IN THE SUPREME COURT
STATE OF GEORGIA

STATE OF GEORGIA Petitioner - Appellee, vs. DONALD JOHN TRUMP Respondent - Appellant.	: : : : : : :	OPPOSITION TO CERTIORARI Docket Number: S25C0591

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

Court of Appeals of Georgia opinion A241599
Decided December 19, 2024.
Reconsideration not requested.

RESPONSE OPPOSING THE STATE'S PETITION FOR CERTIORARI

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INTRODUCTION

The Court of Appeals' decision held that the disqualification remedy fashioned by the trial court did not cure the "significant appearance of impropriety" caused by DA Willis' actual conduct, and thus the trial court abused its discretion by failing to disqualify her. That "remedy" holding by the Court of Appeals was both narrow and straightforward: the trial court's forced disqualification election – either DA Willis disqualifies her hand-picked, former lover/romantic partner, Special Assistant District Attorney (SADA) Wade, or herself – was an inadequate legal remedy under the circumstances of this "rare" case. Straining to fit this "remedy" opinion into Ga. Supreme R. 40 (1), the State's petition erroneously construes the A24A1599 opinion as the genesis of a new disqualification standard for prosecutors and an upheaval of the standard of review. The Court of Appeals opinion did no such thing.

"Certiorari generally will not be granted merely to correct an asserted error, particularly when the asserted error concerns only . . . the application of a properly stated rule of law to the facts of a particular case." Ga. Supreme R. 40 (1). Contrary to the State's petition, the Court of Appeals did not misapply *Blumenfeld v. Borenstein*'s "continuum" standard for the appearance of impropriety when it held that the undisputed factual findings as to DA Willis' *conduct-based* actual impropriety mandated disqualification. *Roman v. State*, __ Ga. App. __, 2024 WL

5164724, at *5-6 (1) (No. A24A1595-1603; Dec. 19, 2024). *Roman* correctly noted that an appearance of impropriety may disqualify a prosecutor, *id.* at *6 (citing *Battle v. State*, 301 Ga. 694, 698 (3) (2017), and that Willis' rare, specific conduct moved this particular case from the middle of the continuum to that portion where disqualification is mandated because it is the only remedy that could purge the taint of impropriety.

The State's petition is incorrect, as the Court of Appeals did not need to define "rare," for the factual circumstances underlying this case are simply unprecedented. This case is incongruent with Rule 40 (1) (c), as this "rare" conduct and "significant" appearance of impropriety is *not* likely to recur because no Georgia District Attorney has engaged in this level of unprofessional conduct before, it is highly unlikely that any DA will ever do so in the future, and no Georgia court has ever been faced with such actual impropriety by a Georgia DA. Without likelihood to recur, *Roman* is unlikely to set precedent that will illuminate future cases, and is not an appropriate vehicle to squarely reconsider the appearance of impropriety standard. Cases cited by the petition authorized both the trial court and the Court of Appeals to disqualify Willis based on a significant appearance of impropriety in light of, and considered together with, Willis' actual, specific conduct.

Contrary to the petition, in a correct application of the abuse of discretion review standard, the majority gave the legally appropriate deference to the trial

court's findings of impropriety, which were not cross appealed. Upon doing so, the majority found that the outright disqualification of Willis was mandated by the "significant appearance of impropriety" and "odor of mendacity" that remained over this prosecution, even after the trial court's remedy of forced disqualification of either Willis or Wade. [R. at 1926].

Moreover, the State's adoption and wholesale reliance on the dissenting opinion collapses under its own weight. The dissent's three fatal errors (to wit: restricting the standard of review, misapplication of precedent, and incorrect understanding of the trial court's findings) fail to show a compelling case for certiorari and, in fact, they support the majority decision.

Because the questions presented involve routine applications of settled law to undisputed facts, certiorari should be denied.

QUESTIONS PRESENTED

President Trump requests that this Court deny the State's petition for a writ of certiorari and thereby affirm the Court of Appeals opinion in A24A1599 as the law of this case. Correctly framed, the questions presented are:

1. Should this Court deny discretionary review of the Court of Appeals' holding that the application of the "continuum" standard from *Blumenfeld v. Borenstein* to DA Willis' conduct mandated the remedy of her disqualification in this unique, fact-specific case where the trial court found a significant appearance of impropriety based on undisputed factual findings?

2. Should this Court deny discretionary review of the Court of Appeals' application of the abuse of discretion reviewing standard because it properly stated and employed this rule of law to the undisputed facts of this particular case in holding that the trial court erred in failing to disqualify DA Willis?

REASONS TO DENY THE WRIT

I. Certiorari must be denied because the petition fails to satisfy Rule 40 (1).

"Review on certiorari is not a right." Ga. Supreme R. 40 (1). Under Georgia law, "[a] petition for the writ will be granted only in cases of great concern, gravity, or importance to the public.[1]" *State v. Tyson*, 273 Ga. 690, 692 (1) (2001) (citing O.C.G.A. § 15-6-15); GA. CONST. OF 1983, ART. VI, § 6, ¶ 5. "Great concern, gravity, or importance to the public" is not defined, yet cases suggest this phrase is typically reserved for issues of first impression for which the establishment of precedent is desirable—not the application of settled rules of law to unique, undisputed facts that are extremely unlikely ever to recur. *See generally Federated Mut. Ins. Co. v. Dekalb County*, 255 Ga. 522, 523 (1986). Even where an issue is of first impression, certiorari is routinely denied for the wrong vehicle. *See Maso v. Zeh*, 317 Ga. 769 (No. S23C0765; Dec. 19, 2023) (Pinson, J., concurring in denial of certiorari).

[1] In his *Tyson* dissent, Justice Benham limited the phrase "great concern, gravity, or importance to the public" to the "issues contained therein," not the case generally. *Id.* at 701 (3), n. 31. Other Jurists of this Court have applied this construction. *See Mobuary v. State*, 312 Ga. 337, 340 (2021) (Nahmias, C.J., dissenting); *see also Wilson v. Inthachak*, 317 Ga. 868, 875 (2023) (McMillian, J., concurring). Thus, the State's red herring appeals to "intense media scrutiny" and "resultant public interest" fail to satisfy Rule 40 because these considerations are outside the scope of the legal issues presented.

Disqualification of a public prosecutor for the appearance of impropriety is not an issue of first impression.[2] *See Battle*, 301 Ga. at 698 (3). The majority cited *Battle* to apply the *Blumenfeld* continuum to specific conduct that created the significant appearance of impropriety. *Roman*, 2024 WL 5164724, at *5 (1). Because the Court of Appeals described DA Willis' conduct as "the rare case" to mandate disqualification, *id.* at *6 (1), the petition presents an "application of a properly stated rule of law to the facts" for which certiorari "will not be granted." Ga. Supreme 40 (1).

As former Chief Justice Nahmias wrote, "this Court has emphasized [a] high standard for granting certiorari review since [its] very first case exercising that authority":

> This court should be chary of action in respect to certiorari, and should not require by certiorari any case to be certified from the Court of Appeals for review and determination, unless it involves gravity and importance. It was not intended that in every case a complaining party should have more than one right of review.

[2] The trial court interpreted *Battle* to permit disqualification of a prosecutor based on an appearance of impropriety, "even without any explicit finding of an actual conflict." *See* [R. at 1620] (citing *Battle*, 301 Ga. at 698; *Greater Ga. Amusements, LLC v. State*, 317 Ga. App. 118, 122 (2012) (physical precedent only); *Head*, 253 Ga. App. at 758.

Mobuary, 312 Ga. at 340 (Nahmias, C.J., dissenting) (quoting *Central of Ga. R. Co. v. Yesbik*, 146 Ga. 620, 622 (1917)). The State's petition has squarely failed to meet that standard.

Applying this background for the certiorari standard together with Rule 40's non-exclusive examples,[3] certiorari should be denied here for four reasons. First, the majority opinion faithfully applied *Blumenfeld*'s continuum standard for disqualification based on an appearance of impropriety. Second, this "rare," indeed unprecedented, factual scenario is unlikely to recur, and a "significant appearance of impropriety" based on conduct is a legal basis to disqualify. Third, this "remedy" opinion, driven by complete deference to the trial court's undisputed findings of impropriety, correctly applied the abuse of discretion standard of review. Finally, the dissent erred by restricting the abuse of discretion standard of review, and by misconstruing the uncontested facts, the majority analysis, and existing precedent to support its newly proposed, bright-line rule of absolute deference.

A. Rule 40 (1) (a): No new standard was created. The majority applied *Blumenfeld*'s continuum to a "rare" significant appearance of impropriety based on conduct of a public prosecutor.

There was no deviation from *Blumenfeld* in *Roman*—the phrase "*per se*" appears not once in the majority analysis. The petition is wrong - *Roman* did not

[3] Rule 40 (1) provides three non-exclusive examples of when certiorari may be appropriate. Of these examples, the petition seeks to implicate only two. R. 40 (1) (a), 40 (1) (c). The petition makes no argument as to subsection (1) (b).

usurp this Court's authority or create a *per se* disqualification standard for an elected district attorney. Instead, the majority faithfully applied *Blumenfeld* because the second guiding principle noted by division 1's first paragraph was that "attorney disqualification is viewed as a continuum." *Id.*, 2024 WL 5164724, at *5 (citing *Blumenfeld*, 247 Ga. at 409). As opposed to a *per se* rule for prosecutors, the majority made clear that it was the "rare" facts of this case coupled with the trial court's finding of a "significant" appearance of impropriety which rendered its otherwise diluted remedy wholly ineffective. In *Blumenfeld*, this Court wrote[4]:

> 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.

[4] Factually, *Blumenfeld* considered whether an attorney who formerly represented a propounder of a will was *per se* disqualified due to his marriage to the caveator's present co-counsel. 247 Ga. at 407-08. This Court found that marriage, standing alone, created an appearance of impropriety but did not require *per se* disqualification. Disqualification, instead, was a remedy applied on a "continuum." *Id.* at 409.

This block quotation of *Blumenfeld*'s continuum was the heart of *Roman*'s division 1 analysis. *Roman*, 2024 WL 5164724, at *6. The majority applied *Blumenfeld*'s continuum, citing DA Willis' role as a "public prosecutor" as one factor, among others discussed below, to move the remedy from the middle to the top of the continuum for disqualification. *Roman*, 2024 WL 5164724, at *5-6 (1). "After carefully considering the trial court's findings[,]" *id.* at *6 (1), disqualification was mandated by undisputed findings that: (a) the appearance of impropriety was "significant" and impacted "more than a mere nebulous public interest;" [R. at 1625]; and (b) that an "odor of mendacity" remained, even after the trial court's remedy, from the world's observation[5] of DA Willis' seemingly untruthful testimony concerning her relationship with SADA Wade. [R. at 1626].

Specifically, the majority moved the remedy up the continuum based on the following undisputed trial court findings as to DA Willis' conduct. The following facts were **NOT** cross appealed:

1. This appearance of impropriety was significant [R. at 1612];

2. More than a nebulous public interest was impacted [R. at 1625];

3. Chief Judge Robert McBurney disqualified DA Willis during the Special Grand Jury proceeding for naming Lt. Gov. Burt Jones a "target" after hosting a fundraiser for Jones' opposition candidate;

[5] Though DA Willis' disqualification was predicated upon extreme deference to the trial court's findings, *see* Part I (c), *infra*, it should be noted that everyone in America had a "front row seat" to the disqualification hearing because this hearing was transmitted live on national news across the country.

4. DA Willis continued to supervise and pay SADA Wade during their romantic relationship;

5. Substantial taxpayer funds paid to DA Willis' lover SADA Wade were used by her for trips and vacations with him without verifiable reconciliation of funds she claimed were reimbursed;

6. DA Willis testified that Roman's motion to disqualify her only "cemented" her relationship with SADA Wade;

7. SADA Wade's inaccurate interrogatory responses indicated a willingness to wrongfully conceal his relationship with DA Willis;

8. Both DA Willis and SADA Wade gave "potentially untruthful" testimony under oath at the disqualification hearing. *Id.* at *3-5; and

9. An odor of mendacity remained over the proceedings. [R. at 1626].

Taken together, according to the trial court, "an outsider could reasonably think that the District Attorney is not exercising her independent professional judgment totally free of any compromising influences." [R. at 1626].

Nonetheless, the State incorrectly argues the majority opinion failed to apply *Blumenfeld*. To support its faulty premise, the State distorts and misconstrues the majority's statement that these undisputed factors "t[ook] 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." Pet. at 13 (quoting *Roman*, 2024 WL 5164724, at *6 (1). But the State's argument is nothing more than a contrived misunderstanding of what this language actually did—"takes [] out" did not *discard*

the continuum, "takes [] out" *applied* the continuum to the "rare" facts found by the trial court and "significant" appearance of impropriety found by the trial court.

By the "takes out" language it used, the majority recognized contextual distinctions from *Blumenfeld*, explaining that case applied the continuum in a motion to disqualify private counsel where the "important interest" in the right to choice of counsel must be balanced and only a "nebulous interest of the public at large in the propriety of the Bar" are implicated. 247 Ga. at 409. Not so here. Here, the public's interest and defendants' interest in a disinterested prosecutor are aligned. When *applying* the continuum, these distinctions demanded disqualification because it was undisputed that the public interest impacted by this *significant* appearance of impropriety was "*more than*" nebulous. [R. at 1625] (emphasis added).

Consistent with *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987),[6] *Roman* underscored the *important* public interest at stake given the district attorney's role as "an administrator of justice." As the majority noted, the "responsibility of a public prosecutor differs from that of the usual advocate," and the district attorney has "additional professional responsibilities as a public

[6] "A prosecutor occupies a unique role in our criminal justice system and it is essential that he carry out his duties fairly and impartially." *Id*. at 826. Prosecutors must "wield [their] formidable criminal enforcement powers in a rigorously disinterested fashion" to preserve public "faith in the fairness of the criminal justice system in general." *Id.* at 810–11. "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Id*. at 809-810.

prosecutor to make decisions *in the public interest*." (emphasis added). Rather than balancing a defendant's constitutional right to choice of counsel *against* the nebulous public interest in the propriety of the Bar, this case involved the important public interest in having a disinterested prosecutor *in addition to* the defendant's right to one.

The majority's continuum application did not create a "new *per se* standard" for prosecutors. That this application *involved* a public prosecutor was one aggravating fact that moved this case along the continuum and "out of" the cases dealing with private practitioners, a client's choice of counsel, and the nebulous public interest of the propriety of the Bar. Having already moved along the continuum, the majority found the "significant" appearance of impropriety, based on DA Willis' "rare" and "specific conduct," moved the case to the mandatory disqualification portion of the continuum because "no other remedy will suffice to restore public confidence in the integrity of the proceedings."

No "bright line rule" rule of *per se* disqualification for prosecutors was created by the majority opinion. Indeed, had each of the "rare" circumstances in this particular case ***not*** been present (to wit: *significant* appearance of impropriety, disqualification from special grand jury, campaign finance violations, covert romantic relationship with SADA Wade while under contract funded by taxpayer dollars, persistent concealment of relationship, and "odor of mendacity" from

potentially untruthful testimony), disqualification might not have been required. The majority correctly considered each factor in the factual context as a whole.

The State's post-conviction citations, *Whitworth v. State*, 275 Ga. App. 790, 796 (2005) and *Lyons v. State*, 271 Ga. 639, 640 (2) (1999), are poor benchmarks for the majority opinion (which distinguished *Whitworth* in footnote 4),[7] given the posture of the *Roman* defendants who are presumptively innocent. Neither case cited *Blumenfeld* nor mentioned the continuum, despite publication long after 1981.[8] *Id*. Most importantly, the alleged appearances there were not based on specific, actual conduct.

A fundamental flaw in the State's red herring argument (that the majority opinion created a "new *per se* rule") is the supposition that disqualification was based on DA Willis' status (*i.e.*, public prosecutor). Not so. Both the trial court order and majority opinion emphasized that this "significant" appearance of impropriety was based on *conduct*. With undisputed findings of "specific conduct" at the center of the analysis, the State's apprehension of a "*per se*" rule for prosecutors is unfounded. *Roman*'s holding is *not* that a mere appearance of

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[7] Footnote 4, distinguished division 1 of *Whitworth* in that it was "non-binding, physical precedent." Ga. Ct. App. R. 33.2 (a) (2). Factually, *Whitworth* addressed only the disqualification of a special assistant district attorney. *Roman*, 2024 WL 5164724, at *5 (1), n.4.

[8] *Lyons* dedicated only one sentence to its analysis of the appellant's alternative, appearance of impropriety argument.

impropriety involving a public prosecutor requires disqualification *in all cases*, but that disqualification of a public prosecutor was mandated *in this case* by these "rare," undisputed facts and the "significant" appearance of impropriety found by the trial court.

Though the petition protests that the majority was "conclusory" and "failed to explain its analysis," Pet. at 14-15, 20, this myopic focus on division 1's concluding paragraph is willfully blind to the incorporation of fifteen paragraphs of trial court findings from its order. *Roman*, 2024 WL 5164724, at *2-5. The answer to "*how*" the majority applied these "separate considerations" to reach disqualification is simple: additional and "rare" aggravating factors demanded it.

Accordingly, because *Roman* merely applied *Blumenfeld*'s[9] continuum to "rare," undisputed factual findings of specific conduct involving a public prosecutor, this petition involves only the "application of a properly stated rule of law to the

[9] Indeed, even in the middle of the spectrum, when balancing a client's right to choice of counsel against more nebulous interests, *Blumenfeld* held that an appearance of impropriety was "generally" insufficient. In other words, there will be *some* cases where an appearance alone will suffice for disqualifying a private practitioner despite defendant's right to choice of counsel. Entirely consistent with *Blumenfeld*, *Roman* found that the "rare" facts and "significant" appearance of impropriety here didn't fall within the ordinary class of cases where disqualification was "generally" disfavored. And when, as opposed to balancing *against*, the court must consider the defendant's right *in addition to* the public interest in a disinterested prosecutor, those "rare" facts and "significant" appearance removed the case entirely from that part of the spectrum where disqualification was debatable. Pursuant to those undisturbed findings of the trial court, disqualification was mandated.

facts of a particular case." Ga. Supreme R. 40 (1). Certiorari should therefore be denied.

B. Rule 40 (1) (c): this "rare" case is unlikely to recur and *Roman* is not the appropriate vehicle to reconsider the appearance standard.

The Court of Appeals did not need to define "rare." *Roman*, 2024 WL 5164724, at *6. The majority's express finding that *Roman* was "*the* rare case in which disqualification is mandated and no other remedy will suffice to restore public confidence," *id.* (emphasis added), militates against certiorari for a second reason: this question of Georgia law is ***not*** likely to recur. Ga. Supreme R. 40 (1) (c).

Mandatory disqualification of an elected District Attorney for a significant appearance of impropriety, for specific conduct, is unlikely to recur because no Georgia District Attorney has engaged in such egregious disqualifying conduct before and it is highly unlikely that any DA will ever do so in the future. No Georgia court has ever considered impropriety of this extraordinary magnitude. *See generally Head v. State*, 253 Ga. App. 757, 758 (2) (2002); *Ventura v. State*, 346 Ga. App. 309, 311 (2) (2018); *Whitworth*, 275 Ga. App. at 796 (1); *Hodge v. URFA-Sexton, LP*, 295 Ga. 136, 146 (2014); *Edwards v. State*, 336 Ga. App. 595, 600 (2016); *Lewis v. State*, 312 Ga. App. 275, 280 (2011); *Brown v. State*, 256 Ga. App. 603, 607-08 (2002); *Reeves v. State*, 231 Ga. App. 22 (1998); *Dalton v. State*, 257 Ga. App. 353 (1981). With no likelihood of recurrence, *Roman* did not create novel precedent, but merely established the law of this case. O.C.G.A. § 9-11-60 (h).

"Rare" facts and no likelihood of recurrence make *Roman* an inappropriate certiorari vehicle to squarely reconsider the appearance of impropriety legal standard for disqualification. *See Maso*, 317 Ga. at 769 (Pinson, J., concurring in denial of certiorari). Though it describes the appearance standard as "a relic of the former Code of Professional Responsibility," the petition does not seek certiorari on this ground. Pet. at 6-8. The State cannot have it both ways: it prefers a variable, non-mechanical legal standard, but not *so* variable as to be materially affected by "significant" and "rare" aggravating factors.

The petition maintains that "application of the appearance of impropriety standard alone to authorize disqualification is not accepted practice in Georgia[.]" Pet. at 8. This is another red herring. This standard was not applied *alone*. The State's argument ignores the findings of actual impropriety that predominate the trial court's order.[10] *See* [R. at 1612, 1615, 1619, 1622, 1625-27].

Cases cited by the State in its own petition interpret *Blumenfeld* to authorize disqualification based on an appearance of impropriety in conjunction with *actual* impropriety. *See e.g.*, *Cohen v. Rogers*, 338 Ga. App. 156, 164 (1) (2016) (citing *Blumenfeld*, 247 Ga. at 408) (emphasis in original); *see also Ga. Trails and Rentals, Inc. v. Rogers*, 359 Ga. App. 207, 214 (2021) (". . . our Supreme Court has held

[10] The State's citations do not include the trial court's condemnation of the DA Willis' "legally improper," racially charged speech at a historic Black church in Atlanta on Martin Luther King, Jr. Holiday. *See* [R. at 1630].

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 added). *Cohen* and *Ga. Trails* disjunctively distinguish actual impropriety from an actual conflict of interest, and the majority here relied on undisputed litany of actual impropriety from the trial court's order. *Roman*, 2024 WL 2024 WL 5164724, at *3-5 (1).

In sum, because this "rare case" is not likely to recur or provide significant precedential guidance beyond its unique facts, certiorari should be denied.

C. Abuse of Discretion: this narrow "remedy" opinion was based on complete deference to undisputed trial court factual findings.

From the outset, the majority narrowed the scope of its holding to the adequacy of the trial court's remedy:

> 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. *Roman*, 2024 WL 516724, at *1 (emphasis added).

Division 1 found an abuse of discretion – based entirely on facts found by the trial court and *because* of the order's findings – in the failure to impose a remedy adequate to cure the ongoing problems its order identified. *Id.* at *2-6. Here, the State's ironic complaints that the majority did *not* dispute any trial court factual

findings *supports* a proper application of the standard of review and a denial of certiorari. *See generally Reed v. State*, 291 Ga. 10, 14 (3) (2012) ("We accept a trial court's factual findings unless they are clearly erroneous.").

The petition echoes the dissent, arguing the majority failed to apply the abuse of discretion standard and substituted its own discretion. Pet. at 18-20. Nothing could be further from the truth. By expressly incorporating fifteen paragraphs from the trial court's order, the majority gave complete deference to the trial court's findings, noting three times that the State did not cross appeal the finding of significant appearance of impropriety. *Roman*, 2024 WL 5164724, at *1, 6. The majority did not find its own facts; it block-quoted the factual findings set out in the trial court's order.

The State's argument that the majority found no legal error overlooks language within the same opinion excerpt that it quotes: the trial court's remedy did not redress problems it found were still there. *See Eagle Jets, LLC v. Atlanta Jet, Inc.*, 347 Ga. App. 567, 576 (2) (c) (2018) ("Although this standard of review is deferential, it is not toothless. An abuse of discretion occurs where a ruling is unsupported by any evidence of record or where that ruling misstates or misapplies the relevant law.") (citations omitted). The majority explained:

> 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. *Roman*, 2024 WL 5164724, at *6 (1).

"[A]dequate legal remedy does not mean any legal remedy." *Southern Healthcare Sys. Inc. v. Health Care Capital Consolidated, Inc.*, 273 Ga. 834, 835 (6) (2001). As the majority explained, the trial court's forced election of Willis **or** Wade did not purge the taint from the preindictment stage, and it was insufficient to cleanse future proceedings of the "odor of mendacity" that the trial court found "remained." *See* [R. at 1612, 1625-27]. Given findings of "significant," actual impropriety and the remaining "odor of mendacity," the majority rightly concluded that the trial court's inadequate remedy was outside "the range in which reasonable jurists could disagree[.]" *Cf. Burns v. State*, __ Ga. __, 907 SE2d 581, 586 (No. S23G1192; Oct. 15, 2024) (collecting cases on abuse of discretion standard). Stated another way, "rare" and "significant" facts mandated an extraordinary remedy - disqualification.

Because disqualification was the only remedy legally adequate to purge the ongoing, significant appearance of impropriety, the majority correctly held that the trial court's exercise of discretion was "infected by a significant legal error. . .." *Rockdale Hospital, LLC v. Evans*, 306 Ga. 847, 851 (b) (2019) (citations omitted).

By finding significant error in the remedy, the majority correctly applied the abuse of discretion standard and certiorari should be denied.

D. Dissent in Error: Judge Land restricted the standard of review, misapplied precedent, and changed facts to support his proposed absolute deference.

The final erroneous pillar of the State's petition is its adoption of the dissent's flawed reasoning. *See Roman*, 2024 WL 5164724, at *7-11 (Land, J., dissenting). The dissent incorrectly took exception to the majority's reversal, advocating for absolute deference to the trial court's remedy. *Id.* The dissent's position was simply wrong.

Respectfully, the dissent suffers from three analytical flaws. First, the dissent restricts the abuse of discretion standard to a mechanical, "bright line" rule of absolute deference. Second, the dissent misconstrues precedent, conflating "actual impropriety" with an "actual conflict of interest." Finally, the dissent is based on a misunderstanding of the facts found by the trial court.

1. The dissent would reduce the abuse of discretion standard to absolute deference.

Citing *Neuman v. State*, 311 Ga. 83, 88 (3) (856 SE2d 289) (2021), the dissent begins with general language misconstruing the standard of review, imported from

Ventura, 346 Ga. App. at 310 (2).[11] Neither *Ventura* nor *Neuman* describes the contours of this standard nor mention the appellate court's authority to reverse in cases of "significant legal error …." *Rockdale Hospital, LLC*, 306 Ga. at 851 (b).

Because precedent from this Court *does*, in fact, vest the Court of Appeals with authority to reverse despite the appropriate deference, the dissent's framing of the standard is, at best, incomplete. This Court has written:

> such discretion is not unfettered; the trial court must exercise its discretion in conformity with the governing legal principles, and the facts that the court is to find and those which must be evaluated by this Court are those relevant to determining whether the legal requirements have been satisfied. Indeed, if the trial court significantly misapplies the law or makes a clear error with regard to a material finding of fact, the trial court's exercise of discretion can be upheld only if this Court can reach the conclusion that had the trial court used the correct facts and legal analysis, it would have had no discretion to reach a different judgment. Otherwise, there is an abuse of discretion as a matter of law. *State v. Hill*, 295 Ga. 716, 718 (2014) (internal citations omitted).

The dissent does not engage the majority's authority to reverse. Nor does the dissent explain how the trial court's remedy was adequate to cure the ongoing problems the trial court identified. The dissent undertook no remedy analysis. In the dissent's view, absolute deference to the remedy fashioned by the trial court was required by the mere fact that no actual conflict of interest was found. Here, although

[11] *Ventura* was a "relationship" case and, applying *Blumenfeld*'s continuum, found no abuse of discretion in the failure to disqualify a prosecutor based on her marriage to an attorney that represented Ventura in an unrelated plea three years prior.

it notes *Blumenfeld*'s rejection of a *per se* rule for disqualification, it was *the dissent* that advocated for a "mechanical, *per se*" application of the continuum.

The dissent posits sweepingly that a trial court's remedy is not within the scope of appellate review. *See id.* at *8 (Land, J., dissenting) ("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"); *see id.* at *9 (Land, J., dissenting) ("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."). Though it discusses *Blumenfeld* generally, the dissent's view of the abuse of discretion standard would actually prohibit an appellate court from auditing a trial court's remedy determination as required by the *Blumenfeld* continuum. This would improperly render unassailable a trial court's application of the *Blumenfeld* factors, so long as an actual conflict was not found below.

That dissent argument is predicated on the flawed assumption that no factors *other than* an actual conflict can move the remedy within the continuum to disqualification. *Blumenfeld* did not so hold. On the contrary, *Blumenfeld* described the "appearance of impropriety based on conduct on the part of the attorney" *generally*, as the only type of appearance that was *not* anchored along the continuum

at the ends of the spectrum where disqualification decisions were mandated. 247 Ga. at 409. Because an appearance based on conduct was not anchored, but instead was "somewhere in the middle," fact-specific circumstances dictate whether disqualification is necessary.

Blumenfeld explained that an appearance based on conduct was "generally" insufficient "to outweigh the client's interest in counsel of choice" based on three factors that the trial court found were *not* present here (a nebulous public interest, the absence of danger to the client, and the client's interest in counsel of choice). *Id.* These factors strongly support the disqualification remedy in this "rare case"—the public interest in a disinterested prosecutor was *not* nebulous, the appearance was *significant*, causing danger to the defendants, and the only choice of counsel interest was the *defendants*' interest not to continue with a tainted prosecution. [R. at 1612, 1625-26]. Absolute deference, without regard to the *Blumenfeld*'s factors, usurps the appellate authority to review the trial court's analysis of the continuum based on the facts it found. This is not Georgia law.

2. The dissent misconstrues precedent and conflates "actual impropriety" with an "actual conflict of interest."

Beyond restricting the standard of review, the dissent objects that *Williams v. State*, 285 Ga. 305 (1988), did not discuss disqualification based on mere appearances. *Roman*, 2024 WL 5164724, at *9. Published after 1981, *Williams* division 2 did not cite *Blumenfeld* nor discussed the appearance of impropriety

precisely because that disqualification challenge was not based on an appearance, and instead was based on forensic misconduct, through that prosecutor's violation of the Rules of Professional Conduct. *Williams*, 285 Ga. at 314-15 (2) (A)-(B).

Although the dissent was correct that *Williams* is a "leading criminal case[] dealing with the disqualification of prosecutors," it was dead wrong to import *Williams'* analysis of a forensic misconduct argument into the appearance of impropriety context. Heavy reliance on *Whitworth* (not precedent below) failed to show the majority's incongruence with a decision of this Court; the dissent did not respond to the majority's distinction in footnote 4. *Roman*, 2024 WL 5164724, at *5 (1), n.4. The dissent's attempt to finesse *Lee v. State*, 318 Ga. 412 (2024), an otherwise inapposite, near-summary decision,[12] also falls flat. Tellingly, the dissent did not cite *Lee*'s division 5 analysis, only one sentence in the introduction. *Id.* at 419-20 (5). Contrary to the dissent, no "principles" were "reiterated" in *Lee*'s sole introductory sentence. *Id.* at 412-13. The dissent's confusing footnote 3 supported

[12] *Lee's* division 5 *analysis* had minimal relevance because that case did not seek disqualification based upon an appearance of impropriety but, instead, an *actual conflict* due to alleged prior representation and information or knowledge gained. Rather than holding anything about an appearance of impropriety standard, *Lee* simply affirmed the trial court's refusal to disqualify given appellant's failure to prove his claims of an actual conflict because there was no "evidence in the record showing that the assistant district attorney actually represented him in prior cases," or "information and knowledge that the assistant district attorney might have acquired during that alleged representation that could have disadvantaged Lee." *Id.* at 419-20 (5).

the majority: consistent with *Battle*, the majority applied *Blumenfeld* to a prosecutor and described its remedy as extraordinary.[13]

Finally, the dissent's analysis of cases applying the appearance of impropriety standard actually *supported* the majority's decision to reverse the remedy. Specifically, *Kamara v. Henson*, 340 Ga. App. 111, 116 (2) (2017) and *Georgia Trails* both expressly authorize disqualification for an appearance of impropriety based on actual impropriety. Though it twice protests that the trial court "rejected allegations of actual impropriety," *Roman*, 2024 WL 5164724 at *8, 11 (Land, J., dissenting), the order shows otherwise. *See* [R. at 1612, 1625-27]; *see also* Part I (D) (3), *infra*.

A fatal flaw in the dissent's argument is its assumption that "actual conflict of interest" and "actual impropriety" are synonymous. They are not. Actual impropriety refers to conduct on the part of an attorney that creates the appearance of impropriety, as opposed to mere status alone. Cases use these terms disjunctively indicating that either an actual conflict or an actual impropriety coupled with an appearance is sufficient to disqualify. *See* Part I (B), *supra*. Because the trial court

[13] Footnote 3 is further confusing because the dissent utterly ignores *Young*, Georgia precedent, and the bar rules applicable to prosecutors which all clearly describe the "unique" role and responsibilities of the prosecutor in serving the public interest. *See* Part I (B), *supra;* ABA Criminal Justice Standards For Prosecutors 3-1.2, Georgia Rule of Professional Responsibility 3.8, ABA Standard 3-1.6(a); ABA Standard 3-1.10(h); *cf.* 28 U.S.C. § 528.

did, in fact, find actual impropriety and the cited cases authorized disqualification on this basis, the dissent provides no grounds for certiorari. Ga. Supreme R. 40 (1).

3. The trial court did not reject the allegations of actual impropriety.

A flawed premise, central to the dissent's analysis, is the factual claim that the trial court "rejected allegations of actual impropriety." *Roman*, 2024 WL 5164724, at *8, 11. It did not. The trial court rejected an actual conflict of interest, but its order in several locations found several instances of actual impropriety based on DA Willis' conduct. *See* [R. at 1612, 1615, 1622, 1625-27, 1630].

Specifically, the order noted DA Willis' disqualification during the special grand jury investigation; her "unprofessional" and "potentially untruthful" testimony concerning her clandestine relationship with SADA Wade; her failure to keep "any form of verifiable reconciliation" for her cash transactions with SADA Wade; her campaign finance violations; her efforts with SADA Wade to hide their relationship through false affidavits and interrogatory responses; her racially-charged speech before a historically Black church on Martin Luther King Day; and the potentially dishonest and untruthful in-court testimony of SADA Wade and DA Willis, characterized as "an odor of mendacity" by the trial court. *See id.*

Contrary to the dissent's characterization, the trial court's remarks (*i.e.*, characterizing DA Willis' conduct and testimony as a "tremendous lapse in judgment, unprofessional, and potentially untruthful") on this specific conduct did

not merely "chastise" DA Willis, they found actual impropriety. These findings were so impactful that the trial court noted (without citation) that this "perceived conflict in the reasonable eyes of the public threatens confidence in the legal system itself." [R. at 1622]. And these findings were ***not*** cross appealed.

The dissent wrote: "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 motion to disqualify." *Id.* at *8 (Land, J., dissenting). But unlike those prior cases, this "rare" case *did* involve findings of actual impropriety, making it both an outlier and "extraordinary," even under the dissent's view. For that reason, and as explained by the opinion, the majority's disqualification remedy was the *only* legally adequate remedy.

(Continued on the next page with signatures)

CONCLUSION

For the foregoing reasons, President Donald J. Trump respectfully requests this Court **DENY** the State of Georgia's petition, **THE WRIT**, and thereby **AFFIRM** the Court of Appeals opinion in A24A1599 as the law of this case.

CERTIFICATION OF WORD COUNT

This submission does not exceed the word-count limit imposed by Rule 20 (3).

Respectfully submitted this 17th day of January, 2025

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing RESPONSE upon Messrs. Alex Bernick and F. McDonald Wakeford, Assistant DAs for Fulton County, by filing this response via the Supreme Court's E-file service, and by depositing the same in the United States Mail with adequate first class postage affixed thereon to insure delivery, addressed to the Fulton County District Attorney's Office, 136 Pryor Street, third floor, Atlanta, Georgia 30303.

This 17th day of January, 2025.

s:/ Matthew K. Winchester
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