IN THE COURT OF APPEALS
STATE OF GEORGIA

DONALD JOHN TRUMP Appellant - Defendant, vs. STATE OF GEORGIA Appellee - Plaintiff.	: : : : : : :	INTERLOCUTORY APPEAL Docket Number: A24A1599

An interlocutory appeal from the Superior Court of Fulton County
Indictment 23-SC-188947
The Honorable Scott F. McAfee, presiding.

REPLY BRIEF FOR APPELLANT PRESIDENT DONALD JOHN TRUMP

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I. The State's standing argument should be deemed abandoned. Alternatively, President Trump was aggrieved by Willis' church speech, a severe violation of the Georgia Rules of Professional Conduct.

The State's ephemeral reference to standing fails for two reasons. First, due to an absence of any citation to authority, this Court's local rules dictate that response argument III (A) be deemed "abandoned."[1] Ga. Ct. App. L. R(s). 25 (b) (2) & (c) (2). Second, President Trump was aggrieved by the trial court's failure to disqualify Willis and suffered adverse personal impact from Willis' church speech.

A party has standing[2] when it has suffered an adverse impact to its own rights. *Reid v. Samsung SDI, Co., Ltd.*, 366 Ga. App. 570, 575 (2023). Specifically, "[t]o have standing to move for an opposing lawyer's disqualification, a lawyer must substantiate a violation of the rules [of professional conduct] which is sufficiently severe to call in question the fair and efficient administration of justice." *Cohen v. Rogers*, 338 Ga. App. 156, 166 (2016).

[1] This Court has applied its abandonment rules to the appellee. *See e.g.*, *Zelda Enterprises, LLLP v. Guarino*, 343 Ga. App. 250, 251 n.3 (2017). Local Rule 25 (b) (2) provides: "Part Two [of appellee's brief] shall contain appellee's argument and the citation of authorities as to each enumeration of error." Local Rule Rule 25 (c) (2) provides: "Any enumeration of error that is not supported in the brief by citation of authority or argument may be deemed abandoned." With no citation to authority, the response in Section III (A) fails to comply. State's Br. at 61-62.

[2] A plaintiff with standing is necessary to invoke a court's judicial power to resolve a dispute, and the power of Georgia courts — as with any power possessed by a branch of state government — is conferred by our state Constitution. *Sons of Confederate Veterans v. Henry Cnty Bd. of Comms.*, 315 Ga. 39, 45 (2) (2022).

Applying the standard from *Cohen*, President Trump has unquestionably "substantiated" Willis' violation of the Georgia Rules of Professional Conduct (GRPC) – specifically, Rule 3.8(g). The Opening Brief explained why Willis' speech did not serve a legitimate law enforcement purpose, and why the language Willis employed "ha[d] a substantial likelihood of heightening public condemnation of the accused." Trump at 34-36. The State's response does not dispute the trial court's finding that the church speech was "legally improper." State's Br. at 68. Willis' intentional injection of false allegations of racism into this high-profile case is undoubtedly severe enough "to call in question the fair and efficient administration of justice." *Cohen*, 338 Ga. App. at 166.

Willis' improper allegations of racism are "especially pernicious in the administration of justice." *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 223 (2017). Courts recognize that "few forms of prejudice are so virulent," *Miller v. North Carolina*, 583 F.2d 701, 707 (4th Cir. 1978), so much so that state and federal courts alike observe structural implications in a prosecutor's appeal to racial bias. *Weddington v. State*, 545 A2d 607, 614-15 (Del. 1988) (right to a fair trial free from improper racial implications is so basic that an infringement can never be treated as harmless error); *State v. Kirk*, 339 P23d 1213, 1218-19 (Idaho 2014) (vacating conviction and noting relaxed standards for prejudicial error where "prosecution invoked racial consideration"); *United States v. Cabrera*, 222 F.3d 590, 597 (9th Cir.

2000) (prosecutors' argument that defense counsel engaged in "racist speculation" lacked merit and was "serious prosecutorial misconduct" requiring reversal irrespective of harm). Willis wrongly labeled defendants and their counsel as racists: that's as "severe" as it gets.

Moreover, Willis' speech remark that her prosecution of the defendants was "God's work" essentially inverted the presumption of innocence and thus shifted the burden of proof. Burden-shifting has resulted in "plain error" reversal because it "seriously affect[s] the fairness and reputation of judicial proceedings." *Cheddersingh v. State*, 290 Ga. 680, 686 (2012) (plain error where verdict form required jury to find defendant "not guilty beyond a reasonable doubt"); *cf. Debelbot v. State*, 305 Ga. 534, 544 (2019) (Bethel, J., concurring) (describing prosecutor's erroneous summation on the burden of proof as "repugnant to our system of criminal justice."). Squarely implicated by Willis' extrajudicial comments, the admonitions from these cases show that Willis' violation of GRPC 3.8(g) is "serious enough to call into question the fair administration of justice." *Cohen*, 338 Ga. App. at 166. Standing is shown.

Pretermitting fairness, President Trump was injured by Willis' "legally improper" speech because national and local media outlets broadcast and reported Willis' claim as an attack against the *defense*. Willis *falsely* declared that allegations against her stemmed from racism to hide the fact that they were true. Willis

obviously intended that every potential Fulton County juror who heard or read Willis' racist speech should label the defendants as racists.

The State's "interpretation" of the speech (*i.e.*, that Willis was vague, or that it was debatable to whom she referred) is disingenuous at best. Willis' purpose was plain: to obscure her misconduct by falsely accusing the *defense* of racism. Willis' strategic use of pronouns was neither innocuous nor vague—Willis repeatedly used "them," "they," and linked these terms to her antagonist: "white male republicans." [No. A24A1596 (Shafer) at 1677]. The only "white male republicans" included in Willis' perception of "[God's] work" (her prosecution of this case) were President Trump and the other defendants. Contrary to the State's attempt to elevate form over substance, "so many others" (plural) could not refer only to Roman (singular).

Willis used these terms as insidious, calculated references to President Trump and the other defendants. Willis knew what she was doing and got precisely the reaction she wanted:[3] the overwhelming media coverage of her false and pernicious

[3] Here is how the Washington Post described her appearance: "Sunday was the first time Willis had been seen in public since Roman's motion. Her appearance at Big Bethel AME as part of a special Sunday service honoring King ahead of the holiday that honors him Monday had been previously scheduled, and though her office suggested she intended to honor the invitation as the church's keynote speaker, it was not clear Willis would talk about the controversy. News of her impending appearance was the leading news story on local television Sunday, and as Willis entered the church sanctuary to the soaring soundtrack of a choir and an archival audio of a sermon from King urging followers to keep strong in their faith, her every move was trailed by a bank of local news cameras set up in the church balcony". *See Fani Willis, Trump Georgia case prosecutor, ends silence on misconduct accusations*, https://www.washingtonpost.com/national-security/2024/01/14/fani-willis-georgia-trump/ (last visited Aug. 22, 2024).

subterfuge would slander the defendants before the entire nation. Willis calculated this result despite her duty to protect the presumption of innocence, due process, and a fair trial. *In re: J.S.*, 140 Vt. 230, 232 (1981) ("It is unconscionable for a prosecutor . . . to undermine the rights specifically granted in the Constitution [s]he has taken an oath to uphold.")

This Court has held that individuals criticized in grand jury reports suffer injury to personal rights, and that applies equally to individuals who are not named directly but are instead part of a criticized group. *In re Presentments of Lowndes County Grand Jury*, 166 Ga. App. 258 (1983) (unnamed individuals injured and entitled to expungement of grand jury report criticizing police department); *Thompson v. Macon-Bibb County Hosp. Auth.*, 246 Ga. 777 (1980) (individual rights implicated by report that criticized but did not indict); *In re Hensley*, 184 Ga. App. 625 (1987) (rights of numerous individuals identified in report affected).

Therefore, under either standing theory (severe violation of the GRPC affecting fairness or injury to personal rights), President Trump has standing.[4]

[4] Notably, the State's Amicus Curiae does not join the State's standing argument, nor advances a standing argument of its own, instead merely citing (in a footnote) the trial court's footnote alluding to the standing question. Amicus Br. at 21, n. 12.

II. Forensic Misconduct: the State's reliance on the *Billings* dissent is at odds with precedent, deviates from *Williams*, and fails to support its own prejudice argument.

Willis' comments, speech, and courtroom behavior were flagrant violations of her ethical duties, intentionally wielded in direct contravention of GRPC 3.8(g) against presumptively innocent defendants, for her personal and political gain. To side-step damaging facts, the State seeks to narrow the law; it incorrectly restricts *Williams*, as the trial court did, to reach only comments on the guilt of the accused.[5]

According to the State, so long as it refrains from saying "the defendant is guilty," a prosecutor may do and say anything, no matter how defamatory, unethical, or widely reported it is, because time is a sufficient cure for harm. The State contends this Court is without recourse to punish the offending prosecutor and must disregard the deliberate ethical violations, false allegations of racism, and claims to "do[ing] God's work," because the case will not be tried soon. Nonsense.

The State's response errs in three ways: (1) *Williams* and prior precedent do not require prejudice; (2) even if prejudice were required, the State ignores that prejudice results from a biased prosecutor; and (3) the *Billings* dissent has no

[5] The State's argument omits that forensic misconduct decisions in other states have included appeals to racial or religious bias. *See State v. Farokhrany*, 259 Ore. App. 132 (2013) (prosecutor's discussion of Sharia law constituted forensic misconduct because it involved issues of "racial, ethnic, or religious bias").

persuasive value, nor does it help the State: Justice Billings in fact endorsed a pretrial prejudice standard that is easily met here.

A. *Williams* and prior precedent do not require prejudice to disqualify Willis for her severe ethical rule violations.

The State's insistence that disqualification is limited to comments regarding the guilt of the accused or misconduct that prejudices the defendant's trial is foreclosed by numerous cases. *State v. Registe*, 287 Ga. 542 (2010) (despite defendant's Sixth Amendment right to choice of counsel, defense attorney disqualified for ethical rule violation); *Clos v. Pugia*, 204 Ga. App. 843, 844–845(1) (1992) (rather than mechanically applying disqualification rules, trial court must weigh the degree to which public trust may be eroded and should examine facts peculiar to each case to balance the need to ensure attorneys ethical conduct and other social interests); *Ford Motor Co. v. Young*, 322 Ga. App. 348, 356-57 (3) (2013) (pro hac vice admissions revoked based on ethical rule violations regarding candor to the court and fairness to opposing counsel and finding the attorney's admissions "may be detrimental to the prompt, fair and efficient administration of justice"). Significantly, in *Ford*, this Court wrote:

> [W]e have previously held that trial courts may disqualify attorneys for violations of the disciplinary rules. For example, in *Piedmont Hosp. v. Reddick*, 267 Ga. App. 68 (2004), we held that the trial court erred in ruling that, because sanctions for violations of disciplinary rules appear to be the exclusive province of the Supreme Court of Georgia, not of the trial court, it lacked authority to determine whether plaintiff's counsel violated Rule 4.2 of the Georgia Rules of Professional Conduct

> and therefore should be disqualified. We noted that the determination of whether an attorney should be disqualified from representing a client in a judicial proceeding rests in the sound discretion of the trial judge. (internal citations omitted).

Neither these cases nor *Williams* require prejudice. The *Williams* Court analyzed the ethical rule and considered the facts and circumstances surrounding the comments. 258 Ga. at 313-14. *Williams* then explained that improper prosecutorial statements can create a conflict of interest and/or constitute forensic misconduct, holding that the line between the two is not clear and "a given ground for disqualification might be classified as either." *Id.* at 314 n.4. First, *Williams* clarified that a conflict is created when a prosecutor's improper comments show a personal interest or stake in the conviction. 258 Ga. 305, 314 (citing *Hohman* (personal bias created conflict) and *Fugitt* (prosecutorial misconduct motivated by personal interest in obtaining mistrial)).[6] Second, improper prosecutorial comments may constitute disqualifying forensic misconduct, and courts should look to the motive and intent behind the statements in determining disqualification.

Williams did ***not*** hold that a trial court is prohibited from nor lacks discretion to disqualify prosecutors for ethical violations or improper comments demonstrating

[6] The trial court truncated the conflict analysis by restricting it to a financial interest. Consistent with *Williams*, other states hold that misconduct demonstrating bias, improper influence, or partiality creates a disqualifying conflict due to a personal interest or stake. *State v. Nicholson*, 7 S.W.2d 375, 378 (Mo.Ct.App. 1928)(any influence that impacts fairness); *see State v. Snyder*, 256 La. 601 (La. 1970)(bias might impact impartiality); *State v. Gonzales*, 138 N.M. 271, 273 (2005)(bias might influence professional judgment).

partiality, bias, or personal interest. Instead, *Williams* pointed to each factor and held the improper comments in *that case* were not so "egregious" that disqualification was *required*. Thus, the trial court erred by restricting *Williams* to comments on guilt and by restricting its conflict analysis to the financial benefit Willis received. Ethical violations, bias, and personal interest are factors warranting disqualification under either a forensic misconduct or conflict analysis.

The State accepts the finding that Willis' speech was "not inadvertent." As for the argument that Willis' speech, viewed together with her prior (and subsequent) racial invocations, evinced a calculated plan to prejudice appellants before potential jurors, the State argues that "Find Me the Votes" and Willis' slew of other nationally publicized comments have "no connection." State's Br. at 85.

No connection? The connection is Willis' repeated public display of racial animus towards appellants. "Welded together" by defense attorneys, says the State, to overstate the appeal. *Id*. Overstated? Courts across this Nation go to tremendous lengths to keep racial considerations *out* of the criminal justice system. Yet, it was Willis who "welded together" this theme by consistently and publicly injecting the same improper topic: racism.

As the State's brief essentially conceded *Williams*' first two factors (improper extrajudicial statements and calculated conduct, not inadvertence)—the only issue remaining is whether Willis' intentional injection of racism into this historic case, on

national television, "of such egregious nature as to require [her] disqualification" *Id.* at 314. Of course it was. The elected District Attorney of Fulton County,[7] with news outlets trailing her every move, intentionally injecting false racist claims in a Black church, before potential Black jurors who were celebrating MLK, Jr. (blocks from where he lived his entire life – in Fulton County) is quintessentially "egregious." Willis calculated and deliberate plan to prejudice the accused through unethical, racially charged media comments requires nothing less than disqualification.

Given the "structural" concerns noted by the citations in Part I, *supra*, Willis' intentional injection of racist allegations against the defendants was among the most severe violations of GRPC 3.8(g) conceivable.[8] Prosecutors do not have "carte blanche to engage in improper commentary," and when a lawyer's conduct is "inimical to the integrity of the judicial system," courts must correct the wrong and "send a message that such conduct will not be tolerated." *See e.g., State v. White*, 285 A.3d 262 (Me. 2022) (citing *Berger*, impartiality, and the higher standards applicable to prosecutors, concrete action beyond verbal rebuke was necessary because the "prosecutor should have taken great pains" to ensure the focus remained

[7] Most respectfully, it is important for the record to reflect that the DA who is falsely claiming President Trump and the other appealing defendants are racists, is also Black.

[8] Tellingly, the State does not even attempt to respond to President Trump's argument that Willis' "legally improper" speech violated GRPC 3.8(g).

on the relevant issues). Injection of race is "antithetical to the purposes of the Fourteenth Amendment . . . whether in a procedure underlying, the atmosphere surrounding, or the actual conduct of, a trial." *United States ex. Rel. Haynes v. McKendrick*, 481 F.2d 152, 159, 161 (2d Cir. 1973).

Significantly, GRPC 3.8(g) does not sound in actual or even presumed prejudice. It states a prosecutor must "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused." The purpose of the rule is to *safeguard* the integrity of the justice system and *guard against* prejudice from a prosecutor's out-of-court statements. In today's political and social climate, a widely disseminated extrajudicial statement by the DA publicly and falsely labeling President Trump and the other defendants as racists in a historic Atlanta Black church celebrating the birthday of MLK, Jr. was unmistakenly designed to heighten public condemnation, in direct contravention of 3.8(g). Under these circumstances, the mere verbal rebuke of Willis by the trial judge was utterly insufficient—it demanded disqualification.

B. If prejudice were required, the State ignores that pretrial prejudice may be presumed from the presence and participation of a biased prosecutor.

"[T]he consequences of failing . . . to remedy the *prejudice now* would jeopardize the proceedings at a later time when the prospects of delay would be multiplied and the consequences probably more drastic with respect to the rights of

the defendant or the people of the State of [Georgia] or both." *In re: J.S.*, 140 Vt. 230, 232 (1981). In *In re: J.S.*, also an interlocutory appeal, the majority presumed prejudice from a prosecutor's improper extrajudicial statement. This improper statement showed the prosecutor's inability to act "impartially and with the objective of doing justice without regard to his personal feelings." *Id.* at 231. Like in *White*, the *J.S.* Court specifically sent to Vermont prosecutors a "directive as to acceptable conduct." *Id.* In the face of this compelling analogy, the State pivots focus to a dissent.

But even if this Court accepts the State's incorrect argument that prejudice is required to disqualify, the State (unlike the dissent it relies upon) mistakenly ignores the *Williams* Court's clear acceptance of the legal proposition that the burden may be met by an accused at the pretrial stage. The State does not engage the compelling reasons given by the *In re: J.S.* majority to presume prejudice from the participation of a biased prosecutor.

Those reasons are fully applicable here. *J.S.* relied on *Hohman*[11] and *Berger* to find pretrial prejudice from the mere presence and participation of a biased prosecutor. *Id.* No more was required.

[11] Notably, *Hohman* found that disqualification was required due to the "personal bias" and "attitude" shown via the prosecutor's improper comments, and it pointed to the manipulation of prosecutorial power for personal or political profit, the obligation to govern impartially, and the "serious questions" regarding the ethical propriety of the prosecutor's conduct.

Nevertheless, the State dubiously protests that *Williams* must have imported into its forensic misconduct definition the views expressed in Justice Billings' dissent. Not so. There is no evidence in *Williams* division 2 that the Georgia Supreme Court adopted *anything* beyond Billings' citation to the Columbia note and the note's broad definition. Rather than restrict disqualification to misconduct with tangible prejudice at trial, *Williams* omitted the dissent's language and reasoning.

The *Williams* Court had every opportunity to adopt Billings dissent, or select views expressed therein, but it did not.[13] The State echoes Justice Billings' "emphatic" argument that misconduct can disqualify only when it deprives a fair trial or influences the trier of fact, State's Br. at 72-73, but *Williams* never used the terms "fair trial," "fairness at trial," or "prejudice"—much less influence on the fact finder. 258 Ga. at 313-14. Likewise, *Williams* did not incorporate the "cumulative effect upon the jury" language from *United States v. Pierce*, 86 F.2d 949 (6th Cir. 1936),[14] instead retaining *only* the "calculated plan" concept into the pretrial stage disqualification analysis.

[13] Viewing these distinctions, the *Williams* Court's *'* cite to Billings' dissent is nothing more than a reference to the general acceptance of two separate grounds to disqualify a prosecuting attorney.

[14] The State's quote from *Pierce* supports appellants: "That it was intended to prejudice the jury is sufficient ground for a conclusion that it in fact did so." State's Br. at 75-76. Here, the trial court's finding that Willis' speech was "not inadvertent" leaves little doubt as to her intent to prejudice.

C. The *Billings* dissent has no persuasive value, nor does it help the State: Justice Billings endorsed a pretrial prejudice standard that President Trump has met.

Sound reasons explain why *Williams* did *not* limit disqualification to only the trial circumstances described by the State. First, Justice Billings used disjunctive phrases permitting disqualification where prosecutorial misconduct creates only *the potential* for prejudice. *In re: J.S.*, 140 Vt. at 235-36 (Billings, J., dissenting) ("To disqualify a prosecutor, prejudice *or the potential for prejudice* must be demonstrated.") (emphasis added). Second, and most importantly, Justice Billings joined Justice Hill's dissent, which advocated for a pretrial prejudice standard to "rigorously *protect* defendants" and "would *not* require a showing of actual, or likely, harm." *Id.* at 239-40 (Hill, J., dissenting) (emphasis added).

In a death knell here for the State's argument, Justice Hill wrote:

> [B]efore a trial, the court should be sensitive to the potential for prejudice to the defendant. I believe that a trial court should disqualify the state's attorney ***if his continued presence in the case would cause a reasonable potential for prejudice to the defendant***. A reasonable potential for prejudice standard would rigorously protect defendants. ***It would not require a showing of actual, or likely, harm***. Rather, ***the trial court would focus on the possibility of an unfair trial***. Yet, this rule would place the burden on defendants of demonstrating some real, not imagined, ***chance of prejudice.*** (emphasis added).

Here, even Hill's "reasonable potential for prejudice" pretrial standard is easily met. With nationwide slanderous media coverage on every available

network,[15] appellants have shown that there is not only a "real chance," but a substantial probability, for unfair treatment during the trial process.

Willis placed herself within two disqualification categories proposed by both dissenters: a biased prosecutor and a prosecutor with personal (financial and political) interest in the proceedings. *Id.* at 239-40 (Hill, J., dissenting). Justice Billings notes that (1) the key aspect of *Hohman* is "the awesome power to prosecute ought never to be manipulated for personal or political profit," and (2) a disqualifying conflict exists when a prosecutor "tie[s] h[er] political future to convicting [the defendants]." *Id.*

Unlike the distinction Justice Billings raised when analyzing political interest (*i.e.*, no campaign at the time), Willis was engaged in a re-election campaign when she made her church speech, participated in "Find Me the Votes," testified unprofessionally in court, and has repeatedly commented to the media. Like the Hohman prosecutor's comment to voters that he would convict a defendant, or commenting on evidence, Willis falsely told churchgoers (potential jurors and voters) that defendants were racists, she was doing God's work while acting ethically, and the allegations against her were untrue. Willis thereby tied her personal

[15] The Washington Post noted that a bank of local news cameras trailed Willis' every move and comment.

and political interests to the outcome of *these proceedings* and publicly commented on the merits of them.

The trial court found that the effect of Willis' January 14, 2024 MLK church speech was to cast racial aspersions, that an "odor of mendacity" lingered over Willis' and Wade's disqualification testimony,[16] and that Willis exhibited a "tremendous lapse in judgment" and acted "unprofessionally" in court. Willis deliberately chose to "play the race" card,[17] in a calculated effort to bring public condemnation against the accused and deflect public attention away from herself. Even to this day, Willis shows no remorse: "They don't want me to talk about race, but I'm going to talk about it anyway."

"[T]here 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." *Williams*, 258 Ga. at 314, n.4. Whether this Court focuses on Willis' calculated "play[ing] the race" card to engender public condemnation, her unprofessionalism, or the "odor of mendacity," the outcome must be the same: disqualification. Willis flagrantly violated the Georgia Rules of Professional

[16] The trial court stopped short of making a finding regarding Willis' testimony or her GRPC violations because it incorrectly determined it was unable to disqualify for such conduct.

[17] "O Lord, they going to be mad when I call them out on this nonsense. First thing they said, "oh she going to play the race card now. But no, God, isn't it them playing the race card when they only question one?"

Conduct, and her forensic misconduct was calculated and egregious. Willis must therefore be disqualified.

CONCLUSION

For the foregoing reasons, President Trump respectfully requests this Court to **VACATE** in part the order denying his motion to disqualify the prosecutor and **REMAND** his case to the trial court with instructions that indictment 23-SC-188947 be **DISMISSED**, or alternatively, that Willis and her office be **DISQUALIFIED** from further participation in these proceedings.

Respectfully submitted this 26th day of August, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing REPLY BRIEF upon Mr. Alex Bernick, by filing the foregoing via the Court of Appeals E-Fast service, and by depositing the same in the U.S. Mail with adequate postage affixed to insure delivery, addressed to Fulton County District Attorney, 136 Pryor Street, third floor, Atlanta, Georgia 30303.

Pursuant to Court of Appeals Rule 24(f), undersigneds hereby certify that this brief does not exceed the criminal case word limit imposed by Rule 24(a).

This 26th day of August, 2024.

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