IN THE COURT OF APPEALS OF GEORGIA

DONALD JOHN TRUMP *et al.*, Applicants, versus THE STATE OF GEORGIA, Respondent.	**Case A24I0160**

BRIEF OF AMICI CURIAE IN OPPOSITION TO THE APPLICATION FOR INTERLOCUTORY APPEAL

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I. INTERESTS OF AMICI CURIAE

Amici curiae, Amy Lee Copeland, Scott Cummings, Charles Geyh, Bruce Green, David Luban, J. Tom Morgan, Richard Painter, Cassandra Robertson, and Sarah Saldaña, are ethics experts and former federal and Georgia state prosecutors and defense attorneys further identified in the attached Appendix, who collectively have decades of experience with the disqualification and conflict of interest issues that apply to prosecutors. Based on their years of experience with the very issues raised in Defendants' motions, *amici* respectfully submit that their amicus brief may assist the Court in its decisional process and in its evaluation of the legal issues raised in this matter.

II. INTRODUCTION

Defendants seek immediate review of a disqualification order that, if anything, was a generous reading of the law favoring the Defendants. After dedicating two and a half days to hearing evidence on the disqualification motion, the trial court concluded that "the allegations and evidence [Defendants advanced were] legally insufficient to support a finding of an actual conflict of interest." March 15, 2024 Order ("Order") at 23. The trial court nevertheless took the additional step of requiring Special Assistant District Attorney Wade to leave the prosecution team if District Attorney Willis was

to continue the prosecution. *Id.* at 17. The logic of that order was simple. Any appearance of impropriety from a romantic relationship among members of the prosecution team would be removed if SADA Wade were no longer part of the team.

Having obtained a favorable order, Defendants now seek its immediate review. But their application gives no real reason to believe that the trial court reversibly erred, much less to believe that the benefits of interlocutory review would outweigh the costs. After all, it has long been recognized that delay is especially harmful to the public interest in criminal cases—a public interest that is magnified here because the victims of the alleged crimes include, at a minimum, everyone who voted in Georgia's 2020 presidential election, and because voters in Georgia and elsewhere have an understandably strong interest in knowing whether one of the presumptive nominees for president in 2024 committed felonies to try to stay in office after he lost the 2020 election. To be clear, that public interest is equally great if the trial results in acquittal or in conviction.

In sum, the unique circumstances of this case not only fail to justify departure from the usual rule that alleged errors should be reviewed post-conviction, but they also strongly support denying interlocutory review and allowing the case to proceed to trial without further delay. The Court should deny Defendants' application ("Application") for interlocutory review.

III. ARGUMENT

a. Interlocutory Review Harms the Public's Interest in Prompt Adjudication of Criminal Trials

The basic question before the Court is whether Defendants have demonstrated that this Court should depart from the usual rule that appeal is available only after final judgment. To evaluate that question, the Court must consider that delaying criminal trials implicates not just the parties' interests, but also the interests of the public. Indeed, given the crimes alleged here, the public interest in a speedy trial is particularly strong. "Justice delayed is justice denied." *Denson v. State*, 353 Ga. App. 450, 454 (2020).

Allowing interlocutory review in any case can be disruptive, but "the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Di Bella v. United States*, 369 U.S. 121, 126 (1962); *see also Will v. United States*, 389 U.S. 90, 96 (1967) ("All our jurisprudence is strongly colored by the notion that appellate review should be postponed, except in certain narrowly defined circumstances, until after final judgment has been rendered by the trial court."). The Supreme Court has emphatically pronounced that the "encouragement of delay is fatal to the vindication of the criminal law." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

In contrast to routine civil matters, the harms of delay in a criminal case affect the public as well as the parties. *See Strunk v. United States*, 412 U.S. 434, 439 n.2 (1973) (recognizing that "[t]he public interest in a broad sense . . . commands prompt disposition of criminal charges," regardless of the parties' interests). As the Georgia Supreme Court has recognized, "there is a *societal interest* in providing a speedy trial that exists separate from, and at times in opposition to, the interests of the accused." *Sosniak v. State*, 292 Ga. 35, 39 (2012) (emphasis added) (quoting *United States v. MacDonald*, 435 U.S. 850, 862 (1978)); *see also Zedner v. United States*, 547 U.S. 489, 498 (2006) (Scalia, J., concurring) (noting that the federal Speedy Trial Act "protects the interests of the public as well as those of the defendant"). This public interest flows from the "distinctly communal character . . . reflected in both the Constitution itself and the legal tradition from which it arose." *United States v. Trump*, 2023 WL 8359833, at *11 (D.D.C. Dec. 1, 2023), *aff'd*, 91 F.4th 1173 (D.C. Cir. 2024), *cert. granted*, No. 23-939, 2024 WL 833184 (U.S. Feb. 28, 2024). As Blackstone observed, "crimes 'are a breach and violation of the public rights and duties due to the whole community, considered as a community.'" *Id.*

Indeed, more than most cases, the interests of the whole community are obvious here. This case involves an alleged crime aimed to thwart the democratic transfer of power, in which the victims were, at a minimum, the entire Georgia electorate, and the most prominent defendant seeks re-election to an office whose constitutional duties

include "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976). The public's interest in prompt resolution of criminal trials is, therefore, at its zenith in this case.

Of course, the unique public interest in this case does not detract from the many other harms of delay that would ensue if the Court allows this or other interlocutory appeals.[1] Delay provides additional opportunity for wrongdoers to commit further crimes; it risks the unavailability of witnesses and memories that may dim; it prejudices the victims of crimes; and it diminishes the deterrent value of punishment and thwarts the interests of justice. *See Dickey v. Florida*, 398 U.S. 30, 42 (1970) (Brennan, J., concurring); *Weis v. State*, 287 Ga. 46, 49-50 (2010); *Sosniak*, 292 Ga. at 39-40.

The Court should also be mindful that interlocutory appeals in criminal cases are ripe for abuse as a delay tactic. As the Supreme Court has stated, delay is not an uncommon defense tactic, because delay means that prosecution "witnesses may become unavailable or their memories may fade," potentially "seriously" weakening the prospects of the prosecution meeting its burden. *Barker v. Wingo*, 407 U.S. 514,

[1] On April 8, Trump and 14 of his co-defendants filed another Joint Motion for Certificate of Immediate Review, this time of the Superior Court's April 4 Order denying their Motions to Dismiss Under the First Amendment.

521 (1972). This Court has recognized, moreover, that "counsel us[e] motions to disqualify as a dilatory tactic," leading the Court to treat disqualification as "an extraordinary remedy that should be granted sparingly." *First Key Homes of Ga., LLC v. Robinson*, 365 Ga. App. 882, 885 (2022) (quoting *Hodge v. URFA-Sexton*, 295 Ga. 136, 139 (2014)).

The risk of opportunism is still greater if appeals of orders denying prosecutorial disqualification are allowed. The Ohio Supreme Court recognized the strategy's allure when rejecting an interlocutory appeal in *State ex rel. McGinty v. Eighth District Court of Appeals*: a "months-long delay in his or her prosecution by moving to disqualify the prosecutor and then appealing the resulting denial." 28 N.E.3d 88, 93 (Ohio 2015). It condemned that result as "against the public policy favoring speedy and orderly criminal trials." *Id.* Likewise, the Connecticut Supreme Court rejected an appeal from an order denying prosecutorial disqualification, explaining that while such appeals "might well serve the purpose of parties who desire for their own ends to postpone the final determination of the issues," "[a]llowance of multiple appeals in a single action would not accord with the sound policy which favors the speedy disposition of actions in court, and particularly of criminal prosecutions." *State v. Powell*, 442 A.2d 939, 944 (Conn. 1982) (quoting *State v. Kemp*, 1 A.2d 761 (Conn. 1938)).

For these reasons, the Court should begin with a strong presumption that interlocutory review of the trial court's disqualification decision is contrary to the interests of justice in this criminal case.

b. Review, If Necessary, Is Available Post-Conviction

In addition to the weighty reasons not to delay a criminal trial, as described above, Defendants have ample opportunity to press their claims in the future. Numerous federal and state courts have held that decisions denying disqualification of prosecuting attorneys can, and should, be reviewed on appeal from final judgment. *See United States v. Caggiano*, 660 F.2d 184, 191 (6th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *In re April 1977 Grand Jury Subpoenas*, 584 F.2d 1366, 1369 (6th Cir. 1978), *cert. denied*, 455 U.S. 945 (1982) (holding defendant "can raise the disqualification of [government] counsel issue after indictment and conviction, the normal course of review in such cases"); *State v. Powell*, 442 A.2d at 943 ("Even if it is assumed that the trial court's denial of the motions to disqualify was erroneous, any harm caused thereby would clearly be reparable if convictions are obtained."); *Luke v. Commonwealth*, 949 N.E.2d 434, 435 (Mass. 2011) (rulings denying disqualification of prosecutors "are routinely reviewed on appeal from conviction of a crime"); *cf. Settendown Public Utility, L.L.C. v. Waterscape Utility, L.L.C.*, 324 Ga. App. 652, 657

(2013) (disqualification of counsel in criminal cases is not subject to immediate appeal under collateral order doctrine).

Of course, at present, it is pure speculation whether the disqualification claims that the Superior Court has dismissed here will ever come before this Court on appeal from final judgment. Thus, this Court is not deciding whether it should address these issues now or later, but, potentially, whether it will have to expend the time and resources addressing them at all. Indeed, it remains to be seen whether there will be convictions at trial; whether Defendants have standing to challenge at least some of the claims made in support of disqualification, *see* Order at 20, n.6 (noting existence of potential standing issue for five Defendants with respect to DA Willis's remarks on January 14, 2024), and whether any or all of the Defendants will reach plea agreements. Thus, Defendants' purported concern regarding the expenditure of resources is far better served by leaving any consideration of these claims for appeal from final judgment.

c. Erroneous Failure to Disqualify a Prosecutor Does Not Automatically Require Reversal of Convictions

Erroneous failure to disqualify a prosecutor does not, as Defendants wrongly contend, constitute a structural error requiring automatic "reversal of any convictions without additional showing of prejudice." Application at 26. Even assuming that the issue reaches this Court on appeal from final judgment, the Court may nevertheless

affirm the conviction if there is no showing of prejudice to Defendants. *See Barber v. State*, 204 Ga. App. 94, 94-95 (1992) (affirming conviction on appeal after pretrial denial of disqualification motion, where appellant failed to show she was prejudiced by prosecuting attorney's pretrial statements about her character, his personal opinion of her guilt, and her attempts to enter a guilty plea). Indeed, insofar as Defendants' concerns relate to "forensic misconduct" arising from pre-trial statements, protections are amply provided by cross-examination of witnesses, by *voir dire* of potential jurors, by jury instructions, or by any of the other myriad tools available at trial. *See R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 580 n.8 (1982) (noting means of ameliorating the impact of prejudicial facts being reported in the media by, *inter alia*, "searching voir dire" and "clear and emphatic instructions to the jury to consider only evidence presented in open court"); *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006) (searching *voir dire* addressed potential prejudice from pretrial publicity); *Glenn v. State*, 255 Ga. 533, 534 (1986) (admonition of district attorney and curative instructions to jury addressed potential prejudice from alleged prosecutorial misconduct during trial); *Orsini v. State*, 665 S.W.2d 245, 251-252 (Ark. 1984) (affirming trial court decision that prosecuting attorney was not subject to disqualification, where defendant failed to demonstrate that any juror was prejudiced by pretrial publicity; *voir dire* of jury provides adequate safeguard against pretrial publicity).

The only Georgia case the Defendants cite concerning disqualification of a prosecutor, *McLaughlin v. Payne*, 295 Ga. 609 (2014), did not hold, as Defendants summarize, that "failure to remove disqualified prosecutor warrants new trial." Application at 15. Rather, citing a Georgia Supreme Court case that applied the harmless error standard, the Court held that a conflict of interest based on a personal interest *can* warrant a new trial under certain circumstances. *McLaughlin,* 295 Ga. at 613 (citing *Lane v. State,* 238 Ga. 407, 408-410 (1977) (vacating conviction and ordering a new trial where there was a finding that appellant was denied due process) and *Clifton v. State*, 187 Ga. 502, 504 (1939) ("[I]t is fundamental that a new trial will not be awarded where it appears that the defendant suffered no prejudice from the ruling complained of.")).

d. Defendants Fail to Satisfy the Requirements for Interlocutory Appeal

This Court should reject Defendants' Application under the above-described principles, which undergird Georgia courts' reluctance to allow interlocutory appeals in criminal cases. In addition, this Court should reject Defendants' Application, because they have failed to meet their burden under Ga. Ct. App. R. 30(b).

Rule 30(b) prescribes three tightly-delineated circumstances in which an application for interlocutory appeal will be granted:

(1) The issue to be decided appears to be dispositive of the case; or

(2) The order appears erroneous and will probably cause a substantial error at trial or will adversely affect the rights of the appealing party until entry of final judgment, in which case the appeal will be expedited; or

(3) The establishment of precedent is desirable.

Id. Defendants have not established that any of these circumstances exist here.

i. The Issue Does Not Appear to be Dispositive of the Case

Defendants concede their arguments concerning disqualification would not be dispositive of the case, even if successful. Application at 14 ("[D]isqualification is not dispositive of the underlying allegations in the Indictment."). Thus, it is undisputed that they have not met their burden under Rule 30(b)(1).

ii. The Order is Not Erroneous or Likely to Cause Substantial Error

The Defendants do not carry their burden of showing that the Order satisfies the requirements of Rule 30(b)(2), *i.e.*, that it both 1) appears erroneous, and 2) will probably cause a substantial error at trial or adversely affect the rights of the Defendants until final judgment. The Order, which followed a two and a half day adversarial evidentiary hearing and was based on careful findings of fact and credibility assessments, was carefully-researched and well-reasoned, and the remedy the Court

crafted to "proportionally address[]" the appearance of impropriety is more than sufficient to protect against any substantial error. *See* Order at 22-23.

Defendants' request that this Court essentially reverse the Superior Court's factual findings, including about DA Willis's and Mr. Wade's expenses and when their relationship started, *see* Application at 5, 8-9, is unsupported by the record. *See, e.g.*, Order at 7 (finding the "evidence did not establish the District's Attorney's receipt of material financial benefit"); Order at 8 (finding "evidence demonstrated that the financial gain flowing from her relationship with Wade was not a motivating factor on the part of the District Attorney to indict and prosecute this case"); and Order at 16 (finding Defendants did not "establish by a preponderance of the evidence when the relationship evolved into a romantic one").

As this Court has previously stated, "[t]he ultimate determination of whether an attorney should be disqualified from representing a client in a judicial proceeding rests in the sound discretion of the trial judge . . . the trial court sits as the trier of fact, resolving conflicts in the evidence and assessing witness credibility." *First Key Homes*, 365 Ga. App. at 882-83 (2022) (citing *Samnick v. Goodman*, 354 Ga. App. 805, 806 (2020)); *see also Whitworth v. State*, 275 Ga. App. 790, 791 (2005) ("Such an exercise of discretion is based on the trial court's findings of fact which we must sustain if there is any evidence to support them."); *Padget v. Collins Mobile Home Sales, Inc.*, 357 Ga. App. 30, 32 (2020). The deferential lens through which this Court must view the Order

further raises the bar for the Defendants to show an appearance of error, which they have not done.[2]

iii. Delay to Establish Precedent Would Not be Valuable

Establishment of precedent likewise does not justify interlocutory review here under Rule 30(b)(3) because this case is a poor vehicle for establishing precedent that would provide meaningful guidance in other cases. Put differently, it is not enough to say that it would be better if there were more disqualification precedent; instead, the

[2] The two cases from California appellate courts that Defendants rely on are easily distinguishable. In *People v. Choi*, 80 Cal. App. 4th 476, 479 (2000), the court affirmed a trial court order recusing the District Attorney's office in a murder prosecution, where the District Attorney was quoted in a newspaper saying that the defendants were involved in an uncharged murder of his close personal friend—a statement that contradicted the court's express instruction to the jury that the murders were not connected *and*, unlike here, bore on the defendants' guilt for the charged murders.

In *People v. Lastra*, 83 Cal. App. 5th 816, 823 (2022), *as modified on denial of reh'g* (Sept. 28, 2022), *review denied* (Jan. 11, 2023), the appeals court was again affirming a trial court's disqualification decision. Significantly, the appeals court emphasized the need to defer to the trial court's fact-finding, explaining "the trial court must consider the entire complex of facts surrounding the conflict to determine whether the conflict makes fair and impartial treatment of the defendant unlikely." *Id.* (quoting *People v. Eubanks*, 14 Cal. 4th 580, 599 (1996)). Here, as in *Lastra*, this Court should defer to the trial court's careful fact-finding, which concluded that none of DA Willis's pretrial comments were disqualifying and that there was no personal interest requiring disqualification. Therefore, to the extent these cases are relevant, they only demonstrate that this Court should reject Defendants' request to overturn the Superior Court's fact and credibility findings.

Court should ask whether this proposed appeal will provide precedent sufficiently useful to justify the costs of delay. It will not.

First, ample precedent exists to support the Superior Court's decision to deny the Defendants' disqualification motion based on Defendants' claims of forensic misconduct and conflict of interest. The forensic misconduct caselaw, for example, cannot be viewed in isolation from the large body of general disqualification jurisprudence on which it rests. *See Williams v. State*, 258 Ga. 305, 314 n.4 (1988) ("There 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."); *see also* Order at 3-17 (collecting disqualification jurisprudence). Georgia's extensive jurisprudence concerning disqualification demonstrates the extremely high bar parties must meet before courts consider disqualification to be merited. *Williams* and other similar cases simply apply this jurisprudence in the specific context of forensic misconduct.

In *Williams v. State*, the defendant appealed the trial court's denial of a motion to disqualify the prosecutor based on pretrial comments broadcast on television and printed in newspapers that there was "substantial reason to believe Mr. Williams is guilty of the offense charged." 258 Ga. at 310. The Supreme Court of Georgia affirmed the trial court order denying disqualification, holding "it is quite clear that any improper remarks made by the prosecutor were not of such egregious nature as to require his

disqualification" and that to conclude otherwise would require "a quantum leap." *Id.* at 313-14.

Likewise, in *Barber v. State,* an elementary school bus driver convicted of simple battery, reckless conduct, and DUI appealed her conviction claiming the trial court had erred in denying her motion to disqualify the prosecutor, based upon the prosecutor's pretrial statements at a meeting at the elementary school attended by the victims, their parents, and the general public, at which he made statements about her character, his personal opinion of her guilt, and her attempts to enter a guilty plea. 204 Ga. App. 94, 94-95 (1992). This Court affirmed the conviction, concluding that, "[d]isqualification was not mandated in order to assure a fair trial, and appellant has not shown that any witness or juror was infected by the solicitor's conduct." *Id* at 95. As the prosecuting attorney noted, "any witness bias could be revealed by cross-examination and [] any juror bias could be ferreted out on voir dire." *Id*. *See also Williams*, 258 Ga. at 313-314 (no abuse of discretion in denying a motion for mistrial based on prosecutor's expression, in jury's presence, of his belief in defendant's guilt, when the court sustains an objection and the district attorney apologizes.). *Compare* Order at 20 ("the case is too far removed from jury selection to establish a permanent taint of the jury pool").

Additionally, further precedent in the disqualification context is unlikely to be of significant assistance given the highly fact-specific nature of any disqualification

assessment. And even within a highly contextual assessment, the facts of this case are unique, further rendering it unlikely that establishing precedent will aid future cases significantly.

Finally, even to the extent that it is desirable to have further precedent in this area, this Court may have the opportunity to provide such precedent—following any appeal from final judgment.

IV. CONCLUSION

For the reasons articulated above, *amici* respectfully request the Court deny the Application as swiftly as possible.

Respectfully submitted this 12th day of April, 2024.

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RULE 24 CERTIFICATION

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of April, 2024, I served a copy of the foregoing Brief of Amici Curiae upon the Fulton County District Attorney's Office via first class mail, and upon the defendants via the email addresses provided below, pursuant to a prior agreement with defense counsel to allow documents in a PDF format sent via email to suffice for service.

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**The *amici* are signing on in their personal capacities. Titles are for identification purposes only.