IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DONALD JOHN TRUMP, RUDOLPH WILLIAM LOUIS GIULIANI, JOHN CHARLES EASTMAN, MARK RANDALL MEADOWS, KENNETH JOHN CHESEBRO, JEFFREY BOSSERT CLARK, JENNA LYNN ELLIS, RAY STALLINGS SMITH III, ROBERT DAVID CHEELEY, MICHAEL A. ROMAN, DAVID JAMES SHAFER, SHAWN MICAH TRESHER STILL, STEPHEN CLIFFGARD LEE, HARRISON WILLIAM PRESCOTT FLOYD, TREVIAN C. KUTTI, SIDNEY KATHERINE POWELL, CATHLEEN ALSTON LATHAM, SCOTT GRAHAM HALL, MISTY HAMPTON a/k/a EMILY MISTY HAYES Defendants.	CASE NO. 23SC188947

STATE'S SUPPLEMENTAL BRIEF FOLLOWING HEARING ON MARCH 1, 2024, CONCERNING STANDARD OF PROOF AND LEGAL STANDARD FOR DISQUALIFICATION OF AN ELECTED DISTRICT ATTORNEY

At the hearing on March 1, 2024, concerning Defendants' motions to disqualify District Attorney Fani T. Willis, the Court posed several questions to the parties concerning the standard of proof required for disqualification and the legal standard to be applied by the Court. The binding caselaw in Georgia is clear: a trial court is not authorized to disqualify an elected district attorney absent a showing, by "a high standard of proof," that such an elected district attorney either has an

actual conflict of interest or has engaged in forensic misconduct.[1] This brief will address that standard of proof recently recognized by the Georgia Court of Appeals and the few circumstances recognized under Georgia law that constitute actual conflicts of interest for prosecutors.

As a threshold matter, "[t]he elected district attorney is not merely any prosecuting attorney. [She] is a constitutional officer, and there is only one such officer in each judicial circuit." *McLaughlin v. Payne*, 295 Ga. 609, 612 (2014) (citing GA. CONST. OF 1983, Art. VI, Sec. VIII, Par. I (a)). Under Georgia's Constitution, a district attorney is *constitutionally mandated* "to represent the state in all criminal cases in the superior court of such district attorney's circuit." *Id.* (citing GA. CONST. OF 1983, Art. VI, Sec. VIII, Par. I (d)) (cleaned up). Here, the District Attorney seeks only to do exactly that—perform her solemn duties as mandated by the Georgia Constitution "to subserve public justice" in a case of great public importance. *See State v. Sutherland*, 190 Ga. App. 606, 608 (1989). The Defendants ask the Court to impose a novel, hair-trigger standard for the disqualification of an elected district attorney. But no such standard exists under our law. The true legal standard, set forth by our appellate courts and confirmed by statutory language, is much higher and requires proof of an actual, palpable conflict of interest with "a substantial basis in fact." *Lamb v. State*, 267 Ga. 41, 42 (1996). That standard is high for a reason. The public's interest in seeking justice is in no way served by a low standard that would allow trial courts broad authority to invalidate the public's choice in their elected district attorney, selected by the people

[1] This brief will not examine the legal standard surrounding forensic misconduct, which was covered extensively at the hearing. The State maintains that the evidence presented does not even come close to establishing that the District Attorney's statements "were part of a calculated plan evincing a design to prejudice the defendant[s] in the minds of" potential jurors, the standard required for a finding of forensic misconduct. *Williams v. State*, 258 Ga. 305, 315 (1988). No prosecutor in Georgia has ever been disqualified from prosecuting any case on grounds of forensic misconduct, and this case should not be the first.

to carry out essential constitutional duties. And our state Supreme Court reinforced this high standard just weeks ago. *See Lee v. State*, 2024 Ga. LEXIS 31, *2 (Feb. 6, 2024) (Pinson, J.).

All criminal defendants have certain rights that must be protected by our system of justice, but among them is neither the right to be tried by a prosecutor of his choosing, *Nel v. State*, 252 Ga. App. 761, 672 (2001), nor the right to delay his prosecution for no good reason, *Terrell v. State*, 304 Ga. 183, 187 (2018). Inappropriate or improper disqualification of a district attorney, elected by the people of this county and constitutionally mandated to represent the state in all criminal cases in the superior court of this circuit, has severe consequences—both for the people's faith in their constitutional right to be represented by a district attorney elected by them, *see generally Kemp v. Gonzalez*, 310 Ga. 104 (2020), and for the public's confidence in our system of justice. For the reasons set forth below, the Defendants' motions to dismiss the indictment and disqualify the Fulton County District Attorney's Office should be denied.

I. The Defendants bear the burden of proving their claims by a "high standard of proof," which necessarily must be more than preponderance of the evidence.

"[I]t is the burden of the party seeking to disqualify counsel to prove that the extraordinary remedy of disqualification is warranted." *Lewis v. State*, 312 Ga. App. 275, 283 (2011). In *McGlynn v. State*, 342 Ga. App. 170, 173 (2017), the Georgia Court of Appeals recognized that a court considering a defendant's motion to disqualify an elected district attorney and her office based on alleged misconduct must "[hold] those who allege such misconduct to a *high standard of proof*." (emphasis added). At the hearing in this case, the Defendants urged the Court to adopt a preponderance of the evidence standard, but under *McGlynn*, that cannot be the correct standard of proof. While not squarely addressed in the context of disqualification, Georgia's appellate courts have often categorized a "*clear and convincing showing* of actual malice" as a "high standard of proof." *Terrell v. Ga. TV Co.*, 215 Ga. App. 150, 151-52 (1994); *see also Atkins v. News Publ'g*

Co., 290 Ga. App. 78 (2008), *Torrance v. Morris Publ'g Group, LLC*, 289 Ga. App. 136 (2007), *Strange v. Cox Enters.*, 211 Ga. App. 731 (1994). Moreover, the Eleventh Circuit Court of Appeals has regularly and explicitly recognized that "preponderance of the evidence … [is] *not* a high standard of proof." *United States v. Knight*, 773 Fed. Appx. 1057, 1063 (2019) (emphasis added); *see also United States v. Tolbert*, 185 Fed. Appx. 913, 915 (2006), *United States v. Cox*, 188 Fed. Appx. 889, 894-95 (2006), *United States v. Harris*, 200 Fed. Appx. 912, 913 (2006), *United States v. Askew*, 193 F.3d 1181, 1183 (1999).

The State maintains that the Defendants have not established an actual conflict of interest even by a preponderance of the evidence. But even so, based on these cases—specifically the holding in *McGlynn* that trial courts must hold defendants seeking disqualification of a prosecutor "to a high standard of proof"—the Court should hold the Defendants to something higher than a preponderance of the evidence standard.

II. The Defendants ask the Court to adopt a legal standard that is not recognized under Georgia law, and they rely on cases that are either cited in a misleading way, are inapplicable, or actually support the State's position.

The Defendants rely on numerous cases in support of their motion that are either cited in a misleading way, are inapplicable, or support the State's position. The Defendants can point to no appellate case—because there is no case—where an elected district attorney in Georgia was properly disqualified solely based on an appearance of a conflict of interest or other appearance of impropriety. Indeed, if such a case existed, it would undoubtedly have been brought to the Court's attention by the Defendants months ago. Instead, the Defendants cobble together flowery, righteous quotations from inapplicable cases that may sound enticing at first but that entirely misstate the law in Georgia. In doing so, the Defendants ask the Court to adopt a novel legal

standard for the disqualification of an elected constitutional officer that has never before been recognized in Georgia and that is contrary to decades of case law.

The cases relied on by the Defendants can be divided into five categories (1) cases that do not concern disqualification at all but that the Defendants use as a source of flowery and righteous—though inapplicable—language; (2) cases where criminal defense attorneys were disqualified on the basis of divided loyalty, in violation of the Georgia Rules of Professional Conduct; (3) cases where a prosecutor had an actual personal interest or stake in the outcome of a prosecution; (4) a single case where a defendant was denied a fundamentally fair trial where the district attorney had previously represented the victim in the case; and (5) cases where no actual conflict of interest was shown and disqualification was not proper. The first category of cases is the largest.[2] The Court should categorically disregard them in the context of this motion as they say nothing at all about disqualification of an elected district attorney.

A. Cases involving criminal defense attorneys disqualified on the basis of divided loyalty are not applicable here.

The second category of cases concerns *criminal defense attorneys* who were disqualified on the basis of *divided loyalty*, in violation of the Georgia Rules of Professional Conduct specifically relating to representation of individual clients. These cases simply do not apply to the disqualification of a constitutional officer whose loyalty lies with seeking justice—not with any individual, private client. Beginning with *Registe v. State*, 287 Ga. 542 (2010), the Georgia Supreme Court upheld the disqualification of a criminal defense attorney who had previously been

[2] These cases include the following: *McIver v. State*, 314 Ga. 109 (2022), *Sallee v. State*, 329 Ga. App. 612 (2014), *State v. Brown*, 269 Ga. App. 875 (2004), *Collier v. State*, 266 Ga. App. 345 (2004), *State v. Wooten*, 273 Ga. 529 (2001), *Allen v. Lefkoff*, 265 Ga. 374 (1995), *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), *Rose v. Clark*, 478 U.S. 570 (1986), *Vasquez v. Hillery*, 474 U.S. 254 (1986), *United States v. Birdman*, 602 F.2d 547 (3rd Cir. 1979), *United States v. Della Universita*, 298 F.2d 365 (2nd Cir. 1962), and *Offutt v. United States*, 348 U.S. 11 (1954).

directly involved in the defendant's prosecution, including filing an application for search warrants against the defendant. The Court held that the circumstances implicated at least four ethics rules, *Id.* at 544-45, and Rule 1.7 specifically prohibited the attorney's representation of Registe because the representation "create[d] a 'significant risk that … the lawyer's duties to … a former client … will materially and adversely affect the representation' of his present client …, [and] because the representation 'includes the assertion of a claim by one client against another client … in the same … proceeding,' [the] conflict cannot be waived … ." *Id.* at 547. Moreover, Rule 1.9 also prohibited the representation: "[a] lawyer who has formerly represented a client in a matter' [cannot] thereafter represent[] another person 'in the same or a substantially related matter' if 'that person's interests are materially adverse to the interests of the former client … .'" *Id.* at 548. These rules simply do not apply to the circumstances alleged in the Defendants' motions.[3]

The remaining cases in this second category follow the same logic as *Registe*. In *Edwards v. State*, 336 Ga. App. 595 (2016), a criminal defense attorney was properly disqualified where he had previously represented the mother of the victim in the case and neither Edwards nor the victim's mother gave informed consent to the conflict created by the defense attorney's divided loyalties, as required by Rule 1.7. In both *Brown v. State*, 256 Ga. App. 603 (2002) and *Love v. State*, 202 Ga. App. 889 (1992), defense attorneys were disqualified where members of their firms had previously been employed as prosecutors and were substantially involved in earlier stages of

[3] In the context of cases implicating Rule 1.7, courts have considered whether the facts create an "actual or serious potential conflict of interest" because, when Rule 1.7 applies, the rule requires that consideration. Rule 1.7 establishes that a conflict of interest exists in representing a client if there is a "substantial risk" that a lawyer's own interest or duties to another client, a former client, or a third person will materially and adversely affect the representation of the client. Ga. St. Bar R. 4-102(d):1.7(a). In the present case, where Rule 1.7 is not implicated, a "serious potential conflict of interest" is insufficient to disqualify an elected district attorney.

the defendants' prosecutions.[4] Finally, in *Reeves v. State*, 231 Ga. App. 22 (1998), a defendant's conviction was reversed where (1) his criminal defense attorney had accepted a job offer with the same district attorney's office that was prosecuting the defendant, (2) the record did not establish that the defense attorney had disclosed that fact to the defendant, (3) the defendant asserted on appeal that disclosure of his attorney's future employment would have affected his decision making, and (4) the defense attorney waived a jury trial, called no defense witnesses, and failed to have the bench trial transcribed. While *Reeves* refers to an "appearance of impropriety," it is factually distinct from the present motion, was decided under the former ethics rules that do not apply here, and is non-binding physical precedent. *See* Ga. R. App. P. 33.2(a)(2).

B. Cases involving prosecutors with a personal interest in the outcome of a proceeding demonstrate that no disqualifying conflict of interest exists here.

The third category of cases relied on by the Defendants consists of cases where a prosecutor had acquired a personal interest in the outcome of the proceeding. In both *Greater Ga. Amusements v. State*, 317 Ga. App. 118 (2012) and *Amusement Sales, Inc. v. State*, 316 Ga. App. 727 (2012), special prosecutors were disqualified from civil asset forfeiture proceedings where they were paid on a contingency fee basis. While *Greater Ga. Amusements* refers to the appearance of a conflict of interest necessarily created by such a contingency fee arrangement, the case was ultimately decided on public policy grounds—not conflict of interest grounds—so that reference is dicta: "application of a legal standard that the Court merely assumed and *explicitly did not adopt*."[5]

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[4] The Georgia Rules of Professional Conduct, in their current form, became effective January 1, 2001. *Love* was decided under a prior version of the rules, and *Brown* was tried in April 2001 and relies on cases decided under the prior rules. Accordingly, neither *Love* nor *Brown* explicitly references Rule 1.7 of the current Georgia Rules of Professional Conduct.

[5] The same can be said for the Georgia Supreme Court's reference to "the appearance of impropriety" in *Battle v. State*, 301 Ga. 694, 698 (2017). In that case, the district attorney was not disqualified because there was "no evidence … [of] any conflict of interest or a personal relationship with the victim or his mother or any personal interest in obtaining the sought

Alexander v. State, 313 Ga. 521, 529 (2022) (emphasis added). "And, 'dicta is not binding on anyone for any purpose.'" *Id.* Moreover, *Greater Ga. Amusements* is non-binding physical precedent, *see* Ga. R. App. P. 33.2(a)(2), and fewer than six weeks after it was decided, the binding, better-reasoned opinion in *Amusement Sales, Inc.* held that such contingency fee arrangements created an actual conflict of interest "in light of the [special prosecutors] having a personal financial stake *in the outcome*."[6] *Amusement Sales, Inc.*, 316 Ga. App. at 736 (emphasis added).

In the remaining cases in this category, disqualification was appropriate based on actual conflicts of interest. In *Young v. U.S. ex rel. Vuitton et Fils S. A.*, 481 U.S. 787 (1987), special prosecutors in a criminal contempt action were disqualified because they also represented the plaintiff in the underlying civil injunction action that gave rise to the criminal contempt action, and their prosecution of the criminal case gave them a "bargaining chip in civil negotiations." By the same logic, in *Nichols v. State*, 17 Ga. App. 593 (1916), the solicitor-general was disqualified from prosecuting Nichols for perjury in an underlying civil personal injury action where the solicitor-general, in his private capacity, also represented the personal injury plaintiff against Nichols and allegedly used the criminal prosecution to force a settlement in the personal injury case.

As this Court correctly pointed out at the hearing in this matter, and as these cases demonstrate, to create a disqualifying conflict of interest, a prosecutor's alleged "personal benefit" must be *material*: there must be some factual relationship between the alleged benefit and the prosecutor's involvement in the case in order to show a personal stake or interest in the outcome

convictions." *Id.* Where the Court did not adopt an "appearance of impropriety" standard in rendering its decision, that language is necessarily dicta. The Court in *Battle* applied an actual conflict of interest standard, and again, no Georgia prosecutor has ever been disqualified based solely on an appearance of impropriety.

[6] While *Greater Ga. Amusements* appears after *Amusement Sales, Inc.* in the Georgia Appeals Reports, *Greater Ga. Amusements* was decided on May 25, 2012, and *Amusement Sales, Inc.* was decided several weeks later on July 11, 2012.

of the proceedings. *See Amusement Sales, Inc.*, 316 Ga. App. at 736. Here, the Defendants have not even alleged—and certainly have not proven—that the District Attorney received any benefit *contingent upon the outcome of this case*. A nebulous alleged benefit that is either (1) not personal or (2) not directly tied to the outcome of the case—traditionally, the conviction of the defendant—is not enough to warrant disqualification. *See Sutherland*, 190 Ga. App. at 607 (disqualification not appropriate where the "criminal charges … have no factual connection whatsoever to the [alleged personal interest] and the outcome in neither proceeding would in any way have an effect upon the other."). Otherwise, as this Court observed at the hearing, any alleged improper "personal benefit" received by a district attorney under any circumstance would disqualify her from prosecuting every case in which she signed her name to the indictment; that is—obviously—an unworkable interpretation of the law.

C. The remaining cases relied on by the Defendants demonstrate that no disqualifying conflict of interest exists here.

The fourth category of cases relied on by the Defendants—a single case, *Davenport v. State*, 157 Ga. App. 704 (1981)—concerns a defendant's right to a fundamentally fair trial. In *Davenport*, the Court held that a defendant charged with shooting her estranged husband was denied a fundamentally fair trial where (1) the district attorney had previously represented the husband in the divorce proceedings that were pending at the time of the shooting, (2) the district attorney "was cognizant of information and incidents that occurred between the victim and [defendant] by virtue of his representation of [the victim] in the divorce proceedings," and (3) the district attorney sat at counsel's table for the entirety of the trial. 157 Ga. App. at 705-06. The Court held that "public policy prohibits a district attorney from prosecuting a case … while representing the victim of the alleged criminal act in a divorce proceeding involving the accused." *Id.* at 706.

Both the facts and the legal principles in *Davenport* are far too remote from the present case for that case to be applicable here.

The final category of cases relied on by the Defendants involves cases where disqualification was found *not* to be proper: (1) a special prosecutor who accepted future employment with a law firm that previously represented a prosecution witness in a collateral matter was not grounds for disqualification because no actual conflict was shown, *Whitworth v. State*, 275 Ga. App. 790 (2005) ("The Supreme Court of Georgia has repeatedly held that an *'actual conflict of interest'* is required to warrant reversal for failure to disqualify." (emphasis added)); (2) a district attorney's office investigator's close personal friendship with a victim was not grounds for disqualification, *Head v. State*, 253 Ga. App. 727 (2002); and (3) a prosecutor's statements to the media, after a hung jury, that "the score is 35-1 for conviction" and that "there is substantial reason to believe [the defendant] is guilty" did not amount to either forensic misconduct or any other grounds for disqualification, *Williams*, 258 Ga. at 314-15. None of these cases suggest that a district attorney may be disqualified based on anything less than an actual conflict of interest.

III. 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.

"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*, 258 Ga. at 314. Under Georgia law, conflicts of interest have been found only where a "prosecutor previously has represented the defendant with respect to the offense charged," "has consulted with the defendant in a professional capacity with regard thereto," or "where the prosecutor has acquired a personal interest or stake in the [outcome of the proceedings]." *Id.* No other disqualifying conflict of interest has ever been recognized under

Georgia law. Moreover, as the Georgia Supreme Court again reiterated less than a month ago, an *actual conflict of interest* is required for disqualification of a prosecutor. *Lee*, 2024 Ga. LEXIS 31 at *2 ("[T]he trial court did not abuse its discretion … by failing to disqualify the Assistant District Attorney ***absent an actual conflict of interest***." (emphasis added)).

This has been the unchanged law of this state for decades. In *Blumenfeld v. Borenstein*, the Georgia Supreme Court considered whether a trial court erred in disqualifying an attorney based on an "appearance of impropriety" that resulted from the fact that two lawyers representing opposing parties in the matter were married. 247 Ga. 406 (1981). The Court recognized that "[a]lthough the issue has never been squarely addressed in Georgia, courts in other jurisdictions have rarely been willing to disqualify an attorney based on the appearance of impropriety alone where there is no danger that the actual trial of the case will be tainted." *Id.* at 407-08. The Court reversed the trial court and rejected the notion that trial courts are authorized to disqualify attorneys based on an appearance of impropriety:

> Appellees have not shown us a case where a per se rule was applied to disqualify an attorney on the basis of an appearance of impropriety alone. *The Georgia cases cited by appellee do not stand for the proposition that a trial judge is authorized in Georgia to disqualify an attorney solely on the basis of an appearance of impropriety.*

Id. at 409 (emphasis added). Significantly, the Court did not restrict its language here to status-based conflicts, and the state of the law has not changed since *Blumenfeld* was decided more than 40 years ago. Based on the State's reading of the caselaw, no appellate case in this state has, before or since *Blumenfeld*, ever authorized a trial judge to disqualify a prosecutor solely based on the appearance of a conflict of interest.

This concept has been reinforced in multiple cases since *Blumenfeld*. In *Lyons v. State*, the Georgia Supreme Court refused to accept a defendant's argument that the trial court erred in

refusing to grant his motion to disqualify the district attorney based on an appearance of impropriety.[7] 271 Ga. 639, 640 (1999). The Court reiterated that "[a] theoretical or speculative conflict will not impugn a conviction which is supported by competent evidence." *Id.* (quoting *Lamb*, 267 Ga. at 42). While *Lamb* did not involve disqualification of a district attorney, in that case the Court reiterated that an alleged conflict "must be palpable and have a substantial basis in fact." 267 Ga. at 42. Decisions of the Georgia Court of Appeals are in accord. In *Whitworth v. State*, the Court affirmed a trial court's denial of a motion to disqualify the prosecutor where "no actual conflict of interest was shown." 275 Ga. App. at 796. "The Supreme Court of Georgia has repeatedly held that an 'actual conflict of interest' is required to warrant reversal [of a conviction] for failure to disqualify." *Id.* (citing *Pruitt v. State*, 270 Ga. 745, 753 (1999)). "A 'theoretical or speculative conflict' is simply not sufficient." *Id.*

Every Georgia case that has addressed the issue has reached the same conclusion: in order to authorize a trial court to disqualify an elected district attorney, an actual conflict of interest must be proven. No prosecutor in this state has ever been disqualified on the appearance of a conflict.

IV. O.C.G.A. § 15-18-5 confirms multiple Georgia cases holding that an *actual* conflict of interest must be shown to disqualify an elected district attorney.

The cases set forth above that hold that proof of an actual conflict of interest is required to disqualify an elected district attorney are confirmed by the language of O.C.G.A. § 15-18-5. That statute explains the procedure for the appointment of appoint a substitute "[w]hen a district attorney's office is *disqualified from interest or relationship* to engage in a prosecution." O.C.G.A. § 15-18-5 (emphasis added). The statute makes no mention of disqualification due to an

[7] These cases examine the question in a post-conviction context. At the hearing on this matter, the Court inquired as to whether a different standard may apply pre-trial. No Georgia case has ever held that the standard for disqualifying an elected district attorney is different based on whether the question is raised before or after trial.

"appearance" of a conflict of interest based on personal interest or relationship. This Court must "construe the statute according to its terms [and] give words their plain and ordinary meaning." *La Fontaine v. Signature Research, Inc.*, 305 Ga. 107, 108 (2019) (cleaned up). Moreover, this statutory language has remained unchanged since the state's first codification of the common law, which took effect on January 1, 1862: "When a Solicitor is absent, or indisposed, or *disqualified from interest or relationship* to engage in a prosecution, the presiding Judge must appoint a competent attorney of the Circuit to act in his place … ." Orig. Code Ga. 1860, § 358 (emphasis added). This language, as old as Georgia's statutory law itself, should guide the Court.

V. References to "Caesar's wife" in certain cases do not lessen the requirement that an actual conflict of interest must be shown to disqualify an elected district attorney.

At the hearing on this matter, the Court also referred to the occasionally invoked example of "Caesar's wife." The language to which the Court referred was first used in *Nichols v. State*: "The administration of the law, and especially that of the criminal law, should, like Caesar's wife, be above suspicion, and should be free from all temptation, bias, or prejudice, so far as it is possible for our courts to accomplish it." 17 Ga. App. at 606 (cleaned up). The Court noted this language and questioned whether it suggests that something less than an actual conflict of interest could suffice to disqualify a prosecutor. The State has not found any case that has ever made such a holding, and in *State v. Sutherland*, the Georgia Court of Appeals went out of its way to *reinforce* the differing standards between prosecutors and factfinders such as judges or juries. Shortly after quoting the "Caesar's wife" language found in *Nichols* and other cases, the Court explained:

> Mr. Wilson's civil action is entirely separate from appellee's criminal prosecution and, assuming that Mr. Thacker is a partisan, he has not been shown to be such a partisan as would disqualify him from proceeding with the prosecution of appellee. "'While the prosecuting officer should see that no unfair advantage is taken of the accused, yet he is not a judicial officer. Those who are required to exercise judicial functions in the case are the judge and jury. The public prosecutor is necessarily a partisan in the case. *If he were compelled to proceed with the same circumspection*

> *as the judge and jury, there would be an end to the conviction of criminals.*'" *Scott v. State*, [53 Ga. App. 61, 67 (3) (1935)]. The record shows nothing to suggest that, in his handling of the prosecution of appellee, Mr. Thacker was "acting in his personal or individual character, or for his personal or individual interest, but in his character as an officer of the law specially charged by statute to perform this particular duty. He was not employed by any private person to prosecute, and his acts in connection with the instant case were 'not with a view to the interest of any client, but alone to subserve public justice.'" *Pinkney v. State*, 22 Ga. App. 105, 109 (95 SE 539) (1918). The trial court erred in granting appellee's motion to quash the indictments on the ground of Mr. Thacker's disqualification.

Sutherland, 190 Ga. App. at 607-08 (emphasis added). *Sutherland* thus acknowledges the example of "Caesar's wife" cited in *Nichols* and other cases but emphasizes that prosecutors are not held to the same standard as judges. Instead, prosecutors can only be disqualified in cases where they are acting in their own "personal or individual interest" rather than in their "character as an officer of the law specially charged by statute to perform this particular duty." *Sutherland* also invokes, yet again, the example of private prosecution —for example, contingency-fee-based prosecution—as an example of the sort of actual conflict of interest required for disqualification. Indeed, in every case the State has found involving disqualification of a prosecutor based on personal stake or interest, that personal interest has consisted of the prosecutor enjoying some direct pecuniary gain *contingent upon the outcome of the criminal case.* Without such a personal interest, sufficient to wholly displace the prosecutor's role as an officer of the law, disqualification is not authorized.

VI. The Defendants have not met their burden of proving either an actual conflict of interest or forensic misconduct on the part of the District Attorney.

For the reasons set forth above, the Court should not disqualify the Fulton County District Attorney's Office from prosecution of this matter where the evidence before the Court fails to demonstrate an actual conflict of interest or forensic misconduct on the part of the District Attorney by a "high standard of proof." *McGlynn*, 342 Ga. App. at 173. To whatever extent the Defendants allege that the District Attorney received a benefit arising out of this prosecution, they have made no allegation—and have offered no evidence—that the District Attorney has any improper, direct,

and material personal stake or interest *in the outcome of these proceedings* sufficient to authorize disqualification. *See Lee*, 2024 LEXIS 31 at *2; *Williams*, 258 Ga. at 314-315; *Amusement Sales, Inc.*, 316 Ga. App. at 736; *Whitworth*, 275 Ga. App. at 796. The Defendants' suggestions concerning what constitutes an improper personal stake or interest are both unsupported by law, and, as the Court rightly pointed out at hearing in this matter, entirely unworkable. Application of the actual legal standards, reiterated by Georgia courts and by statute as set forth above, leads to only one authorized outcome: the indictment should not be dismissed, and the Fulton County District Attorney's Office should not be disqualified.

Respectfully submitted this 5th day of March 2024,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

Adam Abbate
Georgia Bar No. 516126
Chief Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
adam.abbate@fultoncountyga.gov

/s/ John W. "Will" Wooten
John W. "Will" Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney's Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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CATHLEEN ALSTON LATHAM,	
SCOTT GRAHAM HALL,	
MISTY HAMPTON a/k/a EMILY MISTY HAYES	
Defendants.	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of this STATE'S SUPPLEMENTAL BRIEF FOLLOWING HEARING ON MARCH 1, 2024, CONCERNING STANDARD OF PROOF AND LEGAL STANDARD FOR DISQUALIFICATION OF AN ELECTED DISTRICT ATTORNEY, upon all counsel who have entered appearances as counsel of record in this matter via the Fulton County e-filing system.

This 5th day of March 2024,

FANI T. WILLIS
District Attorney
Atlanta Judicial Circuit

/s/ John W. “Will” Wooten
John W. “Will” Wooten
Georgia Bar No. 410684
Deputy District Attorney
Fulton County District Attorney’s Office
136 Pryor Street SW, 3rd Floor
Atlanta, Georgia 30303
will.wooten@fultoncountyga.gov