**IN THE COURT OF APPEALS**
**STATE OF GEORGIA**

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| DONALD JOHN TRUMP<br>Appellant - Defendant,<br><br>vs.<br><br>STATE OF GEORGIA<br>Appellee - Plaintiff. | :<br>:<br>:<br>:<br>:<br>:<br>: | INTERLOCUTORY APPEAL<br><br>Docket Number: A24A1599 |

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**An interlocutory appeal from the Superior Court of Fulton County**
**Indictment 23-SC-188947**
**The Honorable Scott F. McAfee, presiding.**

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# OPENING BRIEF FOR APPELLANT PRESIDENT DONALD JOHN TRUMP

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**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF ADOPTION REGARDING CO-APPELLANT BRIEFS

This Court granted nine Appellants' **joint** motion for interlocutory appeal on the issue of the trial court's refusal to disqualify Fulton County District Attorney Willis and dismiss the case for her misconduct. Each Appellant has their own docket and must file their own brief. President Trump intends to adopt arguments made by his co-appellants pursuant to Ga. Ct. App. R. 23 (a).

Because this rule requires adoption of other appellants' arguments "with precision," and President Trump does not yet know each argument by enumeration of error that his co-appellants will raise on the disqualification issue, he intends to a file a more detailed notice of amended statement of adoption upon receiving the briefs of his co-appellants. That amended statement of adoption will specifically include the arguments by reference to the enumeration of errors and arguments contained in his co-appellants' briefs.

As of the date of this filing, and pursuant to Ga. Ct. App. R. 23 (a), President Trump hereby adopts the following arguments, which he is presently aware of and which he has reason to believe will be advanced by his co-appellants in the related interlocutory appeals:

A24A1595 (Michael Roman) – Enumerations of Error and argument challenging the trial court's determinations on actual conflict of interest and the appearance of impropriety.

A24A1596 (David Shafer) – Enumerations of Error and argument challenging the trial court's (a) proposed remedy; and determinations on (b) forensic misconduct; and (c) the appearance of impropriety.

A24A1597 (Robert Cheeley) – Enumerations of Error and argument challenging the trial court's (a) failure to determine an actual conflict of interest existed; and (b) failure to disqualify DA Willis after determining an appearance of impropriety existed.

President Trump also adopts in their entirety the co-appellant briefs filed in A24A1598 (Mark Meadows), A24A1600 (Cathleen Latham), A24A1601 (Rudolph Giuliani), A24A1602 (Jeffrey Clark) and A24A1603 (Harrison Floyd).

## STATEMENT OF JURISDICTION

The Court of Appeals of Georgia, rather than the Supreme Court of Georgia, has jurisdiction over this interlocutory appeal because none of the alleged offenses are felonies punishable by death. GA. CONST. Art. 6 § 6 ¶ III (8). This appeal does not involve the construction of a treaty, nor the state or federal Constitutions, and no constitutional questions are presented. GA. CONST. Art. 6 § 5 ¶ II (1).

On March 20, 2024, the trial court timely certified the issues raised herein for immediate review. [R. at 1644]. On May 8, 2024, this Court granted President Trump's application for interlocutory appeal. [R. at 1712]; *see also* O.C.G.A. § 5-6-34 (b).

## PART ONE: COURSE OF PROCEEDINGS BELOW

This all-important interlocutory appeal presents a novel issue concerning the legal standard for "forensic misconduct" warranting dismissal of an indictment and, alternatively, the disqualification of a prosecutor and her office. Below, the trial court found that elected Fulton County District Attorney Fani Willis gave a prepared, "legally improper" speech about the defendants and that a "significant appearance of impropriety" existed but stopped short of ordering the remedies that these findings required. In so holding, the trial court failed to accurately apply the forensic misconduct standard and thereby abused its discretion.

Should a prosecutor be disqualified for intentionally and repeatedly violating ethical and professional canons to prejudice defendants for personal or political gain? Yes. Is disqualification necessary when a prosecutor testifies falsely, conceals misconduct, and creates "an odor of mendacity" that results in a "significant appearance of impropriety?" Undoubtedly so. If this prosecutor deflects attention from her misconduct by claiming on national television that the defendants are dishonest racists for bringing the truthful accusations to light, could anyone have confidence in the impartiality of the prosecutor's actions? Absolutely not.

Since launching the investigation, DA Willis has engaged in a pattern of consistently flouting her ethical obligations which has resulted in her being publicly

chastised (and twice disqualified[1]) by two superior court judges. Because neither fully removed her, Willis has only become emboldened. To this day, Willis continues to ignore those clear warnings without remorse or accountability, making it crystal clear that her previous improper conduct was neither inadvertent nor isolated, and was both planned and part of a long-standing, wrongful practice.[2]

Willis has put her personal, financial, political, and romantic interests before not only her own professional integrity but, more importantly, the due process rights of the accused and the integrity of our judicial system. Willis has taken full advantage of her position to poison the well for the defendants. Willis believes she is immune from disqualification, regardless of how unethical and outrageous her comments are, so long as she does not, in her view, *explicitly* state that a particular defendant is guilty of the crimes charged.[3] This is not, and cannot be, the law.

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[1] Beyond Judge McBurney disqualifying her in 2022, the trial court held that Willis and her office must step aside or, alternatively, Wade could.

[2] Following the trial court's order, Willis publicly stated that she has no remorse and has done nothing wrong: "Let's say it for the record, *I'm not embarrassed by anything that I've done*. . . I guess *my greatest crime is that I had a relationship with a man . . .*" *See* https://www.cnn.com/videos/politics/2024/03/23/fulton-county-da-fani-willis-exclusive-intv-nr-vpx.cnn.

[3] *See* Resp. to App. for Interlocutory Rev. at 7 ("The applicants have not identified any statement injecting the District Attorney's personal belief as to the defendant's guilt or appealing to the public weighing of evidence."); *see id*. at 5 ("In essence, a comment may be improper without being disqualifying."); *see id*. at 6, n. 2 ("Factual passing references to the various races of members of a prosecuting team are hardly the type of egregious commentary contemplated by *Williams* to warrant disqualification. And a comment suggesting individuals were "playing the race card" is too vague, brief, and limited in scope to imply any defendant harbored racial prejudice, particularly to the point of requiring disqualification."); *compare with* Part I (B) (2), *infra*.

The trial court's order expressly found that Willis' challenged actions, including hiring as lead prosecutor her paramour, Special Assistant District Attorney Nathan Wade, and accepting gifts and trips that were funded through his taxpayer compensation, created a "financial cloud of impropriety" that cast a pall over the proceedings. [R. at 1627]. The order determined that Willis' out-of-court speech was "legally improper," that her conduct at the disqualification hearing was "unprofessional," and that significant sworn testimony from her and Wade was both dubious and likely false. [R. at 1619, 1627, 1630].

The trial court was required to unequivocally disqualify Willis and her office. The proposed remedy—a forced election between the withdrawal of Willis and her office or the withdrawal of Wade—did not redress the appearance of impropriety. Nor did it cure or mitigate the misconduct and "odor of mendacity" that it found permeated this case. [R. at 1626].

The Supreme Court of the United States has long recognized that the public's faith in the integrity of 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 . . . to 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).

Nowhere are these interests more important or on display than in a high-profile case, involving a former President of the United States and presumptive 2024 Republican nominee for president, that has captured the attention of our 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 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).

Make no mistake: Willis, by persistently untethering herself from the legal, ethical, and professional constraints of her powerful position, has decimated the integrity of these proceedings. Sadly, the circumstances that require her disqualification are entirely self-inflicted wounds that were within her power to avoid. DA Willis disqualified *herself*. Absent the removal of Willis and her office, a pall and the "odor of mendacity" will continue to loom. To give effect to the Professional Conduct Rules and protect defendants' due process rights, this Court must conclusively disqualify Willis and her office and dismiss the indictment.

### A. Factual Background.

On January 8, 2024, co-defendant Roman moved to disqualify Willis and her office based upon the personal, financial stake she acquired through a secret relationship with her lead prosecutor. *See* [No. A24A1595 (Roman) at 704-830]. The Roman motion alleged that Willis hired Wade, paid him approximately $650,000 in a two-year period and had personally and financially benefitted from this relationship.

Evidence revealed that, from October 2022 to April 2023, Wade incurred over $17,000 in credit card charges for vacations he and Willis took to Miami, Aruba, the Bahamas, and California.[4] Willis admitted that she was the recipient of day trips to Tennessee, Alabama, South Carolina, North Carolina, and other parts of Georgia, and numerous lunches and dinners. [R. at 1616-17]. These expenses were neither shared proportionally nor tracked. [R. at 1617]. Willis could only produce a single receipt for plane tickets totaling $1,394 in her effort to offset the $17,000 paid by Wade. [R. at 1616].

Wade testified that expenses were paid on his cards because, "for safety reasons, she would limit her transactions," and explained how they were unable to "walk through the airport or sit at a restaurant" because of all the "attention." [MT

[4] Travel expenses totaled over $17,000 in a 7-month period. [R. at 1023, 1027, 1035, 1047, 1051 (bank records), 1120-1153 (company records)]; [MT Feb. 1, 2024 at 110-12, 126-32, 130, 142-43, 180, 202-04, 277-88, 304-307, 353-355] (testimony).

Feb. 15, 2024 at 128: 7-14]. No evidence suggested that her bank accounts or credit cards were ever monitored, however.

Long before the Roman motion was filed, Willis had engaged in a pattern of conduct designed to prejudice the defendants for personal gain. Beginning two days after launching the investigation, and continuing unabated to this day, Willis has made widely publicized, extrajudicial statements to the media regarding the defendants and the case despite her heightened ethical obligations to refrain from doing so. Part I (B) (2), *infra*.

Willis was previously judicially disqualified. Two years ago, Judge McBurney determined that Willis had created an "actual and untenable" conflict of interest by publicly naming Lieutenant Governor Jones a target of her investigation and then headlining a political fundraiser for his opponent shortly thereafter. [No. A24A1597 (Cheeley) at 1111-12]. Judge McBurney then took the unprecedented (and unlawful) step of carving out the *target* of the investigation rather than conflicted *counsel*.

Four days after Roman moved to disqualify, the trial court noticed the parties of its intent to hold an evidentiary hearing. In spite of (or perhaps *because* of) the impending disqualification hearing, Willis undertook additional efforts designed to prejudice defendants and deflect attention away from, and otherwise conceal, the full scope of her disqualifying conduct.

Two days later, while facing intense media scrutiny, Willis, during the Martin Luther King, Jr. Holiday weekend, gave a keynote speech at Big Bethel Church (a historical black church in Atlanta) knowing this speech would be covered by local and national news media. With a notebook of prepared remarks, Willis marched to the podium and continued her premeditated pattern of prejudicial public statements about the defendants and their counsel. This time, however, in her zeal to protect her personal interests and reputation, she "upped the ante" in four ways.

First, Willis falsely maligned defendants and their counsel as dishonest and claimed that God told her to pray for their souls, deflecting from her personal relationship with Wade. Second, Willis injected race and racial bias into the case (while referencing politics) as a red herring when she knew the misconduct allegations were true. Third, Willis strongly intimated the defendants were guilty and would be convicted (boasting that her "superstar" team with a "conviction rate of 95 percent" "win, win, win."). Fourth, Willis appealed to religion by implying that God had chosen her for this case, was on her side, and that she was doing God's work by prosecuting the defendants.

DA Willis said:

> 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.

*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.[5] (emphasis added).

Two weeks later, a New York Times best-seller was released about Willis and the ongoing case, depicting Willis as the "hard-charging" prosecutor. *See* Michael Isikoff & Daniel Klaidman, *Find Me The Votes: A Hard-Charging Georgia*

[5] [No. A24A1596 (Shafer) at 1677].

*Prosecutor, a Rogue President, and the Plot to Steal an American Election*, Acknowledgements (1st ed. 2024) (*Find Me The Votes*). Knowing this book would be published before trial, according to the authors, Willis sat down for multiple interviews, gave significant "access and time," and granted additional interviews with members of her staff. *Id.* at 298, 303.

In those interviews, Willis thrusted into the public forefront allegations of racism against her and her office by telling the authors that, since her office had opened this case, the comments were "always racist." *Id.* at 223. Willis disclosed racist comments, threats of violence, and highlighted her need for enhanced security due to this case. Willis again invoked God as her ally, stating that she had God's protection and *direction* in *this* prosecution. *Id.* at 2, 6, 225, 271, 273.

Having publicly castigated the defendants as racists and aligned herself with God, Willis began her efforts to conceal from the tribunal the full nature of her conduct.[6] On February 2, 2024, Willis opposed Roman's motion with an affidavit from Wade that falsely averred their romantic relationship did not begin until 2022,

[6] On January 17, 2024, Willis filed for a protective order in Wade's divorce proceeding and 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." [MT Mar. 1, 2024 at 1188] (Def.'s Ex. 37 at 8). Willis asked the court for time "to investigate and depose relevant witnesses with regard to the interference and obstruction this motion contends . . . ." [MT Mar. 1, 2024 at 1191] (Def.'s Ex. 37 at 11). Coming from the elected DA, this could only be viewed as a threat of criminal prosecution to Mrs. Wade in violation of Ga. RPC 3.4 (h) which prohibits such threats to gain advantage in a civil case.

[R. at 1107-11, ¶ 27], and the two later testified it began around April. *Compare* [MT Feb. 15, 2024 at 273 (Willis) at 102 (Wade)].

Overwhelming evidence proved this was false. For example, Robin Yearti (close friend and former employee) testified that Willis' romantic relationship with Wade started in 2019, that she personally witnessed the two acting as a couple, and that there was "no doubt" that it began before Wade was hired. [MT Feb. 15, 2024 at 59, 61, 63]. Yearti was corroborated by text messages sent to Roman's attorney by Terrence Bradley, a long-time friend and former law partner of Wade, which confirmed that the romantic relationship "absolutely" started in 2019 when Willis "was a judge in south Fulton." [MT Mar. 1, 2024 at 1165-66] (Def.'s Ex. 26).[7]

That evidence was further corroborated by defense analysis of Wade's cell phone records. These records established that, before Willis hired Wade, his phone was in the general location of Willis' apartment on at least thirty-five occasions, including at least two overnight visits. [R. at 1453-57] (Aff. of Mittelstadt, re: CellHawk analysis). Eleven months of cell records proved that, during the period that Willis and Wade claimed *not* to be romantically involved, there were 2073 calls and 9792 texts between them—an average of 6.2 calls and 29.3 texts per day. *Id.*

[7] Bradley confirmed the accuracy of the allegations in Roman's motion prior to its filing. [MT Mar. 1, 2024 at 1167-68] (Def.'s Ex 27).

Unable to provide receipts, credit card or bank statements demonstrating Willis had expenses to offset the $17,000 paid by Wade,[8] Willis and Wade testified to a wholly unsupported explanation of cash repayments. [MT Feb. 15, 2024 at 110-12, 202-04, 280-88]. Unable to produce any records of withdrawals, deposits, or discussions of repayments,[9] Willis testified that she kept large amounts of cash in her home which she built up over the years by occasionally going to Publix and getting cash back and by taking cash from her campaign account (appearing to violate campaign finance laws).[10]

Both were barred attorneys and Willis, as an elected constitutional officer, had reporting requirements to track and disclose any expenditure on her behalf that exceeded $100 in a year. Nevertheless, in 2022, Willis falsely[11] certified that she received no gifts or benefits in the yearly aggregate of $100. [MT Mar. 1, 2024 at 1160-64] (Def.'s Ex. 21).

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[8] *See* [Roman at 920-21] (Delta receipt).

[9] *See e.g.* [MT Feb. 15, 2024 at 171: 6-11] (Q: "You don't have a single, solitary deposit slip to corroborate or support any of your allegations that your were paid by Ms. Willis [], do you?" A: "No, sir."); *see e.g.* [MT Feb. 15, 2024 at 280: 13-15] (Q: "And so when you got cash to pay him back on these trips, did you go to the ATM? A: "No lady.").

[10] [MT Feb. 15, 2024 at 281: 22-25, at 282: 1-4].

[11] In 2022, Willis received thousands of dollars from Wade, a "prohibited source." [MT Mar. 1, 2024 at 1023, 1027, 1035 (bank records); 1120-1153 (company records).

### B. Procedural Background.

On August 14, 2023, a Fulton County grand jury returned an indictment charging President Trump with violating several state laws, including Racketeering. [R. at 5-102] (23-SC-188947). President Trump has denied the allegations, entered a not guilty plea, and invoked his right to a jury trial.[12] [R. at 171].

On January 8, 2024, Roman moved to dismiss 23-SC-188947 as fatally defective and to disqualify Willis, her office, and Wade from further prosecution. [Roman at 704]. On January 12, 2024, the trial court notified the parties of its intent to hold a hearing. Two days later, on January 14, 2024 (MLK Holiday), Willis delivered a prepared, racially-charged, televised speech that aspersed the defendants and their counsel.

Following Willis' Church speech, President Trump adopted[13] Roman's motion and supplemented with new arguments that Willis' extrajudicial speech was a "calculated effort to foment racial bias into the case" that violated Rule 3.8 (g) of the Georgia Rules of Professional Conduct. [R. at 1061]. Augmenting the grounds for disqualification, President Trump took the position that Willis' speech was

[12] The State has sought to specially set trial within one year. [R. at 103, 123, 140, 732-35] (motion for case scheduling order, motion to set trial October 23, 2023, motion to set trial August 5, 2024).

[13] President Trump adopted the disqualification motions of co-defendants Shafer, Cheeley, Clark, and Latham. [R. at 1065, 1327, 1278, n.1].

"forensic misconduct" under *Williams v. State*, 258 Ga. 305, 314 (1988). [R. at 1282-83, 1574-76].

The trial court held four hearings on the motion to disqualify, three evidentiary. The trial court heard testimony from Yearti, Bradley, SADA Wade, DA Willis, Governor Barnes, John Floyd (DA Willis' father), and Austin Dabney (former associate of Bradley and Wade).

On March 15, 2024, the trial court entered an order granting in part and denying in part the disqualification motion. [R. at 1611-33]. The order held the defendants failed to prove an actual conflict of interest but *had* proven the appearance of impropriety. [R. at 1620-28]. To remedy this appearance, the order proposed a forced election: Willis and her office could step aside, or Wade must. [R. at 1612, 1627].

The trial court criticized Willis' behavior in testifying as "unprofessional" and described her actions as a "tremendous lapse in judgment" over which the "odor of mendacity" lingers. [R. at 1619, 1626]. The trial court labelled the cash repayments as "unusual," stated the lack of supporting documentation was "understandably concerning," and held there existed a "financial cloud of impropriety." [R. at 1617, 1627]. Stopping just short of calling their cash repayment testimony an outright fabrication, the trial court half-heartedly said that it was "not so incredible as to be inherently unbelievable." [R. at 1617].

The order found a need to dissipate the "potential untruthfulness" over the proceedings as a direct result of Willis and Wade's actions. [R. at 1627]. It 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*.

Despite acknowledging 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," [R. at 1613], the trial court "punted" Willis' numerous legal and ethical violations to "[o]ther forums or [] 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." [R. at 1619].

On forensic misconduct, the order expressly found that Willis' extrajudicial speech was "legally improper" and "not inadvertent." [R. at 1630]. It then issued Willis a stark warning: "the time may well have arrived" for a "gag" order to prohibit "the State from mentioning the case in any public forum" to "prevent pretrial publicity[.]" *Id*.

Despite its findings, which all but acknowledged forensic misconduct, the trial court refused to disqualify based on a "restricted" application of *Williams v. State*, 258 Ga. 305 (2) (1988). The order construed *Williams* as a "limited holding," "restrict[ed]" *Williams* to its facts, and construed forensic misconduct to only reach extrajudicial statements that expressly comment on a defendant's guilt. [R. at 1628]. 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*. *Id.* (emphasis supplied).[14]

On March 18, 2024, the defendants jointly and timely moved for a certificate of immediate review, [R. at 1635-42], which the trial court granted. [R. at 1644].

On May 8, 2024, this Court granted the joint application for interlocutory appeal. [R. at 1712]. On May 16, 2024, President Trump timely filed a notice of appeal to the Court of Appeals of Georgia. [R. at 1]. This briefing follows.

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[14] The absence of precedent was hardly surprising. No prosecutor is known to have ever provided endless pretrial interviews to national media outlets, granted unprecedented pretrial access to the authors of a book, proclaimed God had anointed them to prosecute a case, or wrongfully claimed on national television that defendants were overt racists.

## PART TWO: ENUMERATIONS OF ERROR

I. The trial court erred in holding that the standard for "forensic misconduct" under Georgia law prohibits a trial court from disqualifying prosecutors for intentional and deliberate violations of Georgia Rules of Professional Conduct 3.8 (g) (special responsibilities of a prosecutor) and 8.4 (a) (1) & (4) (misconduct).

**Preservation Below:** President Trump preserved his challenge to the superior court's construction and application of the "forensic misconduct" legal standard by timely moving the court below to disqualify the prosecution based on forensic misconduct. [R. at 1059, 1278, 1574].

II. The trial court abused its discretion in failing to disqualify both prosecutors, Willis and Wade, upon finding the prosecution was encumbered by their "appearance of impropriety."

**Preservation Below:** President Trump preserved his challenge to the superior court's chosen remedy by timely moving for disqualification of the Fulton County District Attorney's Office in its entirety. [R. at 1059, 1278, 1574].

III. The trial court erred in refusing to dismiss 23-SC-188947 for the prosecutorial misconduct outlined in enumerations I & II.

**Preservation Below:** President Trump preserved his challenge to the superior court's failure to dismiss 23-SC-188947 by timely adopting the arguments of co-defendant Roman, who timely requested the dismissal remedy. [R. at 1059].

## STANDARD OF REVIEW

### I. Legal Standard for Forensic Misconduct.

Like the interpretation of a statute, the trial court's construction of a legal standard is a "question of law, which is reviewed de novo on appeal." *State v. Rich*, 348 Ga. App. 467, 468 (2019) (citation omitted). "Because the trial court's ruling on a legal question is not due any deference, we apply the 'plain legal error' standard of review." *Id*.

### II & III. Disqualification Remedy for Appearance of Impropriety and Failure to Dismiss the Indictment.

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."[15] *Welcker v. Ga. Bd. Of Examiners of Psychologists*, 340 Ga. App. 853, 856 (2017) (ellipses in original).

[15] "[T]he existence of a conflict of interest is a legal question subject to de novo review." *United States v. Lanier*, 879 F.3d 141, 150 (5th Cir. 2018); *see also Cohen v. Rogers*, 338 Ga. App. 156, 168 (2016) (it is "a matter of law whether a lawyer has a conflict of interest requiring disqualification.").

## PART THREE: ARGUMENT AND CITATIONS TO AUTHORITY

### I. The trial court erred in holding that the standard for "forensic misconduct" under Georgia law prohibits a trial court from disqualifying prosecutors for intentional and deliberate violations of Georgia Rules of Professional Conduct 3.8 (g) (special responsibilities of a prosecutor) and 8.4 (a) (1) & (4) (misconduct).

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

Fulton County DA Willis,
November 14, 2023[16] (emphasis supplied)

By "restrict[ing]" *Williams* to its facts and refusing to unequivocally disqualify, the trial court abused its discretion in two ways. *See generally Paramount Tax & Accounting, LLC v. H & R Block Eastern Enterprises, Inc.,* 299 Ga. App. 596, 597 (2009) (defining abuse of discretion for "misinterpret[ation] [] relevant law"). The trial court: (1) erroneously excluded Willis' knowing and intentional prosecutorial misconduct and violations of the Georgia Rules of Professional Conduct; and (2) truncated its factual analysis of whether Willis' challenged remarks showed a "calculated plan to prejudice the defendants."

#### A. Improper restriction of *Williams*: "forensic misconduct" is not limited to public expressions of belief in a defendant's guilt.

"[R]estrict[ion]" of *Williams* was error because *Williams*, by its terms, described a "prosecutor's expression of his belief in a defendants' guilt[]" as only

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

*one example* of forensic misconduct. 258 Ga. at 314 (2) (B). In *Williams*, our Supreme Court used nonexclusive language as it considered an extra-judicial comment by a prosecutor to the media describing conviction as "the right result" after a defendant's third retrial ended in a hung jury. *Id.* at 310. Finding this "right result" comment violated DR 7-107 (B) (6) of the State Bar of Georgia, *Williams* explained that the two generally recognized grounds for disqualification of a prosecutor are conflict of interest and forensic misconduct. *Id.* at 314 (2).

On forensic misconduct, *Williams* cited to a law review article broadly defining the term and held that the "improper expression by the prosecution attorney of his personal belief in the defendant's guilt" is but "one primary example" of forensic misconduct. *Id.* *Williams* used non-exclusive language and relied upon *Vermont v. Hohman*, 138 Vt. 502 (1980), overruled on other grounds by *Jones v. Shea*, 148 Vt. 307, 309 (1987), and *In re J.S.*, 140 Vt. 230 (1981). The opinions discussed "prosecutorial impropriety," ethical violations related to the public comments, and emphasized the need for prosecutors to remain impartial.

These cases involved public comments that merely *implied* guilt. In *In re J.S.,* a prosecutor was disqualified for *one* statement that referenced comments made *by others* which did not name the defendant. *Id.* at 233-34. This reference was made while *legitimately advocating* before a legislative committee regarding the need to house juveniles for longer periods. *Id*. In *Hohman*, a prosecutor was disqualified

because he pledged in a reelection campaign ad featured in a local newspaper to "vigorously prosecute" the defendant "and obtain a second conviction" after a first conviction was reversed. *Id.* at 505. Quoting *Berger*, the Supreme Court of Vermont "strongly condemned the conduct of the state's attorney," and found error in *both* the denial of the motion to disqualify and the prosecutor's failure to disqualify himself." *Id.* at 506.

*Hohman* was unequivocal: "The awesome power to prosecute ought never to be manipulated for personal or political profit." *Id.* at 505. This broad policy directive is reinforced by decisions of the United States Supreme Court:

> Between the private life of the citizen and the public glare of criminal accusations stands the prosecutor. That the state official has the power to employ the full machinery of the state in scrutinizing any individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who would wield this power will be guided solely by their sense of public responsibility for the attainment of justice. *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (IV) (1987).

Rooted in *Berger*, *Hohman*'s reaffirmation of this broad policy was incongruent with the trial court's restrictive application of *Williams*, especially given Willis' intentional use of a prepared, televised speech for personal and political gain. [R. at 1630-31] (trial court discussion of speech). Nothing inadvertent about it: Willis read prepared remarks from a notebook knowing the nation would watch. Willis cast false racial aspersions against the defendants and their counsel as a red

herring for the public—to repair her reputation, deflect *away* from her misconduct and, obviously, to heighten public condemnation of the defendants—in advance of her upcoming election and the trial of this case.

Simply stated, every available analytical tool (*Williams* language, the opinion's citations, public policy, the historic role of the prosecutor, the Georgia Constitution's "trustee" provision, and her motive for the improper comments) counseled *against* the trial court's "restricted" application. This was error.

*Williams*' foundation – *Hohman*'s broad policy directive – was consistent with the heightened ethical standards for prosecutors.[17] Prosecutors, under the Georgia Constitution, are "trustees and servants of the people and are at all times amenable to them." GA. CONST. OF 1983 Art. I, § II, ¶ I. Prosecutors represent the public interest and are required to preserve the integrity of the criminal justice system. *See Love v. State*, 202 Ga. App. 889, 891 (1992) (quotation omitted). The Supreme Court of Georgia has repeatedly held that prosecutors "ha[ve] additional

[17] Under the ABA Standards for Prosecutors, 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. Sec. 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. ABA Standard 3-1.4; ABA Standard 3-1.10(c). Prosecutors may not allow improper considerations, such as partisan, political or personal considerations, to effect prosecutorial discretion, nor can their judgment be influenced by a personal interest in potential media attention. ABA Standard 3-1.6(a); ABA Standard 3-1.10(h). While all attorneys have a duty of candor, prosecutors have a "heightened duty of candor to the courts and in fulfilling other professional obligations." ABA Crim. Jus. Sec. 3.14(a).

professional responsibilities . . . to make decisions in the public's interest." *State v. Wooten*, 273 Ga. 529, 531 (2001); *see also In re: Redding*, 269 Ga. 537, 537 (1998) (per curiam). 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.

Thus, forensic misconduct is "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). This Columbia Law Review note was cited by *Williams* to support our Supreme Court's first reference to forensic misconduct. 258 Ga. at 314.

This broad standard necessarily reached Willis' knowing, intentional and deliberate violations of the Georgia Rules of Professional Conduct (RPC). *See Registe*, 287 Ga. at 544 (quoting *Wheat*, 486 U.S. at 160) ("[C]ourts have an independent interest in ensuring that criminal trials are conducted *within the ethical standards of the profession*[].") (emphasis added). The trial court noted that "Georgia courts have not hesitated to step in and use their inherent authority to disqualify a state prosecutor when required[,]" [R. at 1613], but omitted Willis' violation of her ethical obligations as 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 "obliged to take measures against unethical conduct occurring in connection with any proceeding before it."). Despite acknowledging *Registe*, GA. CONST. OF 1983 Art. VI, § I, Par. IV, and its powers under O.C.G.A. § 15-1-3 (4), the trial court failed to do so.

The "any activity" definition was consistent with findings in *Williams* and *Hohman* that those challenged extrajudicial comments violated the rules of professional conduct. Like those cases, review of the Georgia RPC reveals that Willis' use of the prepared speech to "cast racial aspersions at an indicted Defendant's decision to file th[e] [disqualification] motion" squarely and flagrantly violated Rule 3.8 (g). Rule 3.8 (g) states:[18]

"[T]he prosecutor in a criminal case shall:

> (g) 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. (emphasis supplied).

Without a doubt, Willis' nationally-televised, intentional injection of racism had a substantial likelihood of heightening both the public and the prospective jury

[18] Relatedly, Ga. RPC 8.4 (a) provides that it "shall be a violation of the Georgia Rules of Professional Conduct for a lawyer to: (1) violate or knowingly attempt to violate the Georgia Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . and (4) engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation." Thus, a knowing violation of Rule 3.8 (g) violated Rule 8.4 (a) (1) & (4).

pool's condemnation of the accused.[19] *See Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017) ("Discrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice, 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[.]") (internal citations omitted).

The State has not invoked any of the Rule 3.8 (g) exceptions to defend the speech because these exceptions do not apply. Willis' speech was in no way "necessary to inform the public of the nature and extent of the prosecutor's action." There was no prosecutorial action for comment. Instead, Willis directed her comments at the disqualification motion and concealed from the public (rather than disclosed) her improper relationship with Wade by falsely claiming the allegations stemmed from racism. Part I (A), *supra* (speech). The State below made no argument that this speech served a legitimate law enforcement purpose. It did not.

Given the trial court's factual finding on the purpose for Willis' speech (*i.e.*, casting racial aspersions at the defendants), [R. at 1630], there is no doubt that this speech was "activity by the prosecutor which tend[ed] to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in

[19] Other States unequivocally hold that "[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) (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). Courts "must be vigilant of conduct that appears to appeal to racial or ethnic bias . . . ." *Id.* at 714.

the manner prescribed by law." *See People v. Hill*, 17 Cal. 4th 800, 832-33 (A) (4) (d) (1998) (prosecutorial misconduct includes "cast[ing] aspersions on defense counsel" and holding that "[a]n attack on the defendant's attorney can be as seriously prejudicial as an attack on the defendant himself, and, in view of the accepted doctrines of legal ethics and decorum, it is never excusable."). Describing the speech as "still legally improper," [R. at 1630], the trial court's conclusion was inescapable: "legally improper" meant "forensic misconduct."

No different than the prosecutor's "right result" comment in *Williams,* Willis committed forensic misconduct by strongly intimating her opinion that the defendants will be convicted. Willis commented that the team she hand-picked for *this* case "wins, wins, and wins," and that the conviction rate of *both* the trial team and *this leader* "was 95%." Beyond casting racial aspersions, Willis called the defendants dishonest and claimed that God told her to pray for their souls but, by contrast, proclaimed that her team, their decisions, and statistics were part of "[God's] work." Willis inverted the burden of proof, presuming by negative inference that the defendants—who were, in her view, against God—were guilty. Under *Williams*, this too demanded disqualification.

Finally, the trial court placed the "cart before the horse" in its search for prejudice where none is required at this interlocutory stage. *Compare Estes*, 381 U.S. at 540 ("[t]he heightened public clamor resulting from radio and television

coverage will inevitably result in prejudice."); *Young*, 481 U.S. at 812 (when the public perception of the integrity of the criminal justice system is at stake, no prejudice to defendants needs to be shown); *see also Amusement Sales, Inc.*, 316 Ga. App. at 736 (2) (analogizing forfeiture prejudice standard to "criminal cases" and holding that no prejudice is required when prosecutor becomes interested and the trial court erroneously denies disqualification); *see also McLaughlin v. Payne*, 295 Ga. 609, 613 (2014) (describing as structural error the failure to disqualify a prosecutor who should be disqualified). The order acknowledged, on the one hand, "ancillary prejudicial effects yet to be realized" from public statements and the book, [R. at 1629], but on the other hand, noted that "it had not been decided" whether "some showing of prejudice is required." [R. at 1628].

These findings confirmed the need for Willis' disqualification, not a "slap on the wrist" with a "don't do it again" warning. Latent "ancillary prejudicial effects" from Willis' prior extrajudicial statements – *beyond* her "legally improper" speech – only compounded the forensic misconduct. Under *Williams*, upon a finding of forensic misconduct, the trial court should have focused on the disqualification remedy, not prejudice. The trial court erred by conflating these topics.

### B. Disqualification: the trial court truncated the analysis of whether DA Willis' forensic misconduct was part of a calculated plan.

To disqualify, *Williams* directs courts to examine whether the prosecutor's improper statements were "inadvertent" or "*part of a calculated plan evincing a*

*design to prejudice the defendant in the minds of the jurors . . .*" *Williams*, 258 Ga. at 314 (B). Specifically, *Williams* held:

> 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. *Id.* (citations omitted).

Far from one "inadvertent, albeit improper, utterance," Willis' speech was intentional and deliberate. *See, e.g., Estes*, 381 U.S. at 544. The order found Willis' speech was "legally improper" and not "improvised or inadvertent." [R. at 1630]. Despite that finding, which required disqualification, the trial court held "as best as it c[ould] divine under the sole direction of *Williams*," the speech did not "cross[] the line to the point where the Defendants have been denied the opportunity for a fundamentally fair trial, or that it requires the District Attorney's disqualification." *Id.* This was not the legal standard for disqualification—the trial court's failure to consider whether this speech was part of a calculated plan, Willis' motive, and its omission of other relevant evidence truncated the second step (remedy) of the *Williams* analysis.

Examined through *either* the lens of forensic misconduct or an appearance of impropriety,[20] Willis' personal motive was material and palpable. *Williams* did not

[20] "[T]here is no clear demarcation line between conflict of interest and forensic misconduct, and a given ground for disqualification of the prosecutor might be classifiable as either." *Williams*,

require numerous comments over a period to demonstrate a plan. Indeed, *Williams* involved a single comment on a single day and, in deciding whether to disqualify, *Williams* examined for inadvertence or intentionality.

A pattern of egregious comments, present here, may be necessary to illuminate the plan in circumstances where motive is unclear, and the comments are unplanned. But no such ambiguity existed here. At the other end of the spectrum, Willis delivered a *prepared* speech with clear intent to malign the defendants for personal and political gain. Intentional misconduct undertaken for personal objectives establishes the lack of judgment, impartiality and fairness required of prosecutors. Motive was evidence of a plan; public condemnation of the defendants and their counsel was the objective. This speech *was* the plan.

Willis' additional misconduct likewise evinced a calculated plan. In the related, O.C.G.A. § 24-4-404 (b) context, this Court has defined a plan as "several similar offenses [or acts] closely connected by geography, time, and manner so as to constitute a scheme or plan of [] conduct." *Sloan v. State*, 351 Ga. App. 199, 205 (1) (a) (2019) (citation omitted). Despite the available evidence of additional misconduct, the trial court failed to undertake any "plan" analysis. Instead, the order gave isolated, summary consideration to both Willis' prior extrajudicial comments

258 Ga. at 314, n.4. The grounds for Willis' disqualification involve forensic misconduct that also creates conflicts and the appearance thereof.

and the "Find me the Votes" publication, and it gave no consideration to her submission of a false affidavit or her false testimony. *See* [R. at 1611-37].

Evidence showing a deliberate plan, as opposed to unintentional utterances, included four categories of conduct: (1) the speech, casting racial aspersions at defendants and claiming to be ordained by God to convict them; (2) prior media statements evincing her opinion of the defendants' guilt; (3) publication of "Find me the Votes;" and (4) submission of a false affidavit and false testimony.

**1. Ordained by God: Willis' Church speech cast racial aspersions towards the defendants and defense counsel.**

Injection of racism has proven a consistent theme in Willis' public statements about this case, corroborating a design to prejudice the defendants by poisoning the jury pool. In her Church speech, Willis "frequently refer[red] to SADA Wade as the 'black man' while her other unchallenged SADAs were labeled 'one white woman' and 'one white man.'" [R. at 1631]. The trial court correctly noted:

> 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 racial aspersions at an indicted Defendant's decision to file this pretrial motion. [R. at 1630-31].

Willis' injection of racial bias into this speech was designed and unmistakable—every local and national news outlet reported the same. [Shafer at 1711-57].

Willis' recitation of a "conviction rate" and appeals to religious authority only corroborated her plan to prejudice. Willis intentionally touted her special prosecutors' credentials, referring to her "superstar" team as having a "conviction rate of 95 percent," and as one that "wins, wins, wins." Willis then proclaimed God had "qualified" her for this case, and thereby intentionally initiated an "'inflammatory appeal to . . . [potential] jurors' private religious beliefs.'" *Hammond v. State*, 264 Ga. 879, 886 (1995).

Context matters. Willis' knowledge of the significant media attention that would follow her racial aspersions likewise corroborated a calculated plan to prejudice. Indeed, "[t]he heightened public clamor resulting from radio and television coverage will inevitably result in prejudice," and "the 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, 549 (emphasis supplied); *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.") (emphasis supplied).

Willis did not take these premeditated steps because she was "free from temptation, bias or prejudice" and "acting on behalf of the public in a disinterested fashion." Instead, she acted from her own "personal and political" need to obscure her misconduct by slandering the defendants. *See Nichols v. State*, 17 Ga. App. 593, 606 (1916) (physical precedent only) ("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 . . . .").

The State argued that these facts are "so similar" to *Williams* that appellate guidance was unnecessary, but the distinctions in degree could not be more egregious. *Williams* stopped short of disqualifying a prosecutor for stating he was confident he would get "the right result" if the case was retried a fourth time because the comment came "immediately after termination of the third trial," when "besieged by representatives of the media, and "in response to questioning." 258 Ga. at 310 (A). There, the prosecutor truthfully explained the need for retrial, and the opinion underscored the legitimacy and truthfulness of his comments while noting the information was publicly available from its two prior opinions finding sufficient evidence. *Id*. at 314 (B).

By contrast, Willis did not react to an onslaught of press on the courthouse steps. Quite the contrary. Willis said nothing, for days. Only *after* the court scheduled the evidentiary hearing did Willis prepare her remarks to publicly condemn the defendants and defense counsel.

Unlike unexpectedly *responding* to media *questions*, Willis intentionally *prescheduled* an appearance at a historical black church on MLK weekend so that she could deliver a crafted *speech*. Unlike making *truthful* remarks about *publicly available* information, Willis – notebook in hand – delivered this speech with the sole intention of *mis*leading the public, particularly the Fulton County jury pool. Even worse than concealing the allegations truth and lying about the reasons for Roman's challenge, Willis selected a lie that struck at the very heart of the holiday that the church (and our Nation) celebrated that day. Nothing could be more calculated nor flagrant. Contrary to the order, every aspect of Willis' speech established a calculated plan to prejudice the defendants that required disqualification.

**2. Prior extrajudicial statements to the media evincing Willis' opinion of the defendants' guilt.**

The trial court failed to consider how Willis' actions throughout the case evinced a calculated plan. Just two days after announcing the launch of her investigation, Willis sat down for a prime-time interview with Rachel Maddow. [Roman at 1216-29] (archiving DA Willis's public comments). By March 2023,

some six months prior to indictment, Willis had given approximately 40 interviews with at least 14 different media agencies, most had national audiences.[21] *Id.*

Willis has frequently spoken publicly, oftentimes on prime-time national television, using phrases such as "fake electors" to intimate the defendants' guilt, not for a legitimate law enforcement purpose, but instead to prejudice the defendants for personal or political gain. *Id.*; [Shafer at 1758-1886]. For example, among other topics, Willis publicly (while speaking with national press) opined about President Trump's supposed *mens rea*,[22] commented that his conduct was criminal[23] and

[21] Contrary to the view laid out in the trial court's order, [R. at 1628], defendants compiled her interviews only through March of 2023. These numbers do not include the innumerable interviews since, nor do they convey the prejudicial impact of those stories being re-published hundreds of times.

[22] *See* [Roman at 1218, ¶ 4 n.4] (Feb. 12, 2021) ("So you look at facts to see, 'did they really have **intent**?' [or] 'did they really understand what they were doing?' Detailed facts become important like, **asking for a specific number** and then going back to investigate and understand that that number is just **one more than the number that is needed**. It lets you know that **someone had a clear mind**. They **understood what they were doing** . . . ").

[23] *See* [Roman at 1221, ¶ 21 n.24] (April 19, 2022) (". . . **right to vote being infringed upon**. And the allegations, quite frankly, **were not a civil wrongdoing, but a crime**. And so **everybody is equal** before the law **no matter what position** they hold, no matter **how much wealth** . . . ."); *see also* [Roman at 1227, ¶ 36 n.54] (Sep. 12, 2022) ("I mean, if **crime** happens in my jurisdiction, who's going to investigate it? I do not have the right to look the other way on a **crime** that could have impacted a **major right of people** in this community and throughout the nation.").

illegal,[24] said that "people are facing prison sentences,"[25] lambasted the defendants[26] and repeatedly interjected her race for the obvious purpose of prejudicing the jury pool.[27]

Even after being twice reprimanded (by Judge McAfee's Order, [R. at 1626-27, 1631]) and Judge McBurney's Order, [Cheeley at 1111-12]), being disqualified

[24] *See* [Roman at 1222, ¶ 23 n.29] (May 2, 2022), (Regarding the electors, ". . . I am very concerned that if **behavior that is illegal**, goes unchecked, that it could lead to a very bad start and a very, very bad path."); *see also* [Roman at 1223, ¶ 24 n.34] (May 27, 2022) (Regarding the electors, "[t]here are so many issues that could have come about if somebody participates in **submitting a document that they know is false. You can't do that**.").

[25] Matthew Brown, Tom Hamburger, *Georgia 2020 election inquiry may lead to prison sentences, prosecutor says,* THE WASHINGTON POST, (Sep. 15, 2022), https://www.washingtonpost.com/national-security/2022/09/15/fani-willis-georgia-prison/.

[26] *Id.* (regarding recent filings related to pressure on Ruby Freeman: "**I hate a bully**. Obviously, I think we would find it offensive to **bully an election official to influence an election**.").

[27] Kylie Cheung, *Fulton County DA Fani Willis Is Holding Trump Accountable*, MS. (Jan. 12, 2021), https://msmagazine.com/2021/02/12/fulton-county-district-attorney-fani-willis-trump-georgia-investigation/. (Days after announcing her investigation, "I've had to double my security. We've gotten a lot of comments. **And they're always racist** . . . **I don't think it's an insult to remind me I'm a Black woman**. It's a waste of their time."); *see also* [Roman at 1220, ¶ 14, n.17] (Sep. 29, 2021) ("certainly, if someone did something as serious as interfere with people's right to vote—which you know as a woman, **and a person of color**, is a sacred right where people lost a lot of lives, we are going to invest in that."); *see also* [Roman at 1221 at ¶ 17, n.20] (Feb. 3, 2022) (". . . Willis said she's received a mix of responses from supporters of the former president, including a **litany of racist slurs and threats**. . . ."); *see also* Blayne Alexander, *Fulton County DA Fani Willis shares racist threat as Trump probe nears a conclusion* (Aug. 1, 2023), https://www.nbcnews.com/politics/politics-news/fulton-county-da-fani-willis-shares-racist-threat-trump-probe-nears-co-rcna97515. (**disclosing a racist email**, Willis describes it as "not very unique. In fact, it is pretty **typical and what I have come to expect**."); Stacey Brown, *Fulton County DA Fani Willis Addresses Racial Threats Amid Trump Prosecution* (Sept. 28, 2023), https://seattlemedium.com/fulton-county-da-fani-willis-addresses-racial-threats-amid-trump-prosecution/. ("Willis revealed that she has become **desensitized to racial slurs** hurled at her due to her prosecution of former President Donald Trump." Willis states, **"**I've been called the N-word so many times, **I don't even think I hear it anymore**.'")

due to her actions creating an *actual* conflict of interest, *id*., and being warned that "the time may well have arrived" for a "gag" order, [R. at 1631], Willis continues to turn a blind eye to the court's admonitions and deliberately violates Rule 3.8 (g) to this day.[28]

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[28] On March 25, 2024, Willis stated, "I'm not embarrassed by anything I've done . . . 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 . . . There's one district attorney in the state and really around the country that has had the courage to do this, and she continues to do it. . . ." *See* https://www.fox5atlanta.com/news/fulton-county-da-fani-willis-claims-shes-only-da-with-courage-to-prosecute-trump.

Speaking with CNN, Willis called herself the face of the feminist movement and said she has seen an outpouring of support amid the disqualification effort. Willis said she is "flawed like every human being," adding she plans to continue to try to do her job honorably and **warned that "the train is coming" for Trump**. *See* https://www.newsweek.com/fani-willis-calls-herself-face-feminist-movement-1884186.

The following Friday, poking at the court's order, Willis said, "It's hard out here always having to prove yourself two and three times. Recently, they tell me, they don't like me to talk about race. Well, **I'm going to talk about it anyway**." *See* https://www.newsweek.com/fani-willis-talks-about-race-new-speech-despite-judge-mcafee-rebuke-1885322.

On May 6, 2024, with Willis sitting directly in front and tacitly agreeing, **Rev. Motley,** one of her religious supporters**, referred to President Trump as the "Florida" man with the "resources of hell" behind him who is "saturated with evil**." *See, e.g.,* https://youtu.be/9ZuzlPptRn0?si=feYr7G94OhxG3y6E. Willis immediately gave her prepared remarks discussing the fear she has given the threats she receives and stated, "these men are the ones who provide me protection and that has become a real thing for me these last four years." Willis again invoked God as her ally in this case: "**I don't care how many times they threaten me, I will leave here knowing I'm doing God's work**."

On May 20, 2024, with Rachel Maddow, while discussing the threats brought against her because of this case, Willis commented, "having prosecutors that are free from interference that are allowed to just look at cases, look at the facts, and **if people broke the law, to bring charges**, has to go on for us to live in a free society." Another comment on the guilt of the accused, Willis spoke directly about *this* case, about the threats she received because of *this* indictment, and directly stated she needs to be able to charge defendants who are guilty – here referencing President Trump.

On June 13, 2024, Wills said she is "thriving" despite the "attacks" and cited being "attacked and oversexualized" as a Black woman doing her job. "See, I'm so tired of hearing these idiots call

Unlike the singular comments in *In re J.S., Hohman,* and *Williams* that did *not* garner significant press coverage, Willis has long engaged in an extensive pattern of premeditated, prescheduled, publicity statements about this case.[29] Given the number, content (not limited to public necessity) and context (national media outlets) of her statements – *and* that they have continued after the trial court threatened a "gag" order – the conclusion that Willis has continued for prejudice and for personal and political gain is inescapable.

### 3. "Find Me the Votes": Willis participated in a NYT Best Selling Book About Herself and this Case.

The trial court's order failed to consider whether the contents of the book or the timing of its publication were further evidence of a plan. [R. at 1629]. Rather, the order mentioned "Find me the Votes" in only one sentence. *Id.*

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my name as 'fanny' in a way to attempt to humiliate me because, like silly school boys, the name reminds them of a woman's rear, of her behind." *See* https://www.foxnews.com/politics/fani-willis-tells-church-congregation-shes-thriving-despite-critics-attempts-humiliate-her.

[29] A snapshot of Willis' social media activity crystalizes her pattern of forensic misconduct and intimations on the defendants' guilt. Days after issuing Senator Graham a subpoena, Willis posted a political cartoon implying that, because of her impending investigation, President Trump was tampering with witnesses and attempting to cover up criminal conduct. *See* https://twitter.com/FaniWillisForDA/status/1549163274897350657.

By viewing in isolation Willis' participation in the book, the trial court ignored evidence of strikingly similar invocations of God as her ally and racial aspersions, which occurred relatively close in time. Like her speech and prior extrajudicial comments, Willis thrust into the public forefront themes of racism by detailing various racist comments and threats, as well her need for enhanced security, and reiterated that, since opening *this case*, the comments were "always racist." [MT. Mar. 1, 2024 at 1164] (Def's Ex. 22 at 223). Willis invoked God as her ally against the defendants, stating that she had God's protection *and direction* in handling *this* case. *Id*. at 2, 6, 225, 271, 273.

The timing of this publication (January 30, 2024) viewed *together with* the State's efforts to set trial, adds further color to what is undoubtedly a calculated plan. *Compare* [R. at 123, 140, 732]. Any and all inferences from the book cut against the refusal to disqualify.

**4. Hearing Conduct: Willis submitted a false affidavit and false testimony in her attempt to conceal her misconduct.**

In a desperate bid to stave off disqualification, Willis undertook to conceal her misconduct, thereby creating additional evidence of a plan. First, Willis knowingly filed a false affidavit with her response to the disqualification motions. [R. at 1107-1111]. Second, both Willis and Wade gave false testimony before the trial court. [MT Feb. 15, 2024 at 102, 273].

### *a. The false affidavit.*

On February 2, 2024, the DA's Office opposed the disqualification motion. [R. at 1079]. Attached was a sworn affidavit from Wade that falsely averred he met Willis in 2019 but that it was only in 2022, after he was hired, that they "developed a personal relationship in addition to our professional association and friendship . . . ." [R. at 1107, ¶ 27].

Overwhelming evidence showed that Wade's affidavit was known to be false (by both he and Willis) when it was filed. For example, Yearti testified that the romantic relationship started in 2019 and that there was "no doubt" it began before Wade's hiring. [MT Feb. 15, 2024 at 59]. Beyond Willis telling Yearti about her romantic relationship, Yearti observed Willis and Wade behaving as a couple. *Id*. at 63. Yearti gained these intimate details through her long-standing, close friendship with Willis. *Id.* at 53-54. Indeed, the two were so close that, in April 2021, Willis took over the lease to Yearti's Hapeville condominium – the condo where she met with Wade. *Id*. at 54: 5-12; *see* [R. at 1453-57] (CellHawk analysis).

Roman's counsel only learned about the Hapeville condo and Yearti through Terrance Bradley, and Yearti's testimony was corroborated by Bradley's texts – facts which the trial court failed to consider when it determined his testimony left "too brittle a foundation upon which to draw conclusions." [R. at 1626]; [MT Mar. 1, 2024] (Def.'s Ex. 39 at 17-20) (texts explaining how to locate Willis' friend who

owned condo, identifying Yearti by picture, and confirming relationship details). Indeed, Bradley provided significant information and assistance for five months, and he edited and confirmed the motion allegations were correct prior to filing. *Id.* at 6, 8-9 (Q: Anything else that isn't accurate? A: "Looks good.") After being called to testify, however, Bradley claimed his knowledge was gained exclusively through his confidential communications with Wade and asserted attorney-client privilege.[30] When Bradley was forced to testify, he feigned ignorance and was impeached with his texts. Bradley's texts confirmed that the romantic relationship had "absolutely" started in 2019 when Willis "was a judge in south Fulton." [MT Mar. 1, 2024 at 1165-66] (Def.'s Ex. 26).

Willis and Wade confirmed that Willis moved into the Hapeville condo and conceded Wade occasionally visited the location despite their assertion that the relationship was not yet romantic. [MT Feb. 15, 2024 at 145, 244, 266, 297-302, 320]. When asked, Wade dubiously claimed there were many reasons why he might visit Willis at her residence prior to becoming romantic (or being hired) but stated that he was not there more than 10 times. *Id*. at 198-200. When pressed, Wade could only muster two unconvincing reasons—to visit DA Willis' friend, Yearti, and

[30][MT Feb. 15, 2024 at 34-35, 40] (The court: "I think he is taking the position that he is not willing to share anything Mr. Wade ever told him, period, which that's a broader representation of attorney-clint privilege than I've ever heard.").

"to review a document I received."[31] *Id.* Wade failed to explain why he would do either when the two were merely friends.

Yearti and Bradley's texts were corroborated by the analysis of Wade's cell phone records which showed an average of 6.2 calls and 29.3 texts per day during the period they claimed *not* to be dating (April 2021 to November 2021). [R. at 1453-57]. These records *disproved* Willis and Wade's sworn testimony (that Wade would not have been at her apartment more than 10 times and that he never stayed overnight). *Id*. Wade's phone was in the general location of her condo on at least thirty-five occasions, including at least two overnight visits. *Id.*

Unable to argue this data was incorrect or unreliable, the State claimed the analysis did "nothing more than demonstrate that Wade's telephone was located somewhere within a densely populated multiple-mile radius where various residences, restaurants, bars, nightclubs, and other businesses are located." [R. at 1458]. Leaving out the fact that most businesses are closed overnight, the State failed to explain why Wade would have called the elected DA for 40 minutes while on the way to the area in the middle of the night, or why Wade texted Willis at 4:20

[31] Wade's admission that they would visit Yearti at the condo during this period corroborated Yearti's testimony that she witnessed romantic interaction before he was hired. The trial court failed to consider this and the additional corroborating evidence when it discounted Yearti's testimony as "lack[ing] context." [R. at 1626].

A.M. once arriving home, if he was in the area for some reason unrelated to visiting Willis. [R. at 1453-57]. There was nothing to explain: Wade was "visiting" Willis.

This evidence was further corroborated by the proffered testimony of Cobb County ADA Yeager, who was likewise told by Bradley about the beginning date of the relationship. [Shafer at 2167-69] (offer of proof). ADA Yeager witnessed Willis instruct Bradley not to speak to anyone about her relationship with Wade. *Id.* The trial court refused to consider Yeager's testimony, [R. at 1627, n.5], but the mounting evidence of evasive tactics and impeached testimony supported a calculated plan that required disqualification.

***b. DA Willis' false testimony and evasive tactics.***

Prosecutors have a heightened duty of candor to the tribunal. *Gaulden v. State*, 11 Ga. 47, 50 (1852); *see also* Ga. RPC 3.3 (a) (1). Willis untruthfully testified that she started dating Wade around April of 2022. [MT Feb. 15, 2024 at 273]. Evidence proved this testimony was false, that Wade and Willis intentionally concealed the true nature of their relationship, and that this false statement and concealment were material to the disqualification proceedings. O.C.G.A. § 16-10-70 (a); [MT Feb. 15, 2024 at 58-59, 62-64] (Yearti testimony that romantic relationship began in 2019); [Def.'s Ex. 26] (Bradley text message that romantic relationship "absolutely" began in 2019); [Def.'s Ex. 27] (Bradley confirming the factual allegations in the motion were accurate); [MT Feb. 15, 2024 at 196-97]

(Wade testimony that he did not reveal his relationship with Willis); [MT Feb. 15, 2024 at 331-32, 336] (Willis testimony that she did not reveal the relationship to the prosecution team and that no member was aware of it); [MT Feb. 16, 2024 at 460-61] (Willis' father, John Floyd's testimony that he knew about and met a prior boyfriend but was never told about Willis' relationship with Wade despite meeting Wade while the two were dating).

The ethical violations did not stop there. Willis' inveracity was further illuminated by three distinct actions: (1) efforts she undertook to prevent and tamper with key witnesses, like Bradley and Wade, O.C.G.A. §§ 16-10-93, 16-10-94; (2) her requested protective order in Wade's divorce proceeding that threatened to prosecute Wade's ex-wife, [MT Mar. 1, 2024 at 1181-92] (Def.'s Ex. 37), Ga. RPC 3.4 (h); and (3) her false certifications that she had received no gifts or benefits from a prohibited source. [MT Mar. 1, 2024 at 1155-56, 1158, 1160-64] (Def.'s Ex. 20-21); Fulton Cnty. Code Ethics, Sec(s). 2-66 (b), 2-68 (a), 2-69 (c), 2-67 (s).

The trial court was faced with "understandably concerning" circumstances given the suspicious context of the alleged cash repayments and the lack of supporting documentation. [R. at 1628]. As a result, it found "reasonable questions about whether the DA and her hand-selected lead SADA testified truthfully," [R. at 1627], and that an "odor of mendacity" lingered. [R. at 1626]. Despite these

damning findings and the significant ethical violations uncovered during the hearing, the order declined to disqualify Willis and her prosecutorial team.

The trial court avoided the only appropriate remedy. By truncating the disqualification analysis and restricting its application of *Williams*, the trial court either glossed over, or omitted, material facts that all counseled *against* the tempered remedy it imposed. This was reversible error.

## II. The court below erred in failing to disqualify both prosecutors upon finding the prosecution was encumbered by their "significant appearance of impropriety."

Once the trial court found that a "significant appearance of impropriety[32] [] infect[ed] the current structure of the prosecution team," [R. at 1612], the remedy was to disqualify each affected prosecutor and the entire DA's office. *See Head v. State*, 253 Ga. App. 757, 758 (2) (2002) (holding that where there exists "at least the appearance of a prosecution unfairly based on private interests" the "prosecutor who has the conflict may be disqualified from participation in the case[.]"); *see also Battle v. State*, 301 Ga. 694, 698 (3) (2017) (holding that appearance of impropriety disqualification applies to prosecutors). Here, Willis and Wade were *both* affected prosecutors because they jointly participated in the "specific conduct" that

[32] "A lawyer must avoid even the appearance of impropriety, to the end that the image of disinterested justice is not impoverished or tainted. Thus, it is that sometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administration of justice." *First Key Homes of Georgia, LLC v. Robinson*, 365 Ga. App. 882, 885 (2022) (internal quotations omitted).

"impacted more than a mere 'nebulous' public interest . . ." [R. at 1625]; *see generally* O.C.G.A. § 16-2-20 (a)-(b).

The trial court's forced election remedy failed to redress the "significant appearance of impropriety" because this remedy removed only a portion of the impropriety that created the appearance. *Contra* [R. at 1612, 1627]. This appearance was caused by "specific conduct" that involved *both* Willis and Wade:[33]

(a) Willis' decision to continue supervising and paying Wade while maintaining a romantic relationship [R. at 1625];

(b) Willis' regular and loose exchange of money with Wade without any verifiable measure of reconciliation, *id*.;

(c) Actions taken by both parties regarding Wade's divorce. For Wade, the submission of false interrogatories. [MT Mar. 1, 2024 at 963-79] (Def.'s Ex. 5-6). For Willis, an emergency motion by non-party deponent for a protective order. [MT Mar. 1, 2024 at 1181-92] (Def.'s Ex. 37);

(d) Willis' legally improper speech, made in Wade's defense, [R. at 1630]; and

(e) Willis' potential untruthfulness, [R. at 1627].

This specific conduct violated Rules of Ethics, Fulton County Code Ethics, Sec(s). 2-66 (b), 2-68 (a), 2-69 (c), 2-67 (s), Georgia laws governing the employment of assistant district attorneys, O.C.G.A. § 15-18-20 (a), and manifested a constitutional breach of trust. GA. CONST. OF 1983 Art. I, Sec. II, Par. I.

[33] *See* footnote 20, *supra*.

Because this "specific conduct" involved Willis and Wade, the trial court found that the "District Attorney's *prosecution*"—not *only* Wade—was "encumbered." [R. at 1625] (emphasis added). Consequently, both were affected prosecutors and due to be disqualified. *Head*, 253 Ga. App. at 758 (2).

Georgia courts regularly disqualify private lawyers for an appearance or possibility of a conflict in both criminal and civil cases. *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 (1998); *Love*, 202 Ga. App. at 889-90; *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981); *Dalton v. State*, 257 Ga. App. 353 (1981). This concept makes sense in the context of existing Georgia case law: if private lawyers are disqualified from representing clients based on an appearance of impropriety, so too are prosecutors, who are held to even higher professional standards and, as "trustees," are required by due process to remain disinterested.

Deviating from *Head*, the trial court's "alternative" remedy was premised upon its reading of several cases to permit the "consider[ation] of alternative solutions[.]" [R. at 1624]. But review of these cases showed that the trial court's extrapolation was not supported by the language or context of those decisions. *See* [R. at 1623-25] (discussing *Blumenfeld*, *Bd. of Ed. v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979), and *Billings v. State*, 212 Ga. App. 125, 129 (1994)).

For example, the trial court relied heavily for its alternative remedy in *Blumenfeld*. In *Blumenfeld*, the Supreme Court considered whether an attorney who formerly represented a propounder of a will was *per se* disqualified due to his marriage to the caveator's present co-counsel. 247 Ga. at 407-08. The Court found that marriage, standing alone, created an appearance of impropriety but did not require *per se* disqualification. Disqualification, instead, was a remedy applied on a "continuum." *Id.* at 409. But there, the appearance was based on status, not conduct.

Here, *Blumenfeld*'s continuum supported disqualification because the appearance of impropriety was based on attorney conduct (*not* status) and the appearance was *not* outweighed by "the client's interest in choice of counsel." *Id.* at 409-10. To the contrary, the sole "choice of counsel" interest was the defendants' joint "choice" *not* to continue with encumbered prosecutors. *Compare id.* at 409-10 *with* [R. at 1059, 1278, 1574]. Unlike the "nebulous" civil scenario hypothesized in *Blumenfeld*, the trial court expressly found that the "appearance" impacted "*more than* a mere 'nebulous' public interest . . . ." [R. at 1625] (emphasis added). This "significant appearance of impropriety" was far more egregious than *Blumenfeld*.

The excerpt quoted from the Second Circuit in *Nyquist* was taken out of context. [R. at 1625]. In *Nyquist*, a declaratory action, the very sentence following the trial court's quote stated: "This is particularly true where, as in this case, the appearance of impropriety *is not very clear*." 590 F.2d at 1247 (emphasis added).

Needless to say, given the trial court found a "significant appearance of impropriety," the impropriety here was very clear.

Finally, the trial court sought to draw a flawed analogy to the screening procedure noted in *Billings*. *Billings* rejected a motion to disqualify the DA's Office because the "imputed disqualification rule was not meant to encompass governmental law offices[.]" 212 Ga. App. at 129 (4). But the factual scenario in *Billings*, the defendant's former defense attorney becoming his prosecutor, explains why *Billings* did not disqualify the entire prosecutor's office. By contrast, there was no screening here nor could there be. Willis and Wade ran the prosecution team together; the investigation forward was under their control. *Billings* did not authorize or suggest a forced election was appropriate under these circumstances.

In sum, the trial court's forced election remedy "misapplied the relevant law" (*i.e.*, the cited cases) and thus abused its discretion. Because it found that *both* Wade and Willis were affected by a significant appearance of impropriety, the trial court had to disqualify both. *See Registe*, 287 Ga. at 544 (noting independent interest of courts to ensure trials are conducted within ethical standards and to protect public confidence in the integrity of the judicial system). Under *Registe*, withdrawal of Wade failed to cure the appearance of impropriety that Willis created through her *own* misconduct.

## III. The court below erred in refusing to dismiss 23-SC-188947 for the prosecutorial misconduct outlined in enumerations I & II.

"Dismissal of an indictment . . . [is an] extreme sanction[], used only sparingly as a remed[y] for unlawful government conduct." *State v. Lampl*, 296 Ga. 892, 896 (2) (2015) (collecting cases). Unlawful government conduct includes forensic misconduct, *Williams*, 258 Ga. at 308 (B), and specific conduct by a government attorney (public official or privately appointed) causing an appearance of impropriety. *See Young*, 481 U.S. at 811 (III) (B) ("appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general."). Where a prosecutor, conflicted by the appearance of impropriety, participates in grand jury proceedings during that conflict, disqualifying government conduct results. *Nichols*, 17 Ga. App. at 821.

Unlawful government conduct occurred below: the trial court found a substantial appearance of impropriety that "encumbered" the "District Attorney's prosecution," [R. at 1625], and that Willis' speech was both "legally improper" and "not inadvertent." [R. at 1630]. Wade led the grand jury in 23-SC-188947.

To sustain the trial court's unlawful government conduct finding, President Trump incorporates by reference the analysis set forth above. *See* Enum. I & II, *supra*. The unlawful government conduct of Willis and Wade requires dismissal of 23-SC-188947 because Wade's conflicted status and lead role before the grand jury violated due process and rendered those proceedings unfair.

Under *Lampl* and other longstanding precedent, prejudice is presumed and dismissal "may be imposed for violation of a constitutional right" or "in the rare case in which the State's action has compromised the structural protections of the grand jury and thus rendered the proceedings fundamentally unfair." *Id.*; *see Colon v. State*, 275 Ga. App. 73, 78 (3) (2005) (dismissal for violation of grand jury structural protections where prosecutor was present during grand jury deliberations).

This Court and other state courts have found fundamental unfairness and dismissed indictments where a conflicted private prosecutor is present for, and participates in, the grand jury investigation. *Nichols*, 17 Ga. App. at 821 (sustaining plea in abatement to indictment drawn by conflicted solicitor who examined witnesses before the grand jury); *Farber v. Douglas*, 178 W.Va. 491, 496 (1985) ("Since the prosecutor should have disqualified himself as a matter of law from seeking this indictment, his presence before the grand jury in this matter was unauthorized and vitiates the indictment."); *Corbin v. Broadman*, 6 Ariz. App. 436, 441 (1967) ("We hold that the deputy county attorney, being disqualified to prosecute or present matters to the grand jury by virtue of his conflict of interest, was an unauthorized person at the sessions of the grand jury."); *State v. Hardy*, 406 NE2d 313 (Ind. App. 1980) (same).

Like in *Nichols*, Wade's conflict existed from the inception, and Wade was therefore not an authorized grand jury participant, violating due process. *See Young*,

481 U.S. at 814-15 (Blackmun, J., concurring). In refusing to dismiss, the trial court failed to consider that Wade's conflict existed before the indictment. *See* [R. at 1627] (characterizing dismissal as an "extreme sanction" and refusing to dismiss because "[t]here has not been a showing that the Defendant's due process rights have been violated or that the issues involved prejudiced the Defendants in any way.") (citations omitted). Wade's frequent presence and participation with, and *control* of, the grand jury proceedings is undisputed. [Roman at 800-05, 812-17] (Wade invoices detailing hours of participation in special purpose grand jury).

Since being hired, Wade played an integral role before both the special purpose as well as the regular grand jury as *lead* prosecutor. Wade not only called witnesses and presented testimony, but he was responsible for educating, instructing and assisting the grand jury as it considered the indictment. Throughout his tenure, Wade operated under the conflict of interest that has now disqualified him.

Because the appearance of impropriety found by the trial court existed before the indictment, the grand jury process was not impartial nor free from the potential for improper influence. Indictments obtained by conflicted prosecutors, be they elected, appointed or private, must be dismissed. This is particularly true here because of the staggering misconduct of both Willis and Wade. Reversal is therefore required.

## CONCLUSION

DA Willis engaged in a deliberate, calculated plan and pattern of misconduct in total disregard for her heightened ethical constraints. Knowing full well the unethical nature of her Church speech, Willis – a career prosecutor – chose to rectify the reputational harm she single-handedly caused by intentionally and flagrantly disparaging the defendants and defense counsel with a crafted lie. This blatant lie – that the defense was racist – caused the utmost damage before a group of people (all potential jurors), who would be most affected.

After choosing to take the stand to explain her misconduct, Willis testified falsely in violation of her "heightened duty of candor to the courts." Undeniable intentionality rings throughout her persistent disregard for her ethical obligations and court directives. The totality of her actions establishes why she must be removed lest she continue to act with total disdain for the administration of justice and her prosecutorial obligations.

As Judge McBurney noted when he disqualified Willis, "[a]n investigation of this significance, garnering the public attention it necessarily does and touching so many political nerves in our society, cannot be burdened by legitimate doubts about the District Attorney's motives." [Cheeley at 1111]. What necessitates disqualification is "that concern about the District Attorney's partiality naturally,

immediately, and reasonably arises in the minds of the public, the pundits, and – most critically – the subjects of the investigation." *Id*.

That was true two years ago. It is even more true today when, after the allegations came to light, the defendants watched in shock as Willis "cast racial aspersions" at them on MLK weekend, and as America watched the "potential untruthfulness" of her televised hearing testimony. The circumstances of this case demand Willis' disqualification. To decide otherwise will be taken by Willis as this Court's imprimatur of her playing the race card whenever she chooses to prejudice the defendants and defense counsel.

For the foregoing reasons, President Trump respectfully requests this Court to **VACATE** in part the order denying his motion to disqualify the prosecutor and **REMAND** his case to the Superior Court of Fulton County with instructions that indictment 23-SC-188947 be **DISMISSED**, or alternatively, that Willis and her office be **DISQUALIFIED** from further participation in these proceedings.

Respectfully submitted this 24th day of June, 2024.

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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing OPENING BRIEF upon Mr. Alex Bernick, by filing the foregoing via the Court of Appeals E-Fast service, and by depositing the same in the U.S. Mail with adequate postage affixed to insure delivery, addressed to Fulton County District Attorney, 136 Pryor Street, third floor, Atlanta, Georgia 30303.

Pursuant to Court of Appeals Rule 24 (f), undersigneds hereby certify that this brief does not exceed the criminal case word limit imposed by Rule 24 (a).

This 24th day of June, 2024.

*/s/ Matthew K. Winchester*
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