IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

CASE NO.

DONALD JOHN TRUMP,
RUDOLPH WILLIAM LOUIS GIULIANI,
MARK RANDALL MEADOWS,
JEFFREY BOSSERT CLARK,
ROBERT DAVID CHEELEY,
MICHAEL A. ROMAN,
DAVID JAMES SHAFER,
HARRISON WILLIAM PRESCOTT FLOYD, and
CATHLEEN ALSTON LATHAM,

Defendants-Appellants.

v.

THE STATE OF GEORGIA,

Appellees.

APPLICATION FOR INTERLOCUTORY APPEAL

Steven H. Sadow
Georgia Bar No. 622075
260 Peachtree Street, N.W.
Suite 2502
Atlanta, Georgia 30303
Email: stevesadow@gmail.com
Telephone: (404) 577-1400

L. Allyn Stockton, Jr.,
Georgia Bar No. 682909
STOCKTON & STOCKTON, LLC
191 S. Main St., P.O. Box 1550
Clayton, Georgia 30525
Email: Lastockton@windstream.net
Telephone: (706) 782-6100

Jennifer L. Little
Georgia Bar No. 141596
400 Galleria Pkwy., Suite 1920

John S. Esposito
New York State Bar # 2010809
Admitted *Pro Hac Vice*

Atlanta, Georgia 30339
Email: jlittle@jllaw.com
Telephone: (404) 947-7778

Counsel for Defendant-Appellant President Donald J. Trump

Harry W. MacDougald
Georgia Bar No. 463076
CALDWELL, CARLSON, ELLIOTT & DELOACH, LLP
6 Concourse Pkwy., Suite 2400
Atlanta, Georgia 30328
Email: hmacdougald@ccedlaw.com
Telephone: (404) 843-1956

Catherine S. Bernard
Georgia Bar No. 505124
BERNARD & JOHNSON, LLC
5 Dunwoody Park, Suite 100
Atlanta, Georgia 30338
Email: catherine@justice.law
Telephone: (404) 432-8410

Counsel for Defendant-Appellant Jeffrey B. Clark

Christopher S. Anulewicz
Georgia Bar No. 020914
Jonathan R. DeLuca
Georgia Bar No. 228413
Wayne R. Beckermann
Georgia Bar No. 747995
BRADLEY ARANT BOULT CUMMINGS LLP
1230 Peachtree Street NE, 20th Floor
Atlanta, Georgia 30309
Email: canulewicz@bradley.com
Telephone: (404) 868-2030

Richard A. Rice, Jr.
Georgia Bar No. 603203
THE RICE LAW FIRM, LLC

David L. Lewis
New York State Bar # 1685791
Admitted *Pro Hac Vice*

Counsel for Defendant-Appellant Rudolph William Louis Giuliani

James D. Durham
Georgia Bar No. 235515
GRIFFIN DURHAM TANNER & CLARKSON, LLC
104 West State St.
Suite 200
Savannah, Georgia 31401
Email: jdurham@griffindurham.com
Telephone: (912) 867-9141

Counsel for Defendant-Appellant Mark Randall Meadows

Ashleigh B. Merchant
Georgia Bar No. 040474
John B. Merchant, III
Georgia Bar No. 533511
THE MERCHANT LAW FIRM, P.C.
701 Whitlock Avenue, S.W., Ste. J-43
Marietta, Georgia 30064
ashleigh@merchantlawfirmpc.com
john@merchantlawfirmpc.com
Telephone: (404) 510-9936

Counsel for Defendant-Appellant Michael Roman

3151 Maple Dr., NE
Atlanta, Georgia 30305
Email: richard.rice@trlfirm.com
Telephone: 404-835-0783

Counsel for Defendant-Appellant Robert David Cheeley

Craig A. Gillen
Georgia Bar No. 294838
Anthony C. Lake
Georgia Bar No. 431149
GILLEN & LAKE LLC
400 Galleria Pkwy.
Suite 1920
Atlanta, Georgia 30339
Email: cgillen@gwllawfirm.com
aclake@gwllawfirm.com
Telephone: (404) 842-9700

Holly A. Pierson
Georgia Bar No. 579655
PIERSON LAW LLC
2851 Piedmont Road NE, suite 200
Atlanta, Georgia 30305
Email: hpierson@piersonlawllc.com
Telephone: (404) 353-2316

Counsel for Defendant-Appellant David J. Shafer

Todd A. Harding
Georgia Bar No. 101562
HARDING LAW FIRM, LLC
113 E. Solomon Street
Griffin, Georgia 30223
Email: kamikazehitman@comcast.net

Christopher I. Kachouroff, Esq.
Admitted Pro Hac Vice
MCSWEENEY, CYNKAR &
KACHOUROFF, PLLC
13649 Office Place, Suite 101
Woodbridge, Virginia 22192
Email: chris@mck-lawyers.com
Telephone: (703) 365-9900

Counsel for Defendant-Appellant Harrison William Prescott Floyd

William G. Cromwell
Georgia Bar No. 197240
CROMWELL LAW FIRM LLC
400 Galleria Pkwy.
Suite 1920
Atlanta, Georgia 30339
Email: bcromwell@cartercromwell.com
Telephone: (678) 384-5626

Counsel for Defendant-Appellant Cathleen Alston Latham

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Pursuant to O.C.G.A. § 5-6-34(b) and Court of Appeals Rule 30, Defendant-Appellants President Donald John Trump**,** Rudolph William Louis Giuliani**,** Mark Randall Meadows, Jeffrey Bossart Clark, Robert David Cheeley, Michael A. Roman, David James Shafer, Harrion William Prescott Floyd, Cathleeen Alston Latham, (collectively, "Defendants" or "Appellants") apply for leave to appeal the Fulton County trial court's March 15, 2024 Order (the "Order") on Defendants' Motions to Dismiss and Disqualify the Fulton County District Attorney (the "Motions"). *See* **Ex. A**.

I. INTRODUCTION

Defendants were indicted by Fulton County District Attorney Fani Willis ("DA Willis") in August 2022 for their alleged actions related to the 2020 Presidential Election. At issue here is whether DA Willis and her entire office should have been disqualified from prosecuting this case based upon (1) DA Willis's inflamatory out-of-court statements regarding Defendants and their counsel and other misconduct ("forensic misconduct") in response to this Motion, and/or (2) her actual or apparent conflict of interest in the case. While the trial court factually found DA Willis's out-of-court statements were improper and Defendants proved an apparent conflict of interest, the trial court erred as a matter of law by not requiring dismissal and DA Willis' disqualification. This legal error requires the Court's immediate review.

An erroneous interlocutory trial court order that will cause substantial error at a trial is subject to immediate review by this Court, as are orders that raise issues for which precedent is needed. *See* Ga. Ct. App. R. 30 (b)(1) and (b)(2). The March 15, 2024 Order from the trial court declining to disqualify DA Willis from further prosecuting this case invokes both criteria.

First, the erroneous failure to disqualify a prosecutor is a structural error that would not just cause substantial error at trial – it would render each and every trial in this case a nullity. Given the complexity of this case, the fact that it likely will be conducted through multiple different trials given the number of Defendants, and the projected length of each of these trials (estimated by the State to be at least four months each, but likely much longer), the time and resources that the courts, the parties, and the taxpayers of Fulton County are going to be forced to expend to go through this process even once is massive. It is neither prudent nor efficient to require the courts, the parties, or taxpayers to run the significant and avoidable risk of having to go through this painful, divisive, and expensive process more than once when an existing structural error can be remedied by this Court now.

Second, the need to establish precedent in this case regarding the disqualification standard for forensic misconduct is manifest. The trial court candidly acknowledged the lack of appellate guidance on this important disqualification issue significantly impacted his ruling. In the forensic misconduct

context, he noted there was no appellate guidance outside of *Williams v. State*, 258 Ga. 305, 314 (1988) on how to apply the forensic misconduct standard, that his decision was "[u]nmoored from precedent," and that he felt "confined to the boundaries of *Williams"* to "restrict[] the application of the facts found here to [*Williams'*] limited holding." Ex. A at 18. With additional and appropriate guidance from this Court, Judge McAfee's ruling would come out differently.

Third, the trial court expressly found DA Willis's challenged actions, including hiring her paramour, Special Assistant District Attorney ("SADA") Nathan Wade, as lead prosecutor in this matter, and accepting gifts and trips from him that were funded through his compensation as lead prosecutor, created an appearance of impropriety in this case that cast a pall over these entire proceedings. Ex. A at 2, 15. The trial court was bound by existing case law to not only require Wade's disqualification (which occurred) but ***also*** to require the disqualification of DA Willis and her entire office. The trial court's failure to do so is plain legal error requiring reversal.

Finally, the public's faith in the integrity of the judicial system, especially the criminal justice system, is critical to its functioning. *See, e.g., Berger v. United States*, 295 U.S. 78 (1935). Courts have an obligation to ensure that "legal proceedings appear fair to all who observe them." *Wheat v. United States,* 486 U.S. 153, 160 (1988). "[O]ur system of law has always endeavored to prevent even the

probability of unfairness . . .. [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Estes v. State of Tex.*, 381 U.S. 532, 543 (1965) (quotations omitted). When the public perception of the integrity of the criminal justice system is at stake, no prejudice to defendants needs to be shown. *See Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 812 (1987).

Nowhere are these interests more important or on display than in a high-profile case like this one that has captured the attention of the Nation. Crucial to the public's confidence is that prosecutors remain and appear to be disinterested and impartial. *See Berger*, 295 U.S. at 88 (the prosecutor is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that justice shall be done."). "The prosecutor has more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, Att'y Gen. of the U.S., The Federal Prosecutor, Address to the Second Annual Conference of United States Attorneys (Apr. 1, 1940).

To avoid structural error that would invalidate and require a repeat of the upcoming trials, to establish needed precedent in the area of disqualifying forensic misconduct, and to protect and maintain the public's confidence in the integrity of the criminal justice system, this Court should grant the Application.

II. BACKGROUND

On January 8, 2024, Defendant Roman filed a motion seeking disqualification of District Attorney Willis ("DA Willis") and her office based upon the personal financial stake she acquired due to her improper and secret relationship with her lead prosecutor, SADA Wade. *See* Ex. C, Defendant Michael Roman's 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"). The Roman Motion alleged that DA Willis hired SADA Wade, paid him approximately $650,000 in a two-year period, and was personally financially benefiting from the relationship, among other things. *Id*. The evidence revealed that, within the 7-month period of October 2022 to April 2023, SADA Wade incurred over $17,000 in credit card charges for vacations he and DA Willis took to Miami, Aruba, the Bahamas, and California. Ex. HH, Financial Summary. DA Willis was also admittedly the recipient of day trips to Tennessee, Alabama, South Carolina, North Carolina, and other parts of Georgia, and numerous lunches and/or dinners. Ex. A at 6-7. These expenses were not shared proportionally or even tracked. Indeed, DA Willis could only provide a single receipt for two plane tickets totaling $1,394 to offset the more than $17,000.00 in benefits paid by SADA Wade. *Id*. at 6.

Long before the Roman Motion was filed, DA Willis had engaged in a pattern of conduct designed to prejudice Defendants. DA Willis began by repeatedly making widely publicized, improper extrajudicial statements throughout the course of the investigation in violation of her heightened ethical obligations as a prosecutor to refrain from doing so. *See* Ex. O, Defendant Michael Roman's Supplemental Reply To The State's Response to Motion To Dismiss and Motion To Disqualify ("Roman Reply") at Exhibit A (collecting many of the District Attorney's public comments throughout the investigation and indictment of this case).

In spite of (or perhaps *because* of) the impending hearing on Roman's Motion to dismiss and disqualify, DA Willis undertook significant efforts designed to prejudice Defendants and deflect attention away from, and otherwise conceal, the full nature of her disqualifying behavior. On January 14, 2024, only six days after the Roman Motion was filed, DA Willis, reading from prepared notes, gave a speech at Big Bethel Church, a historical Black church in Atlanta, which was televised by local and national news media. In that speech, DA Willis, while concealing her personal relationship with SADA Wade, improperly injected race and racial bias into the case, indicating that Defendants and their counsel were racists for challenging her unethical conduct, that Defendants were guilty and would be convicted (boasting about her "superstar" team with a "conviction rate of 95 percent" who "win, win,

win."), and implying that that God himself had chosen her for this case, that he was on her side, and that she was doing His work in this prosecution. Ex. E at 5-7.

Approximately two weeks later, Hachette Book Group published a book about D.A. Willis and the ongoing criminal case depicting her as the "hard-charging," afraid of nothing prosecutor. *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, Willis gave them significant "access and time…" and Willis certainly knew that this book would be published prior to the trial of this case.[1]

Having already significantly compromised Defendants' due process rights, DA Willis then began her efforts to conceal the full nature of her behavior from the trial court.[2] On February 2, 2024, DA Willis filed an opposition to various

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[1] In her extensive interviews with the book's authors, D.A. Willis continued to thrust her themes of alleged racism against her and her Office into the public forefront, providing details of racist comments and threats of violence against her, as well as highlighting her need for enhanced security because of this case. Among other things, Willis told the authors that, since her Office had opened this case, the comments were "always racist." *Id.* at 223. She again invoked God as her ally, stating that she had God's protection and direction in handling this case. *Id*. at 2, 6, 225, 271, 273.

[2] On January 17, 2024, DA Willis, through her private attorney, filed for a protective order in SADA Wade's divorce proceeding in the Superior Court of Cobb County. In that filing, Willis accused Wade's spouse of "conspire[ing] with interested parties in the criminal Election Interference Case to use the civil discovery process to annoy, embarrass, and oppress District Attorney Willis." Ex. F at 44-45, Emergency Motion By Non-Party Deponent for Protective Order, January 17, 2024, p. 8, *Wade v. Wade*,

Defendants' motions to dismiss and disqualify, which included an affidavit from SADA Wade falsely claiming that he and DA Willis did not begin their personal relationship until 2022. *See* Ex. M, State's Opposition to Defendants Roman, Trump, and Cheeley's Motions to Dismiss and to Disqualify The District Attorney ("Opposition"), Exhibit A, ¶ 27. At the evidentiary hearing on February 15, 2024, both DA Willis and SADA Wade similarly testified under oath that their romantic relationship began around April 2022. *See* Transcript of February 15, 2024 Hearing at 5:53:09 and 1:49:40 (*available at* https://www.youtube.com/watch?v=Ndcexi-W8rQ&t=21220s).

The evidence at the hearing, however, demonstrated otherwise.[3] Furthermore, DA Willis and SADA Wade both testified to a wholly unsupported explanation of

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case number 21-1-08166 (Super. Ct. Cobb Cnty. 2021). DA Willis asked the Cobb County Judge for time "to complete a review of the filings in the instant case, investigate and depose relevant witnesses *with regard to the interference and obstruction this motion contends*…" *Id*. at 11.

[3] For example, Defendants presented the testimony of Ms. Yeartie, a former close friend and employee of DA Willis, who testified that Willis' romantic relationship with Wade started in 2019 and that there was "no doubt" that it began before Wade was hired. *Id.* at 1:08:35. Ms. Yeartie's testimony was corroborated by text messages sent to Roman's defense attorney by Terrence Bradley, a long-time personal friend of SADA Wade's, who was also his former law partner, which confirmed that the romantic relationship between DA Willis and Wade had "absolutely" started when Willis "was a judge in south Fulton," which was in 2019. Exhibit II at 5. That evidence was further corroborated by the analysis of SADA Wade's cell phone records, which proved that his phone was in the immediate area of her apartment on at least thirty-five occasions, including at least two overnight visits. *See* Ex. W at 5. The 11 months of available phone records also proved that, during the period that DA Willis and Wade claim they were just friends, there were

cash repayments, without any documentation of payments or the source of funds, despite the fact that they are both attorneys and the fact that DA Willis, as an elected constitutional officer, has strict reporting requirements that require her to keep track of any expenditures on her behalf that exceed $100 in any given year. In fact, in her disclosures for 2021 and 2022, DA Willis certified that she had received no gifts or benefits in the yearly aggregate of $100, even though the undisputed evidence shows that she received the benefit of thousands of dollars from Wade, who was a "prohibited source." Ex. E at 218-219.

The trial court criticized DA Willis' conduct in testifying at the hearing on this matter as "unprofessional" and her overall conduct as a "tremendous lapse in judgment" over which the "odor of mendacity" lingers. Ex. A at 9, 16. The trial court labelled the cash repayments as "unusual" and the lack of supporting documentation "understandably concerning." *Id.* at 7. The trial court then went further, characterizing it is a "financial cloud of impropriety." *Id.* at 17. Stopping just short of calling their testimony regarding these alleged cash payments an outright fabrication, the trial court half-heartedly said that her testimony on this issue was "not so incredible as to be inherently unbelievable." *Id.* at 7. But the trial court gave DA Willis no such benefit of the doubt regarding the untruthfulness of her

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2073 calls and 9792 texts between them – an average of 6.2 calls and 29.3 texts per day. *Id*. (these exact numbers were included in a non-public filing as an attachment to Ex. W.)

testimony about when the relationship with Wade started, which he described as "potential untruthfulness." *Id.* at 7, 17. The trial court also noted that "reasonable questions about whether the District Attorney and her hand-selected lead SADA testified untruthfully about the timing of their relationship further underpin the finding of an appearance of impropriety and the need to make proportional efforts to cure it." *Id.* at 17.

Despite the damning findings that there was a "significant appearance of impropriety," *id.* at 2, 15, and instead of disqualifying DA Willis, the trial court punted D.A. Willis' numerous legal and ethical violations to "[o]ther forums or sources of authority such as the General Assembly, the Georgia State Ethics Commission, the State Bar of Georgia, the Fulton County Board of Commissioners, or the voters of Fulton County" to "offer feedback on any unanswered questions that linger." *Id.* at 9.

Inexplicably, the trial court then permitted DA Willis – the very person whose actions created the appearance of impropriety, whose explanation was not quite inherently unbelievable, whose testimony still harbors the question of being untruthful, who falsely claimed she was not talking about Defendants in this case, who created the lingering "odor of mendacity" – to decide how to "cure" the "significant appearance of impropriety that infects the current structure of the prosecution team" and attempt to purge this case of the appearance of impropriety

and the lingering stench of lying and falsehoods in her and SADA Wade's testimony. And unsurprisingly, the choice made by DA Willis was for SADA Wade to resign. Thus, this case carries forward with DA Willis still in charge, regardless of the continuing appearance of impropriety as long as she and her office remain involved.

III. JURISDICTION

The Court of Appeals has jurisdiction over this appeal because it is not one reserved for the exclusive jurisdiction of the Supreme Court of Georgia, and the Superior Court timely certified the Order for interlocutory review. *See* GA. CONST. ART. VI, § V, ¶ III; GA. CONST. ART. VI, § VI ¶ II; O.C.G.A. § 5-6-34 (b); GA. COURT OF APPEALS RULE 30(c); Ex. A; Ex. B, Certificate of Immediate Review.

IV. ORDER APPEALED

On March 15, 2024, the trial court entered an omnibus Order addressing Defendants' Motions to Dismiss and Disqualify the Fulton County District Attorney. *See* Ex. A. That Order contains a number of legal errors that this Court should exercise its interlocutory appellate jurisdiction to correct.

The Order granted Defendants' motions in part and made four determinations. First, DA Willis does not have "an actual conflict of interest in this case through her personal relationship and recurring travels with her lead prosecutor"—former SADA Wade. Ex. A at 2–9.

Second, however, there is "a significant appearance of impropriety that infects the current structure of the prosecution team—an appearance that must be removed through the State's selection of one of two options." *Id*. at 2, 10–17. The first option required the "District Attorney … to step aside, along with the whole of her office, and refer the prosecution to the Prosecuting Attorneys' Council for reassignment." *Id*. at 17. "Alternatively, SADA Wade [could] withdraw, 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." *See id*. Unsurprisingly, the prosecution chose the latter option and SADA Wade resigned.

Third, the Order denied Defendants' motions to disqualify based on forensic misconduct after the trial court concluded that it was "[u]nmoored from precedent[.]" *Id*. at 17–20.

Fourth and finally, the Order determined that DA Willis' appointment of special prosecutors did not violate O.C.G.A. § 15-18-20 and that the prosecution's conduct did not violate Ga. Const. Art. I, § II, Para. I (the "Trustee Clause").

The trial court timely issued a Certificate of Immediate Review on March 20, 2024. *See* Ex. B.[4] This Application timely follows.

[4] Pursuant to Court of Appeals Rule 30(e), Defendant-Appellants also attach Exhibits C–II.

V. STANDARD OF REVIEW

There exists "a categorical rule against the appointment of an interested prosecutor, adherence to which requires no subtle calculations of judgment." *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987). Georgia appellate courts employ careful standards when reviewing orders that implicate prosecutorial disqualification, but ultimately whether disqualification is required in this case is a question of law for the Court.

Specifically, when "reviewing a trial court's ruling on a motion to disqualify a prosecutor, [this Court] appl[ies] an abuse of discretion standard." *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2012). "[U]nder the abuse of discretion standard, '[this Court] review[s] … legal holdings *de novo*, and [it] uphold[s] … factual findings as long as they are not clearly erroneous, which means there is some evidence in the record to support them." *Welcker v. Georgia Bd. Of Examiners of Psychologists*, 340 Ga. App. 853, 856 (2017) (quoting *Murray v. Murra*y, 299 Ga. 703, 705 (2016) (ellipses in original)). Here, Defendants challenge the trial court's legal findings and thus a *de novo* review is proper.

Indeed, while courts review facts underlying disqualification for clear error, "the existence of a conflict of interest is a legal question subject to *de novo* review." *U.S. v. Lanier*, 879 F.3d 141, 150 (5th Cir. 2018). This Court has also said it is "a matter of law whether a lawyer has a conflict of interest requiring disqualification."

Cohen v. Rogers, 338 Ga. App. 156, 168 (2016). So, if a trial court does "not apply the correct legal standards when disqualifying counsel ….[,]" then this Court "vacate[s] the judgment and remand[s] the case to the trial court for proceedings consistent with [the correct legal standard]." *Befekadu v. Addis Int'l. Money Transfer, LLC*, 332 Ga. App. 103, 103 (2015) (Branch, J.) (emphasis added); *see also Bernocchi v. Forcucci*, 279 Ga. 460, 463–64 (2005). Here, as a matter of law, DA Willis's disqualification was required, and the trial court erred as a matter of law in not ordering it.

VI. ARGUMENT

Georgia Court of Appeals Rule 30(b) provides that an application for interlocutory review will be granted where it appears that *any* of the following exist:

- The issue to be decided appears to be dispositive of the case;
- The order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment in which case appeal will be expedited; or
- The establishment of precedent is desirable.

GA. CT. APP. R. 30(b). Defendant-Appellants' Application easily satisfies the second and third criteria. And while disqualification is not dispositive of the underlying allegations in the Indictment, failure to disqualify would require reversal of any judgment obtained that is prosecuted by DA Willis or her office.

A. The Application Should Be Granted Because the Erroneous Failure to Disqualify a Prosecutor Pretrial is Structural Error and a Due Process Violation Requiring Reversal of Any Convictions.

The failure to disqualify a prosecutor is a structural error that would necessitate reversal of any convictions without any additional showing of prejudice. *See, e.g., Vuitton et Fils S.A.,* 481 U.S. at 810-814 (failure to remove disqualified prosecutor is structural error requiring reversal; harmless error rule inapplicable); *McLaughlin v. Payne*, 295 Ga. 609, 613 (2014) (failure to remove disqualified prosecutor warrants new trial) (citations omitted) *cf. Lewis v. State,* 312 Ga. App. 275, 282 (2011) (erroneous deprivation of defense counsel is a "structural error, one that affects 'the framework within which the trial proceeds,' and it requires an appellate court to reverse any conviction that follows without any inquiry into harm or prejudice").

Additionally, courts have a duty to ensure that the accused are afforded due process of law. Due process also "requires that the accused receive a trial by an impartial jury free from outside influences," including adverse publicity. *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*. (emphasis supplied). "[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 (emphasis supplied).

The Supreme Court has determined that due process is violated when negative pretrial publicity is widespread through the media, and its prejudicial effects on defendants are inherent and presumed. *See, e.g., Estes*, 381 U.S. at 544 ("Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still, one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. . . . .Such untoward circumstances [] are inherently bad and prejudice to the accused was presumed.")

The failure to disqualify DA Willis in this case is a structural error, and as argued below, also offends Defendants' right to due process.

B. The Application Should Be Granted to Provide This Court with the Opportunity to Clarify Precedent and the Forensic Misconduct Standard for Disqualification of a Prosecutor in Georgia.

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

Fulton County DA Fani T. Willis,
November 14, 2023[5] (emphasis supplied)

The trial court explicitly found in its March 15 Order that DA Willis' extrajudicial statements made on January 14, 2024 were "*legally improper*."[6] Ex. A

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

[6] In its Order, the trial court deferred DA Willis' apparent legal and ethical violations to "[o]ther forums or sources of authority such as the General Assembly, the Georgia

at 20 (emphasis supplied). The trial court also expressly found that there are "reasonable questions about *whether the District Attorney and her hand-selected lead SADA testified truthfully*," *id.* at 17 (emphasis supplied), and that an "odor of mendacity" lingers over DA Willis in this case. *Id.* at 16. Despite these findings, the trial court, applying *Williams v. State*, 258 Ga. 305 (1988), our Supreme Court's decision on pretrial prosecutorial forensic misconduct, felt confined to stop short of disqualification due the professed lack of guidance in Georgia case law on the standards for disqualifying a prosecutor for forensic misconduct. *Id.* at 18, 20. The trial court wrote:

> This Court has not located, nor been provided with, a single additional case exploring the relevant standard for forensic misconduct, or an opinion that actually resulted in disqualification under Georgia law. *Left unexplored, therefore, is how other examples of forensic misconduct can manifest*, such as whether statements that stop short of commenting on the guilt of a defendant can be disqualifying. Nor has it been decided if some showing of prejudice is required – and how a trial court should go about determining whether such prejudice exists. Nor is it clear whether the analysis differs depending on the pretrial posture of the case. *Unmoored from precedent*, *the Court feels confined to the boundaries* of *Williams* and *restricts the application of the facts found here to its limited holding*.

State Ethics Commission, the State Bar of Georgia, the Fulton County Board of Commissioners, or the voters of Fulton County." Ex. A at 9. But this cannot be squared with the trial court's finding that "courts have an independent interest in ensuring that criminal trials are conducted *within the ethical standards of the profession* and that *legal proceedings appear fair to all who observe them*." Ex. A at 3 (citing *Registe v. State*, 287 Ga. 542, 544 (2010)) (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

Id. at 18 (emphasis supplied).[7]

In *Williams*, the Georgia Supreme Court articulated a standard to be applied in Georgia for disqualifying forensic misconduct based upon a prosecutor's pretrial extrajudicial statements expressing a belief in the defendant's guilt:

> 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.

Williams, 258 Ga. at 314 (emphasis supplied). As the passage of the Order quoted above makes clear, the trial court felt constrained to limit its application of *Williams* to its particular facts because of the lack of Georgia legal precedent addressing forensic misconduct which does not involve prosecutors expressing their belief in a

[7] The trial court was obviously concerned in its Order about the lack of appellate guidance. But the absence of precedent involving circumstances similar to those in this case, however, is hardly surprising. No prosecutor has ever been so reckless and relentless in pursuit of personal gain that she provided endless pretrial interviews to the media, granted unprecedented pretrial access to the authors of a book, or attempted to distract from her disqualifying unethical behavior by publicly and wrongfully castigating Defendants as racists for exposing her, and proclaiming God has anointed her and was on her side. But the fact that no case of such outrageous prosecutorial misconduct has ever before occurred cannot and does not mean that the *Williams* standard is not satisfied. Furthermore, *Williams* did not purport to enumerate *all* potential examples of forensic misconduct which would support the disqualification of a prosecutor. If this outrageous, unlawful, and unethical conduct does not satisfy that standard, then forensic misconduct does not, in fact, exist in Georgia.

defendant's guilt. *See also* Ex. A at 20 ("As best it can divine, under the sole direction of *Williams*, the Court cannot find that this speech crossed the line . . . .").[8]

By its own terms, *Williams* should not be read in such a limited fashion. Indeed, the *Williams* Court noted that the type of forensic misconduct it addressed in that case – extrajudicial pretrial comments by the prosecutor of his belief in the defendant's guilt – was but "*[o]ne* of the primary *examples* of 'forensic misconduct.'" *Williams*, 258 Ga. at 314 (emphasis supplied). The Court cited favorably to a Columbia Law Review article broadly defining prosecutorial forensic misconduct 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*."[9] *See* Note, *The Nature and*

[8] The trial court, however, ignored one of the arguments made by DA Willis in the church speech that did in fact comment on the guilt or innocence of the defendants in this case. DA Willis twice referred to a 95% and 96% conviction rate for her office and the prosecution team. In the context in which these statements were made, it is clear DA Willis was professing a belief as to the guilt of the defendants. Thus, even under the trial court's constrained reading of *Williams*, DA Willis should have been disqualified for forensic misconduct, and it legally erred by not doing so.

[9] The full text is as follows: "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. 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. The jury may also be encouraged to disregard the weighing process prescribed by law and substitute one more favorable to the state, or otherwise to misapprehend its functions."

Consequences of Forensic Misconduct in the Prosecution of a Criminal Case, 54 Colum. L. Rev. 946, 949 (1954) (emphasis supplied).

This standard for disqualifying pretrial forensic misconduct and the broader, but necessary, application of the principles set out in *Williams* is logical. Especially in light of U.S. Supreme Court precedent regarding due process and the strict prohibitions on prosecutor's public statements in the ethics rules, it simply cannot be the case that anything a prosecutor says is fair game. A prosecutor appearing on national television to malign and disparage defendants is not rendered consistent with due process and her ethical obligations merely because she refrains from explicitly saying that they are guilty of the crime charged, and only strongly intimates it. The existing due process and ethical guardrails already in place extend well beyond simply protecting a defendant from a prosecutor's pretrial comment on his or her guilt. But because of its admitted uncertainty caused by the lack of appellate guidance, the trial court felt compelled to apply *Williams* very narrowly, limiting it to its facts. There is substantial doubt expressed by the trial court in its Order about whether that ruling is correct, and the need for additional precedent in this case's context is evident.

1. DA Willis' Extrajudicial Statements Are Disqualifying Forensic Misconduct.

Williams instructed that courts must look to whether the statements were *"part of a calculated plan evincing a design to prejudice the defendant in the minds of the*

jurors." *Williams*, 258 Ga. at 314. DA Willis' statements and conduct demonstrate just such a design to prejudice the defendants. Here, while many of DA Willis' extrajudicial statements during this case are alone sufficient forensic misconduct to warrant her disqualification,[10] one in particular stands out – the DA's prepared speech delivered before the congregation of a historical Black Atlanta church on January 14, 2024. As the trial court noted in its Order:

> In these public and televised comments, the District Attorney complained that a Fulton County Commissioner "and so many others" questioned her decision to hire SADA Wade. When referring to her detractors throughout the speech, she frequently utilized the plural "they." The State argues the speech was not aimed at any of the Defendants in this case. Maybe so. But maybe not. Therein lies the danger of public comment by a prosecuting attorney. By including a reference to "so many others" on the heels of Defendant Roman's motion which instigated the entire controversy, the District Attorney left that question open for the public to consider.
>
> More at issue, instead of attributing the criticism to a criminal accused's general aversion to being convicted and facing a prison sentence, the District Attorney ascribed the effort as motivated by "playing the race card." She went on to frequently refer to SADA Wade as the "black man" while her other unchallenged SADAs were labeled "one white woman" and "one white man." The effect of this speech was to cast

[10] Throughout this investigation and case, DA Willis has provided numerous interviews to the media during which she called the acts under investigation criminal and illegal, discussed the *mens rea* of the accused, and stated the accused were facing prison sentences. Ex. O, Roman Reply at Ex. A. She also gave significant time and exclusive access to the authors of a book about this case called *Find Me The Votes,* knowing full well it would be released in advance of Defendant's day in court.

> racial aspersions at an indicted Defendant's decision to file this pretrial motion.[11]

Ex. A at 19-20.

Under *Williams*, the January 14, 2024 church speech alone is disqualifying forensic misconduct. Even if *Williams* were unclear, 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. And the fact that DA Willis has intentionally and publicly injected race, racial bias, and religion into this case (and *any* possible jury pool) makes the disqualification of DA Willis

[11] DA Willis also indicated that Defendants were guilty and would be convicted. She boasted about her special prosecutors' credentials, referring to her "superstar" team as having a "conviction rate of 95 percent," and as one that "wins and wins and wins." But the prejudicial extrajudicial commentary did not stop there. DA Willis also indicated that God himself had spoken to her, had "qualified" her for this case, and that she was doing His work in this prosecution (of these presumptively guilty defendants who are not on God's side):

> *God [ ] responds [to me], "*Child, pray for those. *They can't see what I've qualified."*
>
> 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.* 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.

See Ex. E, Shafer Motion at 7 (emphasis supplied). The full extent of DA Willis' prejudicial and disqualifying forensic misconduct will be fully briefed if this Application is accepted.

and her Office particularly necessary and appropriate. As the U.S Supreme Court has recognized:

> [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). "Reliance on racial or ethnic bias has no place in the justice system." *State v. Horntvedt*, 539 P.3d 869, 874 (Wash. Ct. App. 2023) (citations omitted). 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*." *State v. Zamora*, 199 Wash.2d 698,710 (2022) (emphasis supplied).

District attorneys and their offices have been disqualified or recused from prosecutions for making prejudicial statements to the media in other cases. *See, e.g., 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).[12]

2. DA Willis' Submission of a False Statement and False Testimony Is Disqualifying Forensic Misconduct.

The forensic misconduct in this case is not limited to DA Willis' improper extrajudicial statements evidencing her opinion of the defendants' guilt, her claims to be ordained by God himself to convict these defendants, or her falsely disparaging Defendants and their counsel as racists (for the transgression of bringing to light her unethical conduct). Instead, in a desperate bid to stave off her disqualification despite her forensic misconduct and the actual, personal stake she has acquired in the case, DA Willis engaged in additional – and even more deeply troubling – forensic misconduct. She knowingly filed a false sworn affidavit of former Special Prosecutor Nathan Wade as part of the State's response to Defendants' motions, and

[12] DA Willis' claim that she is God's designated emissary in this case and that she is prosecuting it as a result of some divine mandate was also a grossly improper "'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)). Not only was her televised speech at a large historic Black church in Atlanta on Martin Luther King, Jr. weekend, but in her speech she told the audience that God spoke to her and told her that He had "qualified" her for this case and was directing her to do God's "work" in this prosecution. This injection of religion, and her specific claim that God was on her side and the side of the prosecution, further clarified her personal belief in the guilt of the accused and was an inflammatory suggestion that God had picked a side in this case – and it was hers.

she lied to the court under oath in her testimony before the trial court (as did former SADA Wade).[13]

Alarmingly, the evidence demonstrates that even after being rebuked for her improper and unethical behavior in this case by both Judge McBurney in his July 25, 2022 Order, Ex. CC, and again by Judge McAfee in his March 15, 2024 Order, Ex. A, and having *already been disqualified* because of her actual, personal conflict of interest,[14] DA Willis is still utterly unrepentant for her individual misconduct and that of SADA Wade.[15]

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[13] The trial court stopped short of making a specific finding that DA Willis' lied to the court, saying that "the Court is not under an obligation to ferret out every instance of potential dishonesty from each witness or defendant ever presented in open court." *See* Ex. A at 16-17. Maybe so. But when the record evidence clearly shows that the DA, who is prosecuting one of the highest profile cases in the country, even arguably gave untruthful testimony under oath in the very case in which her office is prosecuting many of the defendants for allegedly perjuring themselves and making false statements, the need to address this behavior and to disqualify her from further participation in the prosecution is of the highest necessity.

[14] In his July 25, 2022 Order, Judge McBurney determined that DA Willis had an "actual and untenable" conflict of interest in this case that required her disqualification. Ex. CC at 4. Instead of following Georgia law which required the disqualification of Willis and her Office from any further investigatory or prosecutorial role in this case, Judge McBurney took the unprecedented (and unlawful) step of carving out one of the targets of the investigation (Lieutenant Governor Burt Jones) from the case. Despite the fact that the decision was contrary to Georgia law and unsupported by any authority, Judge McBurney refused to allow the defendants to appeal it. The Court can still minimize the impact of the current disqualification dispute by accepting the Application and determining that DA Willis was disqualified under Georgia law as of the date of Judge McBurney's order.

[15] *See, e.g.,* https://www.cnn.com/videos/politics/2024/03/23/fulton-county-da-fani-willis-exclusive-intv-nr-vpx.cnn (When asked by CNN on March 23, 2024 if she

Defendants maintained below that dismissal is the truly appropriate remedy because the disqualification of DA Willis and her office cannot fully undo the damage caused to Defendants and their due process rights.[16] But her disqualification is the minimum that must be done to remove the stain of her legally improper and plainly unethical conduct from the remainder of the case. And given her lack of acknowledgement of or any remorse for her misconduct that has been separately denounced by two superior court judges, her disqualification is necessary to ensure that she cannot continue to violate her heightened ethical obligations as a prosecutor to further prejudice Defendants and this case.[17] DA Willis has already taken two

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needed to reclaim her reputation, DA Willis stated, "Let's say it for the record, *I'm not embarrassed by anything that I've done."* While continuing to claim she had done nothing illegal, she stated "I guess my greatest crime is that I had a relationship with a man, but that's not something I find embarrassing in any way.")

[16] For this and other reasons, if the Application is accepted, the remedy of dismissal will also be fully briefed.

[17] The ABA Standards for the Prosecution Function are cited favorably in the comments to Georgia Rule of Professional Responsibility 3.8, Special Responsibilities of a Prosecutor, adopted by the Georgia Supreme Court. According to those standards, a prosecutor is the "administrator of justice" who should "exercise sound discretion and independent judgment" in serving the public interest and must act with integrity while avoiding the appearance of impropriety. *See* ABA Criminal Justice Standards For Prosecutors 3-1.2. Prosecutors must be circumspect and not make comments that have "a substantial likelihood of *materially prejudicing a criminal proceeding* or that *heighten the public condemnation*" of the accused, and they should limit comments to what is *necessary* to inform the public of the prosecutor's action and that *serve a legitimate law enforcement purpose*. *See id.* at Standards 3-1.4 and Standard 3-1.10(c) (emphasis supplied); *see also* Georgia Rule of Professional Responsibility 3.8(g). Furthermore, prosecutors are prohibited from allowing improper considerations, such as partisan, political or personal

bites of the apple at the expense of Defendants' due process right to a disinterested prosecutor and a fair trial. She must not get a third.

"[C]ourts have an independent interest in ensuring that criminal trials are conducted *within the ethical standards of the profession* []." Ex. A at 3 (citing *Registe v. State*, 287 Ga. 542, 544 (2010) (quoting *Wheat*, 486 U.S. at 160) (emphasis added). "Georgia courts have not hesitated to step in and use their inherent authority to disqualify a state prosecutor when required[,]"[18] *id.*, and consideration of the prosecutor's violation of her ethical obligations is an important part of that analysis. *See Registe*, 287 Ga. at 544; *see also Woods v. Covington Cnty. Bank***,** 537 F.2d 804, 810 (5th Cir. 1976) (court is "obliged to take measures against unethical conduct occurring in connection with any proceeding before it," including disqualification of counsel).

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considerations, to effect prosecutorial discretion, nor can their judgment be influenced by a personal interest in potential media attention. *See* ABA Standard 3-1.6(a); *see also* ABA Standard 3-1.10(h); *cf.* 28 U.S.C. § 528 (requiring Attorney General to "require the disqualification of any officer or employee of the Department of Justice, including a United States attorney or a member of such attorney's staff, from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof.")

[18] In further support of these propositions, the trial court also cited Ga. Const. Art. VI, § I, Para. IV ("Each court may exercise such powers as necessary . . . to protect or effectuate its judgments[.]") and O.C.G.A. § 15-1-3(4) ("Every court has power . . . [t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto[.]") *See* Ex. A at 3.

Additionally, while all attorneys are officers of the court and have a duty of candor, prosecutors have a "*heightened duty of candor to the courts and in fulfilling other professional obligations.*" *See* ABA Criminal Justice Standards for Prosecutors, Section 3.14(a) (emphasis supplied). Here, Defendants submit that the DA's untruthful testimony to protect her personal interests in this prosecution, over and at the expense of the case itself is, at the very least, forensic misconduct. The Georgia courts are not only empowered to disqualify DA Willis to ensure that this criminal trial will be conducted "within the ethical standards of the profession," *see Registe*, 287 Ga. App. at 544, they are obligated to do so here to protect the integrity of the remaining proceedings and the constitutional rights of Defendants.

As DA Willis has herself acknowledged, "*[W]hen you represent the citizens… you need to be beyond reproach*." *See* "Fani Willis talks about race against D.A. Paul Howard," 11Alive (August 6, 2020), *available at https://www.youtube.com/watch?v=3CEM3GfiLdo.* Here, DA Willis has covered herself and her office in scandal and disrepute, as she has squandered her credibility and repeatedly and flagrantly violated the heightened ethical standards demanded of her position. The evidence of her forensic misconduct is overwhelming, and her disqualification is required.

The trial court's decision not to disqualify DA Willis under these circumstances is a structural error, a violation of Defendants' due process rights, and

seriously denigrates the public's confidence in the integrity of the criminal justice system.

C. The Order's Failure to Find an Actual Conflict and Its Proposed Remedy for the Appearance of Impropriety Is Erroneous Under Georgia Law and Will Cause Substantial Error at Trial.

As noted, the erroneous failure to disqualify a prosecutor who has acquired a personal stake in the litigation through either an actual conflict of interest or an appearance of impropriety is structural error subject to automatic reversal. Here, the trial court erred in not holding that the District Attorney was operating under an actual conflict of interest even based upon the facts that the trial court itself found. Additionally, the remedy that the trial court imposed for the significant appearances of impropriety that it determined DA Willis created are unprecedented in Georgia law and, more importantly, do nothing to remedy the very improprieties that the trial court actually found. The trial court erred in declining to disqualify the District Attorney based on her actual conflict of interest, and the remedy the trial court offered is legally insufficient.

1. The Trial Court Erred in Determining DA Willis Had Not Acquired a Personal Stake in This Case Through Her Actual Conflicts of Interest.

DA Willis acquired a personal disqualifying interest necessitating her disqualification from this case. A personal disqualifying interest can arise from either an actual conflict of interest or an appearance of a conflict of interest. *See Reed*

v. State, 314 Ga. 534, 545 (2022) (*citing Williams v. State*, 258 Ga. 305, 314 (1988)); Ex. A at 4.

"Lawyers must avoid even the appearance of impropriety . . . to the end that the image of disinterested justice is not impoverished or tainted." *First Key Homes of Georgia, LLC v. Robinson*, 365 Ga. App. 882, 886 (2022). And where an actual conflict of interest exists, this certainly requires disqualification. *Id*. at 886 (noting that where lawyer had actual conflict entire firm disqualified). Just on the facts found by the trial court itself, an actual conflict of interest exists between DA Willis's public duties and her private interests here.

DA Willis hired her paramour as lead prosecutor in this case and put him in a position to be paid over $650,000 by her at the taxpayers' expense. *See* Ex. HH. Compounding this problem, DA Willis then directly benefited from hiring her romantic partner.[19] SADA Wade paid for lavish vacations around the world—funded from the $650,000 DA Willis paid him. Ostensibly because they knew it was wrong and a conflict of interest, DA Willis and SADA Wade actively hid their romantic and financial relationship from virtually everyone -- the public, Defendants, and the courts. And when questioned about these benefits, both DA Willis and SADA Wade

[19] The trial court erroneously found the amount at issue was between $12,000 to $15,000, but the record evidence submitted to the court shows the amount is over $17,000. *See* Ex. HH. Either way, the amount is significant and more than *150 times greater* than the $100 Fulton County reporting threshold.

gave false testimony to the trial court in a further attempt to cover their tracks.[20] DA Willis allowed her private interests to overtake and compromise her public duties, resulting in an actual conflict of interest.

But even if DA Willis was not actually conflicted, she should have been disqualified based on the trial court's determination that she appeared to have a conflict of interest based upon the evidence. Criminal defendants have a fundamental right to "face a disinterested prosecutor." *See Young*, 481 U.S. at 807. So whenever a prosecutor's conduct creates "at least the appearance of impropriety, … [the defendants are] denied fundamental fairness in the state's prosecution of the charges against [them]." *Davenport v. State*, 157 Ga. App. 704, 705 (1981). And, under those circumstances, the defendants are "entitled to a new trial." *Id*. at 706; *see also Amusement Sales*, 316 Ga. App. at 736 (same).

Whether an actual conflict or an appearance of a conflict, the law ***requires*** the disqualification of DA Willis here.

2. The Trial Court Erred by Determining No Actual Conflict of Interest Exists Based on Its Own Factfinding.

DA Willis, her office, and the SADAs are "trustees and servants of the people and are at all times amenable to them." GA. CONST. Art. I, § II, ¶ I. Indeed, as the

[20] Compounding this, DA Willis filed two false certifications that she had received no gifts or benefits in the yearly aggregate of $100, even though SADA Wade was a "prohibited source" and the aggregate amounts far exceeded the annual limit of $100.00. Ex. E at 218-219.

Georgia Supreme Court has emphasized:

> 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 of behavior. As to this there has developed a tradition that it unbending and inveterate.

Malcom v. Webb, 211 Ga. 449, 457 (1955) (quotation omitted). And the most basic rule is that "no … public agent or trustee[] shall have the opportunity or be led into the temptation to make profit out of … others entrusted to [their] care[.]" *City of Macon v. Huff*, 60 Ga. 221, 228 (1878). Or, put differently, "[a]ll public officers … labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts." *City of Columbus v. Ga. Dep't of Transp.*, 292 Ga. 878, 832 (2013) (quotation omitted).[21]

Prosecutors are supposed to represent the public interest and are required to preserve the integrity of the criminal justice system. *See also Love v. State*, 202 Ga. App. 889, 891 (1992) (quotation omitted). As such, and as the Georgia Supreme Court has found, prosecutors "ha[ve] additional professional responsibilities . . . to make decisions in the public's interest." *State v. Wooten*, 273 Ga. 529, 531 (2001); *see also Matter of Redding*, 269 Ga. 537, 537 (1998) (*per curiam*).

[21] Apart from being public trustees, "[d]istrict attorneys are generally considered to be quasi judicial officers" under Georgia law. *Forston v. Weeks*, 232 Ga. 472, 478 (1974); *see also Holsey v. Hind*, 189 Ga. App. 656, 657 (1988). Thus the disqualification standards governing the conduct of judges is equally applicable to prosecutors.

Thus, prosecutors must "wield [their] formidable criminal enforcement powers in a rigorously disinterested fashion" to preserve public "faith in the fairness of the criminal justice system in general." *Young*, 481 U.S. at 810–11. And criminal defendants have a constitutional right to "a disinterested prosecutor." *Id*. at 807. DA Willis has failed to meet these obligations. As the trial court found, DA Willis's actions created a "financial cloud of impropriety." Ex. A at 17. Her conflict creates a stain on the judicial process, impairs Defendants' right to a fair proceeding, and requires her disqualification here.[22]

Based on the foregoing, the trial court, as a matter of law, erred in determining DA Willis did not have an actual conflict requiring her disqualification. *See Lanier*, 879 F.3d at 150 (existence of a conflict is legal question subject to *de novo* review). Georgia appellate courts have found (1) public officials cannot "reap[] personal financial gain at the expense of the public," *Ga. Dept. of Human Resources v. Sistrunk*, 249 Ga. 543, 547 (1982) (quotation omitted)), *overruled on other grounds by Ga. Ports Auth. v. Harris*, 274 Ga. 146 (2001); (2) a public trustee's duty is to act "[n]ot [with] honesty alone, but [with] the punctilio of an honor the most

[22] Prior to the disqualification motions, DA Willis publicly stated in her filed pleadings that "[i]n light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations." Ex. BB (quoting ABA STAND. CRIM. JUST. REL. PROS. FUNCT. 3-1.4(a) (emphasis added)). DA Willis knows that she is subjected to a heightened duty, yet she has repeatedly failed that duty.

sensitive[.]" *Malcom*, 211 Ga. at 457; and (3) a prosecutor cannot "acquire[] a personal interest or stake in the defendant[s] conviction[s]." *Williams,* 258 Ga at 314. If this law means anything, the trial court's actual findings here establish an actual conflict.

3. The Trial Court Erred by Refusing to Disqualify DA Willis for the Appearance of a Conflict or Impropriety

Georgia courts regularly disqualify private lawyers for an appearance or possibility of a conflict in both criminal and civil cases. *See Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 146 (2014); *Edwards v. State*, 336 Ga. App. 595, 600 (2016); *Lewis v. State*, 312 Ga. App. 275, 280 (2011); *Brown v. State*, 256 Ga. App. 603-607-08 (2002); *Reeves v. State*, 231 Ga. App. 22, 22 (1998); *Love v. State*, 202 Ga. App. 889, 889-90 (1992); *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981); *Dalton v. State*, 257 Ga. App. 353, 353 (1981). When there is an appearance of impropriety, such as those the trial court found here, then disqualification must follow—as this Court has found. This concept makes sense intuitively and in the context of existing Georgia case law: if private lawyers are disqualified from representing their clients based on a finding of an appearance of impropriety, so too are prosecutors, who are held to even higher professional standards and are required by due process to be disinterested.

In *Davenport v. State*, for example, a defendant convicted of assaulting her husband argued on appeal that she "was denied due process of law because the

district attorney prosecuting this case had represented [the husband during the former couple's] divorce proceedings." 157 Ga. App. 704, 704 (1981). This Court agreed, holding that "there [was] at least the appearance of impropriety, and [the defendant] was denied fundamental fairness in the state's prosecution of the charges against her." *Id*. at 705. The Court then ordered a new trial. *See id*. at 706.

In *Greater Ga. Amusements v. State*, this Court held that a trial court erred by refusing to disqualify a district attorney because "a district attorney may not be compensated by means of a fee arrangement which guarantees ***at least the appearance of a conflict of interest*** between his public duty to seek justice and his private right to obtain compensation for his services." 317 Ga. App. 118, 122 (2012) (physical precedent only). Several months later, this Court favorably cited *Greater Ga. Amusements* to hold that a trial court again erred by refusing to disqualify a prosecutor on that same basis. *Amusement Sales*, 316 Ga. App. at 736. As in *Davenport*, this Court ordered a new trial. *See id*.

In *Battel v. State*, a defendant convicted for murder argued on appeal that the district attorney should have disqualified himself and his office because the victim's parent worked there. 301 Ga. 694, 698 (2017). The Georgia Supreme Court began its analysis by explaining that "a conflict of interest *or* the appearance of impropriety from a close personal relationship with the victim may be grounds for disqualification of a prosecutor." *See id*. Based on the facts of that case, the Court

held "there was no evidence that [any prosecutor] … had any conflict of interest or a personal relationship with the victim or his mother or any personal interest in obtaining the sought convictions." *Id*. at 698–99. But the fact remains that the "appearance of impropriety," as distinguished from an actual conflict of interest, can result in disqualification. *See id*. at 698; *see also Head v. State*, 253 Ga. App. 757, 758 (2002) ("a prosecutor's close personal relationship with [a] victim … may create at least the appearance of a prosecution unfairly based on private interests rather than one properly based on vindication of public interests").

What is important here is that the trial court expressly found an appearance of impropriety existed. Based on that finding, DA Willis was required to be disqualified from this case. Nothing in the law—anywhere—says that the remedy for an appearance of impropriety is the disqualification of one apparently conflicted lawyer but not another. Yet that is what the trial court did. If Wade was apparently conflicted and he needed to be disqualified (as the trial court found), then DA Willis necessarily was also conflicted and must be disqualified. Because the trial court properly found an appearance of impropriety as to both DA Wilis and SADA Wade existed, the law requires the disqualification of them both. Otherwise, the appearance of impropriety is not cured, and neither the public nor the accused can have the required confidence in the impartiality and fairness of the criminal process.

The trial court specifically determined that "[w]hen the appearance of a conflict exists, only the affected prosecutor, be they elected or appointed, is affected" and must be disqualified. Ex. A at 14 (citations omitted). And the Court also found that *both* Wade and DA Wills were so affected here – which under Georgia law and the trial court's own findings and rulings *requires* the disqualification of *both*. The trial court instead providing DA Willis with the option to simply remove Wade confounds logic and is contrary to Georgia law.

And because DA Willis is disqualified, so too is her whole office. As the Georgia Supreme Court has made clear, "[w]hen 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 v. Payne*, 295 Ga. 609, 613 (2014).[23]

VII. CONCLUSION

For the within and foregoing reasons, this Court should grant Defendants' Application and accept the interlocutory appeal.

[23] *McLaughlin* also emphasizes the fact that a prosecutor's actual or apparent conflict need not be monetary to be disqualifying. There, a district attorney and her office were disqualified because the district attorney's daughter was the classmate of one of the victims in that case. Thus, close personal friendships, familial relationships, and other similar circumstances can give rise to disqualifying conflicts of interest in addition to disqualification based upon financial conflicts of interest.

CERTIFICATE OF SERVICE

I hereby certify that there is a prior agreement with the Fulton County District Attorney's Office to allow documents in a PDF format sent via email to suffice for service. To that end, on the 29th day of March, 2024, I served a copy of the foregoing Application for Interlocutory Appeal upon the following counsel of record via e-mail:

Fani T. Willis
District Attorney
Atlanta Judicial Circuit
Fulton County, Georgia
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: Fani.WillisDA@fultoncountyga.gov
Telephone: (404) 612-4981

Adam Abbate
Georgia Bar No. 516126
Chief Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: adam.abbate@fultoncountyga.gov
Telephone: (404) 612-4981

Daysha Young
Executive District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: Daysha.Young@fultoncountyga.gov
Telephone: (404) 612-4981

F. McDonald Wakeford
Georgia Bar No. 414898
Chief Senior Assistant District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: fmcdonald.wakeford@fultoncountyga.gov

John W. Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: will.wooten@fultoncountyga.gov
Telephone: (404) 612-4981

Grant Rood
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
Email: Grant.rood@fultoncountyga.gov
Telephone: (404) 612-4981

*/s/ Christopher S. Anulewicz*_____
Christopher S. Anulewicz
Georgia Bar No. 020914
BRADLEY ARANT BOULT CUMMINGS LLP
Promenade Tower
1230 Peachtree Street NE
Atlanta, GA 30309
E-mail: canulewicz@bradley.com
Telephone: (404) 868-2030

Attorney for Defendant-Appellant Cheeley

CERTIFICATE OF GOOD FAITH

I, the undersigned attorney of record in the above-styled case, certify that all of the documents that have been uploaded as exhibits are directly relevant to the arguments raised in the application, are necessary to apprise the Court of the appellate issues, and support the arguments advanced in the application.

*/s/ Christopher S. Anulewicz*_____
Christopher S. Anulewicz
Georgia Bar No. 020914
BRADLEY ARANT BOULT CUMMINGS LLP
Promenade Tower
1230 Peachtree Street NE
Atlanta, GA 30309
E-mail: canulewicz@bradley.com
Telephone: (404) 868-2030

Attorney for Defendant-Appellant Cheeley