

**IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA**

STATE OF GEORGIA,

vs.

**MARLON KAUTZ,
ADELE MACLEAN, and
SAVANNAH PATTERSON,**

Defendants.

INDICTMENT NO. 23SC189192

JUDGE ADAMS

**ORDER DENYING MOTION TO DISQUALIFY
AND TO DISMISS INDICTMENT**

The above-captioned case is presently before the Court on the Motion to Disqualify the Attorney General’s Office From Any Further Prosecution of This Case and to Disqualify the Atlanta Police/Homeland Security Unit From Any Further Participation in This Case and for Further Relief Including Dismissal of the Indictment (“Motion to Disqualify”) filed by Defendants Marlon Kautz (“Kautz”), Adele Maclean (“Maclean”), and Savannah Patterson (“Patterson”) (*collectively*, “Movants”). The State of Georgia (“State”) opposes the Motion to Disqualify. On July 25, 2024, the Court held a hearing where counsel for the parties presented argument, testimony, and evidence concerning the Motion to Disqualify. Subsequently, the Court examined, *in camera*, certain e-mails forming the basis of

the instant motion. For the reasons set forth herein, the Motion to Disqualify is **DENIED.**

I. BACKGROUND

1.

On or about May 31, 2023, law enforcement executed a search warrant at Movants' residence at which law enforcement seized several electronic devices.

2.

Movants' counsel advised the Attorney General of the State of Georgia ("Attorney General") that the seized devices likely contained privileged material and requested that the Attorney General employ a filter team to review the seized devices.

3.

Subsequently, the Attorney General advised Movants' counsel that, although downloaded, the Attorney General would not review any non-filtered material obtained during the search at Movants' residence.

4.

Unbeknownst to Movants' counsel, law enforcement also secured, via search warrants to Google on or about July 7, 2023, e-mails from MacLean's and Patterson's Gmail accounts, including, but not limited to, purported communications with Movants' counsel.

5.

On August 29, 2023, the State filed the above-captioned Indictment, charging Movants with racketeering and money laundering.

6.

At the direction of the Court during the arraignment on November 6, 2023, the Parties commenced discovery. In this regard, the State began collecting materials from law enforcement, including, but not limited to, external hard drives with digital case files and the Google records. According to the Attorney General, the State did not review the Google records, including the purported privileged communications and e-mails with counsel, when producing the material to counsel for all Defendants in the above-captioned case.

II. DISCUSSION OF LAW

Movants argue that, based upon the State's violation of attorney-client privilege when searching, seizing, and/or distributing communications, the Court should dismiss the Indictment against Movants, remove the Assistant Attorney General and law enforcement who participated in discovery, order the Assistant Attorney General to not discuss this matter, exclude any witnesses to the instant motion from the trial of this case, and order disclosure of any person who received discovery in this matter. Conversely, the State argues that the Court should deny the instant motion because, *inter alia*, there has been no tainted evidence introduced, the

State was unaware of any purported privileged material, and that the material was inadvertently produced to counsel for the other Defendants consistent with the Court's discovery deadlines. Having reviewed the instant motion, the record, the subject communications, and applicable authority, Movants have failed to justify disqualification of counsel or dismissal of the Indictment.

A. Request to Disqualify the Assistant Attorney General

First, Movants request that the Court disqualify the Assistant Attorney General (and supporting staff) assigned to the above-captioned case. Generally, prosecuting attorneys can be disqualified where there is a “conflict of interest” or “forensic misconduct.” Reed v. State, 314 Ga. 534, 545, 878 S.E.2d 217 (2022). Although a “conflict of interest” occurs when the prosecutor acquires a personal interest or stake in the conviction, “forensic misconduct” involves improper prosecutor statements. Amusement Sales, Inc. v. State, 316 Ga. App. 727, 735, 730 S.E.2d 430 (2012). Likewise, prosecutorial misconduct sufficient to warrant dismissal requires a showing of actual misconduct and prejudice to the right of a fair trial. Whitworth v. State, 275 Ga. App. 790, 796, 622 S.E.2d 21 (2005) (finding trial court did not abuse discretion when denying motion to disqualify based upon continued involvement of a recused individual). Motions to disqualify prosecutors fall within the sound discretion of the Court based upon factual findings supported by “any evidence.” Ventura v. State, 346 Ga. App. 309, 310, 816 S.E.2d 151 (2018).

The Supreme Court of Georgia’s decision in Williams v. State, 258 Ga. 305, 369 S.E.2d 232 (1988) is instructive concerning motions to disqualify prosecutors. Following a third trial, the prosecutor made public statements to the effect that “we’ll get the right result.” Id. at 310. Addressing the defendant’s motion to disqualify the prosecutor/staff, the Supreme Court succinctly explained:

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 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.

One of the primary examples of “forensic misconduct” consists of the improper expression by the prosecuting attorney of his personal belief in the defendant’s guilt.¹ In determining whether an improper statement of the prosecutor as to the defendant's guilt requires his disqualification, the courts have taken 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, albeit improper, utterances.

Id. at 314 (internal citations omitted). Because “it [was] quite clear that any improper remarks made by the prosecutor were not of such egregious nature as to

¹ As the Eleventh Circuit Court of Appeal has also explained, see Bonner v. Prichard, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (adopting as precedent the decisions of the Fifth Circuit Court of Appeals), improper remarks from prosecutors constitutes “forensic misconduct.” Houston v. Estelle, 569 F.2d 372, 383-84 (5th Cir. 1978); Hall v. U.S., 419 F.2d 582, 587 (1969).

require his disqualification,” the Supreme Court affirmed denial of the motion to disqualify. Id.

Here, nothing in the Motion to Disqualify suggests that the Assistant Attorney General has a conflict of interest. Rather, Defendants complain about the conduct of discovery, including the acquisition and distribution of purportedly privileged material. Such alleged conduct does not fall within the second grounds for disqualification, *i.e.*, “forensic misconduct.” Indeed, nothing in the Motion to Disqualify remotely suggests that the Assistant Attorney General made any improper remarks in this matter. Moreover, Defendants have cited no authority suggesting that the alleged conduct forming the basis of the instant motion constitutes “forensic misconduct,” warranting disqualification. And, although the State has disclosed Movants’ purported privileged communications to the other Defendants, based on the Court’s *in camera* review of the subject e-mails, nothing suggests that said disclosure has resulted in prejudice or otherwise prevents a fair trial in this matter. Therefore, Defendants have failed to establish a basis for disqualifying and/or removing the Assistant Attorney General or supporting staff from this matter.

B. Request to Dismiss the Indictment

Second, Movants request that the Court dismiss the Indictment against Movants. Although prosecutorial misconduct in the realm of discovery may warrant dismissal of an indictment, “dismissal of an indictment is not the appropriate remedy

where there is any other [remedy]” — prosecutorial misconduct justifies the extreme dismissal remedy only where “it caused demonstrable prejudice to the defendants’ recognized constitutional or statutory rights or was so outrageous that it is fundamentally unfair and shocking to the universal sense of justice mandated by the Constitution or statute as to deprive [the defendant] of a fair trial as a matter of law.” McGarvey v. State, 186 Ga. App. 562, 563, 368 S.E.2d 127 (1988) (internal quotations and citations omitted). “Absent demonstrable prejudice, a finding that such misconduct was so outrageous as to demand dismissal of the indictment would occur only in the rarest of cases.” Gober v. State, 249 Ga. App. 168, 171, 547 S.E.2d 656 (2001) (explaining that law enforcement’s failure to maintain careful records did not warrant dismissal of indictment).² Like disqualification, motions to dismiss indictments fall within the sound discretion of the Court, which is afforded deference concerning the finding and weighing of disputed facts. State v. Ivory, 304 Ga. App. 859, 860, 698 S.E.2d 340 (2010).

As the Parties noted, the Supreme Court of Georgia decision in Howard v. State, 279 Ga. 166, 611 S.E.2d 3 (2005) is instructive concerning alleged Sixth Amendment violations. In Howard, the defendants were convicted of murder,

² Although explaining that forcing a defendant at gunpoint to set up and operate an illegal lab would warrant dismissal, the Georgia Court of Appeals expounded that trespassing to find illegal drugs used in a prosecution, encouraging corrupt officers to arrest a drug dealer to compensate an informant, and a reverse sting operation involving the sale of drugs to law enforcement would not constitute misconduct warranting dismissal. Gober, 249 Ga. App. at 171.

kidnapping, robbery, and burglary following warrantless searches of cells for certain materials related to threats and intimidation. Id. at 168-69. Addressing the argument that the state's agents intentionally deprived the defendant of a fair trial by undermining the attorney-client relationship, the Supreme Court declared that, when the State becomes privy to confidential communications because of the purposeful intrusion into the attorney-client relationship without a legitimate justification, a prejudicial effect on the reliability of the trial process must be presumed. Id. at 170. However, because the State had a legitimate purpose for the search, *i.e.*, alleged threats/intimidation, the court found non-confidential communications were implicated following an *in camera* inspection, the prosecutor was shielded from access to any information obtained by the search, and there was no allegation the documents were used to the detriment of the defendants at trial, there was no interference with the Sixth Amendment right to counsel. Id. Therefore, the trial court did not err when denying the motion to dismiss the indictment.

Like Howard, at this time, Movants have failed to demonstrate an intentional deprivation of a fair trial based upon the *alleged* undermining of the attorney-client relationship. Here, the State had a legitimate purpose for the search, *i.e.*, an investigation into relevant financial transactions forming the basis of the charges in the Indictment. Assuming the subject material contains privileged communications, nothing *suggests* that the Attorney General or supporting staff have reviewed any of

the subject communications or related reports. Likewise, the subject documents have not been utilized at trial to the detriment of Movants. And, having reviewed the subject e-mails, nothing suggests that distribution of said communications to the other Defendants adversely affects Movants' defense or will prevent a fair trial. At this time, the Court finds no basis to dismiss the Indictment as to Movants.

Finally, comparing the examples in Gober to the *alleged* conduct in this matter further defeats the Motion to Disqualify. Here, Movants complain about the State's disclosure of *purported* privileged communications to co-Defendants. This *alleged* misconduct falls short of the examples in Gober, *i.e.*, trespassing to find illegal drugs, encouraging corrupt officers to make arrests, and a reverse sting with the sale of drugs to law enforcement, all of which did not warrant dismissal of the indictments. Indeed, the State's *purported* discovery misconduct falls woefully short of forcing a defendant at gunpoint to engage in illegal activity the Gober Court stated was the type of misconduct warranting dismissal of an indictment. Simply put, nothing in the record warrants dismissal of the Indictment.

Moreover, Movants mistakenly cite to Baker v. State, 238 Ga. App. 285, 518 S.E.2d 455 (1999) for the proposition that "bad faith" warrants dismissal of the Indictment. Based upon the State's failure to adhere to the reciprocal discovery requirements when serving discovery on the morning of trial, the Georgia Court of Appeals in Baker held that the trial court erred when denying a continuance,


especially in light of defense counsel's statement regarding a newly contradicted defense. Id. at 286-87. Unlike Baker, nothing suggests that the State has violated any reciprocal discovery obligations. And, the alleged misconduct did not occur the morning of trial. Indeed, trial has not commenced and the Court shall remedy any purported issues related to disclosure of any purported privileged communications as appropriate. Thus, Baker is unavailing.

III. CONCLUSION

For the reasons stated herein, the Motion to Disqualify is **DENIED**. Nevertheless, the Court is extremely troubled by the State's gross negligence when handling and disclosing potentially privileged communications. Accordingly, if the State has not done so already, the State is hereby **ORDERED** to provide, within ten (10) days of the date of this Order, Movants with (a) a list of all individuals who have possessed and/or received the subject Gmail communications; and (b) copies of all warrants the State has utilized to obtain material related to the above-captioned case. Moreover, if the State has not done so already, the State is further **ORDERED** to, *instanter*, cooperate with Counsel for Movants to establish a filter team related to the materials seized by law enforcement in this matter. To the extent necessary, the Court will entertain other appropriate remedies to address the disclosure of potentially privileged communications, including, but not limited to, the exclusion of any potentially privileged material and/or testimony from the trial in this matter.

Finally, the State is strongly admonished that future misconduct will result in additional sanctions as determined appropriate.

SO ORDERED, this 30th day of August, 2024.



HONORABLE KIMBERLY M. ESMOND ADAMS
SUPERIOR COURT OF FULTON COUNTY
ATLANTA JUDICIAL CIRCUIT

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