IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA v. DONALD JOHN TRUMP, RUDOLPH WILLIAM LOUIS GIULIANI, MARK RANDALL MEADOWS, JEFFREY BOSSERT CLARK, ROBERT DAVID CHEELEY, MICHAEL A. ROMAN, DAVID JAMES SHAFER, HARRISON WILLIAM PRESCOTT FLOYD, and CATHLEEN ALSTON LATHAM.	INDICTMENT NO. 23SC188947

ORDER ON DEFENDANTS' MOTIONS TO DISMISS AND DISQUALIFY THE FULTON COUNTY DISTRICT ATTORNEY

On January 8, 2024, Defendant Roman filed a motion to dismiss the indictment and disqualify the Fulton County District Attorney's Office. (Roman Doc. 61). Eight co-defendants later joined and supplemented the motion, raising additional grounds for disqualification.[1] Among other allegations of disqualifying conduct, the Defendants contend that the District Attorney obtained a personal stake in the prosecution of this case by financially benefitting from her romantic relationship with Special Assistant District Attorney ("SADA") Nathan Wade, whom she personally hired to lead the State's prosecution team.

More specifically, Defendant Roman alleges that the District Attorney and SADA Wade

[1] (Trump Doc. 114, 1/25/24); (Giuliani Doc. 85, 2/9/24); (Meadows Doc. 69, 2/5/24); (Clark Doc. 93, 2/5/24); (Cheeley Doc. 77, 1/26/24); (Shafer Doc. 89, 2/5/24); (Floyd Doc. 129, 2/6/24); and (Latham Doc. 70, 2/5/24).

traveled together on multiple vacations with Wade covering many of the associated expenses. (Roman Doc. 61 at 5-6). Defendant Roman later supplemented his motion with receipts from some of these travels. (Roman Doc. 70, Ex. B). The State responded with an affidavit, arguing that the District Attorney had not received any financial benefit through her relationship with Wade, and that their personal travel expenses were "roughly divided equally." (State's Opposition, Roman Doc. 65, Ex. A).

As alleged, the claims presented a possible financial conflict of interest for the District Attorney. More importantly, the defense motions 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, the Court 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 Defendants' motions are therefore granted in part.

Actual Conflict of Interest

Our highest courts consistently remind us that prosecutors are held to a unique and exacting professional standard in light of their public responsibility – and their power. Every newly minted prosecutor should be instilled with the notion that she seeks justice over convictions and that she may strike hard blows but never foul ones. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (overruled on other grounds). Most importantly, prosecutors are expected to assume a role beyond a mere advocate for one side and must make decisions in the public's interest – not their own personal or political interest. *See State v. Wooten*, 273 Ga. 529, 531 (2001); *Hicks v. Brantley*, 102 Ga. 264, 271 (1897) ("His is a public duty. He represents the entire public."). Recognizing these are not empty slogans nor toothless admonitions without practical effect, Georgia courts have not hesitated to step in and use their inherent authority to disqualify a state prosecutor when required, especially when that prosecutor labors under an actual conflict of interest. *See* Ga. Const. Art. VI, § I, Para. IV ("Each court may exercise such powers as necessary . . . to protect or effectuate its judgments[.]"); O.C.G.A. § 15-1-3(4) ("Every court has power . . . [t]o control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto[.]"); *Registe v. State*, 287 Ga. 542, 544 (2010) ("courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them") (quoting *Wheat v. United States*, 486 U.S. 153, 160 (1988)).

Disqualification of a prosecutor due to a conflict of interest is thus not a creature of statute so much as it is a judicial remedy recognized by our appellate courts since their formation, generally

on grounds of public policy, as "[t]he administration of the law should be free from all temptation and suspicion, so far as human agency is capable of accomplishing that object[.]" *Gaulden v. State*, 11 Ga. 47, 50 (1852) (disqualifying solicitor-general on grounds of public policy); *Conley v. Arnold*, 93 Ga. 823, 825 (1894) (against public policy for solicitor-general to represent clients, though allegation was untimely); *Baker v. State*, 97 Ga. 452, 454 (1895) (holding "propriety" demands that the solicitor-general cannot personally prosecute a case in which he was "personally concerned"); *Howard v. State*, 115 Ga. 244, 249 (1902) (finding "[p]ublic policy[,] good morals and justice" prevent side-switching); *Nichols v. State*, 17 Ga. App. 593, 606 (1916) (physical precedent only) ("The administration of the law, and especially that of the criminal law, should, like Caesar's wife, be above suspicion, and should be free from all temptation, bias, or prejudice . . .").

The Georgia Supreme Court has most recently denoted conflicts of interest and forensic misconduct as the two generally recognized grounds for disqualification. *Reed v. State*, 314 Ga. 534, 545 (2022) (citing *Williams v. State*, 258 Ga. 305, 314 (1988)).[2] A conflict of interest includes acquiring a "personal interest or stake in the defendant's conviction." *Williams*, 258 Ga. at 314; *see also* Black's Law Dictionary 374 (11th ed. 2019) (defining "conflict of interest" as "[a] real or seeming incompatibility between one's private interests and one's public or fiduciary duties"). In such circumstances, no showing of prejudice by a defendant is required. *Amusement Sales, Inc. v. State of Ga.*, 316 Ga. App. 727, 736 (2012) (citing *Young v. United States*, 481 U.S. 787, 811 (1987)).

[2] While *McGlynn v. State*, 342 Ga. App. 170, 173 (2017) indicated without citation or further explanation that disqualification allegations require a "high standard of proof," neither the Court of Appeals, nor any other appellate opinion, has provided enlightenment on where exactly this relative "high standard" falls on the evidentiary spectrum. The Court believes *McGlynn* offers little, if any, guidance to the analysis at hand.

This is so because the prosecutor's duty to the public creates an additional public interest that must remain unconflicted in every criminal case.

A determination of whether a prosecutor is laboring under a conflict of interest is a fact-driven one. *See*, *e.g.*, *Battle v. State*, 301 Ga. 694, 698-99 n.5 (2017) (finding insufficient evidence of a conflict of interest after establishing through testimony the attenuated nature of the connection between the lead prosecutor and victim's mother, who worked as an employee at the same office). In this case, SADA Wade's manner of payment is not actionable on its own. Whenever a private attorney - like Wade - is paid by the billable hour, a motive exists to extend or prolong the assignment. This, however, is a tension that the legal profession has long accepted. It is also the type of speculative "status" violation that our courts have regularly denied as insufficient grounds for disqualification absent solid proof of some other conduct. *See*, *e.g.*, *Blumenfeld v. Borenstein*, 247 Ga. 406, 408-09 (1981) (finding wrongdoing cannot be imputed to an attorney based on marital status alone). Thus, a SADA's oath of office, in combination with the supervision theoretically provided by a neutral and detached District Attorney, should generally be sufficient to dispel the appearance of that improper incentive. Nor would a romantic relationship between prosecutors, standing alone, typically implicate disqualification, assuming neither prosecutor had the ability to pay the other as long as the relationship persisted. But in combination, as is alleged here by the Defendants, a *prima facie* argument arises of financial enrichment and improper motivations which inevitably and unsurprisingly invites a motion such as this.

As to the financial allegations, the Court makes the following factual findings. 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. (Def. Hrg. Ex. 15). 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. (*Id.*). Under the terms of the first contract, Wade was not to perform more than 60 hours of work per month without written permission. (*Id.*). 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. (Def. Hrg. Exs. 17-18).

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. (Def. Hrg. Exs. 11-12). 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. (2/2/24 State's Opposition, Ex. 4); (Def. Hrg. Exs. 9, 28). In March 2023, the two traveled to Belize, where Wade covered resort and restaurant expenses in the amount of approximately $3,000. (Def. Hrg. Ex. 9). In May 2023, they traveled to Napa Valley, where Wade covered airfare, lodging, and Uber rides in the amount of around $2,829. (*Id.*). 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. (Def. Hrg. Ex. 28) ($12,907); (Def Hrg. Exs. 9, 11-12) ($14,736).

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 Court 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. *Nichols v. State*, 17 Ga. App. at 606.

In addition - and much more important - the Court 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 Court 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. (Trump Doc. 2, 8/16/23). Soon thereafter, the State opposed severance of the objecting defendants who did not demand their statutory right to a speedy trial. (Trump Doc. 37, 9/12/23). 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).

(Trump Doc. 37, 9/12/23). 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. (Trump Doc. 87, 11/17/23). And even before indictment, the District Attorney approved a Grand Jury presentment that included fewer defendants than the Special Purpose Grand Jury recommended. *See* Order Entering Special Purpose Grand Jury's Final Report Into Court Record, 2022-EX-000024, Ex. A (Sep. 8, 2023). 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 Court 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. Other forums or sources of authority such as the General Assembly, the Georgia State Ethics Commission, the State Bar of Georgia, the Fulton County Board of Commissioners, or the voters of Fulton County may offer feedback on any unanswered questions that linger. But those are not the issues determinative to the Defendants' motions alleging an actual conflict.

Appearance of Impropriety

Finding insufficient evidence of an actual conflict of interest does not end the inquiry. Our appellate courts have endorsed the application of an "appearance of impropriety" standard to state prosecutors, even without any explicit finding of an actual conflict. *See Battle v. State*, 301 Ga. 694, 698 (2017) ("Certainly, a conflict of interest *or the appearance of impropriety* from a close personal relationship with the victim may be grounds for disqualification of a prosecutor.") (emphasis added); *Greater Ga. Amusements, LLC v. Stat*e, 317 Ga. App. 118, 122 (2012) (physical precedent only) ("a district attorney may not be compensated by means of a fee arrangement which guarantees at least the appearance of a conflict of interest") (later deemed persuasive by *Amusement Sales, Inc. v. State of Ga*., 316 Ga. App. 727, 736 (2012)); *Head v. State*, 253 Ga. App. 757, 758 (2002) ("a prosecutor's close personal relationship with the victim in a case may create at least the appearance of a prosecution unfairly based on private interests rather than one properly based on vindication of public interests. . . . [i]n that case, the individual prosecutor who has the conflict may be disqualified"); *Davenport v. State*, 157 Ga. App. 704, 705 (1981) (granting new trial after concluding that "[u]nder such circumstances there is at least the appearance of impropriety"); *but see Whitworth v. State*, 275 Ga. App. 790, 794 (2005) (physical precedent only)

(labeling appearance-related argument "irrelevant" due to lack of an actual conflict).[3] The cases cited here that resulted in disqualification did not hold that an actual conflict is a necessary prerequisite. The State nevertheless argues that the facts presented suggested as much, and while that may be so in some instances, the opinions do not make that finding, and this Court cannot ignore the explicit language of the Georgia Supreme Court and multiple opinions from the Georgia Court of Appeals. Further, while *Davenport* is the first instance this Court can find where the exact phrase "appearance of impropriety" is used to assess the disqualification of a state prosecutor, the reference to "Ceasar's wife" in *Nichols v. State*, 17 Ga. App. 593, 606 (1916), and the admonition against "all temptation and suspicion" in *Gaulden v. State*, 11 Ga. 47, 50 (1852), demonstrate the principle has long been endorsed in Georgia law.

While formally undefined in Georgia precedent, an appearance of impropriety is generally considered "conduct or status that would lead a reasonable person to think that the actor is behaving or will be inclined to behave inappropriately or wrongfully." Black's Law Dictionary 122-

[3] The appearance verbiage likely owes its lineage to Canon 9 of the Code of Professional Responsibility ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety"), which previously applied to all aspects of an attorney's professional life. *See* Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 Mo. L. Rev. 699, 713 (1998) (detailing national origin and evolution of Canon 9). Criticized for its vague and varying application, the American Bar Association dropped the appearance standard in its 1983 Model Rules of Professional Conduct. *Id.* at 717. Georgia eventually followed suit, supplanting its professional code in 2001 with the adoption of the Georgia Rules of Professional Conduct. *See*, *e.g.*, *Herrmann v. Gutterguard, Inc.*, 199 F. App'x 745, 755 (11th Cir. 2006) (labeling the appearance of impropriety standard as "outdated"). Yet despite its removal as an explicit professional requirement, Georgia appellate courts continue to apply an appearance standard in both criminal (as previously cited) and civil contexts. *See, e.g.*, *Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 141 (2014); *First Key Homes of Ga., LLC v. Robinson*, 365 Ga. App. 882, 885 (2022); *Shuttleworth v. Rankin-Shuttleworth of Ga., LLC*, 328 Ga. App. 593, 596 (2014).

23 (11th ed. 2019).[4] Borrowing from federal judicial recusal standards, a reasonable person is not an uninformed member of the public with only a passing knowledge of the facts at hand. *See Cheney v. United States Dist. Court for Dist. of Columbia*, 541 U.S. 913, 924 (2004) (Scalia, J., sitting alone). This must be the standard, as otherwise in this case a casual, uninformed, or misinformed observer might believe the District Attorney must recuse herself merely because her father shares a last name with a co-defendant. Nor is a reasonable person "hypersensitive or unduly suspicious" without an understanding of the "relevant legal standards and judicial practice." *In re Sherwin-Williams Co.*, 607 F.3d 474, 478 (7th Cir. 2010) (citing *In re Mason*, 916 F.2d 384, 386 (7th Cir. 1990)).

The appearance standard recognizes that even when no actual conflict exists, a perceived conflict in the reasonable eyes of the public threatens confidence in the legal system itself. When this danger goes uncorrected, it undermines the legitimacy and moral force of our already weakest branch of government. *See, e.g.*, *Inquiry Concerning Judge Coomer*, 316 Ga. 855, 855 (2023) ("The judiciary's judgment will be obeyed only so long as the public respects it[.]") (citing The Federalist

[4] An appearance standard has been defined and regularly applied to judges as part of the Code of Judicial Conduct. *See In re Inquiry Concerning a Judge (no. 97-61)*, 269 Ga. 425, 425 (1998) ("The test for the appearance of impropriety is whether the situation would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."). Notably, this applies to both a judge's professional and personal conduct. *See* Ga. Code of Judicial Conduct Rule 1.2 cmt. (3); *Whitworth*, 275 Ga. App. at 793 ("the neutrality required of a judge is necessarily of a higher degree than that required of a prosecutor"). In contrast, only an attorney's professional behavior is subject to scrutiny through a disqualification motion. Nor is a private attorney held to the strict non-partisan standards of a judge. So, to say that an appearance standard inappropriately holds prosecutors to the same ethical standards as judges is inaccurate, although the distinction is less apparent here as the conduct at issue involves an intermingling of the professional and personal life of the District Attorney.

No. 78 (A. Hamilton)). "Thus it is that sometimes an attorney, guiltless in any actual sense, nevertheless is required to stand aside for the sake of public confidence in the probity of the administration of justice." *Love v. State*, 202 Ga. App. 889, 891 (1992) (citing *State v. Rizzo*, 69 N.J. 28, 30 (1975) to disqualify criminal defense counsel). This Court finds that it can - and indeed must - consider the appearance of impropriety as a basis for a state prosecutor's disqualification, especially in recognition of the critical role that the prosecutor plays in the criminal-justice system.

One final observation can be gleaned from a careful study of our appellate decisions applying this standard: the remedy can vary. Unlike an actual conflict, the finding of an appearance of impropriety does not automatically demand disqualification. Our Supreme Court has previously analyzed disqualification under an appearance standard in a civil case using a continuum, recognizing that disqualification is not always the appropriate outcome:

> 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.

Blumenfeld v. Borenstein, 247 Ga. 406, 409-10 (1981); *Stinson v. State*, 210 Ga. App. 570, 571 (1993) (applying *Blumenfield* to criminal defense counsel). The Supreme Court further noted that disqualification due to an appearance of impropriety should rarely occur where there is no danger that the actual trial of the case will be tainted. *Blumenfeld*, 247 Ga. at 407-08; *see also Board of*

Education v. Nyquist, 590 F2d 1241, 1247 (2nd Cir. 1979) ("when there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases"). Similarly, in *Billings v. State*, 212 Ga. App. 125, 129 (1994), although the Court of Appeals found the existence of an appearance of impropriety, it noted that the appearance could be cured through screening the affected prosecutor from participation or discussion of the affected case. *See also Head*, 253 Ga. App. at 758 ("Moreover, to insure that no conflict of interest or the appearance of one might develop, the district attorney took the prudent step of ordering the investigator to take no part in the investigation or prosecution of the case."). These cases indicate that a trial court can consider alternative solutions to cure the appearance of impropriety.

Nor would the finding of an appearance of impropriety on the part of the District Attorney herself, in contrast to an actual conflict, necessarily result in the disqualification of the entire Fulton County District Attorney's Office. The district attorney in *McLaughlin* was "absolutely disqualified" due to a personal interest in the prosecution. *McLaughlin v. Payne*, 295 Ga. 609, 614 (2014). As a result, assistant district attorneys appointed by the district attorney lacked any authority to proceed. *Id.* at 613. *McLaughlin* did not address an appearance standard and made a point to limit the total disqualification to instances of "absolute disqualification." When the appearance of a conflict exists, only the affected prosecutor, be they elected or appointed, is affected. *Head*, 253 Ga. App. at 758 ("the individual prosecutor who has the conflict [based on at least the appearance of impropriety] may be disqualified from participation in the case, but not all the other prosecutors who work with him"); *Frazier v. State*, 257 Ga. 690, 694 (1987)

(distinguishing *Davenport*, 157 Ga. App. 704, an appearance of impropriety case, by noting that the district attorney's disqualification did not require disqualification of the entire office).

With these principles in mind, the Court finds 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. *Blumenfeld*, 247 Ga. at 410. 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 benefited - 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. 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 Court makes a few brief observations. First, the Court finds itself unable to place any stock in the testimony of Terrance 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.[5] In addition, while the testimony of Robin Yearti raised doubts about the State's assertions, it ultimately lacked context and detail. Even after considering the proffered cellphone 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 remains. The Court is not under an obligation to ferret out every instance of potential dishonesty from each witness or defendant ever presented in open

[5] For that reason, the Court finds it unnecessary to reopen the evidence to consider the testimony of Cindi Yeager or Manny Arora, as proffered by Defendants Shafer and Latham respectively. (Shafer Doc. 106, 3/4/24); (Latham Doc. 83, 3/4/24).

court. Such an expectation would mean an end to the efficient disposition of criminal and civil proceedings. 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.

Ultimately, dismissal of the indictment is not the appropriate remedy to adequately dissipate the financial cloud of impropriety and potential untruthfulness found here. *See Olsen v. State*, 302 Ga. 288, 294 (2017) ("Dismissal of an indictment is an extreme sanction, used only sparingly as a remedy for unlawful government conduct.") (quoting *State v. Lampl*, 296 Ga. 892, 896 (2015)). There has not been a showing that the Defendants' due process rights have been violated or that the issues 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. The Court therefore concludes that the prosecution of this case cannot proceed until the State selects 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* O.C.G.A. § 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 this case.

Forensic Misconduct

The Georgia Supreme Court also recognizes forensic misconduct, or improper comment, by the State as grounds for disqualification. One example of such forensic misconduct is "expression by the prosecuting attorney of his personal belief in the defendant's guilt." *Williams v. State*, 258

Ga. 305, 314-15 (1988) (finding pretrial public comment that a conviction would be the "right result" constituted an impermissible, but not disqualifying, expression of the prosecutor's opinion concerning the merits of the case) (citing *State v. Hohman*, 138 Vt. 502 (1980) (overruled on other grounds). As guidance, *Williams* instructs that the trial court should "take[] into consideration whether such remarks were part of a calculated plan evincing a design to prejudice the defendant in the minds of the jurors, or whether such remarks were inadvertent [] utterances." *Id.* at 315. *Williams* also notes that while a prosecutor's comments may be considered improper, they must be "egregious[ly]" so to justify disqualification. *Id*. at 314.

This Court has not located, nor been provided with, a single additional case exploring the relevant standard for forensic misconduct, or an opinion that actually resulted in disqualification under Georgia law. Left unexplored, therefore, is how other examples of forensic misconduct can manifest, such as whether statements that stop short of commenting on the guilt of a defendant can be disqualifying. Nor has it been decided if some showing of prejudice is required - and how a trial court should go about determining whether such prejudice exists. Nor is it clear whether the analysis differs depending on the pretrial posture of the case. Unmoored from precedent, the Court feels confined to the boundaries of *Williams* and restricts the application of the facts found here to its limited holding.

The Defendants have exhaustively documented every public comment made by the District Attorney concerning this case through their motions and supplemental filings. Many of these have already been addressed through a pretrial challenge made on similar grounds brought by Defendants Trump and Latham. *See* Order on Motion to Quash, Preclude, and Recuse, 2022-EX-

000024 (July 31, 2023). This Court incorporates and adopts the sound reasoning of Judge McBurney and finds that any comments made by the District Attorney prior to July 31, 2023, did not amount to disqualifying forensic misconduct. *Id.* at 6 n.12 ("Public comments about the need for and importance of the investigation fall far short of the type of bias, explicit or implicit, that must be found."). Similarly, more recent comments describing the charges in the indictment, the procedural posture of the case, the office's conviction rates, and personal behind-the-scenes anecdotes are not disqualifying. This includes the District Attorney's unorthodox decision to make on-the-record comments, and authorize members of her staff to do likewise, to authors intent on publishing a book about the special grand jury's investigation during the pendency of this case. Such decisions may have ancillary prejudicial effects yet to be realized, but the comments do not rise to the level of disqualification under *Williams*.

The same cannot so easily be said of the District Attorney's prepared speech delivered before the congregation of a local Atlanta church on January 14, 2024. In these public and televised comments, the District Attorney complained that a Fulton County Commissioner "and so many others" questioned her decision to hire SADA Wade. When referring to her detractors throughout the speech, she frequently utilized the plural "they." The State argues the speech was not aimed at any of the Defendants in this case. Maybe so. But maybe not. Therein lies the danger of public comment by a prosecuting attorney. By including a reference to "so many others" on the heels of Defendant Roman's motion which instigated the entire controversy, the District Attorney left that question open for the public to consider. The Court finds, after considering the statement as a whole, under all the circumstances surrounding its issuance, that the District Attorney's speech

did include Defendant Roman and his counsel within its ambit, whether intentional or not.[6]

More at issue, instead of attributing the criticism to a criminal accused's general aversion to being convicted and facing a prison sentence, the District Attorney ascribed the effort as motivated by "playing the race card." She went on to frequently refer to SADA Wade as the "black man" while her other unchallenged SADAs were labeled "one white woman" and "one white man." The effect of this speech was to cast racial aspersions at an indicted Defendant's decision to file this pretrial motion.

However, the speech did not specifically mention any Defendant by name. Although not improvised or inadvertent, it also did not address the merits of the indicted offenses in an effort to move the trial itself to the court of public opinion. Nor did it disclose sensitive or confidential evidence yet to be revealed or admitted at trial. In addition, the case is too far removed from jury selection to establish a permanent taint of the jury pool. As best it can divine, under the sole direction of *Williams*, the Court cannot find that this speech crossed the line to the point where the Defendants have been denied the opportunity for a fundamentally fair trial, or that it requires the District Attorney's disqualification.

But it was still legally improper. Providing this type of public comment creates dangerous waters for the District Attorney to wade further into. The time may well have arrived for an order preventing the State from mentioning the case in any public forum to prevent prejudicial pretrial

[6] Worth noting is that there may be an issue of standing for the other five Defendants' challenge of this speech. Although counsel for Defendant Trump expressed in open court the possibility that he would join the motion after conducting his own investigation, each Defendant only formally joined Defendant Roman's motion challenging the hiring of SADA Wade *after* the speech had been made.

publicity, but that is not the motion presently before the Court. The Defendants' motions demanding disqualification and dismissal based on forensic misconduct are denied.

Other Grounds

The Defendants invoke a range of other constitutional, statutory, and county provisions in support of disqualification, including Ga. Const. Art. I, § II, Para. I (the "Trustee Clause"), various provisions of the Fulton County Code including financial disclosure requirements, and alleged payment and hiring violations pursuant to O.C.G.A. § 15-18-20. As to the latter, a district attorney may appoint private attorneys to assist with criminal cases independent of any specific statutory authorization. *State v. Cook*, 172 Ga. App. 433, 437 (1984). This statute does not place limitations on the appointment of a SADA to work on a specific case, as opposed to county approval of a general employee. *See Amusement Sales, Inc. v. State of Ga*., 316 Ga. App. 727, 736 n.5 (2012). While SADA Wade's contract did not limit his work to any particular case, the testimony established as much, and the Defendants have not produced any evidence demonstrating that his work ever expanded beyond this prosecution. Further, to the extent the Defendants argue the circumstances of Wade's loyalty oath create independent grounds for disqualification, the Court incorporates its previous Order on the subject and denies the motions. *See* Order on Defendant Chesebro's Motion to Dismiss Indictment for Failure to Comply (Chesebro Doc. 98, 10/6/23).

As for the remaining provisions and arguments, the Court has not been presented with any authority that such violations, even if proven, amount to an actual conflict of interest, nor that an appearance of impropriety can apply to any instance of inappropriate or wrongful behavior. In each case applying the appearance standard, the impropriety was connected in some way to an allegation

of a potential, and previously recognized, actual conflict.

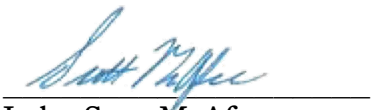
In a separate motion adopting the arguments of her co-defendants, Defendant Latham presents an additional theory. She asserts the right to call the District Attorney as a witness at trial to examine her biases toward the Defendants and demonstrate that she brought a politically motivated prosecution. Accepting the sole citation raised in support, *Duncan v. State*, 58 Ga. App. 551 (1938) (physical precedent only) (allowing impeachment of the "prosecutor" for improper motives or bias), requires ignorance of the opinion's surrounding context. Actually reading the case and the authority upon which it relies, and not simply quoting a headnote, reveals that the Court of Appeal's antiquated use of the word "prosecutor" referred not to the legal officer handling the criminal case on behalf of the public, but rather the "main witness for the State." *Duncan*, 58 Ga. App. at 553 (Broyles, C.J., dissenting). Defendant Latham asserts a claim accurately categorized as one of selective prosecution, and the United States Supreme Court has recognized that such claims are not a defense on the merits to any criminal charges themselves. *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Instead, a claim of selective prosecution must be brought in the form of a motion asking the trial court to exercise its judicial power on equal protection grounds. *Id.* at 464-65. Lacking such a showing here, or any foundation in law or the rules of evidence, the motion is denied.

Conclusion

Whether this case ends in convictions, acquittals, or something in between, the result should be one that instills confidence in the process. A reasonable observer unburdened by partisan blinders should believe the law was impartially applied, that those accused of crimes had a fair

opportunity to present their defenses, and that any verdict was based on our criminal justice system's best efforts at ascertaining the truth. Any distractions that detract from these goals, if remedial under the law, should be proportionally addressed. After consideration of the record established on these motions, the Court finds the allegations and evidence legally insufficient to support a finding of an actual conflict of interest. However, the appearance of impropriety remains and must be handled as previously outlined before the prosecution can proceed. The Defendants' motions are therefore granted in part and denied in part.

SO ORDERED, this 15th day of March, 2024.



Judge Scott McAfee
Superior Court of Fulton County
Atlanta Judicial Circuit