IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

STATE OF GEORGIA,	
v.	Case No.
JEFFREY B. CLARK, ET AL.,	23SC188947
Defendants	

JEFFREY B. CLARK'S REPLY TO THE STATE'S SUPPLEMENTAL POST-HEARING BRIEF.

Comes Now Jeffrey Bossert Clark, Defendant in the above-entitled matter, and submits this reply to the State's Supplemental Post-Hearing Brief filed March 5, 2024. In its brief, the State argues (1) that the standard of proof should be higher than a preponderance of the evidence; (2) that an actual conflict of interest must be shown; (3) that the District Attorney must be shown to have a personal pecuniary interest ***in conviction*** as distinguished from other stages of the proceeding or a personal pecuniary interest in the prosecution as a general matter; and (4) that Defendants' evidence is insufficient to meet these standards. For the reasons set forth below, the State's arguments are without merit.

ARGUMENT AND CITATION OF AUTHORITY

Before turning to the merits of the State's supplemental brief, it is necessary to observe that the District Attorney has ratified the perjury of Nathan Wade.

Nathan Wade obviously lied under oath in his testimony on February 15, 2024 when he was attempting to explain his obviously false interrogatory responses in his divorce case.

We are now 20 days past that testimony. In that intervening period, the District Attorney has said and done nothing whatsoever to either disavow Mr. Wade's perjured testimony or require him to correct it. This is a spectacular breach before all the world of her duty as District Attorney to "faithfully and impartially and without fear, favor, or affection discharge my duties as district attorney," O.C.G.A. § 15-18-2, and of the duties of candor to the tribunal under Rule of Professional Conduct 3.3.

The reason for this state of affairs is obvious—it is in the District Attorney's personal, individual interests that Mr. Wade's perjury go uncorrected. Ms. Willis has ratified Mr. Wade's perjury by not repudiating it as her duty requires. The District Attorney's professional judgment has not been merely impaired by her conflicts of interest, it has been corrupted beyond redemption.

I. STANDARD OF PROOF

The State argues that a preponderance of the evidence standard is too low for disqualification of a District Attorney. At the hearing, Mr. Clark identified six separate categories of disqualifying conflicts of interest, only one of which is subject to any conflict in the evidence.

The one category subject to a conflict in the evidence is the extent of the financial benefits received by the District Attorney from Mr. Wade. The evidence that Mr. Wade furnished the District Attorney with expensive travel and entertainment are credit card statements of undisputed authenticity. The contrary evidence relies entirely on a story about totally undocumented cash reimbursements that magically netted to zero. It relies entirely on the testimony of Mr. Wade, an obvious perjurer, and Ms. Willis, a witness with a motive to lie whose testimony on the topic strains credulity, and whose credibility on other material issues has been impeached. Considering issues of credibility, the evidence is sufficient under any standard of proof to find the District Attorney received prohibited gifts from Mr. Wade and has a disqualifying financial conflict of interest in the investigation and prosecution of this case. We expect that other defendants will be rebutting the State's arguments on this point in greater detail.

Moreover importantly for purposes of this Reply brief, the State makes ***no attempt*** to rebut any of the other grounds of disqualification offered by Mr. Clark: **(1)** the District Attorney's personal and political ambitions; **(2)** a complementary pattern of deceit and concealment of the relationship and the money; **(3)** the speech at the Church ; **(4)** the motion for protective order filed in Mr. Wade's divorce; and **(5)** and the conduct of the State's defense of the motion to disqualify. These conflicts all rest on undisputed facts. Even if the standard of proof were metaphysical certitude, it would be met as to these five types of conflict of interest.

II. ACTUAL CONFLICTS

The State next argues that an actual conflict of interest is required rather than an appearance of impropriety, and that the required interest must be financial, and that it must be in conviction. There are compound errors in these arguments.

First, Mr. Clark's argument at the hearing assumed the actual conflict standard applied. The State never even attempts to answer the argument that the evidence shows a half-dozen actual conflicts of interest, five of which rest on undisputed facts.

Second, the State attempts to disentangle what it claims are inapposite authorities relied upon by Defendants, but in so doing itself conflates the standards for disqualification of prosecutors with those for post-conviction relief based on a claim of ineffective assistance by conflicted defense counsel under the Sixth Amendment. *Lamb v. State*, 257 Ga. 41 (1996), was a case of the latter type in which the defendant, who raised no objection at trial, was required to show that the conflict adversely affected his lawyer's performance by depriving him of the undivided loyalty of counsel. *Id*. at 42.

While criminal defendants are not entitled to pick their prosecutor, they are entitled to an unconflicted, disinterested prosecutor who does not operate in violation of their statutory oath of impartiality or the Rules of Professional Conduct. *See* O.C.G.A. § 15-18-2. In *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808 (1987) (emphasis added), the Court held:

> The requirement of a disinterested prosecutor is consistent with that trend, since "[a] scheme injecting a personal interest, financial or otherwise, ***into the***

> ***enforcement process*** may bring irrelevant or impermissible factors into the prosecutorial decision." (*citing Bloom v. Illinois*, 391 U.S. 194, 207 (1968)).

As evidence for this trend, the court in footnote 19 cited *Brotherhood of Locomotive Firemen & Enginemen v. United States*, 411 F.2d 312, 319 (5th Cir. 1969), for the proposition that the appointment of interested prosecutor was a due process violation. Moreover, "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." *Registe v. State*, 287 Ga. 542, 545 (2010), *citing Wheat v. United States*, 486 U.S. 153, 160 (1988).

Unlike the post-conviction Sixth Amendment ineffective assistance of counsel cases, "[i]f the assigned prosecutor has acquired a personal interest or stake in the conviction, the trial court abuses its discretion in denying a motion to disqualify him, and the defendant is entitled to a new trial, even without a showing of prejudice." *Amusement Sales, Inc. v. State*, 316 Ga.App. 727, 735 (2012) (emphasis added). Thus, if the disqualification motions are denied, and an appellate court finds that the District Attorney should have been disqualified, then any defendant convicted would be entitled to a new trial without any showing of prejudice.

The State also argues that the only interest which is disqualifying is a personal interest in conviction. This ignores that a prosecutor's statutory duty of impartiality inheres in every official act they take, not just conviction:

> [The District Attorney] is controlled by the public interests, and, while these interests require the conviction of the guilty, they forbid that of the innocent. … The solicitor general draws the bill of indictment, examines the witnesses, not with a view to the interest of any client, but alone to subserve public justice. If, in his judgment, the facts stated do not amount to a violation of the criminal law, he will submit no indictment. ***The whole proceeding, from the time the case is laid down before him, where an indictment is demanded, until the rendition of the verdict, is under his direction, supervision, and control, subject, of course, to certain restrictions which the law imposes.***

Hicks v. Brantley, 102 Ga. 264, 29 S.E. 459, 462 (1897) (emphasis added). *See also Young*, 481 U.S. at 808 (injections of financial interest "into the enforcement process" violate the requirement of a disinterested prosecutor). The enforcement process has a milestone at the point of conviction but the process obviously begins earlier. Additionally, it continues to sentencing and even, arguably, to postconviction proceedings as well.

In *Nichols v. State*, 17 Ga.App. 593 (1916), and its companion case *Hughes v. State*, 17 Ga. App. 611, 87 S.E. 823 (1916), the indictments were to be quashed if the personal interest existed ***when the case was presented to the grand jury***, as it did in this case. Here, Mr. Wade was paid over $650,000 over a two-year period beginning long before the indictment and long before any conviction, and the District Attorney received gifts from him during this period. She therefore had a personal interest in the case that was operative at the time of indictment. The State's suggestion that this does not matter because the interest must be in conviction alone should be rejected because it is premised on the false notion that prosecutors have no duties of impartiality at any other time in the progress of a criminal case.

The State argues at p. 14 that it has found no cases of disqualification based on personal interest that did not involve a pecuniary interest in conviction. The State has apparently failed to notice one of the principal authorities relied upon by Defendants, *McLaughlin v. Payne*, 295 Ga. 609 (2014). In *McClaughlin*, there were not one but two non-pecuniary conflicts that required disqualification. The first was the conflict between the District Attorney's duties as a witness and an advocate, *id*. at 611, and the second was that his daughter's close relationship to the victim gave him a personal interest in the case. *Id*. at 614. The State's argument about what Georgia law regards as a disqualifying conflict of interest is without merit because it is contrary to binding Supreme Court authority.

Lastly, the State makes frequent reference to the District Attorney's status as an elected constitutional officer, referring to her as being "elected" 20 times in the supplemental brief. The State suggests that her status as "elected" should make the Court more reluctant to disqualify her. In fact, however, Ms. Willis' status as the elected District Attorney subjects her to an ***elevated***, not a lesser standard of conduct, that of "Caesar's wife."

III. IMPAIRED PROFESSIONAL JUDGMENT AS A RESULT OF ACTUAL CONFLICTS

A lawyer's conflict of interest is not waivable and is disqualifying when it impairs the lawyer's independent professional judgment. *See* Rule of Professional Conduct 1.7. Everything the State has done in this case in response to the motions to

dismiss or disqualify has demonstrated profound impairment of the District Attorney's professional judgment.

The first response of the State was the speech at the Big Bethel AME Church, in which Ms. Willis violated her public duty as a prosecutor under Rule of Professional Conduct 3.8(g) in order to advance her personal interests and those of Mr. Wade—an actualized conflict in which she preferred her personal interests to the detriment of her professional responsibilities.

The second response was the motion for protective order she filed in Mr. Wade's divorce. In that filing the District Attorney violated Rule of Professional Conduct 3.4(h) by abusing the power of her office to threaten her boyfriend's wife with criminal prosecution to gain advantage for herself and her boyfriend in her boyfriend's divorce. This is also an actualized conflict of interest in which she advanced her personal interests and those of Mr. Wade to the detriment of her professional duties.

Her third response was the written filing on February 2, 2024 in this case in which she stated unequivocally that there was "no evidence" that she had received any financial benefit from Mr. Wade. This was false, and the State knew it was false because it came two weeks ***after*** Mrs. Wade filed a response to Ms. Willis' motion for protective order attaching copies of Mr. Wade's credit card statements showing he spent over $10,000 on travel with Ms. Willis—a filing that prompted intense national news coverage that surely came to the attention of the District Attorney's Office. This was

another actualized conflict between the District Attorney's personal interests in concealment and cover up and her and her office's public duties of candor and impartiality.

The fourth response was to falsely accuse Mrs. Merchant of making knowingly false allegations against the District Attorney and Mr. Wade.

The fifth response was to allow Mr. Wade to tell ridiculous lies on the stand about his false interrogatory responses and then fail to correct the perjured testimony. This was a flagrant violation of the District Attorney and her entire team's duties of candor to the tribunal under the Rules of Professional Conduct. They breached their public duties to serve the private interests of the District Attorney and Mr. Wade.[1]

Sixth, Mr. Wade's obvious perjury remains uncorrected to this day, and therefore stands as ratified by the District Attorney. Mr. Wade the perjurer remains lead counsel for the State in one of the most prominent and closely watched cases in the entire United States if not the entire world.

Each of these responses shows profoundly impaired, if not utterly destroyed professional judgment, and the sacrifice of public duty to personal interests. The District Attorney and her office should be disqualified, and the entire case dismissed.

Respectfully submitted, this 6 day of March, 2024.

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[1] We note here that lead counsel for the State in defending the motions to dismiss and disqualify, Anna Cross, has disappeared from the case. She did not attend the last two days of the hearing, and is not even cc'd on the State's courtesy copy emails to the Court and counsel.-

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CERTIFICATE OF SERVICE

I hereby certify that on this 6 day of March, 2024, I electronically lodged the within and foregoing ***Jeffrey B. Clark's Reply to the State's Supplemental Post-Hearing Brief*** with the Clerk of Court using the Odyssey eFile/GA system which will provide automatic notification to counsel of record for the State of Georgia:

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