IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

DEFENDANT DAVID J. SHAFER'S MOTION TO DISQUALIFY THE DISTRICT ATTORNEY FOR FULTON COUNTY, GEORGIA, ATLANTA JUDICIAL CIRCUIT, AND THE DISTRICT ATTORNEY'S OFFICE FROM FURTHER PROSECUTION OF THIS ACTION AND FOR AN EVIDENTIARY HEARING[1]

"*If I were to comment on any open case, it would be a reason to conflict my office out.*"

Fulton County District Attorney Fani T. Willis, November 14, 2023 (emphasis added)

(to a reporter for The Washington Post)[2]

I. INTRODUCTION AND BACKGROUND

The Fulton County District Attorney, Fani Willis, has engaged in a pattern of prosecutorial, forensic misconduct which compels her disqualification from the prosecution of this case as well as the disqualification of her entire Office and prosecution staff. All of the causes for the disqualification are self-inflicted blows. Straying wildly from the legal guardrails which are designed to protect the accused from improper,

[1] As set forth in earlier filings by other co-defendants and in a current motion by defendant Cathleen Latham, District Attorney Willis and her Office have already been found to have a direct, actual conflict in this matter that, under Georgia law *McLaughlin v. Payne*, 295 Ga. 609 (2014), requires her and her entire Office to be disqualified from the investigation and any further prosecution. If this Court grants Mrs. Latham's motion, in which Mr. Shafer joins, to correct that earlier mistake and disqualifies District Attorney Willis and her Office now on that existing basis, it need not address the issues raised in defendant Michael Roman's, which Mr. Shafer also adopts, or this motion.

[2] https://www.youtube.com/watch?v=-wrjx4V3OYM.

extrajudicial comments by a prosecutor, the District Attorney, for over a year-and-a-half, has given multiple interviews where she has improperly labeled some of the defendants as "Fake Electors" and commented on the righteousness of her investigation and prosecution. The District Attorney's pattern of prejudicial public statements in relation to this case reached a new high—or low—on January 14, 2024, in the sanctuary of Big Bethel A.M.E. Church in Atlanta.

It is important to set the stage. On January 8, 2024, defendant Michael Roman filed a 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 (Roman Motion to Dismiss) in this action, alleging that:

1. District Attorney Willis began a romantic relationship with attorney Nathan Wade prior to hiring Mr. Wade as a special assistant district attorney, under a limited contract with a cap on the amount he could charge the County, on or about November 1, 2021. The next day, Mr. Wade filed for divorce from his wife;

2. In March of 2022, District Attorney Willis and Mr. Wade modified the initial professional services agreement;

3. During this time, District Attorney Willis and Mr. Wade continued their personal, romantic relationship;

4. On or about November 15, 2022, District Attorney Willis and Mr. Wade signed an extension of the professional services agreement through May 15, 2023; and

5. District Attorney Willis and Mr. Wade continued their personal, romantic relationship before and after the November 15, 2022, extension of Mr. Wade's contract.

See Roman Motion to Dismiss, pp. 5-7. The Roman Motion to Dismiss further alleges that:

> While the filings in the divorce case are sealed by Court order, undersigned counsel has learned that Willis and Wade have traveled personally together to such places as Napa Valley, California, Florida and the Caribbean and Wade has purchased tickets for both of them to travel on both the Norwe[gi]an and Royal Carrib[b]ean cruise lines.

Id. at 9.

Rather than properly addressing the accuracy of Mr. Roman's allegations, the District Attorney chose a church setting to deflect the Roman allegations by making the most offensive and incendiary allegations against her accusers—forcing the defendants onto the lethal third rail of American politics, and in her own words, "playing the race card." The obvious intent of her remarks was to inject and infect the jury pool in Fulton County with unfounded allegations that anyone who dares question her or Mr. Wade's conduct must have done so for racist purposes. As an attorney and, most importantly, a public prosecutor, her comments which directly affected the pending litigation were indefensible and reprehensible. These comments constitute prosecutorial, forensic misconduct and warrant her removal and that of her Office from the prosecution of this case.

Also, if true, the Roman allegations establish District Attorney Willis' personal conflict of interest in hiring Mr. Wade, her romantic partner, causing him to be paid hundreds of thousands of dollars with public funds, receiving personal benefits from him in the form of paid airline tickets, expensive ocean cruises and vacations to exotic destinations and never revealing to the Fulton County Board of Commissioners the nature of her relationship with Mr. Wade, or the personal benefits she received from him.

In fact, rather than reveal disclose her relationship with Mr. Wade, she chose to affirmatively conceal the existence of the personal benefits received from Mr. Wade by failing to disclose these benefits and gifts on her omitting them from her required financial disclosure reports. Financial disclosure reports are required for a reason. It forces the public official to list any benefits the office received from any "prohibited sources," such as Mr. Wade, who are doing business with the County. She chose to conceal the benefits.

Additionally, pursuant to the Georgia Constitution, District Attorney Willis, as a public officer, is a trustee of the people and a servant of the people and at all times is amenable to the people. Her conduct in hiring Mr. Wade, causing hundreds of thousands of dollars to be paid to him, benefitting personally, and failing to disclose her conduct is a clear breach of her fiduciary responsibility as trustee to the citizens of Fulton County, Georgia.

Pursuant to these facts and others set forth herein, defendant David J. Shafer accordingly moves for disqualification of the District Attorney and her Office from representing the State of Georgia in this action based upon the District Attorney's public statements and conflicts of interest.[3] The District Attorney's publicized statements have

[3] Mr. Shafer fully recognizes that "[d]ismissal of an indictment is an extreme sanction, 'used only sparingly as [a remedy] for unlawful government conduct.'" *Olsen v. State*, 302 Ga. 288, 294 (2017) (quoting *State v. Lampl*, 296 Ga. 892, 896 (2015)). However, the State's misconduct can violate due process where it is "'so extreme that it caused demonstrable prejudice to the defendant's recognized constitutional or statutory rights…'" *Gober v. State*, 249 Ga. App. 168, 171 (2001) (citing *McGarvey v. State*, 186 Ga. App. 562, 564 (1988)). In addition, federal courts in this jurisdiction have held that "[t]he dismissal of an indictment on the ground of prosecutorial misconduct is a discretionary call…" *United States v. Jordan*, 316 F.3d 1215, 1248-49 (11th Cir. 2003) (citing *United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002)). While Mr. Shafer does not request dismissal of the Indictment in this motion, Mr. Shafer intends to adopt motions by co-defendants seeking dismissal of the Indictment based upon District Attorney Willis'

been severely prejudicial to the defense. Furthermore, the District Attorney's employment of Mr. Wade to investigate and prosecute the defendants and payments to Mr. Wade of over a half a million dollars from the Fulton County treasury while allowing Mr. Wade to pay for vacations for the District Attorney and other personal expenses constitutes a disqualifying conflict of interest as well as a violation of ethical rules applicable to attorneys and Fulton County employees, and potentially criminal law.

The defendants possess a due process right to a fair trial with an impartial jury and a disinterested prosecutor. The Court furthermore possesses duties to ensure that the defendants receive a fair trial with an impartial jury, and to preserve public confidence in the impartiality of the administration of justice. The District Attorney's improper and prejudicial actions, which are intentional, self-inflicted wounds, warrant her disqualification as a representative of the State of Georgia in this action and disqualification of her Office, in vindication of defendants' rights and restoration of both the appearance of and actual impartiality of these proceedings.

A. District Attorney Willis' Public Statements to the News Media Regarding "The Race Card," Her "Winning" "Superstar" Team," and Her Direct Communications from God

On January 14, 2024, District Attorney Willis made the following statements during a televised speech to an audience at Big Bethel AME Church in Atlanta:

> Why does [Fulton County] Commissioner [Bridget] Thorne, and so many others, question my decision in special counsel? Lord, your flawed, hard-headed and imperfect child--I'm a little… confused. I appointed three special counsel as is my right to do. Paid them all the same hourly rate. They only attack one.

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conduct. Mr. Shafer submits that the Court may find that the remedy of dismissing or quashing the prosecution's Indictment is warranted as a sanction for District Attorney Willis' numerous acts of misconduct and breaches of the law and rules of professional conduct, as set forth in the various motions filed concerning District Attorney Willis' conduct.

I hired one white woman. A good personal friend and great lawyer. *A superstar, I tell you*.

I hired one white man. Brilliant, my friend and a great lawyer.

And I hired one Black man. Another superstar. A great friend… and a great lawyer.

O Lord, they going to be mad when I call them out on this nonsense.

First thing they said, "oh she going to play the race card now." But no, God, *isn't it them playing the race card when they only question one?* Isn't it them playing the race card when they constantly think that I need someone from some other jurisdiction, in some other state, to tell me how to do a job I've been doing almost 30 years?

[Applause.]

God, why don't they look at themselves and just be honest? I mean, can't they keep it [ ] with themselves? Why are they so surprised that *a diverse team that I assembled, your child, can accomplish extraordinary things?*

God, wasn't it them who attacked this lawyer of impeccable credentials? The Black man I chose has been a judge more than 10 years. Run a private practice more than 20. Represented businesses in civil litigation. I ain't done, y'all. Served as a prosecutor, a criminal defense lawyer, Special Assistant Attorney General. Won Chief Justice Robert Benham Award from the State Bar of Georgia—you know, *they ain't just giving this to Black men*.

How come God, the same Black man I hired was acceptable when a Republican in another county hired him and paid him twice the rate? [Applause] Oh y'all like to hear me. [Applause.] In another county, the elected official has the authority to pay him twice the rate. *Why is the white male Republican's judgment good enough, but the Black female Democrat's not?*

[Applause.]

Now please hear me: I am not criticizing his judgment. The people of his county elected him to make that decision. In fact, let me put it on the record, he's someone I respect, because he was always willing to hire diversity. He was just looking for quality. I don't care political party—they care about it. My only question is: why do they question me?

Now I want to be clear: *all three of these special counselors are superstars. But I'm just asking, God: is it that some will never see a Black man as qualified, no matter his achievements?* What more can one achieve? The other two have never been judges, but no one questions their credentials. I'm just saying. [Applause]

Lord, I'm just asking. Is it that I, because of the shell you chose to put me in, will never be qualified in their eyes to make the decisions the voters put me here to make?

[Applause.]

Lord, never mind your flawed, imperfect servant *has composed a team that wins and wins and wins*. [Applause.] Never mind, Lord, that *this leader has a trial conviction rate of 95 percent*. [Applause.] Never mind,

> Lord, that *the trial team that this lawyer put together has a conviction rate of 95 percent*. [Applause.] Never mind, Lord, that the appellate rate of my office is 96 percent. [Applause.] Never mind, Lord, that 400 plus children are touched by the programming that my staff put together to keep them out of gangs. [Applause.] Never mind, Lord, that thousands of records of citizens in my county have now been restricted so that they can work, and get home and return to being productive. [Applause.] Never mind, Lord, that in three years I have cut the backlog by more than 50 percent. [Applause.] Never mind, Lord, in my community where in the rest of the country crime is down five or seven percent, is down 20 percent here. [Applause.] Never mind, Lord, that homicides are down in Atlanta by 20 percent. [Applause.] Is there something about me, Lord, that makes me still unqualified?
>
> *God [ ] responds, "Child, pray for those. They can't see what I've qualified."* [Applause.]
>
> Wait God. I'm going to slow down here. It's your hard-headed child. *I told you I don't want to pray for them*. [Laughter.] I am tired of being treated cruelly.
>
> Pray for them anyway, child. Pray for their hearts. Pray for their souls. *I qualified you. I qualified your imperfect, flawed self. I saw you in every hour. Do my work*. Ignore the distractions.[4]

(Emphasis added). As she knew they would be, her statements were widely reported by national and local news media, and the recording of her statements was published numerous times online. Irrespective of her vagueness as to whom her statements were directed to, it is plain that they were directed towards Mr. Roman and intended to taint the jury pool in this case.

Following District Attorney Willis' public statements at the church, a flood of media stories were published with headlines such as "**Fani Willis, Trump Georgia case prosecutor, ends silence on misconduct accusations**," "**Fulton County DA Fani Willis defends special prosecutor following allegation of romantic relationship**," "**Fulton DA defends special prosecutor during church speech**,"

[4] FOX 5 Atlanta, "Fani Willis Big Bethel AME Church full speech | FOX 5 News" (January 14, 2024) https://www.youtube.com/watch?v=aGHjumOMWHA .

"**What you need to know about the drama surrounding Fulton County DA Fani Willis**," "**Judge in Trump Georgia case orders hearing on Fani Willis misconduct claims**," "**Lawyer hired to prosecute Trump in Georgia is thrust into the spotlight over affair claims**," and "**How Allegations of an Office Romance Came to Complicate the Case Against Trump.**" *See* Exhibit A. The media correctly understood that Willis' statements accused her critics of racism: "Willis vigorously defended Wade's credentials at a church service on Sunday and suggested the questioning of his hiring was rooted in racism. She has three special prosecutors working on the election case — a white woman, a white man and a Black man — 'they only attacked one,' she said, referring to Wade.." *Id.*, p. 36.

B. <u>Other Public Statements by District Attorney Willis Relating to The Case and The Defendants</u>

On the evening of May 2, 2022, District Attorney Willis voluntarily appeared on CNN. Willis said the following concerning her investigation on national television:

> Um, we are going to look at anything connected with, um, interference with the 2020 election. And so I've allowed that to be a broad scope, not just the President's phone call that you played there. *But other things that indicate that there may have been interference with that… election. To include fake electorates [sic].*[5]

(Emphasis supplied).

In the wake of District Attorney Willis' statements on national cable news, the news media published numerous pieces concerning Mr. Shafer and the other 2020 nominee Republican Presidential Electors with headlines such as "**GOP fake electors 'targets' in Georgia election fraud inquiry**," "**Fake GOP electors targeted in Fulton**

[5] *Id.*

County special grand jury probe," "**Georgia fake electors may face charges in election probe**," "**Georgia prosecutors 'target' 16 'fake electors' in 2020 election probe**," "**Georgia GOP bankrolls lawyers for 'fake' Trump electors in Fulton County DA probe**," "**Judge: GOP head can't share lawyers with other fake electors**," "**Georgia DA seeks to disqualify attorney for 'fake electors' in Trump investigation**," "**Fulton DA offered immunity to 'fake' electors, asks for attorney to remove[ ] from case, motion shows**," "**Fulton DA seeks to disqualify lawyer for some GOP fake electors, citing 'ethical mess**,'" "**Fake Trump electors pointing fingers in Georgia election inquiry; DA seeks removal of defense attorney**," "**'Ethical mess' | Georgia's 'fake' Trump electors turn on each other, Fulton DA says**," "**Fani Willis wants lawyer for Trump fake electors off the case, says there's conflict," "'Fake' Coffee County Trump elector wants 2020 Georgia election investigation ended**," "**At least 8 fake electors have immunity in Ga. election probe**," "**8 Trump 'fake electors' have accepted immunity in Georgia election probe, attorney says**," "**Who are Georgia's alleged fake electors in the Donald Trump investigation?**," "**Georgia Trump investigation | Who are the 'fake' or 'alternate' electors?**," "**Fani Willis successfully flipped eight 'fake electors.' Why that matters to Trump,**" "**Fake Electors 'Perfectly' Positioned to Flip on Donald Trump: Kirschner**," and "**Prosecutors push back on efforts by 3 Trump 'fake electors' to have their Georgia cases moved to federal court**." *See* Exhibit B.

C. "*Find Me The Votes: A Hard-Charging Georgia Prosecutor, a Rogue President, and the Plot to Steal an American Election*"

On January 30, 2024, Hachette Book Group published a book entitled *Find Me The Votes: A Hard-Charging Georgia Prosecutor, a Rogue President, and the Plot to Steal an American Election*, about District Attorney Willis and the "ongoing" criminal case. *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*, Acknowledgements (1st ed. 2024) (*Find Me The Votes*). According to the authors, District Attorney Willis gave them "access and time…" *Id*. District Attorney Willis certainly knew that this book, featuring her as the "hard-charging," afraid of nothing, prosecutor would be published and available to the public prior to the trial of this case. In the extensive interviews, District Attorney Willis continued her themes regarding racism and provided details of racist comments and threats of violence against her and her need for enhanced security, as well as God's protection and direction of her during the handling of this case. *Id*. at 2, 6, 225, 271, 273.

Among other things, District Attorney Willis told the authors that, since her Office had opened this case, the Office had gotten a lot of comments, and that the comments were "always racist." *See Find Me The Votes*, p. 223. District Attorney Willis also purportedly told the authors "*[w]e all have to live by a certain standard of rules. And if you violate them, you catch a charge*." *Id*. at 255 (emphasis in original).

II. ARGUMENT

"*[W]hen you represent the citizens… you need to be beyond reproach*."

Fulton County District Attorney Fani T. Willis,

August 6, 2020 (emphasis added) (to a reporter for 11Alive News)[6]

A. The Court Should Disqualify District Attorney Willis as Counsel for The State of Georgia in This Action Based Upon The District Attorney's Misconduct in the Form of Repeated, Prejudicial Public Statements to the News Media

"*The television camera is a powerful weapon. Intentionally or inadvertently, it can destroy an accused and his case in the eyes of the public*." *Estes v. Texas*, 381 U.S. 532, 543 (1965) (emphasis added). This statement was true when it was made by the United States Supreme Court in *Estes* in 1965, and it is even more true today in the age of the internet, cellphones, social media, and near-universal instant access to news.

Due process requires "'[a] fair trial in a fair tribunal…" *Estes*, 381 U.S. at 543 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955); quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Pursuant to due process, a criminal defendant must be provided with "a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Smith v. Phillips*, 455 U.S. 209, 217 (1982); *accord Inman v. State*, 281 Ga. 67, 74 (2006) (quoting *Smith*, at 217).

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[6] "Fani Willis talks about race against D.A. Paul Howard," 11Alive (August 6, 2020), https://www.youtube.com/watch?v=3CEM3GfiLdo .

Under Georgia law, a prosecuting attorney may be disqualified based upon a conflict of interest or "forensic misconduct." *See Whitworth v. State*, 275 Ga. App. 790, 792 (2005) (citing *Williams v. State*, 258 Ga. 305, 314 (1988)); *see also Woods v. Covington County Bank*, 537 F.2d 804, 813 n. 12 (5th Cir. 1976) (stating that courts may disqualify an attorney where has been a reasonable possibility of improper professional conduct where "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case"). "Prosecutor's forensic misconduct may be generally 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 in The Prosecution of a Criminal Case*, 54 Colum. L. Rev. 946, 949 (1954) (emphasis added) (cited at *Williams*, at 314).

In regard to publicity, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." *Id.* "[T]he

atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Estes*, 381 U.S. at 540.

The Georgia Rules of Professional Conduct state that:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a person would reasonably believe to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Ga. R. Prof. Cond. 3.6(a). The Rules of Professional Conduct furthermore provide that a prosecutor in a criminal case shall, "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, *refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused*." Ga. R. Prof. Cond. 3.8(g) (emphasis added).

District Attorney Willis spoke to the audience and news media present at the church from notes which she had prepared.[7] The District Attorney referenced the race of each of the private attorneys whom the District Attorney had employed in relation to the Indictment, and asked the audience whether Fulton County Commissioner Bridget Thorne and others who criticized her were "playing the race card." District Attorney Willis proceeded to refer to Mr. Wade as the "Black man," and asked why a "white male Republican's judgment" was allegedly "good enough" but a "Black female Democrat's" judgment allegedly was not. She then asked whether there were some persons who "will

[7] "Fani Willis Big Bethel AME Church full speech | FOX 5 News," FOX 5 Atlanta (January 14, 2024), https://www.youtube.com/watch?v=aGHjumOMWHA .

never see a Black man as qualified, no matter his achievements," and whether she would ever be qualified in the eyes of such people because of the "shell" she had been "put in."

District Attorney Willis' publicized statements suggested that Commissioner Thorne, Mr. Roman and the District Attorney's other critics are motivated by alleged racial prejudice or animus. The media likewise interpreted District Attorney Willis' statements as suggesting that Mr. Roman and others questioning the District Attorney's employment or compensation of Mr. Wade were "racist."[8] District Attorney Willis, in making highly-publicized, inflammatory and scandalous remarks suggesting that her opponents are racist, has heightened condemnation of the defendants in this action and prejudiced the defendants' due process right to a fair trial before an impartial jury, free from outside influences, in violation of the Rules of Professional Conduct. The District Attorney has willfully attempted to prejudice any jury panel selected in this case through insinuating that her opponents are allegedly racist. And finally, District Attorney Willis has contributed to the poisoning of any potential jury pool in this case by providing information regarding the investigation and prosecution in this case for a book which has been published prior to trial.

Accusing Commissioner Thorne and many others (including Mr. Roman) of allegedly playing the "race card," District Attorney Willis asked why no one had questioned her hiring of one white woman (attorney Anna Cross) and one white man (attorney John Floyd) as special assistant district attorneys while questioning her hiring of Mr. Wade, a Black man. The answer is obvious. There is no evidence whatsoever that

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[8] https://www.newsweek.com/fani-willis-tears-marjorie-taylor-greene-1860775; https://www.nytimes.com/2024/01/18/us/fani-willis-trump-georgia-prosecutors.html.

District Attorney Willis has a romantic relationship with either of the "white" special assistant district attorneys, caused several hundred thousand dollars to be paid to them, received personal gifts from them in the form of airline flights, seat upgrades, hotel stays, ocean cruises, wine country tours and beach vacations, and failed to report such gifts on her financial disclosure forms. Sadly, it is District Attorney Willis who is playing the race card in order to deflect attention from her own misconduct and conflicts of interest.

The U.S. Supreme Court has recognized that "[t]he heightened public clamor resulting from radio and television coverage will inevitably result in prejudice." *Estes*, 381 U.S. at 549. District attorneys and their offices have been disqualified or recused from prosecutions for making prejudicial statements to the media in other cases. *See People v. Lastra*, 83 Cal. App. 5th 816, 819, 821, 824 (2022), *as modified on denial of reh'g* (Sept. 28, 2022), *review denied* (Jan. 11, 2023) (affirming the trial court's granting of the defendants' motion to recuse the district attorney's office from the prosecution of the defendants for charges relating to a protest march where the district attorney had made media and public appearances, and posts on social media, making statements critical of the Black Lives Matter movement); *People v. Choi*, 80 Cal. App. 4th 476, 479, 480, 484 (2000) (trial court's order recusing the entire district attorney's office affirmed where the district attorney made statements to the press, stating his belief that the defendants, who were charged with murder, were connected to an uncharged murder, affirmed). However, the fact that District Attorney Willis has willfully and publicly raised racial arguments relating to the issues in this action makes disqualification of District Attorney Willis and her Office from representing the State in this action on grounds of the District Attorney's violations of the Rules of Professional Conduct uniquely appropriate. The United States Supreme Court has recognized that:

> [D]iscrimination on the basis of race, "odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell,* 443 U.S. 545, 555 [(1979)], damaging "both the fact and the perception" of the jury's role as "a vital check against the wrongful exercise of power by the State," *Powers v. Ohio,* 499 U.S. 400, 411 [(1991)].

Pena-Rodriguez v. Colorado, 580 U.S. 206, 208 (2017). The jury is supposed to be a criminal defendant's "'protection of life and liberty against race or color prejudice.'" *Id*. at 209 (quoting *McCleskey v. Kemp,* 481 U.S. 279, 310 (1987); quoting *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880)).

As one court has observed, "[r]eliance on racial or ethnic bias has no place in the justice system." *State v. Horntvedt*, 539 P.3d 869, 874 (Wash. Ct. App. 2023) (citing *State v. Zamora*, 199 Wash.2d 698, 723 (2022); *Rose*, 443 U.S. at 555; *State v. Sum*, 199 Wash.2d 627, 640 (2022)). "A defendant is deprived of their right to an impartial jury 'when explicit or implicit racial bias is a factor in a jury's verdict.'" *State v. Bagby*, 200 Wash.2d 777, 787 (2023) (reversing the defendant's convictions for burglary, fourth degree assault, and harassment, finding that "the prosecutor in [the defendant's] case engaged in conduct that flagrantly or apparently intentionally appealed to racial bias and thus undermined [the defendant's] credibility and the presumption of his innocence") (quoting *State v. Berhe*, 193 Wash.2d 647, 657 (2019)). "Because the prosecutor is a representative of the State, it is especially damaging to… constitutional principles when the prosecutor introduces racial discrimination or bias into the jury system." *Zamora*, at 710.[9] A court "must be vigilant of conduct that appears to appeal to racial or ethnic bias…" *Id*. at 714.

[9] One district attorney was even removed from office, as opposed to a particular prosecution, for use of racist language. *See In re Spivey*, 345 N.C. 404, 408, 419 (1997) (affirming trial court's order removing a district attorney from office where the district attorney had used an abusive racial epithet during a confrontation with a patron at a bar).

District Attorney Willis' deliberate, inflammatory accusations at an Atlanta church that those objecting to her employment and compensation of Mr. Wade are "racist" constitute forensic misconduct by the District Attorney in relation to this case and warrant her removal as a representative of the State of Georgia in this action. District Attorney Willis repeatedly emphasized and contrasted Mr. Wade's race and the race of two other attorneys and that of a politician who had hired Mr. Wade. *See Bagby*, 200 Wash.2d at 795 ("Identifying [the defendant] as the black man and [the victim] as the white man in opposition to one another in this manner further emphasizes the idea of a racially charged 'us' versus 'them' mentality"). The District Attorney's public appeals based upon racial bias or prejudice in relation to her hiring of Mr. Wade were especially inflammatory in view of the fact that, earlier in the same speech, District Attorney Willis stated that she had received regular death threats and racist abuse as a consequence of this prosecution:

> Oh, my God, you forgot to mention that my life and the life of my family would be threatened so regularly. I now think it's not normal if I don't have two death threats a week. My God, you did not tell me that people would call me the N word more than they call me Fani. You did not tell me. As a woman of color, it would not matter what I did, my motive, my talent, my ability, and my character would be constantly attacked.[10]

The District Attorney also improperly injected religion into this case. In her speech at the church, she spoke to the audience about a "response" from "God"--to the effect that God had allegedly "qualified" the District Attorney and was directing her to do God's "work." In an apparent reference to the Roman Motion to Dismiss, she seems to be suggesting that God opposes the disqualification motion and approves of her

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[10] FOX 5 Atlanta, "Fani Willis Big Bethel AME Church full speech | FOX 5 News" (January 14, 2024) https://www.youtube.com/watch?v=aGHjumOMWHA .

prosecutorial decisions. District Attorney Willis' statements to the media that God had allegedly "qualified" her and that she is allegedly doing "God's work" were grossly improper and plainly amounted to an "'inflammatory appeal to… jurors' private religious beliefs.'" *Hammond v. State*, 264 Ga. 879, 886 (1995) (quoting *United States v. Giry,* 818 F.2d 120, 133–134 (1st Cir. 1987)). Her statements concerning her "superstar" team that "wins and wins and wins" and has a "95 percent conviction rate" furthermore constituted improper vouching for the prosecution to the public, in disregard of the presumption of innocence and the prosecution's burden to prove its charges against the defendants beyond a reasonable doubt. Given the prosecution's purported conviction rate, potential jurors would assume that defendants are guilty given that the prosecution "wins" 95 percent of its cases.

Moreover, District Attorney Willis' improper and inaccurate characterization of Mr. Shafer and the other 2020 nominee Republican Presidential Electors as "Fake Electors" to the national media has been exceedingly prejudicial to Mr. Shafer. At all times material to the District Attorney's Indictment, Mr. Shafer was qualified as a "lawful" Presidential Elector pursuant to Georgia law through his nomination as a Presidential Elector by the Georgia Republican Party. *See* O.C.G.A. § 21-2-130(3) & (4). Mr. Shafer was nominated as a Presidential Elector by the Georgia Republican Party in March of 2020, approximately eight months before the November 2020 general election. In the conduct alleged in the Indictment, Mr. Shafer was acting pursuant to federal law and the Constitution, the advice of legal counsel, and he and the other nominee Republican Presidential Electors were following the precedent of the 1960 presidential election in the

State of Hawaii.[11] Mr. Shafer and the other 2020 nominee Republican Presidential Electors were not "fake" electors, and the District Attorney's public comments improperly characterizing them as such have greatly prejudiced Mr. Shafer's and the other Presidential Elector defendants' primary defense to the prosecution's charges against them, with the false characterization being widely spread and constantly repeated by the media. In addition, in the nominee Presidential Elector defendants' efforts to remove this action to federal court, United States District Court Judge Steve Jones recognized that the term "Fake Electors" is inaccurate and misleading, finding:

> *Shafer along with the fifteen other individuals who met as the Republican-nominated presidential electors have been deemed "fake electors," in the media and were referred to as such by the State at the evidentiary hearing in this matter*. Hearing Tr. 8:6-12; 68:18–21. Shafer's counsel urged that they be referred to as "contingent electors." *Id*. 9:7–11. *Neither term, however, adequately describes the Republican-nominated presidential electors under federal or Georgia law…* For the sake of precision and clarity, therefore, the Court will use the term "Republican nominated presidential electors" to describe Shafer and the other fifteen individuals that attended the December 14, 2020 meeting.

Georgia v. Shafer, civil action number 1:23-CV-03720-SCJ (N.D. Ga. 2023), Order issued August 29, 2023, p. 3 n. 3.

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[11] *[I]n 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines. See Josephson & Ross, Repairing the Electoral College*, 22 J. Legis. 145, 166, n. 154 (1996)…
Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. *Both Democratic and Republican electors met on the appointed day to cast their votes*. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted. Josephson & Ross, 22 J. Legis., at 166, n. 154.

Bush v. Gore, 531 U.S. 98, 127 (2000) (Stevens, J., dissenting) (emphasis added). If the prosecution's allegations in this case are believed, Justice Stevens was describing alleged criminal activity in his opinion in *Bush v. Gore*.

District Attorney Willis' labelling the nominee Presidential Electors as "Fake Electors" furthermore amounts to an improper and prejudicial opinion that Mr. Shafer and the other Presidential Elector defendants' actions were allegedly illegal. "'The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.'" *Woods v. State*, 275 Ga. 844, 848 (2002) (quoting *ABA Standards of Criminal Justice Relating to the Prosecution Function*).

District Attorney Willis' "remarks were part of a calculated plan evincing a design to prejudice the defendant[s] in the minds of the jurors…" *Williams*, 258 Ga. at 314 (affirming the trial court's denial of the defendant's motion to disqualify where the prosecutor made statements to the media prior to the fourth trial of the defendant, stating "So far as I see it, the score is 35-to-1 for conviction, and I'm confident that if we bring it back and get a jury that is willing and able to decide, then we'll get the right result," and "In my opinion, therefore, there is substantial reason to believe [the defendant] is guilty of the offense charged") (citing *Pierce v. United States*, 86 F.2d 949 (6th Cir. 1936); *Dunlop v. United States*, 165 U.S. 486 (1897). District Attorney Willis used the media attention surrounding this case to make public comments intended to inflict as much damage on her opponents as she believed that she could get away with. In contrast, the prosecution is wholly dismissive of District Attorney Willis' nationally televised comments relating to the case, asserting in its State's Opposition to Defendants Roman, Trump, and Cheeley's Motions to Dismiss and to Disqualify the District Attorney (Opposition) that "District Attorney Willis has made no public statements that warrant disqualification or judicial inquiry…" Opposition, p. 2. The Court should rightly have

serious concerns, however, where a prosecutor and officer of the Court makes public, extrajudicial statements suggesting that her critics, including the defendants, are racist.

District Attorney Willis' intentional, prejudicial public statements amount to forensic misconduct warranting the disqualification of the District Attorney and her Office. The Court should act to safeguard the defendants' right to a fair trial by an impartial jury, free from outside influences and, above all, appeals to racial prejudice by the prosecution. *See Bagby*, 200 Wash.2d at 803 ("'[T]he prosecutor's injection of racial discrimination into this case cannot be countenanced at all, not even to the extent of contemplating to any degree that the error might be harmless'") (quoting *Berhe*, 193 Wash.2d at 682 (Madsen, C.J., concurring)). District Attorney Willis should be disqualified for her misconduct and willful violation of the Rules of Professional Conduct, inserting issues of race into this proceeding and into the public forum in an effort to prejudice any jury pool in this action against the defendants, in violation of the defendants' due process rights.

B. <u>The Court Should Disqualify District Attorney Willis as Counsel for The State of Georgia in This Action Based Upon The District Attorney's Conflicts of Interest</u>

> "*I certainly will not be choosing people to date that work under me.* Let me just say that. Um, you know, we are at a place in society where things happen in peoples' relationships and husband and wife, *sometimes there are outside relationships.* I don't think that that's what the community is concerned about, although there, you know, might be a moral breaking in that. *I think that what citizens are really, really concerned about is if you chose to have inappropriate contact with employees. I mean there's nothing that I can say on it other than it is distracting, um, and it's certainly inappropriate for the number one law enforcement officer in the State, um, and it just—it, it really, really saddens me…*"

Fulton County District Attorney Fani T. Willis, 2020 (emphasis added)[12] [13]

A criminal defendant possesses a right to a disinterested prosecutor. *See Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987). Under Georgia law, "[i]f the assigned prosecutor has acquired a personal interest or stake in the conviction, the trial court abuses its discretion in denying a motion to disqualify h[er]…" *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2012) (citing *Whitworth*, 275 Ga. App. at 796; *Young v. United States*, 481 U.S. 787, 809–814 (1987)). For a district attorney to have a conflict in a case "is contrary to public policy…" *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014) (citing *Lane v. State*, 238 Ga. 407, 408–410 (1977); *Clifton v. State*, 187 Ga. 502, 504 (1939)).

A conflict of interest exists where "there is a significant risk that the lawyer's own interests or the lawyer's duties to another client, a former client, or a third person will materially and adversely affect the representation of the client…" Ga. R. Prof. Cond. 1.7(a). District Attorney Willis' employment of Mr. Wade as a special assistant district attorney for the State and paying him more than three times her annual salary while simultaneously receiving benefits and gifts from Mr. Wade, all while privately being involved in a romantic relationship with him, constitutes an actual, substantial conflict of interest for District Attorney Willis. As a prosecuting attorney, District Attorney Willis

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[12] https://twitter.com/TPostMillennial/status/1748487114168394034?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1748487114168394034%7Ctwgr%5E4f7ac00384bfc7a826fa332a491ed91ac8f033bd%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fthepostmillennial.com%2Fda-fani-willis-slammed-over-video-saying-she-would-not-date-lower-level-staff

[13] District Attorney Willis' hypocrisy in having a romantic relationship with Mr. Wade while criticizing former Fulton County District Attorney Paul Howard for having improper sexual contact with employees of the Office is astonishing.

"represents, not an ordinary party, but a sovereignty, whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice." *Collier v. State*, 266 Ga. App. 345, 352 (2004) (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

District Attorney Willis ' causing over half a million dollars in County funds to be paid to her boyfriend and her receipt of gifts from Mr. Wade in the form of expensive trips has been in District Attorney Willis' personal interest—not in the interest of the State. District Attorney Willis furthermore presumably possesses a personal interest in her romantic interest, Mr. Wade, continuing to receive large amounts of State or County funds by remaining a special assistant district attorney in this case. District Attorney Willis knew what she was doing was wrong. The District Attorney herself made accusations of sexual misconduct against former Fulton County District Attorney Paul Howard when she ran against him in 2020, as shown by the above quote by the District Attorney.

The defendants possess a right to a disinterested, conflict-free prosecutor. For its part, the State should want to provide–in all cases, but especially this one-conflict-free representation that is above reproach. District Attorney Willis should have recused herself from this case prior to the return of the Indictment. She should have complied with her statutory mandate to notify the Executive Director of the Prosecuting Attorneys' Council of the State of Georgia that she was disqualified from this case as a result of "interest or relationship." *See* O.C.G.A. § 15-18-5. She failed to take any of these steps.

i. District Attorney Willis' Conduct Violated District Attorney Willis' Oath of Office

District Attorney Willis' personal, financial conflict of interest in this case is especially serious for the reason that District Attorney Willis' conduct giving rise to the

conflict violated District Attorney Willis' constitutional duties of trust, ethics standards applicable to public servants and attorneys and, potentially, criminal statutes. On taking office, District Attorney Willis swore an oath to faithfully and impartially discharge her duties as District Attorney without fear, favor or affection, and while taking only her lawful compensation. *See* O.C.G.A. § 15-18-2. District Attorney Willis' entering into a contract for her romantic partner to be paid from County funds while receiving benefits from Mr. Wade and concealing the relationship from the County does not constitute either a faithful or impartial exercise of District Attorney Willis' duties.

The prosecution's Indictment charges certain defendants to this action with alleged solicitation of violations by public officers of their oaths of office, in violation of O.C.G.A. §§ 16-4-7 and 16-10-1. *See* Indictment, pp. 72, 74, 84, 87, 95. District Attorney Willis' conduct in employing her boyfriend at a cost of over half a million dollars to the County while failing to disclose the relationship or her receipt of favors constitutes conduct either as or more serious as other cases involving violations of section 16-10-1. *See Nave v. State*, 166 Ga. App. 466, 467 (1983) (DeKalb County assistant district attorney indicted and convicted for violation of oath of office under O.C.G.A. § 16–10–1 , where the attorney received several thousand dollars from a defendant "in exchange for a promise not to prosecute her case and provide her with a copy of the state's file against her"); *State v. Greene*, 171 Ga. App. 329, 329 (1984) (reversing grant of special demurrer by clerk of the Gwinnett County Recorder's Court, who was indicted for falsifying public records and violation of oath by a public officer); *Gaskins v. State*, 318 Ga. App. 8, 9 (2012) (affirming the defendant police officer's conviction for violation of oath of office where the officer ran up charges with, and provided false information to, the carrier for his personal wireless phone); *Poole v. State*, 262 Ga. 718, 718 (1993) (police officer's conviction for

violation of oath affirmed where officer confiscated a handgun and then pawned it to pay his water bill).

The defense has furthermore obtained Fulton County Income and Financial Disclosure Reports (Disclosure Reports) for the years 2021 and 2022, signed and submitted by District Attorney Willis to the County. *See* Exhibit C. The Disclosure Reports require County officials to disclose "[e]ach gift or favor from a single prohibited source in the aggregate amount of $100.00 or more." *Id.* at 2. A "prohibited source" includes any person "seeking to do or [ ] doing business with the county…" *id.,* which in this case would obviously include Mr. Wade. District Attorney Willis did not disclose any of the gifts or favors she received from Mr. Wade on the Disclosure Reports. *Id.* Similar conduct has been subject to criminal prosecution. *See United States v. Bickers*, No. 1:18-CR-98-SCJ-LTW, 2019 WL 7559292, at *12 (N.D. Ga. Sept. 17, 2019), *report and recommendation adopted*, No. 1:18-CR-00098-SCJ, 2019 WL 5587050 (N.D. Ga. Oct. 30, 2019) (observing that the defendant had been charged, *inter alia*, "with wire fraud in violation of 18 U.S.C. §§ 1343 and 1349 in connection with the alleged filing of false Financial Disclosure Forms via the Internet while receiving her City salary as the Director of Human Services"); *United States v. Wright*, No. CRIM. 11-0262-WS, 2012 WL 1365454, at *1 (S.D. Ala. Apr. 19, 2012) (defendant mayor indicted for causing his daughter to sell land which the defendant had transferred to her to the City pursuant to a grant of funds from the Federal Emergency Management Agency (FEMA) without disclosing his conflict of interest). Furthermore, for the purposes of the federal honest services mail fraud statute, 18 U.S.C. § 1346, "'when an official… personally benefits from an undisclosed conflict of interest—the official has defrauded the public of his honest services.'" *United States v. Lopez–Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (the defendant, a county commissioner, who

had had a romantic relationship with a lobbyist appearing before the board of commissioners and had accepted payments from him, was convicted under section 1346). District Attorney Willis' failure to list the gifts and benefits which she received from Mr. Wade on her Disclosure Reports may reasonably be found to constitute evidence of an intent on the part of District Attorney Willis to conceal the gifts and benefits from the Fulton County Commission and the public. The prosecution's Opposition, moreover, entirely fails to address District Attorney Willis' omissions from her Disclosure Reports. *See* Opposition.

District Attorney Willis and her actions are already under investigation by the Judiciary Committee of the United States House of Representatives[14], and a Special Committee of the Georgia State Senate[15]. In light of her conduct, District Attorney Willis must undoubtedly be concerned over the potential consequences of a Republican administration in charge of the United States Department of Justice.

ii. <u>District Attorney Willis' Conduct Constituted a Breach of Trust</u>

The Georgia Constitution provides that public employees are "trustees of the people and servants of the people and are at all times amenable to them." Georgia Const. Art. I, Sec. II.

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard

[14] Zoë Richards and Rebecca Kaplan, "House Republicans launch inquiry into Jan. 6 panel and prosecutor in Trump's Georgia case," NBC News (December 5, 2023), https://www.nbcnews.com/politics/congress/house-republicans-launch-inquiry-fani-willis-jan-6-panel-rcna128242.

[15] Shirin Faqiri, "Georgia state Senate approves special committee investigation into Fani Willis," CNN (January 26, 2024), https://edition.cnn.com/2024/01/26/politics/fani-willis-nathan-wade-georgia-state-senate-investigation/index.html.

> of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.

Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545 (1928) (citing 62 A.L.R. 1). A trustee's every action must be above suspicion. *See Clark v. Clark*, 167 Ga. 1, 5 (1928). "Trustees can never be allowed to derive a personal advantage from the use of the trust property." *Hanson v. First State Bank & Trust Co.*, 259 Ga. 710, 714 n. 7 (1989) (quoting *Perdue v. McKenzie*, 194 Ga. 356, 368 (1942); citing *Caruthers v. Corbin*, 38 Ga. 75 (1868); *Roberts v. Mansfield*, 38 Ga. 452, 458 (1868); *Mayor & c. of Macon v. Huff*, 60 Ga. 221, 228 (1878)). It need only be shown that:

> [T]hat the fiduciary allowed himself to be placed in a position where his personal interest might conflict with the interest of the beneficiary. It is unnecessary to show that the fiduciary succumbed to this temptation, that he acted in bad faith, that he gained an advantage, fair or unfair, that the beneficiary was harmed. Indeed, the law presumes that the fiduciary acted disloyally, and inquiry into such matters is foreclosed.

Fulton Nat. Bank v. Tate, 363 F.2d 562, 571 (5th Cir. 1966).

District Attorney Willis accordingly owed the State and County strict duties of trust. *See Croy v. Whitfield Cnty.*, 301 Ga. 380, 384 (2017) (finding that a county attorney "owe[d] the utmost loyalty and diligence to the county, not only as a consequence of his acceptance of a public office of trust, but also because his professional responsibilities as a lawyer demand[ed] it"); *Haraguchi v. Superior Ct.*, 43 Cal. 4th 706, 709 (2008) ("Prosecutors are public fiduciaries"). District Attorney Willis has breached those duties of trust in knowingly causing hundreds of thousands in State or County funds to be paid to her boyfriend, and by knowingly accepting gratuities from Mr. Wade.

iii. District Attorney Willis' Conduct Violated Georgia Law Governing The Employment of Assistant District Attorneys

District Attorney Willis' employment of Mr. Wade as an assistant district attorney was unlawful. Georgia law permits a district attorney to employ:

> [S]uch additional assistant district attorneys, deputy district attorneys, or other attorneys, investigators, paraprofessionals, clerical assistants, victim and witness assistance personnel, and other employees or independent contractors as may be provided for by local law or as may be authorized by the governing authority of the county or counties comprising the judicial circuit.

O.C.G.A. § 15-18-20(a). District Attorney Willis failed to obtain authorization from Fulton County to employ Mr. Wade or the other private attorneys representing the District Attorney's Office in this action under section 15-18-20(a). On the contrary, District Attorney Willis knowingly concealed her personal relationship with Mr. Wade from the County as well as from the Court and the defense.

The Court of Appeals, in *Greater Georgia Amusements, LLC v. State*, identified an exception to section 15-18-20(a)'s requirement that a district attorney obtain authorization from the governing authority to employ additional attorneys where the representation is for "a specific case…" 317 Ga. App. 118, 120 (2012) (quoting *State v. Cook*, 172 Ga. App. 433, 437 (1984)). However, the District Attorney's Office's employment agreement with Mr. Wade was not limited to a specific case, rendering the alleged exception to section 15-18-20(a) inapplicable.

Georgia law further provides that "[a]ny assistant district attorney, deputy district attorney, or other attorney at law employed by the district attorney who is compensated in whole or in part by state funds shall not engage in the private practice of law." O.C.G.A.

§ 15-18-21(a). By his own admission, Mr. Wade is still engaged in the private practice of law.[16] *See* Opposition, Exhibit A, ¶ 25.

Additionally, Mr. Wade has been compensated, at least in part, with forfeiture proceeds.[17] O.C.G.A. § 9-16-18(a) provides that "[a]ll property declared to be forfeited vests with the state at the time of commission of the conduct giving rise to the forfeiture together with the proceeds of the property after that time." O.C.G.A. § 9-16-18(a). Yet Mr. Wade and the other private attorneys employed by the District Attorney's Office have continued to engage in the private practice of law, in violation of section 15-18-21(a). District Attorney Willis' employment and compensation of Mr. Wade and the other private attorneys to prosecute this action was in contravention of law, and warrants the disqualification of District Attorney Willis and her Office. *See State v. Culbreath*, 30 S.W.3d 309, 313 (Tenn. 2000) (holding that the involvement of attorney paid by special interest group in the investigation and prosecution of the defendant created "an appearance of impropriety that required disqualification of the District Attorney… and his office").

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[16] District Attorney Willis concedes this point in her Opposition to the Roman Motion to Dismiss, when she acknowledges that after Mr. Wade was hired as a special prosecutor, this case became his "primary focus." *See* Opposition, p. 19. The contracts themselves show that Mr. Wade was hired and re-hired for "anti-corruption matters." *Id*., Exhibit H (stating that the DA's office was contracting with Wade for "legal services regarding anti-corruption matters"). Even in her Opposition, District Attorney Willis cannot and does not claim that Mr. Wade was hired for a specific case, rendering the exception upon which she heavily relies inapplicable.

[17] Mr. Wade's receipt of forfeiture funds is detailed at length in Defendant Robert David Cheeley's Motion to Dismiss the Grand Jury Indictment and Disqualify the District Attorney, Her Office, and The Special Prosecutors, filed January 26, 2024, which Mr. Shafer has adopted.

iv. District Attorney Willis' Conduct Violated Ethics Rules

The Fulton County Code of Ethics (Code of Ethics) states that it is "essential" to the proper government and administration of the County that officers and employees of the County "are in fact and in appearance, independent and impartial in the performance of their official duties; that public service not be used for private gain; and that there be public confidence in the integrity of the county." Fulton Cnty. Code Ethics, Sec. 2-66(a).

> Officers and employees should aspire to avoid even the appearance of a conflict of interest by avoiding conduct or circumstances that would provide a reasonable basis for the impression that the officer's or employee's ability to protect the public interest or impartially perform an official act is compromised by his or her financial or personal interests in the matter or transaction. The appearance of a conflict of interest can exist even in the absence of an actual conflict of interest.

Fulton Cnty. Code Ethics, Sec. 2-66(b). The County's Code of Ethics states that "[n]o officer or employee shall perform, or fail to perform, any official act or influence others to perform, or fail to perform, any official act, on a matter in which the officer or employee knows, or reasonably should know, they have an interest that may be affected." Fulton Cnty. Code Ethics, Sec. 2-68(a). County officers and employees cannot "directly or indirectly solicit, request, exact, receive, or agree to receive a gift, loan, favor, promise, or thing of value, in any form whatsoever, for himself, herself, or another person, from any prohibited source," Fulton Cnty. Code Ethics, Sec. 2-69(a), with a value greater than $100, *see* Fulton Cnty. Code Ethics, Sec. 2-69(c). As with the County's Disclosure Reports, a "prohibited source" is any person who "is seeking to do or is doing business with the county…" Fulton Cnty. Code Ethics, Sec. 2-67(s).

The County's Code of Ethics also provides that "[n]o officer or employee shall engage in any activity or transaction that is prohibited by any law, now existing or hereafter enacted, which is applicable to him or her by virtue of his or her office or

position." Fulton Cnty. Code Ethics, Sec. 2-78. County officials and employees must file income and financial disclosure reports with the Clerk of the Fulton County Board, disclosing "any gift(s) or favor(s) from a single prohibited source in the aggregate value or amount of $100.00 or more…" Fulton Cnty. Code Ethics, Sec. 2-79(b)(3).

District Attorney Willis violated these provisions of the County's Code of Ethics through employing Mr. Wade with whom she had an undisclosed romantic relationship, paying Mr. Wade hundreds of thousands of dollars in County funds and accepting gifts from him which she did not disclose to the County. Indeed, by receiving the trips and vacations, District Attorney Willis received gifts and things of value for herself from a prohibited source. District Attorney Willis has furthermore violated her fiduciary duties as an attorney representing the State of Georgia and Fulton County. "All transactions between an attorney and h[er] client are closely scrutinized by the courts, and the attorney's duty in these circumstances is a much higher duty than is required in ordinary business dealings where the parties trade at arms length." *Arey v. Davis*, 233 Ga. 951, 955-956 (1975) (citing Am.Jur.2d 105-107, Attorneys at Law, §§ 93, 94 & 95; 2 E.G.L. 531, Attorney and Client, § 92. (No. 29570)).

C. <u>Consequences</u>

District Attorney Willis has earned the disqualification of both herself and her Office from representing the State of Georgia in this case as a result of her personal, financial conflicts of interest, which are the product of her conduct in dereliction of the law, her duties of trust and ethical rules, and as a consequence of her repeated, prejudicial public statements designed to damage the defendants. "'The administration of the law, and especially that of the criminal law, should, like Caesar's wife, be above suspicion, and should be free from all temptation, bias or prejudice, so far as it is possible for our courts

to accomplish it…'" *Davenport v. State*, 157 Ga. App. 704, 705–706 (1981) (quoting *Nichols v. State*, 17 Ga. App. 593, 606 (1915)). In the interest of protecting the defendants' right to a fair trial by a disinterested prosecution, the Court should order the disqualification of District Attorney Willis and her Office.

D. <u>Disqualification of District Attorney Willis Requires the Disqualification of The District Attorney's Office</u>

If District Attorney Willis is found to be subject to disqualification in this action, then the District Attorney's Office and all assistant and special assistant district attorneys therein are likewise disqualified. "When the elected district attorney is wholly disqualified from a case, the assistant district attorneys—whose only power to prosecute a case is derived from the constitutional authority of the district attorney who appointed them—have no authority to proceed." *McLaughlin*, 295 Ga. at 613. Disqualification of a district attorney is distinct from the mere disqualification of one of the district attorney's assistants. "The elected district attorney is not merely any prosecuting attorney. [Sh]e is a constitutional officer, and there is only one such officer in each judicial circuit," *id*. at 612 (citing Ga. Const., Art. VI, Sec. VIII, Para. I(a)). Under the Georgia Constitution, a district attorney possesses the duty "to represent the state in *all* criminal cases in the superior court of such district attorney's circuit…" Ga. Const., Art. 6, § 8, ¶ I(d) (emphasis added); *see also McLaughlin*, at 294 ("a Georgia district attorney is of counsel in all criminal cases or matters pending in his circuit") (citing *Lane v. State*, 238 Ga. 407, 408–410 (1977); *Clifton v. State*, 187 Ga. 502, 504 (1939)). A criminal proceeding "'is under the direction, supervision, and control of [the district attorney], subject to such restriction as the law imposes.'" *McLaughlin*, at 293 (quoting *Jackson v. State*, 156 Ga. 842, 850 (1923)). All other attorneys employed by a district attorney's office "'can perform no

duties as such except those agreeable to and under the direction of the [district attorney].'" *McLaughlin*, at 293-294 (quoting *Jackson v. State*, 156 Ga. 842, 850 (1923)); *see also DeKalb Cty. v. DRS Investments, Inc.*, 260 Ga. App. 225, 227 (2003) ("'public sector attorneys can exercise only those powers defined and conferred by law'") (quoting *City of Atlanta v. Black*, 265 Ga. 425, 427 (1995); citing O.C.G.A. § 45-6-5). In the event that District Attorney Willis is ordered disqualified in this action, her Office must also be ordered disqualified. Furthermore, any special assistant district attorneys appointed by District Attorney Willis must be disqualified. A "special assistant district attorney is appointed by the district attorney and therefore derives all of his or her power or authority to prosecute a case from the district attorney." Order issued November 11, 2016, *State v. Brown*, case number 11-9-2482-40 (Super. Ct. Cobb Cnty. 2016) (granting the defendant's motion to disqualify the District Attorney for the Cobb Judicial Circuit and his office, and the special assistant district attorneys employed by the District Attorney).

E. <u>An Evidentiary Hearing Is Necessary</u>

An evidentiary hearing is necessary on the defense's disqualification motions for the reason that there are material facts which are in dispute. The prosecution's Opposition to the Roman Motion to Dismiss attaches a declaration by Mr. Wade wherein he swears that his personal relationship with District Attorney Willis began after his hiring in November of 2021 as a special assistant district attorney. There is no declaration or affidavit from District Attorney Willis, however, the filing was filed in her name as District Attorney. Of course, she cannot file such a filing if she knows that it contains materially false statements. Mr. Roman's reply filed on February 2, 2024, represents that several witnesses will directly refute Mr. Wade's declaration. If the testimony of these witnesses proves credible, the inexorable conclusion would be that Mr. Wade has made false

statements in his declaration which has been filed by the District Attorney or on her behalf in the record in this case, and which would constitute yet another instance of forensic misconduct by the District Attorney and her Office.

Additionally, Mr. Wade declares that expenses for personal travel were roughly divided equally between Mr. Wade and District Attorney Willis. Presently, the public filings in the Wade divorce proceeding and the "example" of District Attorney Willis purchasing tickets for herself and Mr. Wade are not remotely "roughly" equal. An evidentiary hearing is necessary to obtain a complete financial picture of the gifts and benefits which Mr. Wade has bestowed on District Attorney Willis.

A full evidentiary hearing on the motions to disqualify the District Attorney, Mr. Wade and the District Attorney's Office is needed to obtain the true transparency. Uniform Superior Court Rule states that "all" motions "shall" be heard at a time and place set by the judge, prior to trial. *See* Uni. Super. Ct. R. 31.2. An evidentiary hearing would permit the defense to develop the evidence relating to the grounds for disqualification of District Attorney Willis and Mr. Wade and, upon information and belief, would assist the Court in adjudicating the defendants' disqualification arguments. The Court should a full evidentiary hearing on February 15, 2024, as initially set, to discover the truth relating to these matters.

Counsel understands and appreciates that an evidentiary hearing regarding the District Attorney's forensic misconduct and the financial aspects of District Attorney Willis and Mr. Wade's personal relationship that create these disqualifying conflicts of interest is unseemly and an uncomfortable experience for all involved. Counsel does not pursue these claims lightly.

But, as noted, District Attorney Willis and Mr. Wade are not victims here—these are all self-inflicted and completely avoidable errors in which the defense had no hand, but are of such significance that the defense has no choice but to put them before the Court.

And, in the big picture here, this discomfort pales in comparison to what Mr. Shafer--a presumptively and actually innocent man--has endured. His life has been upended by unwarranted and meritless charges filed by District Attorney Willis (that she does not have the legal authority or jurisdiction to pursue). Mr. Shafer obeyed the law, following the explicit, detailed, oral and written legal advice by no less than five learned and reputable attorneys, and the only existing American precedent. He now finds his liberty and livelihood threatened by the powerful levers of law enforcement that have been improperly weaponized against him. Through her extrajudicial and prejudicial statements, District Attorney Willis has further weaponized the media, the public, and now even the church against him. An evidentiary hearing on the matters set forth in the disqualification motions is critical for the parties and the Court to have sufficient information to understand the full nature of District Attorney Willis' misconduct and conflicts of interest and to assure the impartial administration of justice promised to every citizen who stands accused of a crime.

CONCLUSION

Based upon the facts and authorities set forth herein, defendant David J. Shafer respectfully requests that the Court grant defendant's Motion to Disqualify The District Attorney for Fulton County, Georgia, Atlanta Judicial Circuit, and The District Attorney's Office from Further Prosecution of This Action and order that Fulton County, Georgia,

Atlanta Judicial Circuit, District Attorney Fani T. Willis and her office are disqualified from representing the State of Georgia in this action.

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

/s/ Craig A. Gillen
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Georgia Bar No. 294838
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CERTIFICATE OF SERVICE

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

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