusion that the District Attorney's statement during her speech did not constitute disqualifying forensic misconduct. This approach was not an abuse of discretion, and the trial court's conclusion was correct under the law as stated in *Williams* and further supported by an examination of the authorities cited in the case.

C. The trial court's analysis under *Williams* was correct.

After remarking upon the relative dearth of caselaw regarding forensic misconduct, the trial court kept its analysis of Appellants' claims "confined to the boundaries of *Williams*" and "restrict[ed] the application of the facts to its limited holding." (R. at 1725). It then quickly dispensed with two classes of statements presented by Appellants: public statements made by the District Attorney before July 31, 2023, and "more recent comments," including those made in interviews with the authors of the book *Find Me the Votes*. (R. at 1726). The trial court found that neither class of statements was disqualifying. As to the former, it noted that most of the statements had "already been addressed through a pretrial challenge made on similar grounds brought by Defendants Trump and Latham"; the trial court adopted the "sound reasoning" of the

prior order in deciding that the statements, individually and collectively, "did not amount to disqualifying forensic misconduct." (R. at 1725-26); *see also* Exhibit 1, Order on Motion to Quash, Preclude, and Recuse, 2022-EX-000024 (July 31, 2023). Citing the prior order, the trial court noted that "[p]ublic comments about the need for and importance of the investigation fall far short of the type of bias, explicit or implicit, that must be found." (R. at 1726) (citing Exhibit 1 at 6 n.12). The statements obviously did not express a personal belief in anyone's guilt, discuss evidentiary details, or demonstrate a deliberate attempt to improperly influence a future jury, particularly in an "egregious" manner.

The trial court found that the District Attorney's more recent comments, including those found in the book, were similar and likewise not disqualifying, as they "described the charges in the indictment, the procedural posture of the case, the office's conviction rates, and personal behind-the-scenes anecdotes." (R. at 1726). While the court characterized the decision to sit for interviews with the book's authors as "unorthodox," with possible "ancillary prejudicial effects yet to be realized," the District Attorney's statements obviously did not constitute egregious disqualifying conduct under *Williams*. (R. at 1726).

The trial court more carefully examined statements contained in a speech delivered by the District Attorney at an Atlanta church on January 14, 2024. The speech contained certain comments discussing criticisms the District Attorney had faced, including her decision to contract SADA Wade to participate in the preparation of this case. The trial court disapproved of the District Attorney's reference to her critics "playing the race card" in their criticism of Wade's credentials, concluding that her use of the pronoun "they," along with the phrase "so many others," could have included Appellant Roman and resulted in the casting of "racial aspersions" at a defendant for his decision to file a pretrial motion. (R. at 1726-27).

Though the trial court criticized the District Attorney, indicating she had entered "dangerous waters," its application of the guidance provided in *Williams* led it to conclude she had not committed disqualifying forensic misconduct. The District Attorney did not express any personal opinions regarding a defendant's guilt or discuss the actual substance of the present case at all. She did not "mention any Defendant by name," did not "address the merits of the indicted offenses in an effort to move the trial itself to the court of public opinion," and did not "disclose

sensitive or confidential evidence yet to be revealed or admitted at trial." In any event, the case was (and remains) so far removed from jury selection that a "permanent taint" on the jury pool is not possible. (R. at 1727).

Thus, while the trial court initially observed that, in the context of forensic misconduct allegations, it has not "been decided if some showing of prejudice is required – and how a trial court should go about determining whether such prejudice exists," (R. at 1725), the court evaluated the circumstances and determined that regardless, prejudice could not result from comments so distant from trial, both in substance and in time. For the trial court, the District Attorney's comments, even if not inadvertent, did not provide a basis for the "quantum leap" from some finding of impropriety to disqualification. In sum, the District Attorney's comments in her speech had not "crossed the line to the point where the Defendants have been denied the opportunity for a fundamentally fair trial, or that it requires the District Attorney's disqualification." (R. at 1727).

While the trial court did not hesitate to criticize the District Attorney for making the comments, it remained focused on the actual

guidance for analyzing claims of forensic misconduct provided by *Williams*. The substance of this case was never mentioned, no individual was named, and no personal feelings regarding guilt were expressed. The Appellants retain the opportunity to have a fundamentally fair trial, particularly where jury selection will not likely begin until at least 12 to 18 months have passed from the delivery of her speech. The trial court's analysis was sound under binding precedent, and further evaluation of the sources cited by the Georgia Supreme Court in *Williams* provides additional support for its holding, particularly its focus on the prospect of a fundamentally fair trial for the Appellants.

D. The sources cited in *Williams* provide further clarity and support for the trial court's holding.

As noted above, the *Williams* opinion identifies two sources for its primary understanding of the concept of forensic misconduct: the dissenting opinion of Judge Billings in the Vermont case of *In re J.S.*[19]

[19] Appellant Trump cites to, and relies upon, the terse majority opinion in *In re J.S.* Trump Br. at 21-22. However, *Williams* does not cite to that opinion and instead cites only to Judge Billings's strongly worded dissent. In his opinion, Billings observes that the majority opinion not only reaches the wrong result but also creates misleading precedent, both by omitting all relevant factual details and by contradicting the Vermont Supreme Court's own ruling in *Hohman*, which required a determination of prejudicial effect. 436 A.2d at 773-76. The *In re J.S.* majority opinion does not provide a definition of forensic misconduct or any practical approach for assessing relevant

and the *The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case* (hereinafter "*Nature and Consequences*"), published in Columbia Law Review in 1954. Judge Billings's opinion draws upon *Nature and Consequences* to provide a succinct definition for "forensic misconduct" and emphasizes that, to result in disqualification, misconduct must lead to prejudice by improperly influencing a jury. *Williams* also cites two federal cases, *Pierce* and *Dunlop*, which analyze misconduct in the midst of trials and also underscore the centrality and requirement of prejudice. Together, these sources provide additional guidance regarding the nature of forensic misconduct and lend further support for the trial court's decision not to disqualify the District Attorney in the present case.

Citing *Nature and Consequences* in his dissent, Judge Billings defined and explained forensic misconduct:

> Prosecutor's forensic misconduct has been defined as "any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law." Note, *The Nature and Consequences of Forensic Misconduct*, *supra*, at 949. More simply, misconduct is

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claims, whereas Judge Billings's opinion, which is actually cited by the Georgia Supreme Court in *Williams*, does.

> behavior by the prosecutor which improperly influences the trier of fact.

In re J.S., 436 A.2d at 774. Also, "[g]enerally, such misconduct is ground for disqualification only in jury trials," and even unethical statements are not disqualifying unless they have some "bearing" on the "determination of the [accused's] rights" and constitute "misconduct improperly influencing the trier of fact." *Id.* at 775.

Both Judge Billings's opinion and *Nature and Consequences* emphasize the relationship between the proposed misconduct and trial juries. Disqualification does not result from misconduct simply because it occurred, but because it exerted an improper influence on the factfinder. This, of course, is the "quantum leap" or "egregiousness" required by the Georgia Supreme Court in *Williams*. Judge Billings is emphatic on this point: even if a prosecutor's statements are exercises in "poor judgment," "unethical," or "worthy of censure," they "do not necessarily deprive a defendant of a fair trial" and thereby do not automatically constitute grounds for disqualification. *In re J.S.*, 436 A.2d at 775. Prejudice is central to the analysis because fundamental fairness of the trial is the paramount concern. *Id.* (citing *Vermont v. Hohman*, 420

A.2d 852, 855 (Vt. 1980)). There must be a finding that the factfinder "was or would be influenced by the prosecutor's statements." *Id.* at 775. And prejudice in this context is not presumed, even when a prosecutor commits obvious misconduct such as expressing a personal belief in a defendant's guilt: "a prosecutor's personal belief that a defendant is guilty does not by itself prejudice a defendant's right to a fair and impartial hearing. Such an opinion is only prejudicial if it comes to the attention of and improperly influences the trier of fact." *Id.* at 774 (citing *Hohman*). Judge Billings focused, as the trial court in this case did, upon the fairness of an eventual trial rather than its own opinion of the District Attorney's conduct (which in *In re J.S.* Billings described as "unethical" and demonstrating "poor judgment"[20]). This is entirely correct, as

[20] *In re J.S.* involved a prosecutor's public comments to a legislative committee. The crimes alleged in that case involved juvenile suspects and led to so much public outcry that the Vermont legislature was contemplating changes in juvenile detention laws. The prosecutor discussed the difficult position that he and other prosecutors faced when trying to provide information to victims of juvenile crimes while also obeying laws concerning detention, confidentiality, and juvenile defendants. He noted that people would "get up and say 'that 15 year old that killed Melissa is getting out in three years.'" He also stated that, if the defendant were released from custody, he had intended to violate any law proscribing him from informing the victim of the defendant's detention status. 436 A.2d at 773-74.

"[d]isqualification is not the remedy for prosecutorial misconduct. It is a protection against unfair trials." *Id.* at 777 (Hill, J., dissenting).

Nature and Consequences, which has been cited by most courts as the foundational authority on forensic misconduct,[21] underscores this point. It provides a number of examples of forensic misconduct, almost all of which arise from prosecutorial actions or statements made *in the courtroom* in the midst of jury trials. "It commonly involves an appeal to the jurors' prejudices, fears, or notions of popular sentiment by presenting to them inadmissible evidence; or urging them to make inferences not based on the evidence; or to disregard the evidence altogether and base their determination on wholly irrelevant factors." 54 Colum. L. Rev. at 949. The point is always to effectively and improperly "sway" a jury. *Id.* If forensic misconduct is to have a meaningful definition *outside* the courtroom, then, it must be connected to statements intended to affect the outcome of a particular case by improperly "swaying" the jury. As the trial court recognized in this case, the likelihood of a

[21] Courts in 11 states (Georgia, Vermont, New Hampshire, California, New York, Massachusetts, Oregon, New Jersey, Louisiana, Pennsylvania, and Arizona), as well as federal district courts, have drawn their definition of forensic misconduct from the note.

"permanent" influence on the factfinder is diminished by the distance, in both time and subject, from the actual trial.

The two additional cases cited by the Georgia Supreme Court in *Williams* that evaluate forensic misconduct each concern statements made in the presence of juries during trials. *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936), is the origin of the "calculated plan" statement found in *Williams*. *Pierce* involved a pattern of repeated attempts by prosecutors to introduce irrelevant evidence at trial. The attempts occurred in the presence of the jury, were highly prejudicial, and constituted misconduct. Although the trial judge sustained objections to the attempts each time they occurred, "in most instances the ruling came after the mischief had been done, and it was clearly a case where the misconduct of the prosecutors was neither slight nor confined to a single instance, but so pronounced and persistent that the cumulative effect upon the jury cannot be disregarded as inconsequential." *Id.* at 953. The repetition of the behavior was vital to the Sixth Circuit's analysis because of what it signified about *prejudice* and the behavior's *effect on the jury*:

> We are not here so much concerned with improper argument springing from the heat and enthusiasm of advocacy, as we are with what appears to have been a studied effort to inject into the case irrelevant and prejudicial matter for the purpose

> of influencing the verdict, and its continued repetition after adverse rulings. Indulgence was designed rather than inadvertent, and an improper purpose its only explanation. *That it was intended to prejudice the jury is sufficient ground for a conclusion that in fact it did so*.

Id. (emphasis added). Consistent attempts to put irrelevant and prejudicial information before the jury, in the face of repeated refusals by a trial judge, can have only one explanation: that a prosecutor is attempting to improperly sway the outcome of the case. Because prejudice was the obvious intention, the *Pierce* court concluded that prejudice had occurred. The Sixth Circuit's analysis, disapproving of the prosecution's actions though it certainly is, focuses on repetition and calculation because of what those factors indicate about *prejudice* and the *fairness of the case*, not simply because they constitute misconduct.

Dunlop v. United States, 165 U.S. 486 (1897), makes a similar point. In that case, the Supreme Court observed that like all lawyers, prosecutors sometimes succumb to the temptation to make statements and refer to facts not properly in evidence during closing arguments. Again, however, the point is *prejudice*, not *punishment for misconduct*: "[i]f every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand." *Id.* at 498. The

central concern is not whether misconduct occurred but whether any resulting prejudice is *cured* or allowed to linger. *Id.*

Judge Billings's opinion, *Nature and Consequences*, *Pierce*, and *Dunlop* all make the same point: prejudice resulting from improper influence on a jury is not merely a part of the analysis but central to it. Traditionally, this issue has arisen and been considered in the context of trials. The extension of the concept of forensic misconduct to out-of-court statements appears to be a more recent phenomenon. In *Nature and Consequences*, the sole example of pretrial, out-of-court publicity attributed to the prosecution actually resulting in reversible error is from *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952). Even in that case, the First Circuit was clear that the passage of additional time would have cured any possible prejudice and resulted in a fair trial. *Id.* at 114 (in the midst of "damaging publicity" engendered by the government, the prosecution "may find it necessary to postpone the trial until by lapse of time the danger of the prejudice may reasonably be thought to have been substantially removed").

These authorities support the reasoning and the conclusion of the trial court. Although it expressed disapproval of the District Attorney's

comments in her speech, it based its decision on disqualification on the likelihood of prejudice and the possibility of a fair trial. There is no jury to improperly influence, and more than a year will have passed before a pool of possible jurors is even identified, much less selected and sworn. There was no mention of any individual defendant, item of evidence (admissible or not), specific charge, or any other substantive aspect of this case, there was no attempt to move the case to the "court of public opinion," and of course there was no expression of a personal belief in anyone's guilt. There was no basis to conclude that the District Attorney's intention was to sway a jury in the Appellants' case—which is what forensic misconduct *actually is*, according to *Williams* and the authorities it relies upon—and the trial court correctly analyzed the facts and applied the law in refusing to disqualify her.

E. The Appellants fail to show that the trial court abused its discretion.

The Appellants suggest that the trial court misapplied the law and abused its discretion in refusing to disqualify the District Attorney. Their arguments focus primarily upon the trial court's analysis of prejudice and its apparent "failure" to consider the Georgia Rules of Professional Conduct, or its "failure" to consider that the District Attorney has

engaged in a calculated plan to prejudice them, from 2021 to the present day. Their arguments fail to grapple with the actual structure of the trial court's order, with *Williams*, with the facts, or with the Appellants' own prior actions, and they are without merit.

1. Prejudice and the Rules of Professional Conduct.

The Appellants argue that this Court should reverse the trial court not by applying the standard for forensic misconduct, but inventing a wholly new, hair-trigger standard for disqualification. Instead of grappling with what *Williams* and the other authorities actually say, the Appellants urge this Court to adopt a standard requiring automatic disqualification for violations of Georgia's Rules of Professional Conduct regarding public statements. In so doing, they argue that a showing of prejudice is unnecessary and that prejudice should simply be presumed. Such a standard would allow them to avoid articulating how a jury will presumptively be improperly influenced by the District Attorney's comments, or how the trial court's point—that the comments were unrelated to the substantive case and too far removed from jury selection to result in prejudice—could be incorrect. The argument does not

properly address the trial court's analysis, *Williams*, or the supporting authorities.

As detailed above, the standard does not declare that any misconduct is disqualifying *per se*, and prejudice is not presumed.[22] Extrajudicial comments, even if improper, do not trigger automatic disqualification. *Williams* is quite clear: although the prosecutor in that case engaged in the primary example of forensic misconduct (opining that a defendant was guilty, a statement that no doubt violates Rules 3.6 and 3.8), the misconduct was not sufficiently "egregious" to warrant disqualification. 258 Ga. at 315. Judge Billings is similarly clear in *In re J.S.*: a "*per se* rule" of disqualification is not appropriate for forensic misconduct because even "unethical" statements, "however worthy of censure, do[] not necessarily deprive a defendant of a fair trial." 436 A.2d at 775. Regardless of whether or not the Rules of Professional Conduct are violated, there must still be resulting prejudice. While the State disagrees with the trial court's conclusions (1) that the District Attorney's comments referred obliquely to Appellant Roman simply because she

[22] Also, as discussed in the first portion of this brief, automatic disqualification is not authorized outside of circumstances demonstrating an actual conflict of interest.

uttered the phrase "so many others" and the pronoun "they," and (2) that the District Attorney's comments about criticisms directed toward SADA Wade's credentials were impermissible,[23] the trial court's assessment of the comments' propriety does not finally determine the issue of disqualification. Violations of ethical rules, while obviously of great concern to trial courts, do not end the inquiry regarding disqualification, and the Appellants' insistence otherwise is directly contradicted by the central precedent on this point. Even the text of the pertinent Rule indicates that prejudice is central to the analysis. *See* Rule 3.6(a) (lawyers should avoid statements that may have a "substantial likelihood of materially prejudicing an adjudicative proceeding in the matter").

Odder still is the Appellants' insistence that the trial court somehow ignored ethical standards in its ruling. Obviously, the trial court had the opportunity to provide its views on the propriety of the District Attorney's comments, which it took. Reference to the Rules of Professional Conduct, in other words, would not "move the ball" for Appellants with a trial court who has already declared the comments to

[23] As the Supreme Court observed in *Williams*, the Rules allow more leeway for attorneys to publicly respond to the public statements of *others*. *See* 258 Ga. at 313; Ga. RPC 3.6, comment 7.

be "improper." After making its disapproval clear, however, the trial court went on to evaluate the comments to determine their relationship to the substance of this case and the likelihood of a fair trial for the Appellants. Nothing in *Williams* or even the Rules themselves removes the trial court's discretion to respond to the particular circumstances of the case as it sees fit. It was not an abuse of discretion for the trial court to censure the District Attorney rather than disqualify her.

The Appellants also suggest that an inquiry into prejudice is not appropriate or necessary because prejudice should simply be presumed to have occurred. They accomplish this by utterly ignoring Judge Billings's cited dissent from *In re J.S.* and eliding the difference between forensic misconduct and actual conflicts of interest. Trump Brief at 27-28.[24] Just as they attempted to do when discussing the appearance of

[24] Appellants also cite *Estes v. Texas*, 381 U.S. 532 (1965), for its warning that "[t]he heightened public clamor resulting from radio and television coverage will inevitably result in prejudice." *Id.* at 549. The case is inapposite and quite dated in its analysis. In *Estes*, the Supreme Court was discussing the still-novel concept of television cameras within the courtroom, observing that "all but two of our States" prohibited cameras in courtrooms. *Id.* at 550. Obviously, the question at issue in *Estes* is quite different from the circumstances at issue in the present appeal, and the *Estes* Court's certainty regarding prejudice does not seem to have survived. Today, only five states and the District of Columbia ban cameras in courtrooms. *See* Cameras in the Courts: A State-by-State Coverage Guide, found at https://courts.rtdna.org/cameras-overview.php. It seems obvious that the ubiquity of television and the expansion of viewers' options in the intervening 60 years has eliminated the "inevitability" of

impropriety standard, their arguments simply conflate the standard for disqualification in cases of forensic misconduct with the standard for cases containing actual conflicts of interest, as if those cases applied to every allegation of prosecutorial misconduct. *See* Trump Br. at 27-28; Shafer Br. at 43-45.[25] But that is not the law in Georgia, or anywhere. The Appellants do not point to a case showing such a presumptive prejudice standard from any jurisdiction. As noted above, no showing of prejudice is required in cases where a prosecutor has acquired a personal stake in a defendant's conviction. That rigorous standard does not apply even in every case involving possible conflicts of interest, and there is no indication whatsoever that it applies in cases of alleged forensic misconduct. *Williams*'s requirement of "egregious" misconduct that satisfies the "quantum leap" from impropriety to disqualification indicates precisely the sort of exercise of discretion that a presumptive-

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prejudice attendant to media coverage. Certainly, there can be no assumption that the *Estes* Court's pronouncement applies to every instance of media coverage in every situation up to the present day.

[25] Appellant Shafer also argues that *Williams* requires a determination of whether the prosecutor engaged in "some sort of plan or 'design to prejudice'" the defendant, and if they did so, then disqualification is required. Shafer Br. at 44. *Williams* does not say this at all. What it actually says is that, in determining whether to disqualify, courts have "taken into consideration" whether or not improper remarks were part of a plan. 258 Ga. at 315.

prejudice standard would not require. The trial court's approach in this case followed the obvious direction of *Williams* rather than the Appellants' unsupported hair-trigger standard, and this was not an abuse of discretion.

2. Calculated Plan

Even as they suggest that a finding of prejudice is not required for disqualification, the Appellants also argue that the District Attorney's actions, from 2021 to the present day, indicate a deliberate plan to prejudice the Appellants. According to the Appellants, the plan has progressed in several stages. First, they list a number of public statements made by the District Attorney and previously raised in an unsuccessful—and then abandoned—motion to disqualify. Then they point to the District Attorney's interviews with the authors of the book *Find Me the Votes*. The next step in the suggested plan was the District Attorney's January 14 speech, and the final step was her testimony at the hearing on the Appellants' motion to disqualify.

The trial court had the opportunity to view all of the evidence that might indicate a calculated plan to prejudice the Appellants, and the court gave the Appellants every opportunity to present it. The trial court

did not somehow err simply because the Appellants' suggestions of a calculated plan did not merit comment in its order. The Appellants' arguments on this point are a post hoc attempt to weld together disparate events with no connection except that this case is variously associated with each. As will be discussed more fully below, the District Attorney's public statements from 2023 and earlier were not examples of misconduct in the first place, and the Appellants abandoned any attempt to argue otherwise. The statements contained in the book are likewise not examples of misconduct. Although Appellants complain that the trial court dispensed with the statements from the book in a single sentence of its order, that is not an indication that the court somehow "did not consider" them; it merely indicates that they have overstated the impropriety of the statements and failed to persuade the trial court that they constituted misconduct. The District Attorney's speech, of course, did not discuss the merits of any particular case, mention any names, or touch upon the substance of the Appellants' cases at all. Instead, the speech contained the District Attorney's own perspective on criticism she had received regarding SADA Wade's qualifications. Finally, the Appellants once again argue as if the trial court declared that the District

Attorney had offered false testimony at the hearing, which—again—it did not do. The trial court in fact credited the District Attorney's testimony as to the absence of an actual conflict of interest and observed that nothing related to the issues involved had prejudiced the Appellants "in any way." In any event, her hearing testimony on personal financial matters has nothing whatsoever to do with public statements made years earlier, interviews provided to two authors, or even comments defending the experience of SADA Wade. The Appellants can neither present an accurate summary of these disparate events nor effectively explain how they are related as part of a calculated plan.

The earliest public statements of the District Attorney are the most confounding example provided by the Appellants. In the words of the trial court, Appellants "have exhaustively documented every public comment made by the District Attorney concerning this case" and cited them as grounds for disqualification for forensic misconduct. (R. at 1725). This is not their first attempt to do so. In 2023, Appellants Trump and Latham filed motions to disqualify the District Attorney and cited these statements, in the most strident terms, as examples of disqualifying conduct. As the trial court observed, Judge Robert McBurney was

unpersuaded, holding that "[n]one of what the movants cite rises to the level of justifying disqualification and all of it, collectively, falls far short" of the necessary showing. Judge McBurney's assessment of the "collective" impact of these statements was not equivocal: "Public comments about the need for and importance of the investigation fall far short of the type of bias, explicit or implicit, that must be found." (R. at 1726; Exhibit 1 at 6 n.12).

Despite vowing to appeal Judge McBurney's order, Appellants Trump and Latham did nothing of the sort.[26] At least as to these two defendants, any claim that the District Attorney committed forensic misconduct via public statements made prior to July 31, 2023, have been abandoned. *Hodgkins v. Marshall*, 102 Ga. 191, 199 (1897) (failure to enumerate errors upon a first appeal waives the right to enumerate them later); *Lee v. State*, 226 Ga. 162, 163 (3) (1970) (issues not enumerated as error are waived); *see Black v. Hardin*, 255 Ga. 239, 240 (3) (1985) (an error not enumerated stands on like footing with a failure to make timely

[26] Appellant Trump filed a notice of appeal in Superior Court and then took no other action. Bill Rankin, "Trump will pursue appeal in bid to thwart Fulton prosecution," *Atlanta Journal Constitution*, August 4, 2023, found at https://www.ajc.com/politics/trump-will-pursue-appeal-in-attempt-to-thwart-fulton-prosecution/LI4QT2OCKNEBJJIWPJQKREPN6E/.

objection in the trial court; any error is waived, and being waived, a procedural bar exists to its consideration in later proceedings). Even if they were not abandoned and affirmatively waived, it would not matter. To the extent that the statements are presented as grounds for disqualification in the present appeal, as Judge McBurney and the trial court both concluded, Appellants' arguments as to these earlier statements are meritless.

In addition to being affirmatively waived and substantively meritless, Appellants' contentions regarding this group of public statements are untimely. As Judge McBurney observed:

> There is an additional basis for denial, not reached here but certainly one preserved for pursuit should this Order be appealed: waiver. As the District Attorney noted in her response, a motion to disqualify the prosecutor in a criminal case "must be raised promptly after the defendant learns of a potentially disqualifying matter." *Reed v. State*, 314 Ga. 534, 546 (2022). Much, if not all, of what serves as the movants' grounds for disqualification is quite dated, having occurred months before their motions were filed—and movants offer no explanation for their delay in seeking disqualification.

(Exhibit 1 at 8 n.14). The statements in question were already "dated" when Appellants Trump and Latham first pointed to them in March of 2023, and they are only more so now. All of the Appellants were certainly

aware of the statements when they were indicted in August of 2023, yet no motion was filed or reference made to these statements until an additional six months had passed. The meritless nature of this ground of disqualification is evident from the Appellants' own neglect of it, and this court should disregard the District Attorney's prior statements, as any arguments regarding them are waived, untimely raised, or legally insufficient.

The Appellants' newfound interest in the District Attorney's "dated" statements demonstrates the meritlessness of their suggestions of a coordinated plan to prejudice them. Inadequate evidence is not strengthened by being tied to other inadequate evidence. They have attempted to resurrect claims that were unfounded to begin with, and which they either abandoned or ignored, in order to prop up their theory. The statements to the authors of the book are similarly "far short" of the sort of impropriety characterized as forensic misconduct, and the District Attorney's hearing testimony has nothing to do with either. The proposals of calculation and design cannot withstand scrutiny, and the trial court did not abuse its discretion by somehow "failing" to consider them.

F. Conflict of interest

Appellant Clark argues that the District Attorney's speech also demonstrates a conflict of interest because she "breached her public duty" in making remarks which violate the Rules of Professional Conduct, thereby creating "concrete actual conflict between her personal interests and her public responsibilities." Clark Br. at 35. Appellant Clark's argument misunderstands the nature of disqualifying conflicts of interest. In *Williams*, the Supreme Court indicated in a footnote that "there is no clear demarcation line between conflict of interest and forensic misconduct, and a given ground for disqualification might be classifiable as either," with the *Hohman* case—where, in the midst of a reelection campaign, a prosecutor pledged to convict a specific individual—being an example. *Williams*, 258 Ga. at 315 n.4. In *Hohman*, the Vermont Supreme Court found that the prosecutor's vow to convict demonstrated that he had acquired "a personal interest or stake in convicting the accused." *In re J.S.*, 436 A.2d at 775 (Billings, J., dissenting) (citing *Hohman*, 420 A.2d at 854-55). *That* was the import of the prosecutor's statement: it indicated that he had a personal political interest in the outcome of the case, just as a prosecutor pursuing a case

with a contingency fee would have a personal financial interest in its outcome.

The District Attorney's statements in her speech contain no such indications of a personal stake in convicting the Appellants. The District Attorney did not say anything that would indicate a personal motive to convict, and the speech did not discuss the substance of the actual case even obliquely. Unlike the prosecutor in *Hohman*, her comments did not tie her own interests to achieving a conviction of Appellant Clark or anyone else, and the Appellant's suggestion otherwise is without merit.

CONCLUSION

For the above reasons, the State of Georgia submits this Honorable Court should affirm the trial court's order, which contained no abuse of discretion.

CERTIFICATION OF WORD COUNT

This submission does not exceed the word count authorized by this Court's order of July 3, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with counsel for the Appellants, as listed below, to allow documents in a PDF format sent via email to suffice for service, as authorized under Rule 6(b)(2). To that end, on the 5th day of August, 2024, I served a copy of the foregoing Brief of Appellee upon the following counsel of record via e-mail:

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