IN THE COURT OF APPEALS OF GEORGIA

DONALD JOHN TRUMP, Appellant, versus THE STATE OF GEORGIA, Appellee.	**Case A24A1599**

BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLEE THE STATE OF GEORGIA

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**Pro hac vice forthcoming*

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I. INTERESTS OF AMICI CURIAE

Amici curiae, Richard Briffault, Amy Lee Copeland, Scott Cummings, Charles Geyh, Bruce Green, Peter Joy, David Luban, Tianna Mays, Richard Painter, Russell G. Pearce, Cassandra Burke Robertson, Rebecca Roiphe, Sarah Saldaña, and Shan Wu, are ethics experts, current and former defense attorneys, and former federal prosecutors, including for the state of Georgia, further identified in the attached Appendix, who have decades of collective experience with the disqualification and conflict-of-interest issues that apply to prosecutors. Based on their extensive experience with the issues raised in Appellants' opening briefs,[1] *amici* respectfully submit that their amicus brief may assist the Court in its evaluation of the legal issues raised in this matter.

II. INTRODUCTION

Georgia courts have long held that there is a high bar to warrant disqualification of a prosecutor. This is because prosecutors are generally trusted to carry out their duties properly and because of the strong public interest in avoiding

[1] Throughout this brief, "Appellants" refers to Appellants Cheeley (A24A1597), Clark (A24A1602), Floyd (A24A1603), Giuliani (A24A1601), Latham (A24A1600), Meadows (A24A1598), Roman (A24A1595), Schafer (A24A1596), and Trump (A24A1599).

delay of criminal proceedings.[2] Disqualification imposes heavy costs, including the loss of counsel's knowledge and experience on the case and the cost of getting new lawyers up to speed. These costs are often perceived as benefits by the movant, so parties "often move for disqualification for tactical reasons," whether for delay or to obtain opposing counsel who might be considered less formidable. *Lewis v. State*, 312 Ga. App. 275, 282 (2011) (citing *Clough v. Richelo*, 274 Ga. App. 129, 132(1) (2005)).

Fulton County District Attorney Fani Willis and her office have been investigating and pursuing this case for over three years. They are acutely familiar with the evidence and witness testimony garnered thus far, having presented this evidence to two separate grand juries. Disqualification here risks losing institutional knowledge and creating significant delays. *See id*. at 280 n.8 (recognizing "lawyers are not fungible, swapping one lawyer for another is not without great consequence").[3] As *amici* explain below, the trial court correctly

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[2] *See Georgia Ports Auth. v. Harris*, 274 Ga. 146, 148 (2001) (those "entrusted by the public to represent their interests" can be trusted to adhere to the "highest standards of ethical behavior," despite financial temptation); *State v. Wooten*, 273 Ga. 529, 531 (2001) (prosecutorial duty to "make decisions in the public's interest"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("[E]ncouragement of delay is fatal to the vindication of the criminal law."); *Denson v. State*, 353 Ga. App. 450, 454 (2020) ("Justice delayed is justice denied.").

[3] This has already proven true in this case. In 2022, DA Willis and her office were disqualified from pursuing their investigation against then-Senator Burt Jones, *see*

determined that DA Willis did not engage in forensic misconduct and that any appearance of impropriety from the romantic relationship between DA Willis and a member of her prosecutorial team could be remedied through that prosecutor's withdrawal. The trial court thus acted well within its discretion when it denied the motions to disqualify.

III. PROCEDURAL BACKGROUND

Following an extensive investigation that began in early 2021, a special purpose grand jury issued a final report recommending charges against numerous individuals alleged to be involved in a scheme to overturn the results of the 2020 Georgia presidential election. A regular grand jury then considered the evidence and indicted 19 defendants. Some of the evidence considered by these grand juries, such as the content of Appellant Donald Trump's call to Georgia Secretary of State Brad Raffensperger urging him to "find" votes, and the efforts to submit fake electoral college certificates, is publicly known. Although Appellant Trump and other Appellants denigrate these charges as meritless and pursued for personal advantage, four defendants have so far pled guilty and agreed to cooperate with

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Order Disqualifying District Atty's Office, *In re 2 May 2022 Special Purpose Grand Jury*, No. 2022-EX-000024 (Fulton Cnty. Super. Ct. July 25, 2022). It took almost two years to appoint an attorney to continue the investigation. *See* Olivia Rubin, *Prosecutor appointed to investigate Georgia Lt. Gov. Burt Jones in election probe*, ABC (Apr. 11, 2024, 12:58 PM), https://abcnews.go.com/US/prosecutor-appointed-investigate-georgia-lt-gov-burt-jones/story?id=109139263.

prosecutors, while other individuals have reportedly accepted immunity deals. *See* Tamar Hallerman, *Eight Georgia GOP electors accept immunity deals in Fulton Trump probe*, The Atlanta J.-Const., http://tinyurl.com/axbxmhr (May 5, 2023).

Earlier this year, Appellant Michael Roman filed a motion to dismiss the indictment and disqualify DA Willis and the entire DA's Office. Eight co-defendants later joined and supplemented the motion.[4] Appellants contend that DA Willis obtained a personal stake in the prosecution of this case by financially benefitting from a romantic relationship with Special Assistant District Attorney ("SADA") Nathan Wade. The trial court dedicated two and a half days to hearing evidence on the disqualification motions, "during which [Appellants] were provided an opportunity to subpoena and introduce whatever relevant and material evidence they could muster." Order on Defendants' Motion to Dismiss and

[4] Several defendants, including Appellant Trump, previously moved to disqualify DA Willis, raising some of the same arguments they raise here. For example, Appellant Trump (later joined by another defendant) attempted to disqualify DA Willis and her office pre-indictment in March 2023, arguing in part that disqualification was warranted because DA Willis's public statements about the case constituted forensic misconduct. *See* Mot. to Quash the Special Purpose Grand Jury Report, to Preclude the Use of Any Evidence Derived Therefrom, and to Recuse the Fulton Cnty. District Att'y's Office, No. 2022-EX-000024 (Mar. 20, 2023). Judge McBurney rejected those arguments, ruling that "[n]one of what movants cite rises to the level of justifying disqualification." Order on Mot. to Quash, Preclude, and Recuse at 7-8, No. 2022-EX-000024 (July 31, 2023).

Disqualify the Fulton Cnty. District Att'y at 2, Indictment No. 23SC188947 (Mar. 15, 2024) ("Order").

Ultimately, the trial court held that Appellants "failed to meet their burden of proving that the District Attorney acquired an actual conflict of interest in this case through her personal relationship and recurring travels with her lead prosecutor." Order at 2. And the court concluded that "the allegations and evidence [Appellants advanced were] legally insufficient to support a finding of an actual conflict of interest." *Id.* at 23. The trial court also found DA Willis did not engage in forensic misconduct due to her public statements. *Id.* at 18-20.

The trial court did, however, determine that the relationship between DA Willis and SADA Wade created an "appearance of impropriety" in the prosecution. Rather than impose the extraordinary remedy of disqualification, the trial court imposed a remedy that responded precisely to the circumstances that caused the appearance of impropriety. *Id.* at 2. The court ruled that DA Willis could continue to prosecute the case if SADA Wade was removed from the prosecutorial team. *Id.* at 17. The logic of that order was simple. Any appearance of impropriety from a romantic relationship would be cured if SADA Wade were no longer part of the team. Appellants now ask this Court to reverse the trial court's order.

IV. ARGUMENT

The trial court's decision to deny the disqualification motion rested upon careful fact-finding after a multi-day hearing and careful analysis of Georgia precedent. The decision to allow DA Willis to continue with the prosecution without the prosecutor whose presence on the team led to the appearance of impropriety lay well within the broad discretion accorded trial courts considering disqualification. Disqualifying a prosecutor is, as Judge McBurney recognized when rejecting an earlier effort to disqualify DA Willis, "uncommon relief" requiring a "significant showing." Order on Mot. to Quash, Preclude, and Recuse at 6. Here, again, the trial court correctly concluded that Appellants failed to make that significant showing.

A. The Trial Court's Ruling Is Consistent with the High Standard for Disqualifying a District Attorney.

"There are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as 'forensic misconduct.'" *Williams v. State*, 258 Ga. 305, 314 (1988). Forensic misconduct has been held to arise where the prosecutor improperly expresses a personal belief in the defendant's guilt. *Id.* While Appellants argue that this standard under *Williams* is an aberration, or attempt to reinterpret it to claim that prosecutors should be disqualified for a wide range of potentially improper conduct, Georgia precedent abundantly supports

Williams's narrow holding and its conclusion that prosecutors should not be disqualified absent egregious conduct.

First, as the Georgia Supreme Court acknowledged in *Williams*, "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." *Id*. at n.4. Moreover, as demonstrated in numerous cases, the standard for disqualification is high under either theory of disqualification. The Georgia Supreme Court has described the issue of attorney disqualification for a conflict of interest as a continuum. *See Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981) (reversing disqualification of husband-attorney, where decision was based solely on the wife-attorney's position with the firm representing the opposing party).[5] On one end, where there is an appearance of impropriety based only on status, disqualification should never result. *Id*. At the other end, where there is an

[5] The trial court in *Blumenfeld* had made its decision "on the basis of Canon 9 of the Code of Professional Responsibility (Bar Rule 3-109): 'A lawyer should avoid even the appearance of professional impropriety.'" *Id.* at 407. On June 12, 2000, the Supreme Court of Georgia adopted the new Georgia Rules of Professional Conduct effective January 1, 2001, thereby deleting the Canons of Ethics in its entirety, including Canon 9. *See* Georgia Rules of Professional Conduct, available at https://www.gabar.org/barrules/georgia-rules-of-professional-conduct.cfm. Notably, the current Georgia Rules of Professional Conduct contain no parallel provision to Canon 9. The phrase "appearance of impropriety" appears in the Rules *only once*, in comment 2 to Rule 3.5, and *only* with respect to conduct affecting judges. *See* Rule 3.5, cmt. 2.

"appearance of impropriety coupled with a conflict of interest or jeopardy to a client's confidences," disqualification is mandated. *Id*. And in the middle of the continuum, where there is an "appearance of impropriety based on conduct on the part of the attorney" disqualification *should not* result "absent danger to the client." *Id*. Thus, citing *Blumenfeld*, this Court has held that "absent an actual conflict of interest or actual impropriety, the trial court does not abuse its discretion in denying a motion to disqualify counsel." *Georgia Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207, 214 (2021); *see also Kamara v. Henson*, 340 Ga. App. 111, 116 (2017), *disapproved of on other grounds by Fulton Cnty. v. Ward-Poag*, 310 Ga. 289 (2020).

With respect to forensic misconduct, *Williams* instructs that "[i]n 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[.]" *Williams*, 258 Ga. at 314 (emphasis added). For comments about a defendant's guilt to justify disqualification, they must not only be improper but "egregious." *Id*. Appellant Trump argues that *Williams* should not be limited to prosecutorial statements of a defendant's guilt, as that is "only *one example* of forensic misconduct." Trump Br. at 20-21. But even if so,

Williams's analysis and facts demonstrate that only the most egregious prosecutorial misconduct constitutes *disqualifying* forensic misconduct.

In *Williams*, the defendant appealed the trial court's denial of a motion to disqualify the prosecutor based on a prosecutor's 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. Those statements left no doubt about the prosecutor's view of the defendant's guilt. Two prior juries, he said, had convicted the defendant and a third deadlocked 11-1 in favor of conviction, leaving the prosecutor "confident" that a fourth jury would "get the right result*." Id*. The Georgia Supreme Court affirmed the trial court's order denying disqualification, observing "it is a quantum leap from any conclusion that extra-judicial statements made by the prosecutor were improper, to the holding that disqualification of the prosecutor is required as a result thereof." *Id.* at 314. Thus, under *Williams*, prosecutorial misconduct must be not only "improper" but "egregious" in a way that jeopardizes a defendant's right to a fair trial. *Id.*

To be clear, *Williams* is not an outlier under Georgia law. In *Barber v. State*, for example, a 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 a meeting at the school attended by the victims, their parents, and the general public, at which the prosecutor made

statements about the bus driver's 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.* Indeed, even in cases where a prosecutor directly tells the jury that he believes the defendant is guilty, curative instructions or actions may suffice. *See 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); *see also Gissendaner v. State*, 272 Ga. 704, 706-07 (2000) (striking jurors for cause adequately addressed pretrial publicity); *R. W. Page Corp. v. Lumpkin*, 249 Ga. 576, 580 n.8 (1982) (discussing 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"); *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). The trial court's refusal to disqualify DA Willis is well in line with this precedent.

The reasoning behind this high bar for disqualification is clear: in the face of potentially conflicting interests or misconduct, Georgia law generally trusts that prosecutors will perform their duties fairly, reserving disqualification for only the most extraordinary circumstances. As Judge McBurney recognized when rejecting Appellant Trump's pre-indictment disqualification motion, prosecutors are trusted to act fairly despite the personal benefits that can accrue from bringing a high-profile criminal prosecution—whether in the form of campaign contributions or future earning opportunities due to the publicity. Order on Mot. to Quash, Preclude, and Recuse at 7 n.13; *accord Hollywood v. Superior Ct.*, 182 P.3d 590, 599-600 (Cal. 2008) (finding no abuse of discretion in denial of motion for prosecutor's recusal based on defendant's contention that prosecutor was influenced by "the prospect of tangible or intangible future benefits"). Indeed, Georgia precedent provides abundant examples of courts rejecting disqualification under circumstances that that might tempt a prosecutor to abandon impartiality. *See, e.g.*, *Rutledge v. State*, 245 Ga. 768, 769-70 (1980) (consistent with due process, a district attorney may accept assistance from an SADA that the victim's family hires to prosecute the case, even though the availability of free assistance is undoubtedly intended to increase the odds of prosecution); *Brown v. State*, 242 Ga. 536, 536 (1978) (so holding where SADA also represented family in civil litigation arising out of the same events); *State v. Sutherland*, 190 Ga. App.

606, 607 (1989) (prosecutor with a pending civil claim against a government board may simultaneously prosecute one of the board's members); *Moon v. State*, 258 Ga. 748, 752 (1988) (prosecutor allowed to proceed where defendant is simultaneously suing for alleged misconduct); *Whitworth v. State*, 275 Ga. App. 790, 792, 794 (2005) (argument that a prosecutor's alleged financial interest in obtaining a conviction to impress a future employer serving as witness counsel was too speculative to require disqualification where the future employer had not conditioned employment on a conviction). The trial court properly recognized this high bar for disqualification in denying Appellants' motions.

B. The Trial Court's Factual Findings Are Not Clearly Erroneous.

As explained further below, *see* Section IV.C., applying these well-established legal standards to the evidence presented, the trial court correctly refused to disqualify DA Willis. But as an initial matter, given Appellants' attempts to relitigate the trial court's findings of fact throughout their briefs, the standard of review of such findings—clear error—bears emphasizing.

Assessing prosecutorial conflicts of interest is a fact-driven endeavor. *See, e.g.*, *Battle v. State*, 301 Ga. 694, 698-99 n.5 (2017) (finding insufficient evidence of a conflict of interest after establishing through testimony the attenuated nature of the connection between the lead prosecutor and victim's mother, who worked as an employee at the same office). Thus, "[t]he ultimate determination of whether an

attorney should be disqualified . . . rests in the sound discretion of the trial judge . . . [who] sits as the trier of fact, resolving conflicts in the evidence and assessing witness credibility." *First Key Homes of Ga., LLC v. Robinson*, 365 Ga. App. 882, 882-83 (2022). As such, the trial court's factual findings must be upheld "as long as they are not clearly erroneous, which means there is some evidence in the record to support them[.]" *Welcker v. Georgia Bd. of Examiners of Psychologists*, 340 Ga. App. 853, 855 (2017) (citing *Murray v. Murray,* 299 Ga. 703, 705 (2016)); *see also Whitworth*, 275 Ga. App. at 791.

In its role as fact-finder, the trial court conducted an extensive evidentiary hearing and duly considered and weighed the testimony and credibility of the witnesses. The record shows, for example, that the trial court questioned the credibility of one of Appellants' key witnesses and determined that another of Appellants' witness's testimony "lacked context and detail." Order at 16. Notwithstanding the deference owed the trial court as the finder of fact, Appellants ignore, mischaracterize, or seek to relitigate many of the trial court's key factual findings. Among the most significant:

- "[T]he evidence did not establish the District Attorney's receipt of a material financial benefit as a result of her decision to hire and engage in a romantic relationship with Wade";[6]
- "[T]he 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 that Appellants "failed to demonstrate that the District Attorney's conduct has impacted or influenced the case to [their] detriment";[7]
- "[T]he District Attorney has not in any way acted in conformance with the theory that she arranged a financial scheme to enrich herself (or endear herself to Wade) by extending the duration of this prosecution or engaging in excessive litigation.";[8]
- Appellants were not "able to conclusively establish by a preponderance of evidence when the relationship" between DA Willis and SADA Wade "evolved into a romantic one";[9]

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[6] *Compare* Order at 7-8 with, *e.g.*, Clark Br. at 50, 56-57; Roman Br. at 27-28, 30-31; Shafer Br. at 48.
[7] *Compare* Order at 8 with, *e.g.*, Cheeley Br. at 32; Giuliani Br. at 4 (adopting Cheeley's Argument).
[8] *Compare* Order at 8-9 with, *e.g.*, Clark Br. at 56-57; Giuliani Br. at 5 (adopting Clark's Argument).
[9] *Compare* Order at 16 with, *e.g.*, Clark Br. at 18-19; Meadows Br. at 5-6; Roman Br. at 13, 15; Shafer Br. at 10-11, 40-42; Trump Br. at 11-12, 40-43, 46.

- DA Willis's January 14, 2024 speech "did not specifically mention any Defendant by name" and, "[a]lthough not improvised or inadvertent . . . did not address the merits of the indicted offenses in an effort to move the trial itself to the court of public opinion. Nor did it disclose sensitive or confidential evidence yet to be revealed or admitted at trial. In addition, the case is too far removed from jury selection to establish a permanent taint of the jury pool."[10]

These findings, which rested on the trial court's assessment of the evidence and live testimony, were not clearly erroneous. *See First Key Homes*, 365 Ga. App. at 882-83. Appellants' attempts to erase these factual findings—including by relying on testimony the trial court concluded lacked credibility, *see* Order at 16, and other evidence that the trial court decided, in its broad discretion, not to consider, *see* Order at 16 n.5 (finding it unnecessary to consider the testimony of Appellants' witnesses Yeager and Arora)[11]—must be disregarded by this Court. *Welcker*, 340 Ga. App. at 855; *Whitworth*, 275 Ga. App. at 791. Absent a showing of clear error, the question for the Court is simply whether, based on the facts found by the trial court, it was an abuse of discretion not to disqualify DA Willis.

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[10] *Compare* Order at 20 with, *e.g.*, Latham Br. at 38-39; Meadows Br. at 4, 15-16; Roman Br. at 12; Shafer Br. at 30, 38-39; Trump Br. at 26-28, 32-34.
[11] *Compare with*, *e.g.*, Clark Br. at 17-19, 58-60; Meadows Br. at 5-6; Roman Br. at 14 n.3; Shafer Br. at 10-11, 40-41; Trump Br. at 40-44.

C. The Trial Court's Ruling Was Consistent with Georgia Precedent.

The trial court correctly applied Georgia precedent to its factual findings to conclude "that the Defendants failed to meet their burden of proving that the District Attorney acquired an actual conflict of interest in this case through her personal relationship and recurring travels with her lead prosecutor." Order at 2. It also held that DA Willis did not engage in forensic misconduct due to her public statements, adopting Judge Robert McBurney's prior order on the topic as to statements prior to July 31, 2023. *Id.* at 18-19. As to DA Willis's remarks at Big Bethel Church in Atlanta on January 14, 2024, the trial court concluded it "cannot find that this speech crossed the line to the point where the Defendants have been denied the opportunity for a fundamentally fair trial," where the speech "did not address the merits of the indicted offenses," did not "disclose sensitive or confidential evidence," and was "too far removed from jury selection to establish a permanent taint of the jury pool." *Id.* at 20.

In support of their arguments that the trial court misapplied Georgia precedent, Appellants misconstrue the Vermont authorities cited in *Williams*, namely *In re J.S.*, 140 Vt. 230 (1981) and *Vermont v. Hohman*, 138 Vt. 502 (1980), *overruled on other grounds by Jones v. Shea*, 148 Vt. 307, 309 (1987). *See, e.g.*, Trump Br. at 21-23.

In *J.S.*, a majority of the Vermont Supreme Court reversed an order denying disqualification of a prosecutor, based on its finding that the prosecutor made public statements "strongly indicating [his] personal belief in the guilt of the juvenile[.]" 140 Vt. at 231. In *Hohman,* the Vermont Supreme Court concluded that the trial court had erred by denying a motion to disqualify the prosecutor based on his promises in a campaign ad to secure a murder conviction against a particular named defendant (Hohman), but declined to reverse the conviction, finding "beyond a reasonable doubt that disqualification of the prosecutor would have had no affect [sic] on the outcome of this trial" and, therefore, that the error was harmless. 138 Vt. at 508.

Here, unlike in *J.S.* and *Hohman*, the trial court found that DA Willis's "speech did *not* specifically mention any Defendant by name" and "did *not* address the merits of the indicted offenses in an effort to move the trial itself to the court of public opinion." Order at 19-20 (emphases added). Therefore, "the Court [could not] find that this speech crossed the line to the point where the Defendants [were] denied the opportunity for a fundamentally fair trial, or that it require[d] the District Attorney's disqualification." *Id.* at 20.[12]

[12] Judge McAfee also noted that "there may be an issue of standing for the other five Defendants' challenge of [the church] speech," given that "each Defendant only formally joined Defendant Roman's motion . . . *after* the speech had been made." *Id.* at 20 n.6.

Appellants also cite California cases to argue that prosecutors and their offices have been disqualified for "making prejudicial statements to the media," *e.g.*, Meadows Br. at 17, but these cases 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 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 court emphasized the need to defer to the trial court's fact-finding, explaining that "the trial court must consider the entire complex of facts . . . 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)). To the extent these cases are relevant at all, they only demonstrate that this Court should reject the Appellants' request to overturn the trial court's fact and credibility findings.

Next, Appellants attempt to expand *Williams* to require disqualification of prosecutors for alleged ethics violations. *E.g.*, Trump Br. at 22-26. But this is

inconsistent with *Williams*, which did *not* disqualify a prosecutor who made pretrial statements asserting the defendant's guilt, 258 Ga. at 313-14, and with other cases they cite for support, each of which involved findings of actual or serious potential conflicts.[13] In *Registe v. State,* 287 Ga. 542, 547 (2010), for example, the Supreme Court of Georgia affirmed a decision disqualifying defense counsel, where the trial court found an actual and unwaivable conflict due to defense counsel previously serving as an assistant district attorney on the other side of the case and having signed search warrants to secure evidence against his client. In *Edwards v. State*, this Court affirmed a decision disqualifying defense counsel, where "[t]he record showed at least a serious potential for a conflict of interest" due to defense counsel's possession of confidential information from a former client—a prospective witness for the prosecution—who had not waived the conflict. 336 Ga. App. 595, 600 (2016). And in *Wheat v. United States*, the Supreme Court held that the trial court did not abuse its discretion by declining a proffer of a conflict waiver from defense counsel who sought to represent co-defendants in a complex drug distribution scheme, holding that district courts are entitled to "substantial latitude in refusing waivers of conflicts of interest . . . where

[13] *See, e.g.,* Trump Br. at 24 (arguing DA Willis's alleged violations of Rules 3.8 and 8.4 constitute disqualifying forensic misconduct).

a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." 486 U.S. 153, 162-63 (1988).

Here, unlike in *Registe, Edwards,* and *Wheat*, the trial court concluded, based on careful fact-finding and consideration of witness credibility, that Willis did not have an actual conflict of interest or engage in forensic misconduct that "denied [Appellants] the opportunity for a fundamentally fair trial." Order at 9, 20. Appellants argue that the trial court erred by "truncat[ing] its factual analysis of whether Willis' challenged remarks showed a 'calculated plan to prejudice the defendants,'" Roman Br. at 43; Trump Br. at 20, but Judge McAfee acknowledged *Williams*'s guidance regarding this analysis, considered every "exhaustively documented" public comment made by DA Willis, and found that they "d[id] not rise to the level of disqualification under *Williams*," Order at 18-19.[14] Thus, the trial court was well within its discretion to deny the motion for disqualification. *See Georgia Trails & Rentals*, 359 Ga. App. at 214.

[14] Some Appellants argue that the trial court erred by requiring defendants "to demonstrate actual prejudice," *e.g.*, Trump Br. at 27-28; Shafer Br. at 14, 43-44, but Judge McAfee imposed no such requirement, noting instead that "prejudice is not a required element for disqualification" based on a conflict of interest and that, for forensic misconduct, it has not been "decided if some showing of prejudice is required," Order at 8, 18.

D. The Trial Court Did Not Abuse Its Discretion by Providing a Remedy Other than Disqualification.

A finding of an appearance of impropriety, like the one made by the trial court in this case, *see* Order at 15, does not require disqualification and may be cured through alternative means, as the trial court recognized. Nonetheless, Appellants argue that the trial court erred by failing to disqualify both SADA Wade and DA Willis, as well as her entire office, despite finding only an appearance of impropriety. *See, e.g.,* Trump Br. at 45-46. But this is unsupported by prior cases. *Georgia Trails & Rentals,* 359 Ga. App. at 214 ("absent an actual conflict of interest or actual impropriety, the trial court does not abuse its discretion in denying a motion to disqualify counsel"); *see also State v. Evans*, 187 Ga. App. 649, 651 (1988), *overruled on other grounds by State v. Smith*, 268 Ga. 75 (1997) ("possible appearance of impropriety" did "not appear to require the disqualification of the solicitor").[15]

[15] Contrary to Appellants' claims, *Davenport v. State*, 157 Ga. App. 704 (1981), does not require disqualification upon finding an appearance of impropriety. *See, e.g.*, Cheeley Br. at 21-22, 36-37; Clark Br. at 25-26; Meadows Br. at 23-25; Roman Br. at 22, 39. Rather, it stands for the much more limited proposition that "public policy prohibits a district attorney from prosecuting a case, even though he does not actually try the case himself, while representing the victim of the alleged criminal act in a divorce proceeding involving the accused." *Davenport,* 157 Ga. App. at 705-06 (collecting cases); *see also id.* at 705 (explaining the DA signed the defendant's plea and sat at the counsel table during the trial). The same is true for *Love v. State*, 202 Ga. App. 889, 891 (1992), *see, e.g.*, Roman Br. at 22-23, in which this court affirmed disqualification of a former assistant district attorney's

Indeed, even the cases Appellants rely on for this argument do not demand such a result. *Head v. State* held that the trial court did not abuse its discretion in denying disqualification and instructed only that a prosecutor "*may* be disqualified" for an appearance of impropriety. 253 Ga. App. 757, 758 (2002) (emphasis added). Similarly, *Battle v. State* found no evidence to support disqualification and merely acknowledged that "the appearance of impropriety *from a close personal relationship with the victim may* be grounds for disqualification of a prosecutor." 301 Ga. 694, 698 (2017) (emphasis added). Finally, Appellants' attempts at distinguishing *Blumenfeld* and *Billings* are unavailing. *See, e.g.,* Trump Br. at 47-49. *Blumenfeld* explained that an "appearance of impropriety based on conduct" is "[s]omewhere in the middle of the continuum" where disqualification is discretionary. *Blumenfeld v. Borenstein*, 247 Ga. 406, 409-10 (1981). And *Billings* stands only for the proposition for which Judge McAfee relied on it—that an appearance of impropriety can be addressed with remedies that fall short of total disqualification. *Billings v. State,* 212 Ga. App. 125, 129 (1994).

Indeed, the Georgia Supreme Court has recognized that disqualification is not necessary where a narrower remedy can cure the issue. In *Neuman v. State*, 856 S.E.2d 289, 295 (Ga. 2021), the defendant argued that prosecutors "should have been

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law firm as defense counsel, where the former ADA had represented the state in the defendant's preliminary hearing.

disqualified from representing the State in his second trial because [they] had improper access to privileged mental health records, which he argue[d] created a conflict of interest and an appearance of impropriety." The trial court however "allowed the two assistant district attorneys to represent the State again at the second trial . . . subject to strict limitations on the use of the privileged material, including excluding the privileged information from evidence, hiring new experts with no access to the privileged information, erecting an 'ethical screen' within their office, and destroying all copies of the privileged information." *Id.* at 296. The Supreme Court of Georgia affirmed, finding the trial court's remedy was "appropriate" for the situation. *Id.*

This Court has likewise allowed an appearance of impropriety to be cured through remedies short of disqualification, including by screening the affected prosecutor from participation or discussion of the affected case, *see Billings*, 212 Ga. App. at 129, and ordering an investigator to take no part in the investigation or prosecution of the case, *see Head*, 253 Ga. App. at 758. *See also Bayshore Ford Truck Sales, Inc. v. Ford Motor Co*., 380 F.3d 1331, 1338 (11th Cir. 2004) (affirming denial of disqualification where one attorney promptly withdrew representation due to conflict representing plaintiff and defendant). The trial court's remedy is therefore in keeping with Georgia precedent.

But stepping back from the case law, the trial court's decision makes sense. After concluding that there was no forensic misconduct, the only basis for disqualification before the trial court was Appellants' claim that DA Willis indirectly benefited from fees paid to Wade for his role on the prosecution team. Their theory of improper appearance was that DA Willis's prosecutorial conduct could be influenced by that alleged benefit, rather than considerations of fairness and justice. But Wade's removal from the prosecution team eliminates this appearance going forward, as Wade will no longer benefit financially from prosecution of this case. This kind of commonsense decision-making by a judge intimately involved in the proceedings is precisely what the abuse of discretion standard is designed to facilitate. *See Bowers v. CSX Transp., Inc.*, 369 Ga. App. 875, 883-84 (2023) (recognizing that the standard affords a "range of possible conclusions a trial judge may reach" and prohibits the reviewing court from "substitut[ing] its judgment"). Nothing in Georgia law compelled Judge McAfee to exercise his discretion differently.

E. Dismissal of the Indictment is Not Supported by the Trial Court's Findings or Relevant Case Law

It follows that Appellants are also not entitled to the more severe sanction of dismissal. As Appellants recognize, *e.g.*, Trump Br. at 50, dismissal of an indictment is an "extreme sanction[]" that is "used only sparingly." *State v. Lampl*, 296 Ga. 892, 896 (2015); see also *Olsen v. State*, 302 Ga. 288, 294 (2017). Courts

have denied motions to dismiss indictments even where defendants have been able to establish some misconduct. See, e.g., *Lampl*, 296 Ga. at 897-98; *Wilcox v. State*, 250 Ga. 745, 755-56 (1983). And even where a court found disqualification was necessary after trial, the case was remanded for a new trial, not dismissed. *See Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 738 (2012).

Appellants also recognize that dismissal is only potentially warranted if a constitutional right has been violated or the state's actions have rendered the proceedings fundamentally unfair. *See, e.g.,* Trump Br. at 51.[16] But Appellants make no attempt to demonstrate they meet this standard. Appellants have not shown that their constitutional rights were violated or that these proceedings were rendered fundamentally unfair due to any relationship between DA Willis and Wade. *Lampl*, 296 Ga. at 896. Nor can Appellants establish that they were actually prejudiced, so as to warrant this relief. *See Olsen*, 302 Ga. at 293-94. Dismissal is not warranted here.

[16] Appellant Trump's reliance on several, mostly out-of-state, cases where dismissal was granted due to "a conflicted prosecutor [being] present for, and participat[ing] in, the grand jury investigation," *id.* (citing, e.g., *Nichols v. State*, 17 Ga. App. 593, 87 S.E. 817, 821 (1916)), fails to account for the critical distinguishing feature of the case at hand—that the trial court did not find any actual conflict, *see* Order at 9.

V. CONCLUSION

For the reasons articulated above, *amici* respectfully request that the Court affirm the trial court's order.

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

Respectfully submitted this 12th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that, on the 12th day of August, 2024, I served a copy of the foregoing Brief of Amici Curiae upon the Appellee Fulton County District Attorney's Office and the Appellants via the email addresses provided below, pursuant to a prior agreement with counsel to allow documents in a PDF format sent via email to suffice for service as contemplated by Rule 6(b)(2):

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