IN THE SUPREME COURT OF THE STATE OF GEORGIA

STATE OF GEORGIA, Petitioner,	)	**CASE NUMBER** _____
versus	)	**On petition for writ of certiorari to the Court of Appeals of Georgia Case Nos. A24A1595, A24A1596, A24A1597, A24A1598, A24A1599, A24A1600, A24A1601, A24A1602, A24A1603**
MICHAEL A. ROMAN, DAVID J. SHAFER, ROBERT DAVID CHEELEY, MARK RANDALL MEADOWS, DONALD JOHN TRUMP, CATHLEEN LATHAM, RUDOLPH WILLIAM LOUIS GIULIANI, JEFFREY BOSSERT CLARK, HARRISON FLOYD, Respondents.	)	

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

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COMES NOW the State of Georgia, Petitioner, and hereby applies for a writ of certiorari to review the opinion which the Court of Appeals of the State of Georgia entered in the above-cited cases, a copy of which opinion is attached to this petition and marked "State's Exhibit A." *See Roman v. State*, 2024 Ga. App. LEXIS 494 (Case Nos. A24A1595-1603, Dec. 19, 2024).

QUESTIONS PRESENTED

1. Did the Court of Appeals err in disqualifying a district attorney, divesting her of her constitutional authority to investigate and prosecute crimes, based solely upon an appearance of impropriety and absent a finding of an actual conflict of interest or forensic misconduct?

2. Assuming *arguendo* that an actual conflict of interest or actual impropriety is not required to authorize disqualification, did the Court of Appeals err in substituting the trial court's discretion with its own and becoming the first Georgia court to reverse a trial court's order declining to disqualify a district attorney based solely upon an appearance of impropriety?

INTRODUCTION

The majority's opinion below overreached the Court of Appeals' authority in all directions and warrants review on certiorari for two reasons. First, without precedential authority or any explanation of its reasoning, the majority opinion created a new standard for disqualification unique to prosecutors, thus granting itself the authority of this Court to announce new standards and principles of law. *See* S. Ct. R. 40(1)(a), (c). Second, the majority opinion disregarded decades of precedent in both this Court and the Court of Appeals in holding, "with the citation of no supporting authority and apparently for the first time in the history of our state, that the mere existence of an *appearance* of impropriety, in and of itself, is sufficient to reverse the trial court's refusal to disqualify the district attorney and her entire office." *Id.*, 2024 Ga. App. LEXIS 494 at *23-24 (Land, J., dissenting). In addition to disregarding binding precedent and flouting *stare decisis*, the majority's opinion—which does not dispute or alter any of the trial court's factual findings—appropriated fundamental trial court authority by brushing aside

the abuse of discretion standard. *See* S. Ct. R. 40(1)(a), (c). Either of these errors, standing alone, warrants review in a case of "great concern, gravity, [and] importance to the public" such as this one. Ga. Sup. Ct. R. 40(1). Taken together, they demonstrate that a writ of certiorari is essential, lest the majority's opinion be allowed to linger and infect the body of Georgia caselaw.

The majority opinion did not dispute the trial court's findings that no actual conflict of interest exists or that Respondents have not been prejudiced "in any way." The State thus submits that the majority below erred in reversing the trial court's order declining to disqualify the District Attorney, a constitutional officer, based solely upon appearances, as well as in rejecting the trial court's remedy without identifying an abuse of discretion. At the very least, if the standards for disqualification of public prosecutors or for review of a trial court's ruling on disqualification are to change, this Court, and not the Court of Appeals, should be the authority to announce those changes. The State respectfully requests that this Honorable Court grant certiorari in this case and correct the errors found in the majority opinion.

ARGUMENT & CITATION TO AUTHORITY IN SUPPORT OF REVIEW

This prosecution underlying this matter results from an indictment alleging that Respondents and others participated in a conspiracy to unlawfully overturn the results of Georgia's 2020 presidential election. The

indictment charges that Respondents made false statements, forged documents, stole voter information, committed perjury, and employed various other methods in their efforts to negate the lawful votes of millions of Georgians. Those criminal charges resulted from nearly three years of investigation, which included a separate Special Purpose Grand Jury that gathered evidence, heard testimony from dozens of witnesses, and ultimately recommended charges against nearly forty individuals. Each step of this process has been conducted under intense media scrutiny. Both the subject matter of the underlying prosecution and the resultant public interest make this case one of "great concern, gravity, or importance to the public" as understood in Rule 40(1) of this Court's Rules.

However, even if that were not true, the Court of Appeals' majority opinion would still imbue this case with the gravity necessary for the grant of certiorari. The opinion managed to overreach both upward and downward, invading the provinces of the trial court and this Court simultaneously. No Georgia court has ever identified or applied a standard for disqualification unique to prosecutors. No Georgia court has ever disqualified a district attorney for the mere appearance of impropriety without the existence of an actual conflict of interest. And no Georgia court has ever reversed a trial court's order declining to disqualify a prosecutor based solely on an appearance of impropriety.

The majority opinion does all three of these things. The opinion ignored precedent and created a new, mechanical standard for disqualification uniquely applicable to public prosecutors, usurping authority properly reserved to this Court while ensuring confusion and uncertainty to follow. It also upended the abuse of discretion standard and afforded no respect to the trial court's handling of the present case, substituting its own discretion and applying its preferred, drastic remedy without identifying any factual error by the trial court. The opinion achieved all of this while failing to actually explain its reasoning or provide any guidance for its application, and review is necessary to address and correct these errors.

A. Disqualification and abuse of discretion generally

Matters of disqualification, which by their nature are fact- and case-specific, are largely reserved to the discretion of the trial judge. Georgia's appellate courts review a trial court's ruling on a motion to disqualify a prosecutor for an abuse of discretion. *Amusement Sales, Inc. v. State*, 316 Ga. App. 727, 735 (2012) (citing *Head v. State*, 253 Ga. App. 757, 758 (2002)). "Such an exercise of discretion is based on the trial court's findings of fact which we must sustain if there is any evidence to support them." *Neuman v. State*, 311 Ga. 83, 88 (2021) (quoting *Ventura v. State*, 346 Ga. App. 309, 310 (2018)). Disqualifications are not favored. Reviewing courts "approach motions to disqualify with caution due to the consequences that could result if the motion

is granted," including cost, inevitable delays, and the loss of "specialized knowledge of the disqualified attorney," as well as the potential for such motions to serve as a dilatory tactic. *Ga. Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207, 213 (2021) (citing *Hodge v. URFA-Sexton*, 295 Ga. 136, 138-39 (2014)). "Accordingly, we view disqualification as an extraordinary remedy that should be granted sparingly." *Id.* Trial courts thus have broad and flexible authority to address circumstances as needed: a trial court "has a wide discretion in framing its sanctions to be just and fair to all parties involved." *United States v. Miller*, 624 F.2d 1198, 1201 (3rd Cir. 1980).

The central Georgia case concerning the disqualification of prosecutors is *Williams v. State*, 258 Ga. 305 (1988), which identified just two recognized grounds for the disqualification of prosecutors: actual conflicts of interest and forensic misconduct. *Id.* at 314. *Williams* thus contains "no discussion of disqualification based on mere appearances." *Roman*, 2024 Ga. App. LEXIS 494 at *27 (Land, J., dissenting). The "appearance of impropriety" standard is a relic of the former Code of Professional Responsibility. As the trial court observed in its order, the Code has since been replaced by the Rules of Professional Conduct, which makes no reference to the standard at all, but occasionally, appellate cases still make use of the phrase. (R. at 1717-18 n.3). [1]

[1] Citations to the record are designated "(R. at [page number])," taking the page numbers from the record in the docket of Appellant Michael Roman, case no. A24A1595.

However, even before the Rules eliminated the appearance of impropriety standard due to its inherent vagueness and variability, this Court created a presumption against its application to disqualify an attorney *without* an actual conflict of interest in *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (1981):

> 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.

This Court went on to note that the cases cited by the parties' briefs all involved disqualification for actual conflicts of interest due to divided loyalties or the violation of client confidences. *Id.* This understanding has persisted to the present day. "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. A 'theoretical or speculative conflict' is simply not sufficient." *Whitworth v. State*, 275 Ga. App. 790, 796 (2005) (physical precedent)[2] (citing *Pruitt v. State*, 270 Ga. 745, 753 (2000)); s*ee also Lyons v. State*, 271 Ga. 639, 640 (1999); *Cohen v. Rogers*, 338 Ga. App.156, 164 ("In

[2] The dissenting opinion notes that the three judges in *Whitworth* was actually unanimous that disqualification was not authorized because "there had been no adequate showing that the special prosecutor had an actual conflict of interest." *Roman*, 2024 Ga. App. LEXIS 494 at *28 n.2 (Land, J., dissenting).

contrast to the prima facie finding necessary to compel discovery in the face of an attorney-client privilege, there must be proof of an actual impropriety to disqualify an attorney from representing a client.").[3] The State submits, as it did below, that application of the appearance of impropriety standard alone to authorize disqualification is not accepted practice in Georgia, and the trial court would not have abused its discretion in declining to apply the standard at all.

While the trial court did ultimately employ the appearance of impropriety standard (R. at 1710), it did not abuse its discretion in declining to apply it to disqualify the District Attorney without an actual conflict of interest. The trial court looked to *Blumenfeld*, which described the law of disqualification as a "continuum," with actual conflicts at one end, requiring disqualification regardless of prejudice, and "mere status" appearances of impropriety on the other, which never authorize disqualification. "Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney" which generally does not suffice to authorize disqualification. 247 Ga. at 409-10.

[3] *See also Ga. Trails & Rentals, Inc.,* 359 Ga. App. 207 (2021); *Befekadu v. Addis Int'l Money Transfer, LLC*, 339 Ga. App. 806 (2016); *Stinson v. State*, 210 Ga. App. 570, 436 S.E.2d 765 (1993); *Jones v. Jones*, 258 Ga. 353 (1988).

While the trial court referred to the continued "application" of the appearance of impropriety standard, the State submits, as it did below, that Georgia courts have not actually *applied* the appearance of impropriety standard rather than merely *mentioning* it in the context of review for actual conflicts of interest.[4] This is particularly true in cases decided since Georgia adopted the Rules of Professional Conduct. Cases mentioning the standard (including the cases cited by the trial court in its order) involve either situations of "divided loyalty" where a prosecutor or defense attorney used to have a professional association with either the State or a defendant[5]; "relationship" scenarios where a member of the prosecution team had a pre-existing personal relationship (friendly, familial, etc.) with either the victim or

[4] *See*, *e.g.*, *Greater Ga. Amusements v. State*, 317 Ga. App. 118 (2012) (physical precedent) (mentioning appearance of impropriety but deciding case on grounds of public policy); *Amusement Sales, Inc. v. State*, 316 Ga. App. 727 (2012) (calling *Greater Ga. Amusements* "persuasive" but deciding on actual conflict of interest grounds, as prosecutors paid by contingency fee had acquired stake in the outcome of the case); *Battle v. State*, 301 Ga. 694, 698 (2017) (mentioning the appearance of impropriety but refusing to disqualify where no actual conflict of interest existed due to lack of close personal relationship to victim or "personal interest in obtaining the sought convictions"); *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987) (prosecutors in contempt action also represented plaintiff in underlying civil action); *Nichols v. State*, 17 Ga. App. 593, 606 (1916) (prosecutor in perjury case represented opposing party in underlying civil action). Indeed, in *Young*, the Supreme Court observed that it was the presence of an "interested prosecutor" that gave rise to the "appearance of impropriety" in the first place.

[5] *See*, *e.g.*, *Brown v. State*, 256, Ga. 603, 607 (2002) (citing to former Code of Professional Responsibility); *Reeves v. State*, 231 Ga. App. 22, 24 (1998) (applying same where defense attorney had accepted employment with prosecutor's office before trial even began and did not inform defendant); *Billings v. State*, 212 Ga. App 125, 129 (1994) (former defense attorney had become prosecutor).

a witness in the case[6]; or they are simply cases of actual conflicts of interest[7]. None of these cases applied the appearance of impropriety standard in a different manner to a prosecutor, nor did any apply the standard to disqualify a prosecutor without the existence of an actual conflict of interest.

One legacy of *Blumenfeld* is unquestionable, however. Regarding appellate review of trial court orders denying motions to disqualify, it is *never* an abuse of discretion for a trial court to decline to disqualify an attorney based solely on appearances. As the dissent noted in this case (in an assertion utterly unchallenged and unaddressed by the majority opinion), "[f]or at least the last 43 years, our appellate courts have held that an appearance of impropriety, without an actual conflict of interest or actual impropriety, provides no basis for the reversal of a trial court's denial of a motion to disqualify. This is true in civil cases and criminal cases, and it applies to prosecutors." *Roman*, 2024 Ga. App. LEXIS 494 at *24 (Land, J., dissenting). "[O]ur Supreme Court has held that absent an actual conflict of interest or actual impropriety, the trial court does not abuse its discretion in denying a motion to disqualify counsel." *Ga.*

[6] *See*, *e.g.*, *Battle*, 301 Ga. at 698 (mentioning appearance of impropriety but basing analysis on lack of personal interest in conviction for prosecutor); *Head*, 253 Ga. App. at 758 (reviewing for personal relationship to victim).

[7] *See*, *e.g.*, *Greater Ga. Amusements* and *Amusement Sales, Inc.*, *supra* (prosecutors paid by contingency fee were personally interested in outcome and violated public policy); *Davenport v. State*, 157 Ga. 704, 705 (1981) (due process analysis of clear conflict of interest scenario where prosecutor represented victim in divorce case and sat at counsel table during prosecution of victim's wife for shooting him).

Trails & Rentals, Inc., 359 Ga. App. at 214. Other Court of Appeals decisions have consistently reiterated this principle. *See Roman*, 2024 Ga. App. LEXIS at *24-30 (Land, J., dissenting). Just last year, in a case involving a motion to dismiss a prosecutor, this Court summarized the principle efficiently: "the trial court did not abuse its discretion…by failing to disqualify the Assistant District Attorney *absent an actual conflict of interest*." *Lee v. State*, 318 Ga. 412, 412-13 (2024) (emphasis supplied).

B. <u>The trial court's order</u>

After bringing a motion accusing the District Attorney of having acquired a personal, financial stake in their case due to a personal relationship with Special Assistant District Attorney Nathan Wade, Respondents "were provided an opportunity to subpoena and introduce whatever relevant and material evidence they could muster" and allowed to present it at a hearing that featured "two and a half days of testimony." (R. at 1709). The trial court found that an appearance of impropriety existed and would persist "were the case allowed to proceed unchanged." (R. at 1712).

The trial court also found that Appellants had failed to demonstrate that an actual conflict of interest existed in the case (R. at 1709); failed to show that the District Attorney had acquired any material financial benefit from her relationship with Wade (R. at 1714-15); failed to show that she had a personal stake in any Respondent's conviction (R. at 1715); failed to show "in any way"

that she had administered the case "in conformance with the theory that she arranged a financial scheme to enrich herself" (R. at 1716); and failed to show that the relationship in question had affected any Respondent's due process rights or prejudiced anyone in any way (R. at 1724). In short, Respondents failed to "show that her relationship with Wade involved any actual impropriety on her part, and failed to show that their relationship, including their financial arrangements, had any actual impact on the case." *Roman*, 2024 Ga. App. LEXIS at *23 (Land, J., dissenting).

Based upon these findings, the trial court declined to disqualify the District Attorney based solely upon an appearance of impropriety. "[D]isqualification of a constitutional officer [is not] necessary when a less drastic and sufficiently remedial option is available." (R. at 1714). Instead, the trial court directed that either Wade should withdraw or the District Attorney should step aside, along with her entire office. *Id.*

C. The Court of Appeals' majority opinion

Respondents appealed, arguing that "disqualification should always result when the elected district attorney engages in activities that raise the appearance of impropriety." *Roman*, 494 Ga. App. LEXIS at *17. In its majority opinion, the Court of Appeals declined to apply a bright-line rule, saying that Georgia law did not require it to do so. "Instead, we must examine the particular facts and circumstances of each case while keeping some general

principles in mind." *Id.* at *18. After quoting extensively from the trial court's order, the Court of Appeals' majority opinion acknowledged that the ruling on a motion to disqualify was reviewed for an abuse of discretion and that "the issue of attorney disqualification is viewed as a continuum." *Id.* (citing *Blumenfeld*, 247 Ga. at 409).

The majority opinion then promptly *removed* the case from the continuum described in *Blumenfeld*. The majority held that the "considerations" attendant to "the context of a significant appearance of impropriety caused by the conduct of a public prosecutor" "take this case out of the continuum of cases involving an appearance of impropriety in connection with the conduct of private counsel and a client's interest in counsel of choice balanced against a more nebulous public interest." *Id.* at *18, *19. With the case apparently detached from prior precedent, the majority continued:

> After carefully considering the trial court's findings in its order, we conclude that it erred by failing to disqualify DA Willis and her office. The remedy crafted by the trial court to prevent an ongoing appearance of impropriety did nothing to address the appearance of impropriety that existed at times when DA Willis was exercising her broad pretrial discretion about who to prosecute and what charges to bring. While we recognize that an appearance of impropriety generally is not enough to support disqualification, this is the rare case in which disqualification is mandated and no other remedy will suffice to restore public confidence in the integrity of these proceedings. Accordingly, we reverse the trial court's denial of the appellants' motion to disqualify DA Willis and her office.

Id. at *19-20. The majority opinion offered no additional analysis of the issue,

nor did it dispute any of the trial court's factual findings.

As discussed more extensively below, the Honorable Judge Land submitted a dissenting opinion.

D. The Court of Appeals ignored established precedent to create a novel, *per se* standard of disqualification for district attorneys.

Review on certiorari is authorized because, without citation to any precedent authorizing such a departure, the majority opinion took this case "out of the continuum" of established precedents from this Court and the Court of Appeals, applying for the first time a separate test for public prosecutors. Despite indicating that separate considerations must apply, the opinion did not explain *how*, nor did it provide any guidance for the application of the apparently heightened standard it sought to create. Instead, it replaced the trial court's remedy with the drastic remedy of disqualification in a total of two sentences:

> The remedy crafted by the trial court to prevent an ongoing appearance of impropriety did nothing to address the appearance of impropriety that existed at times when DA Willis was exercising her broad pretrial discretion about who to prosecute and what charges to bring. While we recognize that an appearance of impropriety generally is not enough to support disqualification, this is the rare case in which disqualification is mandated and no other remedy will suffice to restore public confidence in the integrity of these proceedings.

Id. at *19-20.

These two sentences do not dispute the trial court's finding that the

District Attorney's relationship with SADA Wade had *not actually affected the case in any way*. This means the passage also does not address how any remedy, other than total disqualification, could dispel a hypothetical appearance of impropriety that might attach to certain events despite the absence of any evidence that impropriety actually occurred. The result is to create precisely the sort of unworkable, *per se* standard for disqualification that uniquely applies to elected district attorneys. The result of the majority's cursory reasoning is as follows: (1) if an appearance of impropriety involving a district attorney is established, and (2) the remedy must address the appearance of impropriety's possible effects upon the public perception of charging decisions, which necessarily involve the district attorney, even where (3) there is no actual evidence of those charging decisions being affected in any way, then an appearance of impropriety involving a district attorney will *always* require the disqualification of the district attorney and his or her entire office. The appearance, without more, demands the most drastic remedy.

This is precisely the opposite of the general approach, where disqualification is disfavored and disqualification based solely upon an appearance of impropriety appears to be nonexistent. It is also the sort of *per se* rule of disqualification which Georgia courts have never authorized. Although the majority claimed to reject "bright-line rules," it has created a standard where an appearance of impropriety involving a district attorney

requires disqualification. Neither this Court nor the Court of Appeals have ever indicated, in cases such as *Lyons* or *Whitworth*, that a prosecutor's public role countenanced a wholly different, *per se*, mechanical application of the appearance of impropriety standard to disqualification.

The majority opinion creates this unworkable standard without explaining the basis for its conclusion that this is the "rare case" where disqualification is *mandated* because "no other remedy will restore public confidence in these proceedings." Indeed, the majority opinion does not provide any guidance on what constitutes a "rare case" in any circumstances. Nor does the opinion explain how the Court of Appeals is authorized to replace the trial court's assessment of the public's confidence in the case with its own. As one court in a jurisdiction that has explicitly adopted the appearance of impropriety standard has observed, broad trial court discretion makes particular sense where appearances are concerned. "As the trial court has the greatest familiarity with the facts and visibility of a case before it, it is in the best position to determine whether an appearance of impropriety is sufficient to undermine public confidence and whether disqualification is appropriate under the circumstances." *State v. Marner*, 251 Ariz. 198, 200, 487 P.3d 631, 633 (2021).

If the Court of Appeals has any reason to conclude otherwise, they did not include it in their majority opinion, and as discussed more fully below, the

abuse of discretion standard counsels against precisely this sort of second-guessing by courts of review.

The State submits, as it did in the trial court and in the Court of Appeals, that disqualification of a prosecutor based solely upon the appearance of impropriety, absent any actual conflict of interest or finding of forensic misconduct, has never been the practice in Georgia. Not only is this the first case where any Georgia court has actually applied such a remedy, it holds an elected district attorney—a constitutional officer—to an unexplained, heightened standard without accounting for unique reasons counseling *against* disqualification. A defendant's obvious interests in due process and fair proceedings should be balanced against the role of the District Attorney as a representative of the people and advocate for the State, a vessel for "constitutional and statutory duties," and the public's elected choice of attorney to prosecute "with energy and skill" to "seek justice above all other ends." *State v. Giese*, 900 S.E.2d 881, 886-87 (S.Ct. N.C. 2024).

At the very least, if an appearance of impropriety—absent an actual conflict of interest or forensic misconduct and without any indication of prejudice or due process concerns—is sufficient to require the disqualification of a district attorney, this Court should be the authority to clarify how and why. The Court of Appeals should not be able to establish such a principle in two sentences, without precedential support or further explanation. In so

doing, the majority opinion ignored precedent, created uncertainty that is likely to recur, implemented a hair-trigger standard disfavored under Georgia law, and replaced the trial court's discretion with its own. The State submits that review is necessary to reverse the majority opinion and clarify the standard for disqualification.

E. The Court of Appeals brushed aside the abuse of discretion standard and ignored binding precedent to reverse the trial court's order declining to disqualify the District Attorney absent an actual conflict of interest.

Review is also authorized because, regardless of whether an appearance of impropriety, without more, suffices to require disqualification, Judge Land's dissenting opinion leaves no doubt that the majority opinion had no authority to reverse the trial court's order. The dissent does not mince words. "Where, as here, a prosecutor has no actual conflict of interest and the trial court, based on the evidence presented to it, rejects the allegations of actual impropriety, we have no authority to reverse the trial court's denial of a motion to disqualify. None. Even where there is an appearance of impropriety." *Roman*, 2024 Ga. App. LEXIS 494 at *24 (Land, J. dissenting). This is because "[f]or at least the last 43 years, our appellate courts have held that an appearance of impropriety, without an actual conflict of interest or actual impropriety, provides no basis for the reversal of a trial court's denial of a motion to disqualify. This is true in civil cases and criminal cases, and it applies to

prosecutors." *Id.*

Judge Land's dissent progressed, step by step, through a corpus of decisions establishing this principle again and again. Beginning with the continuum described in *Blumenfeld*, continuing through *Williams* and several Court of Appeals decisions, and concluding with *Lee*, the dissent tracks the consistent refrain that absent an actual conflict of interest or actual impropriety, a trial court's denial of a motion to disqualify an attorney cannot be an abuse of discretion. *Id.* at *24-30. The majority opinion "cannot be reconciled with any of these cases," *id.* at *30, and it supplies no contradictory authority.

The majority's decision to brush these cases aside, in addition to being a direct threat to the concept of *stare decisis*, "has taken what has long been a discretionary decision for the *trial court* to make and converted it to something else entirely." *Id.* at *21. The majority opinion disavowed the restraint required of reviewing courts and seized for itself the "unique role of the trial court" to "impose a remedy that fits the situation as it finds it to be." *Id.* at *22. The nature of the abuse of discretion standard requires reviewing courts to avoid "disturbing" lower court decisions that are "within the bounds of the law, based on correct, relevant facts, and within the range in which reasonable jurists could disagree." *Burns v. State*, 907 S.E.2d 581, 586 (S.Ct. Ga 2024). The standard forecloses reversal by a reviewing court "simply because we might see

the matter differently and might have chosen to impose another remedy had we been the trial judge." *Roman*, 2024 Ga. App. LEXIS 494 at *24 (Land, J. dissenting).

Because the majority opinion is so conclusory, and because it does not identify any errors in fact or law within the trial court's order, there can be no basis for its rejection of the trial court's remedy *except* for simple disagreement with the outcome. That is precisely the sort of reversal *never* authorized by the abuse of discretion standard. "[R]eview under abuse of discretion standard recognizes that there is a range of possible conclusions the trial judge may reach and we will affirm a trial court's decision even though we would have gone the other way had it been our call." *Williams v. State*, 328 Ga. App 876, 880 (2014) (punctuation omitted) (quoting *United States v. Frazier*, 387 F3d 1244, 1259 (11th Cir. 2004)). As the Honorable Henry J. Friendly summarized in a lecture at Emory Law School, "When we are discussing the allocation of power between trial and appellate courts, I find it more useful to say that the trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees." *Feature: Indiscretion About Discretion*, 31 Emory L.J. 747, 754 (1982).

The State maintains, as it did below, that the trial court did not abuse its discretion in declining to disqualify the District Attorney. While the majority opinion concluded that the trial court "erred" in its decision, it did not

identify an abuse of discretion or provide a basis for its decision aside from simple disagreement with the outcome. It also casts aside the trial court's authority and stewardship of this case without any justification aside from disagreement, and it does so in order to require a drastic, extraordinary remedy that should be granted only sparingly. The majority opinion is thus an affront to *stare decisis*, the unique authority of trial courts, and the orderly administration of this important case. Review is necessary, and the majority opinion must be reversed.

CONCLUSION

Proceeding from investigation, through the Special Purpose Grand Jury, to the regular grand jury, and into the pre-trial stages, none of the personal issues discussed in this matter of disqualification have had any effect whatsoever upon the rights of Respondents or the proper administration of this prosecution. After concluding that Respondents had failed to carry their burden or sustain their theories of a conflict of interest, the trial court found that there was only an *appearance* of impropriety which could be dispelled by a remedy far less drastic than the disqualification of the District Attorney and her entire office. The majority opinion in this case, as correctly described by Judge Land's vehement dissent, fails to respect either the binding authority of Georgia's appellate courts or the unique discretion afforded to Georgia's trial courts. It announces a new standard without explaining how it works or what authorizes its implementation, ensuring confusion at best and a *per se* rule of

disqualification at worst. The criteria for review on certiorari are all met, and the State respectfully submits that review is necessary in order to safeguard both this case and the general administration of Georgia's criminal prosecutions from the results of the majority's opinion.

For the reasons stated above, the State of Georgia respectfully petitions this Honorable Court to **GRANT** the State's petition for a writ of certiorari to the Court of Appeals, to **REVIEW** and to **REVERSE** that Court's judgment in this case, to **HOLD** that the District Attorney is not disqualified from prosecuting the cases underlying this appeal, and to **GRANT** any and all other relief which is just and proper.

***

CERTIFICATION OF WORD COUNT

This submission does not exceed the word-count limit imposed by Rule 20.

Respectfully submitted this 8th day of January, 2025.

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STATE OF GEORGIA, Petitioner,	**)**	**CASE NUMBER** _____
versus	**)**	**On petition for writ of certiorari to the Court of Appeals of Georgia Case Nos. A24A1595, A24A1596, A24A1597, A24A1598, A24A1599, A24A1600, A24A1601, A24A1602, A24A1603**
MICHAEL A. ROMAN, DAVID J. SHAFER, ROBERT DAVID CHEELEY, MARK RANDALL MEADOWS, DONALD JOHN TRUMP, CATHLEEN LATHAM, RUDOLPH WILLIAM LOUIS GIULIANI, JEFFREY BOSSERT CLARK, HARRISON FLOYD, Respondents.	**)**	

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This 8th day of January, 2025.

s:\ F. McDonald Wakeford
F. McDonald Wakeford
Chief Sr. Asst. District Attorney
Atlanta Judicial Circuit
Georgia Bar No. 414898

Exhibit A

SECOND DIVISION
BROWN,
MARKLE and LAND, JJ.

NOTICE: Motions for reconsideration must be *physically received* in our clerk's office within ten days of the date of decision to be deemed timely filed.
https://www.gaappeals.us/rules

December 19, 2024

In the Court of Appeals of Georgia

A24A1595. ROMAN v. THE STATE.

A24A1596. SHAFER v. THE STATE.

A24A1597. CHEELEY v. THE STATE.

A24A1598. MEADOWS v. THE STATE.

A24A1599. TRUMP v. THE STATE.

A24A1600. LATHAM v. THE STATE.

A24A1601. GIULIANI v. THE STATE.

A24A1602. CLARK v. THE STATE.

A24A1603. FLOYD v. THE STATE.

BROWN, Judge.

Michael Roman, David Shafer, Robert Cheeley, Mark Meadows, Donald Trump, Cathleen Latham, Rudolph Giuliani, Jeffrey Clark, and Harrison Floyd (collectively "the appellants") were charged in a 97-page indictment with RICO violations and other crimes in connection with an alleged conspiracy to unlawfully change the outcome of the 2020 presidential election. Pursuant to a granted

interlocutory application, the appellants appeal from the trial court's order denying their motion to dismiss the indictment and granting, in part, their motions to disqualify the Atlanta Judicial Circuit District Attorney Fani Willis ("DA Willis") and her office. Collectively, the appellants assert numerous grounds to reverse the trial court's order, including that the trial court imposed an improper remedy after concluding that DA Willis' "prosecution" is encumbered by a "significant appearance of impropriety" not grounded on "mere status alone," but instead resulting from "specific conduct, [impacting] more than a mere 'nebulous' public interest because it concerns a public prosecutor." (Emphasis supplied.) In response, the State asks this Court to affirm the trial court's order in its totality, including the imposition of an alternative remedy requiring that either DA Willis, along with the whole of her office, step aside and refer the case to the Prosecuting Attorneys' Council for reassignment, or Special Assistant District Attorney Nathan Wade ("SADA Wade") withdraw from the case. Importantly, the State has not filed a cross-appeal asserting that the trial court's finding of this appearance of impropriety should be reversed. Accordingly, whether the evidence presented to the trial court adequately supported, under the appropriate standard of review on appeal, its finding of the

existence of an appearance of impropriety is *not* before this Court. Instead, we must determine whether the remedy fashioned by the trial court for this undisputed finding of a "significant" appearance of impropriety was improper as contended by the appellants. For the reasons explained below, we conclude that it was and therefore reverse the trial court's denial of the appellants' motion to disqualify. We affirm, however, the denial of the appellants' motion to dismiss the indictment.

Motion to Disqualify in Special Grand Jury Proceeding. On January 24, 2022, the Chief Judge of the Superior Court of Fulton County impaneled a special grand jury, at the request of DA Willis, "for the purpose of investigating the facts and circumstances relating . . . to possible attempts to disrupt the lawful administration of the 2020 elections in the State of Georgia[,]" including "the decision by the State Republican party officials to draft an alternate slate of Presidential electors. . . ." DA Willis served as the "legal advisor" to the special grand jury, which began receiving evidence in June of 2022. Around the same time, DA Willis hosted and headlined a fundraiser for an opposition candidate against Burt Jones in a lieutenant governor race. After she later publicly identified Jones as a "target" of the grand jury's investigation, he and eleven other alternate electors sought to disqualify DA Willis and her office

based upon an actual conflict of interest. The superior court overseeing the special grand jury proceeding disqualified DA Willis and her office from any further criminal investigation or prosecution of Jones based upon "a plain — and actual and untenable — conflict." It reasoned that

> concern about the District Attorney's partiality naturally, immediately, and reasonably arises in the minds of the public, the pundits, and — most critically — the subjects of the investigation that necessitates the disqualification. An investigation of this significance, garnering the public attention it necessarily does and touching so many political nerves in our society, cannot be burdened by legitimate doubts about the District Attorney's motives. The District Attorney does not have to be apolitical, but her investigations do.

The superior court denied the motion to disqualify filed by the remaining alternate electors because they failed to show an actual conflict of interest with DA Willis or any member of her prosecution team. Its order did not explicitly address the appearance of impropriety as a ground to disqualify. After the special grand jury issued its final report recommending criminal charges against the appellants (and others), it was dissolved on January 9, 2023.

Motion to Disqualify Following Indictment. On August 14, 2023, DA Willis secured the RICO indictment against the appellants (and ten others). On January 8, 2024, Roman filed a motion to dismiss the indictment and disqualify DA Willis, her office, and SADA Wade from further prosecuting this case on alleged grounds of conflict and an appearance of impropriety. Roman alleged a personal relationship between DA Willis and SADA Wade, along with an alleged personal financial interest in the case. After DA Willis spoke publicly in a church service on Sunday, January 14, 2024, the other appellants also filed motions seeking dismissal and disqualification on the same grounds, as well as the additional ground of forensic misconduct in connection with the church speech and various other extrajudicial statements.

The Trial Court's Order. On March 15, 2024, the trial court entered its order on the motions after conducting a multiple-day evidentiary hearing. It summarized the issues and its rulings as follows:

> As alleged, the claims presented a possible financial conflict of interest for the District Attorney. More importantly, the defense motion and the State's response created a conflict in the evidence that could only be resolved through an evidentiary hearing, and one that could not simply be ignored without endangering a criminally accused's constitutional right to procedural due process. After receiving two and

> a half days of testimony, during which the Defendants were provided an opportunity to subpoena and introduce whatever relevant and material evidence they could muster,[1] the [c]ourt finds that the Defendants failed to meet their burden of proving that the District Attorney acquired an actual conflict of interest in this case through her personal relationship and recurring travels with her lead prosecutor. The other alleged grounds for disqualification, including forensic misconduct, are also denied. However, the established record now highlights a significant appearance of impropriety that infects the current structure of the prosecution team — an appearance that must be removed through the State's selection of one of two options. . . . The District Attorney may choose to step aside, along with the whole of her office, and refer the prosecution to the Prosecuting Attorneys' Council for reassignment. See OCGA § 15-18-5. Alternatively, SADA Wade can withdraw, allowing the District Attorney, the Defendants, and the public to move forward without his presence or remuneration distracting from and potentially compromising the merits of the case.

(Citation omitted.) The trial court made the following findings of fact in its order:

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[1] The transcript reveals that the trial court precluded cross-examination of DA Willis about matters related to forensic misconduct, as well as county codes and ordinances. It appears that the trial court limited the evidence in the hearing to "the relationship and/or any financial elements of it" in an off-the-record ruling referenced in the transcript. The record before us contains no authenticated recording or transcript of the church speech, and it was never introduced into evidence at the hearing. The appellants do not assert on appeal that the trial court erred by limiting their cross-examination and introduction of evidence in the hearing.

On November 1, 2021, the District Attorney hired Nathan Wade to serve as a SADA and lead the investigation that produced the indictment in this case. The District Attorney considered at least one other option before hiring Wade, extending an offer to former Governor Roy Barnes, who declined. The contract allowed a $250 hourly rate — a relatively low amount by metro Atlanta standards for an attorney with Wade's years of service — and contained a ceiling on the maximum number of hours permitted. Under the terms of the first contract, Wade was not to perform more than 60 hours of work per month without written permission. No evidence introduced indicates that Wade ever received permission to exceed these monthly hourly caps. His contract was renewed on November 15, 2022, and again on June 12, 2023.

Between October 2022 and May 2023, the District Attorney and Wade traveled together on four occasions that resulted in documentable expenses. The first included an extended trip in October 2022 to Miami and Aruba and a cruise. Wade initially covered expenses for the October 2022 trip totaling approximately $5,223. In December 2022, the two flew to Miami for another cruise for which the District Attorney paid $1,394 for plane tickets, while Wade purchased passage for the cruise along with other vacation-related expenses totaling approximately $3,684. In March 2023, the two traveled to Belize, where Wade covered resort and restaurant expenses in the amount of approximately $3,000. In May 2023, they traveled to Napa Valley, where Wade covered airfare, lodging, and Uber rides in the amount of around $2,829. In addition, the two described taking a number of day-long road trips to Tennessee,

Alabama, South Carolina, North Carolina, and other parts of Georgia. They also admitted to dining out on multiple occasions and taking turns covering the bill. With seemingly full access to Wade's primary credit card statements, the Defendants did not produce evidence of any further documentable expenses or gifts, nor were any revealed through the testimony. In total, Defendants point to an aggregate documented benefit of, at most, approximately $12,000 to $15,000 in the District Attorney's favor.

The District Attorney and Wade testified that these expenditures were not meant as gifts and not designed to benefit the District Attorney. Both testified that the District Attorney regularly reimbursed Wade in cash. And if not reimbursed, the District Attorney covered a comparable, related expense. For example, the District Attorney testified that she reimbursed Wade in cash for the Aruba trip which she estimated cost around $2,000 and that she "gave him money" for both cruises. She further claimed that she reimbursed Wade for the entirety of the Belize trip and that she paid for the Napa Valley excursions. Finally, while Wade could have bought meals in 2020 which totaled more than $100, she would also regularly pay for his meals.

Such a reimbursement practice may be unusual and the lack of any documentary corroboration understandably concerning. Yet the testimony withstood direct contradiction, was corroborated by other evidence (for example, her payment of airfare for two on the 2022 Miami trip), and was not so incredible as to be inherently unbelievable.

However, as the District Attorney herself acknowledged, no ledger exists. Other than a "best guesstimate," there is no way to be certain that expenses were split completely evenly — and the District Attorney may well have received a net benefit of several hundred dollars. Despite this, after considering all the surrounding circumstances, the [c]ourt finds that the evidence did not establish the District Attorney's receipt of a material financial benefit as a result of her decision to hire and engage in a romantic relationship with Wade. Simply put, the Defendants have not presented sufficient evidence indicating that the expenses were not "roughly divided evenly," or that the District Attorney was, or currently remains, "greatly and pecuniarily interested" in this prosecution.

In addition — and much more important — the [c]ourt finds, based largely on the District Attorney's testimony, that the evidence demonstrated that the financial gain flowing from her relationship with Wade was not a motivating factor on the part of the District Attorney to indict and prosecute this case. While a general motive for more income can never be disregarded entirely, the District Attorney was not financially destitute throughout this time or in any great need, as she testified that her salary exceeds $200,000 per year without any indication of excessive expenses or debts. Similarly, the [c]ourt further finds that the Defendants have failed to demonstrate that the District Attorney's conduct has impacted or influenced the case to the Defendants' detriment. While prejudice is not a required element for disqualification, it is relevant to considerations of due process and the Defendants' requested remedy of complete dismissal.

Defendants argue that the financial arrangement created an incentive to prolong the case, but in fact, there is no indication the District Attorney is interested in delaying anything. Indeed, the record is quite to the contrary. Before the relationship came to light, the State requested that trial begin less than six months after indictment. Soon thereafter, the State opposed severance of the objecting defendants who did not demand their statutory right to a speedy trial. The State argued that it only wanted to try the case once (assuming that such a trial would have been affirmed after any necessary post-conviction appeals). The State amended its proposed timeline in November 2023 to request that the trial commence less than one year after the return of the indictment. And even before indictment, the District Attorney approved a Grand Jury presentment that included fewer defendants than the Special Purpose Grand Jury recommended. In sum, the District Attorney has not in any way acted in conformance with the theory that she arranged a financial scheme to enrich herself (or endear herself to Wade) by extending the duration of this prosecution or engaging in excessive litigation.

Without sufficient evidence that the District Attorney acquired a personal stake in the prosecution, or that her financial arrangements had any impact on the case, the Defendants' claims of an actual conflict must be denied. This finding is by no means an indication that the [c]ourt condones this tremendous lapse in judgment or the unprofessional manner of the District Attorney's testimony during the evidentiary hearing. Rather, it is the undersigned's opinion that Georgia law does not

> permit the finding of an actual conflict for simply making bad choices — even repeatedly — and it is the trial court's duty to confine itself to the relevant issues and applicable law properly brought before it.

(Citations omitted.) Although the trial court found "insufficient evidence of an actual conflict of interest[,]" it also concluded that

> the record made at the evidentiary hearing established that the District Attorney's prosecution is encumbered by an appearance of impropriety. This appearance is not created by mere status alone, but comes because of specific conduct, and impacts more than a mere "nebulous" public interest because it concerns a public prosecutor. Even if the romantic relationship began after SADA Wade's initial contract in November 2021, the District Attorney chose to continue supervising and paying Wade while maintaining such a relationship. She further allowed the regular and loose exchange of money between them without any exact or verifiable measure of reconciliation. This lack of a confirmed financial split creates the possibility and appearance that the District Attorney benefitted — albeit non-materially — from a contract whose award lay solely within her purview and policing.

> Most importantly, were the case allowed to proceed unchanged, the *prima facie* concerns raised by the Defendants would persist. As the District Attorney testified, her relationship with Wade has only "cemented" after these motions and "is stronger than ever." Wade's patently unpersuasive explanation for the inaccurate interrogatories he

submitted in his pending divorce indicates a willingness on his part to wrongly conceal his relationship with the District Attorney. As the case moves forward, reasonable members of the public could easily be left to wonder whether the financial exchanges have continued resulting in some form of benefit to the District Attorney, or even whether the romantic relationship has resumed.[2] Put differently, an outsider could reasonably think that the District Attorney is not exercising her independent professional judgment totally free of any compromising influences. As long as Wade remains on the case, this unnecessary perception will persist.

The testimony introduced, including that of the District Attorney and Wade, did not put these concerns to rest. During argument, the Defendants' focus largely pivoted from the financial concerns to disproving the testimony of the District Attorney, namely that her romantic relationship actually predated the November 2021 hiring of Wade. On that front, the [c]ourt makes a few brief observations. First, the [c]ourt finds itself unable to place any stock in the testimony of Terrence Bradley. His inconsistencies, demeanor, and generally non-responsive answers left far too brittle a foundation upon which to build any conclusions. While prior inconsistent statements can be considered as substantive evidence under Georgia law, Bradley's impeachment by text message did not establish the basis for which he claimed such sweeping knowledge of Wade's personal affairs. In addition, while the

[2] DA Willis and SADA Wade testified that their personal relationship ended sometime in the summer of 2023.

> testimony of Robin Yearti raised doubts about the State's assertions, it ultimately lacked context and detail. Even after considering the proffered cell phone testimony from Defendant Trump, along with the entirety of the other evidence, neither side was able to conclusively establish by a preponderance of the evidence when the relationship evolved into a romantic one.
>
> However, an odor of mendacity[3] remains. The [c]ourt is not under an obligation to ferret out every instance of potential dishonesty from each witness or defendant ever presented in open court. . . . Yet reasonable questions about whether the District Attorney and her hand-selected lead SADA testified untruthfully about the timing of their relationship further underpin the finding of an appearance of impropriety and the need to make proportional efforts to cure it.

(Citation, footnote, and emphasis omitted.)

It then rejected dismissal of the indictment and disqualification of DA Willis and her office based upon the following reasoning:

> Ultimately, dismissal of the indictment is not the appropriate remedy to adequately dissipate the financial cloud of impropriety and potential untruthfulness found here. There has not been a showing that the Defendants' due process rights have been violated or that the issues

[3] Mendacity means "untruthfulness" or "tendency to lie." See Webster's Encyclopedic Unabridged Dictionary of the English Language.

> involved prejudiced the Defendants in any way. Nor is disqualification of a constitutional officer necessary when a less drastic and sufficiently remedial option is available[, i.e., the District Attorney's selection of whether Wade would withdraw or she would refer the case to the Prosecuting Attorneys' Council for reassignment].

1. The appellants contend that the trial court's failure to disqualify DA Willis and her office was erroneous in light of the trial court's finding that the record established that the "prosecution" is encumbered by "a significant appearance of impropriety." In the appellants' view, the trial court's forward-looking remedy did not cure the already existing appearance of impropriety and the "odor of mendacity" found by the trial court. Based upon the fact findings of the trial court in its order and the State's failure to cross-appeal the trial court's finding of a "significant" appearance of impropriety, we agree.

As our consideration of the appearance of impropriety is limited to the remedy fashioned by the trial court, we turn to Georgia law on this issue. While the parties advocate for diametrically opposed bright-line rules — disqualification of the district attorney's office can never result from an appearance of impropriety or disqualification should always result when the elected district attorney engages in

activities that raise the appearance of impropriety — Georgia law requires neither as a matter of course. Instead, we must examine the particular facts and circumstances of each case while keeping some general principles in mind. First, the trial court's ruling on a motion to disqualify is reviewed for an abuse of discretion. See *Neuman v. State*, 311 Ga. 83, 88 (3) (856 SE2d 289) (2021). Second, the issue of attorney disqualification is viewed as a continuum. See *Blumenfeld v. Borenstein*, 247 Ga. 406, 409 (276 SE2d 607) (1981).

> At one end of the scale where disqualification is always justified and indeed mandated, even when balanced against a client's right to an attorney of choice, is the appearance of impropriety coupled with a conflict of interest or jeopardy to a client's confidences. In these instances, it is clear that the disqualification is necessary for the protection of the client. Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney. As discussed above, this generally has been found insufficient to outweigh the client's interest in counsel of choice. This is probably so because absent danger to the client, the nebulous interest of the public at large in the propriety of the Bar is not weighty enough to justify disqualification. Finally, at the opposite end of the continuum is the appearance of impropriety based not on conduct but on status alone. This is an insufficient ground for disqualification.

Id. at 409-410. See also *Battle v. State*, 301 Ga. 694, 698 (3) (804 SE2d 46) (2017) (stating that the appearance of impropriety may be grounds for disqualification of a prosecutor) .

Here, we must address the remedy in the context of a significant appearance of impropriety caused by the conduct of a public prosecutor.

> In our criminal justice system, the district attorney represents the people of the state in prosecuting individuals who have been charged with violating our state's criminal laws. The responsibility of a public prosecutor differs from that of the usual advocate; [her] duty is to seek justice, not merely to convict. This special duty exists because the prosecutor represents the sovereign and should exercise restraint in the discretionary exercise of governmental powers. Therefore, the district attorney is more than an advocate for one party and has additional professional responsibilities as a public prosecutor to make decisions in the public's interest. In the district attorney's role as an administrator of justice, he or she has broad discretion in making decisions prior to trial about who to prosecute, what charges to bring, and which sentence to seek.

(Citation and punctuation omitted.) *State v. Wooten*, 273 Ga. 529, 531 (2) (543 SE2d 721) (2001). These considerations take this case out of the continuum of cases involving an appearance of impropriety in connection with the conduct of private

counsel and a client's interest in counsel of choice balanced against a more nebulous public interest.

After carefully considering the trial court's findings in its order, we conclude that it erred by failing to disqualify DA Willis and her office. The remedy crafted by the trial court to prevent an ongoing appearance of impropriety did nothing to address the appearance of impropriety that existed at times when DA Willis was exercising her broad pretrial discretion about who to prosecute and what charges to bring. While we recognize that an appearance of impropriety generally is not enough to support disqualification, this is the rare case in which disqualification is mandated and no other remedy will suffice to restore public confidence in the integrity of these proceedings.[4]

[4] Our opinions in *Head v. State*, 253 Ga. App. 757 (560 SE2d 536) (2002), *Billings v. State*, 212 Ga. App. 125 (441 SE2d 262) (1994), and *Whitworth v. State*, 275 Ga. App. 790 (622 SE2d 21) (2005), are distinguishable. In *Head*, we addressed an appearance of impropriety based upon status alone where the investigator with the alleged status conflict took no part in the investigation or prosecution of the case. 253 Ga. App. at 758 (2). Similarly, in *Billings*, the assistant district attorney with the appearance of impropriety did not participate directly or indirectly in the prosecution of the case after joining the office of the district attorney. 212 Ga. App. at 365-266 (4). Here, on the other hand, DA Willis and SADA Wade have been actively involved in this case from its inception. Division 1 of our opinion in *Whitworth* is non-binding physical precedent, and the case addressed only the disqualification of a special assistant district attorney. 275 Ga. App. at 791-797 (1). Likewise, the Supreme Court of Georgia's opinion in *Frazier v. State*, 257 Ga. 690 (362 SE2d 351) (1987), relied upon by the trial court, is factually distinguishable and does not require a different

Accordingly, we reverse the trial court's denial of the appellants' motion to disqualify DA Willis and her office. As we conclude that the elected district attorney is wholly disqualified from this case, "the assistant district attorneys — whose only power to prosecute a case is derived from the constitutional authority of the district attorney who appointed them — have no authority to proceed." *McLaughlin v. Payne*, 295 Ga 609, 613 (761 SE2d 289) (2014) (distinguishing between absolute disqualification of elected district attorney and disqualification of elected district attorney from serving as an advocate at trial because he was appearing as a witness).

2. The appellants contend that the trial court erred in denying their motions to dismiss the indictment. The State responds that the appellants have failed to show that the trial court erred in finding that the appellants had not shown "that [their] due process rights have been violated or that the issues involved prejudiced [them] in any way."

"Dismissal of an indictment . . . [is] an extreme sanction[ ], used only sparingly . . . for unlawful government conduct." *State v. Lampl*, 296 Ga. 892, 896 (2) (770

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result. The issue before the Supreme Court was the disqualification of the entire district attorney's office based upon an assistant district attorney's conflict of interest rather than the conduct of the elected district attorney. Id. at 693-694 (9).

SE2d 629) (2015). In the absence of express statutory authorization, dismissal of an indictment "generally cannot be imposed absent a violation of a constitutional right." (Citation and punctuation omitted.) Id. While this is the rare case in which DA Willis and her office must be disqualified due to a significant appearance of impropriety, we cannot conclude that the record also supports the imposition of the extreme sanction of dismissal of the indictment under the appropriate standard. See *Olsen v. State*, 302 Ga. 288, 293-294 (2) (806 SE2d 556) (2017); *Lamb v. State*, 267 Ga. 464, 465-466 (5) (479 SE2d 719) (1997). We therefore affirm the trial court's denial of the appellants' motion to dismiss.

3. The appellants' remaining enumerations of error are rendered moot by our holdings in Divisions 1 and 2.

Judgment affirmed in part and reversed in part. Markle, J., concurs. Land, J., dissents.

A24A1595. ROMAN v. THE STATE; and associated cases.

LAND, Judge, dissenting.

Because the law does not support the result reached by the majority, I respectfully dissent. I am particularly troubled by the fact that the majority has taken what has long been a discretionary decision for the *trial court* to make and converted it to something else entirely. If this Court was the trier of fact and had the discretion to choose a remedy based on our own observations, assessment of the credibility of the witnesses, and weighing of the evidence, then perhaps we would be justified in reaching the result declared by the majority. But we are not trial judges, and we lack that authority. Given the unique role of the trial court and the fact that *it* is the court which has broad discretion to impose a remedy that fits the situation as it finds it to be, we should resist the temptation to interfere with that discretion, including its chosen remedy, just because we happen to see things differently. Doing otherwise

violates well-established precedent, threatens the discretion given to trial courts, and blurs the distinction between our respective courts.

Our role as appellate judges is critically important, but it often requires restraint. We are here to ensure the law has been applied correctly and to correct harmful legal errors when we see them. It is not our job to second-guess trial judges or to substitute our judgment for theirs. We do not find the facts but instead defer to the trial court's factual findings where there is any evidence to support them. "We review the trial court's ruling on a motion to disqualify a prosecutor for abuse of discretion. Such an exercise of discretion is based on the trial court's findings of fact which we must sustain if there is any evidence to support them." (Citations and punctuation omitted.) *Neuman v. State*, 311 Ga. 83, 88 (3) (856 SE2d 289) (2021).

Here, the trial court expressly found that appellants failed to show that the district attorney had an actual conflict of interest, failed to show that she received any material financial benefit as a result of her relationship with Nathan Wade, failed to show that she had a personal stake in the conviction of any defendant, failed to show that her relationship with Wade involved any actual impropriety on her part, and failed to show that their relationship, including their financial arrangements, had any

actual impact on the case. Because there was some evidence presented to the trial court that supported these findings, we are bound to accept them. *Neuman*, 311 Ga. at 88 (3). The majority does not dispute these findings. Rather, it holds, with the citation of no supporting authority and apparently for the first time in the history of our state, that the mere existence of an *appearance* of impropriety, in and of itself, is sufficient to reverse the trial court's refusal to disqualify the district attorney and her entire office. As shown below, the law does not support this outcome; rather, it compels precisely the opposite.

Where, as here, a prosecutor has no actual conflict of interest and the trial court, based on the evidence presented to it, rejects the allegations of actual impropriety, we have no authority to reverse the trial court's denial of a motion to disqualify. None. Even where there is an appearance of impropriety. Our binding precedent and the doctrine of *stare decisis* require our restraint and do not permit us to impose a different remedy than the one chosen by the trial court simply because we might see the matter differently and might have chosen to impose another remedy had we been the trial judge.

For at least the last 43 years, our appellate courts have held that an appearance of impropriety, without an actual conflict of interest or actual impropriety, provides no basis for the reversal of a trial court's denial of a motion to disqualify. This is true in civil cases and criminal cases, and it applies to prosecutors. Our Supreme Court first addressed this issue in 1981 after a trial court disqualified an attorney based on an appearance of impropriety arising from the fact that counsel for a caveator was married to an attorney who previously represented the propounder of a will. Concluding that counsel should not be disqualified under these circumstances, the Supreme Court declared 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 an appearance of impropriety alone where there is no danger that the actual trial of the case will be tainted." *Blumenfeld v. Borenstein*, 247 Ga. 406, 407-408 (276 SE2d 607) (1981). Accepting the trial court's finding that there was no actual impropriety but rather just an appearance of such, the Supreme Court held that disqualification could not stand.

> 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. . . . It is perhaps helpful to view the issue of attorney disqualification as a continuum. At one end of the scale where disqualification is always justified and indeed mandated, even when balanced against a client's right to an attorney of choice, is the appearance of impropriety coupled with a conflict of interest or jeopardy to a client's confidences. In these instances, it is clear that the disqualification is necessary for the protection of the client. Somewhere in the middle of the continuum is the appearance of impropriety based on conduct on the part of the attorney. As discussed above, this generally has been found insufficient to outweigh the client's interest in counsel of choice. This is probably so because absent danger to the client, the nebulous interest of the public at large in the propriety of the Bar is not weighty enough to justify disqualification. Finally, at the opposite end of the continuum is the appearance of impropriety based not on conduct but on status alone. This is an insufficient ground for disqualification. This is particularly clear in this case in light of the trial court's specific finding that there was no actual impropriety on the part of any of the parties.

Id. at 409.[1]

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[1] The trial court in *Blumenfeld* granted the motion to disqualify on the basis of Canon 9 of the then existing Code of Professional Responsibility, which provided: "A lawyer should avoid even the appearance of professional impropriety." Id. at 407. Notably, the Supreme Court revised Georgia's Rules of Professional Conduct, effective January 1, 2001, and among other changes removed Canon 9 and any mention of "appearance of impropriety" outside of the context of lawyers' direct dealings with a tribunal. See current Rule of Professional Conduct 3.5, comment 2 (imposing an "appearance" standard on lawyers whose conduct could be seen as

In one of Georgia's leading criminal cases dealing with the disqualification of prosecutors, *Williams v. State*, 258 Ga. 305 (369 SE2d 232) (1988), there is no discussion of disqualification based on mere appearances. Rather, the entire discussion is premised on actual conflicts of interest (found not to exist here) and actual disqualifying "forensic misconduct" (likewise found not to exist here). In *Williams*, our Supreme Court held as follows:

> 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.' 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

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"tampering with judicial impartiality"); compare Code of Judicial Conduct, Rule 1.2, comment 2 ("*Judges* must avoid all impropriety and appearance of impropriety") (emphasis supplied). The fact that the rules have changed since *Blumenfeld* gives us even more reason to defer to the trial court's refusal to disqualify the district attorney here. See *Herrmann v. GutterGuard, Inc.*, 199 Fed. Appx. 745, 755 (IV) (11th Cir. 2006) ("the [district] court properly applied the conflict of interest standard [Georgia Code of Professional Responsibility 1.9(b)] and did not apply the outdated appearance of impropriety standard [former Georgia Canon 9]"). As a leading scholar on disqualification has noted in describing this movement away from an appearance of impropriety standard, "prosecutors cannot realistically be expected to comply with the standards of impartiality required of judges"; in many states, "prosecutorial disqualification is deemed to be appropriate only when the remedy is needed to prevent the accused from suffering prejudice." Richard Flamm, Lawyer Disqualification (2014 ed.), § 31.3, p. 816.

> 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 (2) (B), citing "The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case," 54 Colum. L. Rev. 946 (1954). Here, there is no contention that the district attorney previously represented or consulted with any of the defendants, and there has been no showing that she has a personal interest or stake in any conviction. These facts support the trial court's conclusion that she has no actual conflict of interest.

In 2005, this court was faced with an appeal from a conviction where the defendant contended that a special prosecutor should have been disqualified. We explicitly rejected the argument that "the appearance of impropriety alone is sufficient to require a reversal" and labeled that argument "irrelevant to the case" given the fact that the defendant had "failed to demonstrate an actual conflict of interest." *Whitworth v. State*, 275 Ga. App. 790, 794 (1) (c) (622 SE2d 21) (2005). Elaborating on this point, this court stated that "no actual conflict of interest was shown. As previously noted, a prosecutor, who is not a judicial officer, is not held to as high a standard of independence and neutrality as is a judge. The Supreme Court of Georgia

has repeatedly held that an 'actual conflict of interest' is required to warrant reversal for failure to disqualify." Id. at 796 (1) (c).[2]

In *Kamara v. Henson*, 340 Ga. App. 111 (796 SE2d 496) (2017), disapproved on other grounds, *Fulton County v. Ward-Poag*, 310 Ga. 289 (849 SE2d 465) (2020), this Court was presented with the issue under consideration here – specifically, whether a trial court's denial of a motion to disqualify counsel based on an alleged appearance of impropriety should be overturned. Our holding could not have been clearer: "We affirm the trial court's denial of Kamara's motion to disqualify [d]efense [c]ounsel . . . *because the trial court did not abuse its discretion in denying the motion in the absence of an actual conflict of interest or actual impropriety*." (Emphasis added.) Id. at 111. Citing *Blumenfeld*, we elaborated:

> Absent an actual conflict of interest or actual impropriety, we cannot say that the trial court abused its discretion in denying Kamara's motion to disqualify [d]efense [c]ounsel. See *Blumenfeld v. Borenstein*, 247 Ga. 406,

[2] This court's opinion in *Whitworth* is physical precedent only because Judge Adams did not fully concur with all of the reasoning contained in the majority opinion. However, with respect to the issue discussed above, Judge Adams did fully concur with the other two judges. Writing separately, he stated that while he could not agree with all that was stated by the majority, he did agree with the result because there had been no adequate showing that the special prosecutor had an actual conflict of interest. Id. at 801-802. On this point, then, it appears that all three judges were in agreement.

> 409-410 (276 SE2d 607) (1981) (mere appearance of impropriety is an insufficient ground for disqualification). Consequently, we affirm the trial court's judgment in this regard. In sum, we affirm the denial of Kamara's motion to disqualify [d]efense [c]ounsel, because there is no actual conflict of interest or actual impropriety.

Id. at 116 (2).

In *Ga. Trails & Rentals, Inc. v. Rogers*, 359 Ga. App. 207 (855 SE2d 103) (2021), we once again affirmed a trial court's denial of a motion to disqualify counsel where there was no actual conflict of interest, stating:

> Moreover, as the trial court found in denying the motion to disqualify, the appellants have presented no evidence of an actual conflict to support disqualification. The appellants repeatedly refer to 'potential' conflicts in this circumstance, but our Supreme Court has held that *absent an actual conflict of interest or actual impropriety, the trial court does not abuse its discretion in denying a motion to disqualify counsel.*

(Emphasis supplied.) Id. at 213-214 (1).

Finally, our Supreme Court reiterated these principles less than a year ago in a criminal case involving a motion to disqualify a prosecutor based on an alleged conflict of interest. In *Lee v. State*, 318 Ga. 412 (897 SE2d 856) (2024), the Supreme Court affirmed the denial of the motion to disqualify, succinctly declaring that "the

trial court did not abuse its discretion . . . by failing to disqualify the Assistant District Attorney *absent an actual conflict of interest.*"[3] (Emphasis supplied.) Id. at 412-413.

The majority opinion in this case cannot be reconciled with any of these cases, but we are bound to follow them. "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U. S. 808, 827 (111 S.Ct.

[3] *Lee* is notable because it involved a motion to disqualify a prosecutor. Thus, any suggestion that *Blumenfeld* and its progeny do not apply to prosecutors is dispelled completely by *Lee*. Further, all of these cases are consistent with the often repeated principle that disqualification of counsel is an extraordinary remedy that should be granted sparingly. *Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 139 (1) (758 SE2d 314) (2014); *Bernocchi v. Forcucci*, 279 Ga. 460, 462 (2) (614 SE2d 775) (2005); *Blumenfeld*, 247 Ga. at 408-409. This principle is just as true for prosecutors, including an elected district attorney, as it is for private attorneys, and there is no good reason not to apply it here. "The elected district attorney is not merely any prosecuting attorney. [Sh]e is a constitutional officer, and there is only one such officer in each judicial circuit." *McLaughlin v. Payne*, 295 Ga. 609, 612 (761 SE2d 289) (2014), citing Ga. Const. of 1983, Art. VI, Sec. VIII, Para. I (a). The district attorney was elected by the voters of her circuit. We should tread lightly when asked to deprive the electorate of the attorney they chose to perform this job, especially where there has been no finding of an actual conflict of interest or actual impropriety. See, e. g., *State v. Giese*, 386 N. C. 127, 137 (V) (900 SE2d 881) (2024) (disqualification of elected district attorney interferes with her performance of constitutionally mandated duty and cannot stand in the absence of "an actual conflict of interest or legitimate due process concerns").

2597, 114 LEd2d 720) (1991). If we are not going to follow binding precedent and have no good reason to overrule it, all of these virtues of *stare decisis* are threatened.

In this case, the trial court expressly found that the district attorney had no conflict of interest and rejected the allegations of actual impropriety arising from her relationship with Nathan Wade. It rejected the notion that she received any material financial benefit from her hiring of Wade, that she hired him as part of a scheme to enrich herself, or that their financial arrangements had any impact on this case. It was certainly critical of her choices and chastised her for making them. I take no issue with that criticism, and if the trial court had chosen, in its discretion, to disqualify her and her office, this would be a different case. But that is not the remedy the trial court chose, and I believe our case law prohibits us from rejecting that remedy just because we don't like it or just because we might have gone further had we been the trial judge. See *State v. Evans*, 187 Ga. App. 649, 651 (3) (371 SE2d 432) (1988)(decision to disqualify prosecutor based on appearance of impropriety "is within the discretion of the trial court and the appellate courts will not interfere where, as here, the court's discretion was not abused"), overruled on other grounds, *State v. Smith*, 268 Ga. 75, n.7 (485 SE2d 491) (1997); *First Key Homes of Ga., LLC v. Robinson*, 365 Ga. App. 882,

882 (880 SE2d 371) (2022) ("The ultimate 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.") (citation and punctuation omitted); *Bowers v. CSX Transp., Inc.*, 369 Ga. App. 875, 883-884 (b) (894 SE2d 690) (2023) ("review under abuse of discretion standard recognizes that there is a range of possible conclusions the trial judge may reach and we will affirm a trial court's decision even though we would have gone the other way had it been our call") (citation and punctuation omitted). See also, *United States v. Miller*, 624 F.2d 1198, 1201 (III) (3rd Cir. 1980) (abuse of discretion standard applies to trial court's chosen remedy on motion to disqualify; trial court "has a wide discretion in framing its sanctions to be just and fair to all parties involved") (citation and punctuation omitted).

Every day in courtrooms all over this state, trial judges solemnly and diligently fulfill their constitutional obligations and perform a vital and indispensable public service when they convene hearings, listen to testimony, observe witnesses, make credibility determinations, resolve conflicts in the evidence, weigh the evidence, and exercise their discretion in countless ways. We should not lightly interfere with their work or weaken their discretion by imposing our will because we don't like the result.

Because I am convinced that is what the majority has done in this case, I respectfully dissent.