Fulton County Superior Court
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA, v. ROBERT DAVID CHEELEY, ET AL., Defendants.	Case No. 23SC188947

DEFENDANT ROBERT DAVID CHEELEY'S[1]
RESPONSE TO THE STATE'S
POST-HEARING SUPPLEMENTAL BRIEF

Defendant Robert David Cheeley files this response to the State's post-hearing supplemental brief.

I. INTRODUCTION

Black's Law Dictionary helpfully defines a conflict of interest as "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties." BLACK'S LAW DICTIONARY, *Conflict of Interest* (11th ed. 2019); *see also U.S. v. Dominguez*, 997 F.3d 1121, 1124 n. 1 (11th Cir. 2021) ("Black's Law Dictionary is an authoritative source").

The Fulton County District Attorney has improperly financially benefitted from the contracts, investigation, and prosecution of this case that the District Attorney awarded to her romantic partner—Special Assistant District Attorney ("SADA") Nathan Wade—under cover of night. Robin Yeartie testified that the District Attorney and SADA Wade began a romantic relationship in 2019. This is confirmed by the many text messages from

SADA Wade's friend and law partner Terrence Bradley, the incontrovertible cellular telephone records, as well as the proffered testimony of Cobb ADA Cindi Yeager.

Two years later, in November 2021, the District Attorney hired SADA Wade. At no time then or since (until forced by the current motions) did the District Attorney or SADA Wade disclose their relationship—instead, they conducted themselves in secret as SADA Wade lavished the District Attorney with financial benefits derived from Fulton County and Georgia taxpayers. SADA Wade has since received hundreds of thousands of dollars from three different contracts with Fulton County that are directly related to this prosecution.[1] *See* Salinski Summary Chart filed by Defendant Shafer. The District Attorney, in turn, has benefited to the tune of at least $17,000.00 in the form of vacations paid for by SADA Wade plus an unknown additional amount for numerous dinners and day trips. *See id*. So it appears that funds derived from Fulton County and Georgia taxpayers found their way to various hotels, airlines, and restaurants for the District Attorney's improper financial benefit. The technical term for that scenario is an actual conflict of interest.

Compounding the conflict of interest, neither the District Attorney nor SADA Wade disclosed their relationship or the related financial benefits. In fact, they did everything possible to conceal those problematic details until Defendants' disqualification motions forced them to respond. And, even then, the District Attorney and SADA Wade only cryptically acknowledged that their "personal relationship" began at an undefined point in

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[1] This amount does not reflect any income SADA Wade received from contracts held by his partners, which he admitted to benefiting from after splitting profits with them.

2022 and boldly maintained that the District Attorney "received no funds or personal financial gain from" SADA Wade. *See* State's Initial Response to Disqualification Motions. Furthermore, the District Attorney twice falsely certified that she had received no gifts or benefits, despite knowing full well that SADA Wade was a "prohibited person" and that she had in fact received gifts and benefits from him.

Doubling-down on their deceptive filing and the false certifications, the District Attorney and SADA Wade provided false testimony to cover their tracks. Starting with SADA Wade, he maintained the veracity of prior sworn filings that conveyed he never entertained other partners besides his wife. Yet, SADA Wade has been legally married for decades and admits to paying for the District Attorney to vacation with him on numerous instances. SADA Wade also insisted that the District Attorney paid him back in cash, or in kind, to divide expenses "roughly evenly." He then conveniently explained that he never deposited any of that cash, so that no records could corroborate any reimbursement. Finally, SADA Wade again falsely testified—to minimize the impact of their relationship on this case—that he visited the District Attorney's condominium no more than 10 times. Yet, cell-phone records reveal that he visited her dozens of times before that date in just the first eleven months of 2021. *See* redacted cell-phone records filed by Defendant Donald Trump.

As for the District Attorney, she also maintained that her romantic relationship with SADA Wade began in early 2022, even though the aforementioned cell-phone records reveal numerous late-night and early-morning rendezvous between she and SADA Wade. The District Attorney further claimed to have only "repaid" SADA Wade in cash that she

stored in her home for years.[2] However, the District Attorney claimed at times she only had $500 to $1,000 in her cash stash—far less than the few thousand that she claimed to have repaid SAADA Wade and even farther less than half the more than $17,000 SADA Wade contributed towards the clandestine relationship, not even including the many dinners and daytrips. Moreover, the District Attorney failed to present any documentary evidence supporting these fantastical claims, other than a single receipt for a plane ticket. The only "explanation" the District Attorney gave for the source of this cash was at times getting $50 cash back when making purchases at the grocery store. But again, the District Attorney provided ZERO credit card statements, debit card statements, or any other documentary support for this specious claim.

Dissatisfied with merely perjuring themselves, the District Attorney and SADA Wade engaged in a coordinated campaign to tamper with a witness and encourage the witness to present false testimony. Specifically, Cindi Lee Yeager, a Co-Chief Deputy District Attorney for the Cobb County, Georgia, District Attorney's Office told counsel for Cheeley that the District Attorney called Terrance Bradley in September 2023 and said "They are coming after us. You don't need to talk to them about anything about us." *See* Yeager Proffer filed by Defendant David Shafer. Mr. Bradley also testified that another attorney, Gabe Banks (a friend and former Fulton County ADA with Fani Willis, and whose wife currently works at the District Attorney's Office), called him in advance of his

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[2] Note that some federal courts suggest the possible existence of "a rebuttable presumption that the possession of large amounts of cash is per se evidence of illegal activity." *U.S. v. $37, 780 In U.S. Currency*, 920 F.2d 159, 162 (2nd Cir. 1990).

testimony. Mr. Bradley then took the stand and disclaimed any personal knowledge of the relationship between the District Attorney and SADA Wade, even though he had previously conveyed such knowledge to counsel for Roman and to Cobb ADA Ms. Yeager. *See id*.

When faced with a mountain of evidence revealing obvious conflicts of interest and receipt of improper benefits, the District Attorney and SADA Wade elected not to produce any meaningful evidence to the contrary. There are no bank statements indicating even a single cash deposit by SADA Wade or a withdrawal by the District Attorney even though each of them controls their respective bank accounts. When, as here, someone has evidence in their "power and within [their] reach by which he or she may repel a claim or charge against him or her but omits to produce it" or produce evidence "weaker and inferior nature," then a presumption arises that the charge or claim against such party is well founded[.]" O.C.G.A. § 24-14-22. So any presumption regarding reimbursement must lie *against* the District Attorney and SADA Wade.

That brings us to the State's post-hearing supplemental filing, which boldly proclaims that (i) Defendants bear the burden of proving their claims by a 'high standard of proof, which necessarily must be more than preponderance of the evidence," and (ii) "an actual conflict of interest must be shown to disqualify an elected district attorney." State's br. at 3–4, 10–15. Sandwiched between these two dubious propositions are bungled arguments attempting to analogize post-conviction review of disqualification rulings and distinguish decisions cited by Defendants. *See id*. at 4–10.

Regarding the standard of proof, no Georgia court has ever held that anything more

than a preponderance of evidence is necessary for disqualification. As explained further below, the State exploits a single reference to one phrase, "a high standard of proof," and transmogrifies it into some high evidentiary bar. But, even if the State is correct, the movants have nonetheless proved an actual conflict by clear and convincing evidence, even though the actual burden is simply an appearance of impropriety by a preponderance of the evidence.

Turning to the legal standard, the State's insistence that only an actual conflict of interest requires disqualification is an ineffective appeal to the lowest common denominator. That standard, the State thinks, provides just enough cover to skate past disqualification here. Not quite. No Georgia court has ever held that an actual conflict of interest is required for disqualification.[3] That is no surprise because "[i]t is an old and well-established maxim of law that the appearance of evil is as much to be abhorred as is the evil itself." *Young v. Champion*, 142 Ga. App. 687, 689 (1977) (emphasis added). To be sure, as Judge McBurney explained in his prior order disqualifying the District Attorney, "a mere appearance of impropriety is generally not enough to support disqualification, except … in the rarest of cases." *See* McBurney Order at p. 4 n. 6 (quotation omitted). Yet, "[t]his one of those cases[.]" *See id*. But, even if the Court disagrees and elects to apply an

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[3] The State counters that no Georgia court has ever expressly held that an appearance of conflict or impropriety alone, absent an actual conflict, is enough to justify disqualification. Many disqualification cases feature actual conflicts. But neither has any Georgia court held that an apparent conflict alone is *not* enough to warrant disqualification. To the contrary, Georgia courts have acknowledged that very possibility. *See, e.g., Dalton v. State*, 157 Ga. App. 353, 353 (1981) ("generally the test in cases of attorney conflict of interests is not the actuality of conflict, but the possibility that conflict might arise").

"actual conflict" standard, this "is also a case where the conflict is actual and palpable, not speculative and remote." *See id*. So, either way, Defendants have satisfied whatever legal standard the Court applies.

Lastly, the State inaptly relies on post-conviction disqualification decisions and hypocritically attempts to distinguish dozens of Georgia decisions cited by Defendants. To start, appellate courts reviewing disqualification rulings post-conviction necessarily do not apply the same standard as trial courts in the first instance. The State says that any case involving conflicts attributable to private counsel "do not apply to the disqualification of a constitutional officer." *See* State's br. at 5–7. Yet, the State itself cites numerous decisions involving private counsel when it suits. The State also knocks the applicability of *Davenport v. State*, 157 Ga. App. 704 (1981) while simultaneously relying on *Lee v. State*, 2024 Ga. LEXIS 31 (Feb. 6, 2024), which features a strikingly similar disqualification scenario even though the defendant in *Lee* failed to produce any evidence and thus the jury's verdict was not overturned on appeal. And while the State's other attempts to distinguish cases are less hypocritical, they still end up nowhere.

II. LEGAL STANDARD

"[A]dministration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object[.]" *Gaulden v. State*, 11 Ga. 47, 50 (1852). Courts therefore "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." *Wheat v. U.S.*, 486 U.S. 153, 160 (1988); *see also Fair v. State*, 288 Ga. 244, 260 (2010); *Edwards v. Lewis*, 283 Ga. 345, 350 n. 21 (2008).

And, when assessing potential bias or conflict, "[o]ur system of law has always endeavored to prevent *even the probability of unfairness*." *Dept. of Transp. v. Del-Cook Timber Co., Inc.*, 248 Ga. 734, 740 (1982) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955) (emphasis added)).

With that in mind, "the issue of attorney disqualification [is] a continuum." *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981). On one end, "disqualification is always justified and indeed mandated" when "the appearance of impropriety [is] coupled with a conflict of interest." *See id*. Next, "somewhere in the middle of the continuum[,]… the appearance of impropriety based on conduct on the part of the attorney … generally has been found insufficient" for disqualification of a private attorney in the civil context. *Id*. Thus, it would be paradoxical if disqualification of the District Attorney—who is subject to "the higher standard of public trust [of] a public prosecutor"—required a higher standard of proof than disqualification of a private attorney in the civil context. *See Matter of Redding*, 269 Ga. 537, 537 (1998) (*per curiam*); *see also Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 807 (1987) (plurality) (recognizing fundamental right to "a disinterested prosecutor"). Finally, for both prosecutors and private counsel, "the appearance of impropriety based not on conduct but on status alone … is an insufficient ground for disqualification." *Blumenfeld*, 247 Ga. at 409. However, in the present case, the defense most certainly is NOT seeking disqualification based simply on "status." Rather, the disqualification motions target the improper CONDUCT of the District Attorney.

In sum, disqualification based on appearance alone—while rare and often insufficient in the civil context—is still permissible when a prosecutor is involved. That is

because prosecutors are "required to stand aside for the sake of public confidence in the probity of the administration of justice[,]" while private lawyers are not. *Compare Love v. State*, 202 Ga. App. 889, 891 (1992), *with Blumenfeld*, 247 Ga. at 409. As such, when a prosecutor's participation could even "cast doubt on the fairness of the trial," disqualification "might be appropriate." *See Neuman v. State*, 311 Ga. 83 (2021). No Georgia court has ever held that an actual conflict is necessary to disqualify a prosecutor.

III. LEGAL ARGUMENT

A. The State incorrectly contends that something beyond a preponderance of the evidence is required to disqualify a prosecutor.

The State's opening gambit is to insist that "Defendants bear the burden of proving their claims by a 'high standard of proof,' which necessarily must be more than preponderance of the evidence." State's Br. at 3–4. It makes this claim based on a sentence in *McGlynn v. State*, where the Court emphasized "its role both in addressing attorney misconduct and in holding those who allege such misconduct to a high standard of proof." 342 Ga. App. 170, 173 (2017). Quick to capitalize on that line, the State cites *Terrell v. Ga. TV Co.*, which just says that the standard to recover damages for defamation of a public official—a "clear and convincing showing of actual malice"—is "high standard of proof." 215 Ga. App. 150, 151–52 (1994). The State then cites three other decisions recognizing the same thing. *See* State's Br. at 3–4. And it proceeds to invoke a host of unpublished Eleventh Circuit decisions for the unremarkable proposition that preponderance of the evidence is not a high standard of proof. *See id*.

McGlynn, however, is not the smoking gun the State thinks it is. *McGlynn* involved

a post-conviction review of a defendant's bid to disqualify a district attorney's office. *See* 342 Ga. App. at 173. And it did not even implicate a conflict of interest whatsoever. Rather, the defendant argued that a prosecutor's discussion with a witness "before trial ultimately resulted in [the witness's] decision, on the advice of his own counsel, to assert his Fifth Amendment privilege." *Id*. That discussion, according to the Defendant, violated his due process rights. *See id*. But there was no suggestion of any conflict of interest. Instead, the Court held that the "record … d[id] not establish sanctionable conduct on the part of the ADA." Nothing about *McGlynn* sheds light on the present, conflict-based disqualification argument.

And random decisions invoking a generic phrase like "high standard of proof" outside the disqualification context are irrelevant. A quick Westlaw search of "high standard of proof" curates 14 Georgia decisions. Some involve defamation. See *Terrell*, 342 Ga. App. at 173. Others pertain to proving intellectual disability in the criminal sentencing context. *See Young v. State*, 312 Ga. 71, 129 (2021) (Nahmias, P.J., concurring specially). Still others involve municipal liability. *See DeKalb Cty. v. Bailey*, 319 Ga. App. 278, 288 (2012). What to make of that? Well, not much at all. "High standard of proof" is a common phrase employed in all manner of contexts to signify a wide variety of standards.

No Georgia court has ever employed the phrase "high standard of proof" and no Georgia Court has ever employed the clear and convincing standard when assessing an alleged conflict of interest. Indeed, no Georgia court has ever suggested than anything more than a preponderance of the evidence is required for disqualification. If a court had said as much, the State would surely bring that decision to the Court's attention. But it hasn't.

Instead, the State cites a post-conviction review of an ersatz disqualification argument based on alleged prosecutorial misconduct with a witness that resulted in a witness invoking the Fifth Amendment. *See McGlynn*, 342 Ga. App. at 173. If that glaringly inapposite decision is State's best authority, then that is evidence enough that no Georgia court has ever disclaimed a preponderance of the evidence standard when assessing a prosecutors conflict of interest.

B. The State also wrongly insists that appearance of conflict or impropriety alone can never result in a prosecutor's disqualification.

Aside from advancing an inflated evidentiary standard into the disqualification analysis, the State seeks to smuggle in an exaggerated legal standard as well. Specifically, the State contends that "Multiple Georgia Supreme Court cases clearly establish that Georgia trial courts are not authorized to disqualify an elected district attorney absent an actual conflict of interest; an appearance of a conflict of interest is insufficient." And those multiple cases include: *Lee v. State*, 2024 Ga. LEXIS 31 (Feb. 6, 2024), *Blumenfeld v. Borenstein*, 247 Ga. 406 (1981), *Lyons v. State*, 271 Ga. 639, 640 (1999), *Lamb v. State*, 267 Ga. 41, 42 (1996), and *Williams v. State*, 258 Ga. 305, 315 (1988). None of these cases hold what the State now claims.

Lee v. State involves a post-conviction disqualification analysis and a totally inapposite fact pattern. 2024 Ga. LEXIS 31. There, the defendant argued that a prosecutor "should have been disqualified because of his previous representation of [the defendant] 'in several criminal cases' in which he 'acquired information and knowledge,' presenting a conflict of interest." *Id*. at *16–17. The Defendant, however, identified "no evidence in

the record showing that the assistant district attorney actually represented him in prior cases, let alone evidence of the 'information and knowledge' that the assistant district attorney might have acquired during that alleged representation that could have disadvantaged [the defendant]." *Id*. at *17. The Court therefore affirmed the denial of disqualification because the defendant-appellant "b[ore] the burden of proving error by the appellate record" and failed to satisfy his burden. *Id*. (quotation omitted). Nowhere in this opinion does the Court hold that the burden was by clear and convincing evidence. By contrast, no Movant in the present case has been convicted, Defendants have produced a mountain of evidence demonstrating a conflict, and no Defendant bears the burden of proving error by the appellate record. To the extent the Court mentioned the lack of "an actual conflict of interest," that language must be understood in the post-conviction context where the only thing alleged was an actual conflict due to prior representation, and it does not mean that disqualification for an apparent conflict of interest would have constituted an abuse of discretion. *Id*. at *2. As such, *Lee v. State* is totally inapplicable.

Blumenfeld v. Borenstein describes general disqualification standards but is of exceedingly limited utility here because the focus was on the "status" of counsel – not on improper conduct as is the point in the present case. 247 Ga. at 406. That case was a disputed probate action where the estate's executrix moved to disqualify the sister's attorneys because one member of the firm was married to the executrix's former counsel. *See id*. The superior court granted that motion and "marital status was the sole reason for [the] disqualification." *Id*. at 408. The Supreme Court reversed, holding only "that disqualification based on marital status alone was improper[.]" *Id*. at 410. And, while

surmising that an apparent conflict has "generally has been found insufficient to" warrant disqualification the Court nonetheless cited *Young v. Champion*, where the Court of Appeals held "[t]he test … is not the actuality of conflict, but the possibility that conflict may arise." *Id*. at 409 (citing 142 Ga. App. 687, 690 (1977)). The State is subject to higher standards than private counsel in a civil action, and no Defendant is advocating a status-based disqualification. So *Blumenfeld* is likewise of no use in the present case.

Both *Lamb v. State*, 267 Ga. 41 (1996) and *Lyons v. State*, 271 Ga. 639 (1999) are useless here because they involve convicted defendants who raised ineffective assistance of counsel claims under the Sixth Amendment. In *Lamb*, the Defendant argued that his trial and appellate counsel were ineffective under the Sixth Amendment due to alleged conflicts. 267 Ga. at 41. Specifically, the defendant's trial attorney and his associate both represented the defendant's brother (a co-defendant) in unrelated criminal matters. *Id*. The defendant's appointed appellate counsel then left his position to join the district attorney's office. *Id*. The Court of Appeals held that the defendant "failed to demonstrate an actual conflict on the part of" trial or appellate counsel. *Id*. at 42. But where did that actual conflict standard originate? Well, ""to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id*. (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). *Lyons* too involved a Sixth Amendment ineffective assistance argument based on an alleged conflict resulting from two members of his defense team joining the district attorney's office. 271 Ga. at 640. And the Court did nothing more than quote *Lamb*'s "actual conflict" language. *Id*. No Defendant has raised Sixth Amendment claims—which

would be unripe anyway—so neither *Lamb* nor *Lamb* gets the State anywhere. These decisions are inapplicable to the motions presently pending before the Court.

Finally, *Williams v. State* merely provides examples of some situations where disqualification was appropriate. 258 Ga. 305 (1988). In particular, the Court observed that "[a] conflict of interest has been held to arise where the prosecutor previously has represented the defendant with respect to the offense charged, or has consulted with the defendant in a professional capacity with regard thereto; such conflict also has been held to arise where the prosecutor has acquired a personal interest or stake in the defendant's conviction." *Id*. at 314. The State, reading the decision like a statute, construes these examples as exhaustive. Of course the Court did not say as much. Moreover, Defendants do in fact contend that the District Attorney and SADA Wade have a personal interest or stake in this prosecution and the District Attorney has improperly personally benefitted from the investigation and prosecution due to the financial largess bestowed on her by SADA Wade. Now, the State quibbles that an interest in the case is distinct from an interest in a conviction. But that is splitting hairs. While the neither the District Attorney nor SADA Wade will receive a bonus following any convictions, the District Attorney has inarguably personally benefitted financially from her secret romantic entanglement and the monies she arranged to be paid to SADA Wade.

C. An apparent conflict is sufficient to warrant a prosecutor's disqualification.

The State itself previously has acknowledged in this very case that prosecutors are held to higher standards than their counterparts in private practice. On September 20, 2023,

the District Attorney filed a "Notice of Potential Conflicts of Interest" concerning certain Defense counsel. That notice observed, in relevant part, that a "prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Notice at p.1 (quoting GA. R. & REGS. ST. BAR 3.8, Cmt. 1). The notice then went on to boldly emphasize that, "**[i]n light of the prosecutor's public responsibilities, broad authority and discretion, the prosecutor has a heightened duty of candor to the courts and in fulfilling other professional obligations**." *Id*. (quoting ABA STAND. CRIM. JUST. REL. PROS. FUNCT. 3-1.4(a) (emphasis added)). Given these lofty principles—which are conspicuously absent from the State's recent briefing—the District Attorney professed concern regarding "Defendants' rights to due process and a fundamentally fair trial" if certain Defense counsel were not disqualified given certain prior representations. *See id*. at 11. Defendants simply want to hold the State to the standard it touted only a few short months ago.

In addition to the bevy of citations from prior briefing, the Georgia Supreme Court's decision in *Neuman v. State* illustrates that an actual conflict is not necessary for disqualification. 311 Ga. at 83. The defendant there moved to disqualify the entire office of the District Attorney for the Stone Mountain Judicial Circuit because some prosecutors had read his privileged communications with counsel. *Id*. at 88. The trial court denied that motion and the Georgia Supreme Court affirmed. *See id*. But the court hastened to explain that "[d]isqualification of the prosecuting attorneys might be appropriate … where the privileged information disclosed to the prosecution was so voluminous that it would cast doubt on the fairness of the trial absent disqualification of the prosecuting attorneys who

had reviewed the files." *Id*. at 89. In other words, the standard for disqualification was whether the prosecutors' participation would "**cast doubt on the fairness of the trial**." *Id*. (emphasis added). That is totally inconsistent with an "actual conflict" mandate, which does not appear anywhere in the Court's discussion. The doubt cast is consistent, however, with an appearance of impropriety.

D. State invokes a host of inapposite decisions and hypocritically urges the Court to ignore those invoked by Cheeley.

No discussion of "actual conflict" appears in numerous decisions previously cited by Cheeley and others. *See Edwards v. State*, 336 Ga. App. 595 (2016); *Registe v. State*, 287 Ga. 542 (2010); *Brown v. State*, 256 Ga. App. 603 (2002); *Reeves v. State*, 231 Ga. App. 22 (1998); *Love v. State*, 202 Ga. App. 889 (1992).

To avoid the obvious doctrinal barriers impeding its preferred standard, the State hypocritically maintains that the decisions above "are not applicable." State's Br. at 5–6. Why? Well, the State says, these decisions "do not apply to the disqualification of a constitutional officer whose loyalty lies with seeking justice—not with any individual, private client." *Id*. at 5. That's a bold proposition considering that **the State itself cites three decisions involving private counsel**. *Id*. at 2–3, 11–12; *Lewis v. State*, 312 Ga. App. 275 (2011) (prosecution moved to disqualify defense counsel); *Lamb*, 267 Ga. at 41; *Blumenfeld*, 247 Ga. at 406. So it appears that decisions involving private counsel only become relevant when they benefit the State. That, of course, is nonsense. Given "the higher standard of public trust to which a public prosecutor is held," *see Matter of Redding*, 269 Ga. at 537, it stands to reason that if private attorneys are subject to disqualification,

then prosecutors are disqualified as well. But that heightened standard to which prosecutors are held also means that prosecutors may be disqualified even where private attorneys remain.

The State also implores the Court to ignore *Davenport v. State*, 157 Ga. App. 704 (1981) while invoking a decision involving similar circumstances. State's br. at 9–10. *Davenport* held that a defendant charged was denied a fundamentally fair trial where the district attorney (1) previously represented the victim (the defendant's husband) in pending divorce proceedings, (2) was cognizant of information and incidents that occurred between the victim and the defendant by virtue of his divorce representation, and (3) the district attorney sat at counsel's table for the entirety of the trial. 157 Ga. App. at 705–06. According to the State, "the facts and the legal principles in Davenport are far too remote from the present case for that case to be applicable here." State's br. at 10. That an interesting sentiment given the State's repeated invocation of *Lee v. State*, which is discussed at length above. 2024 Ga. LEXIS 31. So, once again, the State gets to invoke any decision that helps its cause while distinguishing away any decisions that cut the other way.

Finally, the State invokes O.C.G.A. § 15-18-5, even though it too does not demonstrate that an actual conflict is required to disqualify a district attorney. Section 15-18-5(g) provides that "[a]ny order entered by a court disqualifying a district attorney's office from engaging in the prosecution shall specify the legal basis for such order." If, as the State contends, § 15-18-5(a) means a "district attorney's office is disqualified [only based on] interest or relationship to engage in a prosecution," then § 15-18-5(g) would be surplusage because there could be no other legal basis than § 15-18-5(a).

E. The State completely ignores the District Attorney's obligations as a public trustee under Georgia law.

The District Attorney has forgotten that she, her office, and the SADAs are "trustees and servants of the people and are at all times amenable to them." GA. CONST. Art. I, § II,# ¶ I; *see also Matter of Redding*, 269 Ga. at 537 (emphasizing "the higher standard of public trust to which a public prosecutor is held"). Indeed, as the Georgia Supreme Court has emphasized:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that it unbending and inveterate.

Malcom v. Webb, 211 Ga. 449, 457 (1955) (quotation omitted). And the most basic rule is that "no … public agent or trustee[] shall have the opportunity or be led into the temptation to make profit out of … others entrusted to [their] care[.]" *City of Macon v. Huff*, 60 Ga. 221, 228 (1878). While that may be inconvenient for the District Attorney, she "*accept*[ed] office—it [was] not forced upon h[er]. [Sh]e cannot, therefore, complain of the disabilities which are incident to it." *Harrison v. McHenry*, 9 Ga. 164, 167 (1850) (emphasis in original).

Can the District Attorney, her office, and the SADAs—as public trustees—prosecute this case "disinterestedly? Possibly [they] may; but the law regarding our fallen nature as all weak … forbids that [any] temptation be laid in the path of any[one], however exalted [their] office or pure [their] character." *City of Macon*, 60 Ga. at 225. Harkening back to standards articulated at the outset, "[b]oth unfairness and the appearance of unfairness should be avoided." *In re Grand Jury Subpoenas*, 573 F.2d 936, 944 (6th Cir.

1978). So, [w]herever there may be reasonable suspicion of unfairness, it is best to disqualify." *Id*. That is the answer here.

IV. CONCLUSION

For the reasons above, along with those articulated in Cheeley's initial motion and reply, the Court should disqualify the Fulton County District Attorney, her entire office, and the SADAs and dismiss the Indictment.

Respectfully submitted, March 8, 2024.

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 8th day of March 2024, served a true and correct copy of the within and foregoing DEFENDANT ROBERT DAVID CHEELEY'S RESPONSE TO THE STATE'S POST-HEARING SUPPLEMENTAL BRIEF via electronic filing.

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