S213894

COPY 16

# IN THE SUPREME COURT OF CALIFORNIA

JOSHUA GRAHAM PACKER,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

S_____

Ct. App. 2/6 B245923

Ventura County
Super. Ct. No. 2010013013



# PETITION FOR REVIEW
## of *Packer v. Superior Court* (2013) 219 Cal.App.4th 226

STEPHEN P. LIPSON, Public Defender
By Michael C. McMahon, Chief Deputy
*State Bar Certified Specialist – Appellate Law*
*State Bar Certified Specialist – Criminal Law*
SBN 71909
800 S. Victoria Avenue, HOJ-207
Ventura, California 93009
(805) 477 - 7114
michael.mcmahon@ventura.org
Attorney for petitioner

# IN THE SUPREME COURT OF CALIFORNIA

JOSHUA GRAHAM PACKER,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

S_____

Ct. App. 2/6 B245923

Ventura County
Super. Ct. No. 2010013013

# PETITION FOR REVIEW
# of *Packer v. Superior Court* (2013)
# 219 Cal.App.4th 226

STEPHEN P. LIPSON, Public Defender
By Michael C. McMahon, Chief Deputy
*State Bar Certified Specialist – Appellate Law*
*State Bar Certified Specialist – Criminal Law*
SBN 71909
800 S. Victoria Avenue, HOJ-207
Ventura, California 93009
(805) 477 - 7114
michael.mcmahon@ventura.org
Attorney for petitioner
JOSHUA GRAHAM PACKER

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Statutes and Rules:**



**Other:**

# IN THE SUPREME COURT OF CALIFORNIA

JOSHUA GRAHAM PACKER,
Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,
Respondent;

THE PEOPLE,
Real Party in Interest.

S_____

Ct. App. 2/6 B245923

Ventura County
Super. Ct. No. 2010013013

# PETITION FOR REVIEW
# of *Packer v. Superior Court* (2013)
# 219 Cal.App.4th 226

TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner JOSHUA GRAHAM PACKER (Packer) asks this Court to grant review of the Court of Appeal's decision in the above captioned matter to consider issues relating to the "affidavit only" rule of Penal Code section 1424. (A copy of the opinion of the Court of Appeal is bound at the back of this petition.)

## QUESTIONS PRESENTED

- **Do the federal and state constitutional rights to compulsory process apply to a criminal defendant's motion to recuse the assigned prosecutor?**

- **Does the "affidavit only" rule of Penal Code section 1424 (as amended effective January 1, 2000) violate the federal and state rights to compulsory process?**
- **Does the "affidavit only" rule of Penal Code section 1424 violate federal Due Process and undermine the heightened concern for reliability in capital sentencing that is a requirement of the Eighth and Fourteenth Amendments?**
- **Did the court err in concluding that an evidentiary hearing is unnecessary and that a paper record is constitutionally adequate?**

## Petitioner's Contentions

- **Because the "affidavit only" rule requires affidavits from "witnesses who are competent to testify to the facts set forth," it requires the defendant to meet an evidentiary burden solely with witnesses who are cooperative, readily available, and willing to be interviewed and to sign an affidavit. This violates the defendant's right to use the compulsory process of the court to present relevant testimony from those who are uncooperative or are not readily available absent a subpoena compelling their attendance.**
- **The court erred in concluding that an evidentiary hearing is unnecessary, because Packer made a sufficient preliminary showing that a disabling conflict of interest exists for the currently assigned prosecutor, and that the material facts are in dispute and credibility assessments are warranted.**

## GROUNDS FOR REVIEW

Review is necessary to settle important questions of law relating to the "affidavit only" rule of Penal Code section 1424. Trial courts generally grant or deny motions to recuse the assigned prosecutor after an evidentiary hearing. There is very

little guidance, from any source, regarding when a court confronted by a motion to recuse the assigned prosecutor should conduct an evidentiary hearing. Section 1424 [as amended effective January 1, 2000, Stats. 1999, ch. 363, § 1 (AB 154)] states that: *"The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary."* Review should be granted to explain the criteria for determining whether an evidentiary is necessary. Due process requires that the movant be afforded a meaningful opportunity to be heard in a meaningful manner.

Section 1424 establishes a two-part test: (i) is there a conflict of interest? And (ii) is the conflict so severe as to disqualify the district attorney from acting? A "conflict" exists whenever there is a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Petitioner respectfully submits that a court should not assess the severity of the conflict in the instant case without conducting an evidentiary hearing.

Since its enactment in 1980, section 1424 has governed motions to disqualify the prosecuting attorney.[1] But, in attempting to reduce the number of evidentiary hearings on recusal motions by an amendment enacted in 1999, the Legislature went too far. To be clear, Packer has no criticism of the standard set forth in the statute for granting or denying the motion. The enactment of section 1424 eliminated the appearance of impropriety as an independent ground for prosecutorial disqualification: *"The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."* Petitioner fully embraces that burden of proof and is eager to meet that burden.

The problem with section 1424 lies with its procedural anomaly: *"The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit."* (Emphasis added.) This "affidavit only" rule requiring that the

---

[1] Any unspecified references to code are to the Penal Code.

movant rely on hearsay from cooperative and readily available witnesses violates the federal Compulsory Process Clause, the federal Due Process Clause, and undermines the Eighth and Fourteenth Amendments' heightened concern for reliability in the penalty phase of capital sentencing. An essential component of procedural fairness is a meaningful opportunity to be heard. (*In re Oliver* (1948) 333 U.S. 257, 273; *Grannis v. Ordean* (1914) 234 U.S. 385, 394.) Petitioner contends that the Due Process Clause of the Fourteenth Amendment and the Compulsory Process clause of the Sixth Amendment guarantee criminal defendants a meaningful opportunity to be heard at critical stages of criminal proceedings and that petitioner's non-frivolous motion to recuse the assigned prosecutor is a critical stage.

Motions decided based upon affidavits or other hearsay tend to work better in civil actions in which the parties are entitled to depositions, interrogatories, and other broad forms of civil discovery.

Here, petitioner made an adequate showing to warrant an evidentiary hearing on the motion. The Court of Appeal errs by speculating that "the prosecutor in this case would likely be arguing the significance of his children's testimony on the question of whether death is an appropriate penalty rather than contesting their credibility." (*Packer v. Superior Court* (2013) 219 Cal.App.4th 226, 242.) The trial court made no such finding nor was there any evidence to support such a finding. In any event, the prosecutor will be *discounting* the weight of his own children's testimony at trial and that circumstance establishes a prima facie likelihood of an unfair trial. The Court of Appeal also engages in rank speculation by hypothesizing that the conflict will disappear and the prosecutor can avoid "discrediting his children's testimony" if the testimony is simply excluded as "cumulative." (*Ibid.*) [If the children are the first witnesses called at the penalty phase, it is inconceivable the testimony could be excluded as cumulative.]

The claim presented here appears to be one of first impression and should be resolved before the capital trial by your grant of review.

**Memorandum of points and authorities in support of the petition for review.**

**I.**

**On review, a trial court's ruling on a motion for an order recusing a member of the district attorney's office for a conflict of interest is reviewed for abuse of discretion, and its factual findings, if any, are reviewed for substantial evidence.**

On review, a trial court's ruling on a motion for an order recusing a member of the district attorney's office for a conflict of interest is reviewed for abuse of discretion, and its factual findings, if any, are reviewed for substantial evidence. (*People v. Griffin* (2004) 33 Cal.4th 536, 570.) Here, petitioner claims that the court abused its discretion by denying him an evidentiary hearing on the recusal motion and that any factual findings, express or implied, are unreliable and flawed. The substantial evidence standard is inappropriate when the court denies the defendant the opportunity to present testimony on the disputed issues.

**II.**

**The published cases regarding recusal of the assigned prosecutor are of limited help because they do not involve review of an order denying an evidentiary hearing on the motion.**

While every case is unique, some are more unique than others. Your cases regarding recusal of the assigned prosecutor do not involve review of an order denying an evidentiary hearing on the motion.

For the convenience of the court, some of the recent and important Supreme Court cases on recusal are listed here:

- *Stark v. Superior Court* (2011) 52 Cal.4th 368, 417, fn. 26 [although a disqualification motion was denied by the trial court, Stark did not seek review of that

order by a pretrial petition. The opinion involves a motion to set aside the accusatory pleading.]

- *People v. Gamache* (2010) 48 Cal.4th 347, 361 ["the trial court held a series of evidentiary hearings"].
- *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 712, fn. 3 [the court held an evidentiary hearing, but the parties chose to submit the motion on declarations and other written evidence].
- *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 727 [the trial court conducted an evidentiary hearing].
- *People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 748 [the trial court abused its discretion and "erred as matter of law" in finding a conflict where there was none. The extent of the evidentiary hearing is not clear from the opinion].
- *People v. Vasquez* (2006) 39 Cal.4th 47, 55 [the court held multiple hearings and should have granted the motion to recuse the entire office, but the defendant failed to file a pretrial petition and the error was harmless on appeal].
- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 850 [although section 1424 does not apply to civil cases, the entire office should have been disqualified].
- *People v. Griffin* (2004) 33 Cal.4th 536 (overruled on another point) [the court conducted an evidentiary hearing].
- *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 832 [the court conducted an evidentiary hearing].

*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, is a very rare case affirming the court's denial of a recusal motion without an evidentiary hearing although the compulsory process and due process claims were neither presented nor decided, nor any claim that live testimony would contribute to the reliability of the fact finding aspect of the motion. No subsequent, unrelated cases cite or rely upon that opinion. *Spaccia* cannot be read to stand for a proposition that was not presented, discussed, analyzed or decided.

## III.

**The court abused its discretion in refusing to conduct an evidentiary hearing on the recusal motion because the defense satisfied the first prong for recusal by demonstrating Mr. Frawley has a conflict of interest.**

Penal Code section 1424 involves a two-prong analysis. The first prong is satisfied if the defense demonstrates that a conflict of interest exists. (*People v. Eubanks* (1996) 14 Cal.4th 580, 594.)

Packer did so here. The court should have conducted an evidentiary hearing to assess the gravity of that conflict and the possibility or probability of unfairness at any future stage of the proceedings. Assessing and minimizing the gravity of the conflict without an evidentiary hearing will often be fundamentally unfair, as it is here.

## IV.

**The prima facie case: The assigned prosecutor's son, Kyle Frawley, and the assigned prosecutor's daughter, Elizabeth Frawley, will be important defense witnesses at trial. Elizabeth's boyfriend, Thomas Cathcart, will testify for the prosecution that he was a victim of the defendant. The jury will also hear testimony about Linda Frawley, the assigned prosecutor's wife.**

The mitigating story for sparing petitioner's life will involve his life history, emotional and psychological make-up, upbringing, education, relationships, friendships, formative and traumatic experiences, personal psychology and present feelings. Mitigation evidence need not have any "nexus" to the charged crimes and often does not extenuate the gravity of those crimes. (*Tennard v. Dretke* (2004) 542 U.S. 274, 289.)

The assigned prosecutor's children were friends and confidants of petitioner during his young, critical, and formative years.

Contrary to the view of the assigned prosecutor, such witnesses are not fungible: "[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 115.) "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it. People who hear a story interrupted by gaps of abstraction may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story's truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard. A convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best." (*Old Chief v. United States* (1997) 519 U.S. 172, 190.)

Elizabeth Frawley's testimony must be presented. Her testimony will be corroborated with photographs of petitioner with Elizabeth and her two best friends. They are obviously having fun (pp. 592-94; 608-609) as they strike goofy, coordinated poses for the camera, pointing their derrieres at the camera with hands in front of gasping mouths. (pp. 608-609.)[2]

Elizabeth and her two best friends posted a photo of themselves with petitioner on a social network page called "TP Princesses." (pp. 374, 375, and 384-391.) Petitioner's close friend (and penalty phase witness), Thomas Cathcart, dated Elizabeth and posted comments on that web page. (p. 387.)

The assigned prosecutor is incapable of suppressing his emotional embroilment. He reacted emotionally to Elizabeth being described as a "friend" of Mr. Packer and represented that it was "an outright lie" that Mr. Packer and Elizabeth (and her brother Kyle) were friends. (R.T., 8/17/2012, at p. 915.) Because of his conflict of interest, Mr. Frawley has lost all objectivity, and minimizes the connections between his family and Mr. Packer:

---

[2] Citations are to the exhibits.

- Mr. Packer and his friend, witness Thomas Cathcart, hung out "all the time" at the Frawley home, both for Young Life meetings and events, and just to hang out. (B at p. 374, ¶8; 375, ¶14; and p. 382.)
- Mr. Packer attended Elizabeth's birthday party in the back yard of the Frawley home (B at p. 94, ¶3; 395, ¶11; 396, ¶16; and 399, ¶3); according to defense witness Kristy Benscoter, Mr. Frawley's wife, Linda Frawley, was present at all of Elizabeth's parties. (B at pp. 519-520, ¶13; and 524, last ¶.)
- Frawley conceded that Mr. Packer attended a "social gathering" (B at p.29, l. 1) hosted by his daughter in the backyard of the Frawley home, but asserts that Packer was "not invited." (B at p. 29, l. 2; and p. 30, l. 8.) Mr. Frawley did not disclose that the social gathering was actually his daughter's birthday party. (B at p. 94, ¶J.)
- Young Life operates a summer camp in Woodleaf, California. Mr. Frawley represents that Mr. Packer and Elizabeth attended the Woodleaf Camp together only once, which is contrary to Kristy Benscoter's declaration that Elizabeth and Mr. Packer attended the Woodleaf Camp together twice. (B at pp. 518, ¶4; and p. 524.)
- Michael Frawley's wife, Linda, was a co-chair of Young Life, and was present when Mr. Packer was at Woodleaf with their daughter, Elizabeth. (B at p. 383.)
- Linda Frawley was a member of the Young Life Committee for the Ventura area in 2001-04 and was one of two co-chairs in 2003.
- Thomas Cathcart told a defense investigator that when he went to an interview with the district attorney, the prosecution investigator instructed him not to mention Elizabeth Frawley.
- Cathcart then entered the interview room where he was interviewed by Michael Frawley and no mention was made about Elizabeth. (B at pp. 270, ¶4; p. 272, ¶12; and p. 278, ¶2.) Mr. Frawley represented that he does not know whether Thomas Cathcart and his daughter Elizabeth had a dating relationship. (B at p. 348, ll. 10-11.) But, if true, why would his investigator specifically tell Cathcart not to bring up Elizabeth "Ellie" Frawley during the interview with Michael Frawley? (B at p. 337, ll. 5-9.)

- Mr. Cathcart says he met Linda Frawley in the context of dating Elizabeth, and that Linda even dropped Elizabeth off at his home. (B at p. 279.)
- Kristy Benscoter will testify that Elizabeth got into trouble with her parents for sneaking out of the house to see Mr. Cathcart. (B at pp. 518-520; and p. 523.)
- Mr. Cathcart now refuses to talk to the defense about anything, yet when he last spoke to the defense, he was very cooperative and willing to provide yearbooks and information on relationships. At that time, Cathcart had been willing to provide a follow-up interview. (B at pp. 270-271 ¶5; 282; 539-540; 543-544.)
- Elizabeth altered her behavior to the detriment of Mr. Packer in a way that avoided being subpoenaed during her visit home to California, and then attempted to conceal the evidence of this. On August 6, 2012, Elizabeth tweeted – #attorneyfatherprobs "Really over not being able to tweet my whereabouts. This better pay off." (B at p. 272, ¶¶9, 12; and pp. 296-297.)
- Elizabeth later removed this tweet from her Twitter account. (B at p. 272, ¶¶ 9, 12; pp. 296-297; and p. 614, ¶¶ 12-14.) This may be spoliation of evidence.
- Mr. Frawley interfered with the service of a subpoena on Elizabeth to the detriment of Mr. Packer. He told the process server that the defense is "playing games" by attempting to have her served. When Deputy Baugher attempted to subpoena Elizabeth Frawley at the Frawley home, Baugher called and spoke with Michael Frawley. Frawley told Deputy Baugher that Elizabeth does not live there anymore and that he does not know her new address. (B at pp. 272 ¶¶11-12; and pp. 302-303.)
- Deputy Baugher told a defense investigator that he knows the defense is "playing games" and attempting to "put the department in a huge bind" by having the Sheriff serve Elizabeth Frawley. (B at p. 272, ¶¶11-12; and 303.)
- Dep. Baugher also stated that the defense should have informed the Sheriff that the subpoena was for a high-ranking official in the D.A.'s Office (B at p. 272, ¶¶11-12; and 302), and that defense put him "in danger" by asking him to serve Elizabeth. (B at p. 272, ¶¶11-12; and p. 303.)

- When the defense investigator asked Dep. Baugher to sign a declaration and to modify it as needed to make it accurate, he refused to do so, saying he wanted to talk to a lawyer first. (B at p. 570, ¶7.)
- The following day Baugher signed a declaration for the District Attorney in which he denied that Michael Frawley told him he did not know his daughter's forwarding address, and explained that when he said "in danger" but refused to elaborate, he was referring to the fact that persons in law enforcement such as Chief Deputy District Attorney Michael Frawley often have firearms and thus serving a subpoena at his residence could have been dangerous. (B at pp. 422-423)
- Mr. Frawley did not disclose until Nov. 6, 2012 (B at p. 903), that his wife, Linda, was co-chair of the Ventura area Young Life Committee when Mr. Packer was participating in Young Life, including attending the Woodleaf Camp, going to Ski Utah, and visiting the Frawley home. (B at pp. 518, ¶ 4; 522-524, ¶ 3; and p. 93, ¶2; see also pp. 896-901.)
- Kyle Frawley, the assigned prosecutor's son, will also be testifying as a defense witness at trial. (B at pp. 51; and 208, #18.)
- Kyle's loyalty to Mr. Packer's redeeming virtues is such that he posted prayers for Mr. Packer on the "Prayers for Josh" social network webpage.
- Michael Frawley is the only witness to an adoptive admission by his son. In April of 2010, Michael showed Kyle a "letter" or "email." (B at pp. 28 and 60.) Kyle adopted its contents regarding his close relationship with petitioner and it was deemed to be an "adoptive admission" by the trial court. (R.T. 9/14/2012, at p. 965.)
- The defense will introduce corroborating photographs of Kyle and Mr. Packer at trial. (B at pp. 592-595, 598-601, and 604-609.)
- Kyle Frawley changed his behavior to the detriment of Mr. Packer after talking to his father. Kyle called his father regarding an interview he had scheduled with a defense investigator. His father told Kyle that he may be subpoenaed if he talks to the defense investigator. (B at p. 400.) Kyle then evaded the interview without even a phone call to

the investigator who had traveled all the way from Ventura to San Diego. (B at pp. 21, 24, 95, 395, 400)

- Kyle has made statements that indicate he is torn by loyalty to his father. Kyle gave a false explanation that protected his father when explaining to defense investigator Marian Smith why he skipped the interview. Kyle first explained that he skipped the scheduled interview because he was out of town, but then admitted he skipped interview because he did not want to be subpoenaed by the defense investigator after the warning from his father. (B at pp. 395 and 400.) Kyle told Smith that he "'feels like both sides are squabbling to get a side' or to use him for their benefit." (B at p. 400.)
- Kyle made positive statements about Mr. Packer to defense investigator Smith (which he re-affirmed to investigators Carlton and Miller). (B at pp. 393-400, 271, and 273-276.) Kyle described contacts with Mr. Packer through Young Life that were more extensive than those described in his father's email.
- Kyle stated that Mr. Packer was "aggressive, but not in a bad way" and gave an example of a time when a rival cabin tried to ambush their cabin in a pillow fight, and Mr. Packer was the first to jump to the defense of their cabin (B at pp. 394, and 398-399); this statement supports the defense contention that Mr. Packer was not a bully, which is contrary to the prosecution's position as illustrated through aggravating circumstances it has asserted. (B at pp. 42-43, ¶¶ 80-86.)
- Kyle described how Mr. Packer made a "breakthrough and accepted religion" by accepting Jesus for the first time in his life one night at summer camp after reflecting in the woods following a morality skit. (B at pp. 394-395, and 399.)
- Michael Frawley reacted emotionally to a defense interview of Kyle. Michael complained to Steve Lipson, the Public Defender, about the defense interview of his son. Frawley admits telling the Public Defender that it was a "waste of taxpayers' money," "harassment," "unprofessional," and that the interview would "inure to the prosecution's benefit." (B at pp. 37 and 160.)
- Michael Frawley contradicted his son by denying to the Assistant District Attorney that he spoke with Kyle before the defense interview. Although Kyle

acknowledged that he spoke to his father before the defense interview, Michael Frawley told Assistant D.A. Ellison that he did not talk to Kyle before the interview; Ellison's letter states that Michael did not interfere with Kyle talking to a defense investigator because Michael did not speak to Kyle until after the unscheduled interview. (B at p. 156, ¶3.)

- After receiving the defense interview of his son Kyle in discovery, the prosecutor re-interviewed Kyle as a "witness." (B at pp. 356-361.) Kyle then changed his statement about sharing a room with Mr. Packer in Utah (B at pp. 345 and 360), and about the pillow fight incident; he also altered his description of Mr. Packer to being "overly aggressive," stating that it was the "most brutal" pillow fight he had ever seen and he wanted no part of it (B at pp. 345 and 358), transforming defense mitigation into aggravation.
- In the re-interview, Kyle claimed that defense investigator Smith omitted statements he made, added information he did not say, and slanted what he said in her report about his interview (B at p. 358), even though Kyle had later reviewed his report and initialed only two changes. (B at p. 271, ¶8; p. 272, and pp. 273-276.)
- Michael Frawley stated that calling his children "friends" of Mr. Packer is an "outright lie" (R.T.8/17/2012 at p. 915, l. 4), and that this "falsely represents" them. (See People's Opposition, Declaration, p. 2, l. 5, Filing #36.)
- Michael Frawley asserts that the defense "manufactured" the conflict regarding his children (e.g. B at p. 327), and is "maligning" and "denigrating" his children.

An evidentiary hearing is required to resolve the factual disputes.

## V.

## The trial court's findings, if any, are not supported by substantial evidence and do not support its decision to deny recusal. The court's application of the law to the facts is arbitrary and capricious because the fact-finding process itself was deficient.

Here, the court failed to make factual findings, which is not surprising given its ruling that, "*the court is not going to allow an evidentiary hearing to support the allegations made at this stage of the proceedings.*" (BB at p. 843.) It is unclear if the court believed that an evidentiary hearing to support the allegations could be made at some *later* stage of the proceedings.

The court purported to make one factual "finding," which was actually a legal conclusion entitled to no deference on review: "The court finds that the affidavits, stricken of irrelevant hearsay, do not support a finding of a prima facie showing of a disabling conflict of interest." (*Id.*, at p. 842.)

Quite recently, in *Hurles v. Ryan* (citation below), the state trial court denied a motion to recuse the assigned judge and denied the defendant an evidentiary hearing on the recusal motion. The Court of Appeals stated that:

> "Judge Hilliard's denial of Hurles's judicial bias claim rests on an unreasonable determination of the facts. We have held repeatedly that where a state court makes factual findings without an evidentiary hearing or other opportunity for the petitioner to present evidence, 'the fact-finding process itself is deficient' and not entitled to deference. *Taylor*, 366 F.3d at 1001 ('If, for example, a state court makes evidentiary findings without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an unreasonable determination of the facts.') (internal quotation marks omitted); see also *Perez v. Rosario*, 459 F.3d 943, 950 (9th Cir. 2006) (amended) ('In many circumstances, a state court's determination of the facts without an evidentiary hearing creates a presumption of unreasonableness.') (citing *Taylor,* 366 F.3d at 1000); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003) ('But with the state court having refused [the petitioner] an evidentiary hearing, we need not of course defer to the state court's factual findings – if that is indeed how those stated findings should

be characterized – when they were made without such a hearing.'); cf. *Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002) ('Having refused [petitioner] an evidentiary hearing on the matter, the state cannot argue now that the normal AEDPA deference is owed the factual determinations of the [state] courts.'); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999) (according no deference where written statements by trial judge to defense counsel 'were not subject to any of the usual judicial procedures designed to ensure accuracy')."

(*Hurles v. Ryan* (9th Cir. 2013) 706 F.3d 1021, 1038-1039.)

Those observations underscore the false economy and unfairness of denying an evidentiary hearing when confronted with a prima facie showing of prosecutorial bias based in part upon the anticipated testimony of adverse and hostile witnesses. Conducting an expeditious evidentiary hearing right now is far preferable to conducting a hearing decades from now following a remand from a federal appeals court.

The constitutional mandate for heightened reliability in death penalty determinations is well settled, and is based upon the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. (*Sumner v. Shuman* (1987) 483 U.S. 66, 85.) These mandates support Packer's request for an evidentiary hearing. Penal Code section 1424 calls upon the court to assess the *probability* of future unfairness. "[T]he minimum assurance that the life-and-death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." (*Ford v. Wainwright* (1986) 477 U.S. 399, 414, quoting *Solesbee* v. *Balkcom* (1950) 339 U.S. 9, 23 (Frankfurter, J., dissenting).)

In *Panetti v. Quarterman* (2007) 551 U.S. 930, 948, the United States Supreme Court held that federal habeas review of a petitioner's claim is "unencumbered by the deference AEDPA normally requires" when the state's procedures deny the

petitioner an adequate and adversarial evidentiary hearing. Although the claim in that case involved post-judgment incompetency, the Due Process Clause of the Fourteenth Amendment, entitles defendants to full and fair adjudication procedures at every stage of capital litigation.

## VI.

## Where the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion.

The trial court set the bar too high when it denied the defense an evidentiary hearing on the motion. The court stated, "There is a lapse in the link between the apparent conflict, conflict, and unfairness on behalf of the prosecution. * * * There is speculation and innuendo." (BB at pp. 842-843.)

The defense need not prove bad faith or actual unfairness on behalf of the prosecution. The defense need only demonstrate facts which support an inference of a *likelihood* that the defendant will not receive a fair trial. Such an inference is not merely speculation and innuendo, it is based upon an assessment of the probability (or possibility) of future unfairness. Of course, the movant need not demonstrate actual unfairness, only a conflict of interest which would make it unlikely that he would receive a fair trial.

"A 'conflict,' within the meaning of section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict." (*People v. Conner* (1983) 34 Cal.3d 141, 148, emphasis added.)

"Where the trial court's decision rests on an error of law, as it does here, the trial court abuses its discretion." (*People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 742.)

By requiring the defense to demonstrate a link between the prosecutor's conflict and actual unfairness, the court rested its decision on an error of law.

## VII.

## The order denying petitioner an evidentiary hearing effectively denied him the federal Due Process right to be heard at a meaningful time in a meaningful manner.

The right to be heard at a meaningful time in a meaningful manner is fundamental to due process. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Here, because the trial court did not permit petitioner to prove the gravity of the prosecutor's conflict with testimony from reluctant witnesses, the court denied petitioner the right to be heard at a meaningful time in a meaningful manner.

## VIII.

## Whether the assigned prosecutor's conflict of interest is characterized as actual or apparent, recusal is required because the conflict renders it unlikely that petitioner will receive a fair trial.

A district attorney may be "recused," i.e., disqualified from prosecuting a case, where a conflict of interest makes it improper for him or her to act. (See *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, 261.) In *Greer*, the victim's mother worked for the district attorney in the office in which the prosecution of the case was being handled. The court upheld an order recusing district attorney. Trial judges have discretion to prevent the possibility of constitutional violations and need not delay recusing a prosecutor until the last straw of prejudice is added. (Cal. Const., art. III, § 3.) The separation of powers doctrine "does not demand trials in which there is no middle ground between absolute executive discretion and constitutionally mandated judicial intervention." (*Id.*, at p. 265.) Packer submits that this aspect of the *Greer* opinion was not abrogated by the enactment of Penal Code section 1424.

The executive has general authority to choose who will prosecute a case; but, when a criminal charge is filed, the court's jurisdiction is invoked and disposition of the charge becomes a judicial responsibility. "Thereupon the discretion of the executive – as that of any party to the proceeding – becomes subject to the supervision of the trial court ... [W]hile judges do not have the power to direct the executive's choice of a representative for the People, the Constitution does not deny trial courts authority to disqualify a particular representative when his participation would taint the proceeding. The disqualification of a prosecutor in such a case does not impermissibly infringe on the executive's power to select a prosecutor any more than the general discretion of a prosecutor in presenting his case is inhibited when he is prevented from proceeding in an improper manner at trial." (*People v. Superior Court* (*Greer*), *supra,* 19 Cal.3d at p. 265)

"A district attorney may thus prosecute vigorously, but both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be born of objective and impartial consideration of each individual case." (*Id.*, at p. 267.)

In response to the court's decision in *Greer*, the Legislature enacted Penal Code section 1424. Under Penal Code 1424, subdivision (a)(1), a disqualification motion may not be granted, "unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." (See *People v. Eubanks* (1996) 14 Cal.4th 580, 590, 591.)

Section 1424 neither explicitly requires an "actual" conflict, nor explicitly excludes an "apparent" conflict as a basis for recusal. Section 1424 contemplates both actual and apparent conflicts, if the conflict renders it "unlikely" that defendant will receive a fair trial. (*People v. Conner, supra,* 34 Cal.3d at p. 147.) There is no need for a California court to determine whether a conflict is actual, or only gives the appearance of a conflict. (*Id.*, at p. 148.)

/

/

## IX.

**Because section 1424's "affidavit only" rule requires affidavits from "witnesses who are competent to testify to the facts set forth," it requires the defendant to meet an evidentiary burden solely with witnesses who are cooperative, readily available, and willing to be interviewed and to sign an affidavit. This violates the defendant's right to use the compulsory process of the court to present relevant testimony from those who are uncooperative or not readily available absent a subpoena compelling their attendance.**

The Compulsory Process Clause of the Sixth Amendment, grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment. (*Rock v. Arkansas* (1987) 483 U.S. 44, 52 [state's categorical exclusion of defendant's testimony violates the right to Compulsory Process], citing *Washington v. Texas* (1967) 388 U.S. 14, 17-19 [state rule disqualifying an alleged accomplice from testifying on behalf of the defendant violates the right to Compulsory Process].)

Compulsory process operates "exclusively at the defendant's initiative and provides him with affirmative aid in presenting his defense." (*Taylor v. Illinois* (1988) 484 U.S. 400, at fn. 14.) The right to Due Process and the Sixth Amendment right to Compulsory Process are inextricably intertwined in this case. The Eighth Amendment requirement for reliability in a California penalty phase is also infringed by the "affidavit only" rule because Mr. Frawley, a conflicted prosecutor, will present the state's aggravation and attack Packer's proffered mitigation. The rights are applicable to a state capital prosecution through the Fourteenth Amendment.

While state evidence rules governing the examination of witnesses will generally apply, the constitutional standard under the Sixth Amendment requires that the state's interest in excluding certain testimony be balanced against the defendant's right to obtain and to present such evidence.

California procedure requires that a motion to recuse the assigned prosecutor must be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. (Pen. Code, §1424, subd. (a)(1).)

Ordinarily, a state rule of evidence requiring that evidentiary burdens be met with "credible and competent evidence" does not violate the right to Compulsory Process. But the "affidavit only" rule is no ordinary, deeply rooted or bedrock rule of evidence. Instead, it is an arbitrary rule of procedure that hampers the moving party (which is always the defense) and contradicts the ordinary rule that both parties must support their position by competent and credible evidence, rather written statements.

The "affidavit only" procedure arbitrarily forces the defense to shoulder an evidentiary burden armed only with the cooperation of out-of-court witnesses who are readily available, and willing and able to voluntarily provide the defense and fact-finder with the required affidavit.

The rule seems convenient for the court and prosecution, but lacks any "rational relationship" to the gravity of a capital trial. Arguably, it may save time, but it unreasonably increases the chances of denying the defendant the right to a fair trial. The rule is arbitrary in that it requires each defense witness on the issue to present his testimony by affidavit, regardless of the probative value and significance of the testimony.

The Compulsory Process Clause ensures that the recusal decision will not be removed from the court by an *a priori* decision by the Legislature that relevant testimony may not be considered unless the witness volunteers to provide an affidavit.

The Compulsory Process Clause ensures that the ordinary state rules of evidence will operate evenhandedly on both the prosecution and defense and that the Legislature may not categorically and preemptively exclude from consideration reliable and credible testimony merely because the witness fails or refuses to submit an affidavit.

The Compulsory Process Clause provides the defendant the right to present relevant testimony from any witness whose ability to provide reliable testimony is something about which reasonable people can differ.

Conversely, California's "affidavit only" procedure imposes an arbitrary limitation on the ability of the defense to make its case. It is not a rule designed to promote fairness and reliability in the proceeding; it is nothing more than state rule of convenience.

Petitioner invites the court to compare the "affidavit only" rule with the relatively low bar set for a prima facie showing

- Sufficient to trigger an in camera inspection of confidential personnel files in a *Pitchess* motion.
- Or, sufficient to trigger an evidentiary hearing on Fourth Amendment grounds.
- Or, sufficient to meet the prima facie showing requirements for a habeas corpus petitioner.

In none of those other procedures is the movant required to make his case with sworn affidavits from witnesses with personal knowledge of the facts relevant to the prima facie burden. The arbitrary "affidavit only" rule cannot sit comfortably next to the prima facie showing required in those other contexts. The "affidavit only" rule is an anomaly that violates the Compulsory Process Clause.

Because the right to recuse the assigned prosecutor is guaranteed by the state and federal due process clause, this is a "critical stage" of the proceedings to which the right of compulsory process applies.

Arguably, the "affidavit only" rule advances the goals of efficiency and conservation of judicial resources. At the same time, it impairs the countervailing interests of litigants as well as the interest of the public in being afforded access to justice, resolution of a controversy on the merits, and a fair proceeding.

Measures implemented for the sake of efficiency cannot jeopardize the constitutional integrity of the judicial process. In other words, court congestion and the press of other business can never justify depriving parties of fundamental rights and a full and fair opportunity to present all competent and material evidence relevant to the matter to be adjudicated.

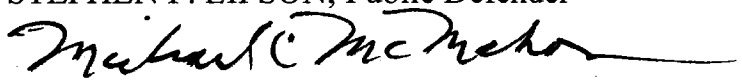
The Court of Appeal concedes that Packer presented sufficient evidence to support a reasonable inference that "the prosecutor was upset with Packer and was grinding that personal axe by tampering with witnesses and taking positions in pretrial litigation unhelpful to the defense" (slip opn., at p. 16), but then concludes Packer failed to make even a prima facie showing to trigger an evidentiary hearing on his motion. The rejection of the reasonable inference of a disabling bias without an evidentiary hearing is arbitrary and capricious, and should be viewed as an abuse of discretion.

## THE PRAYER

Petitioner asks this Court to grant review of the Court of Appeal's decision and to write an opinion reversing the judgment of the Court of Appeal and remand the matter to that court with directions to issue a peremptory writ of mandate. The peremptory writ should direct the superior court to vacate its order denying petitioner's motion to recuse the assigned prosecutor and to conduct an evidentiary hearing on that motion.

Dated: October 8, 2013

Respectfully Submitted,
STEPHEN P. LIPSON, Public Defender



By Michael C. McMahon, Chief Deputy
*State Bar Certified Specialist – Appellate Law*
*State Bar Certified Specialist – Criminal Law*
SBN 71909
Attorney for Petitioner

## CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that by utilization of MSWord 2007 Word Count feature there are 8,410 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated: October 8, 2013.

Jeane Renick
Legal Mgmt. Asst. III

Filed 8/29/13

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

JOSHUA GRAHAM PACKER,

Petitioner,

v.

THE SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

2d Civil No. B245923
(Super. Ct. No. 201013013)
(Ventura County)

OPINION AND ORDER DENYING PETITION FOR WRIT OF MANDATE

A criminal defendant seeking to disqualify a prosecutor is not entitled to an evidentiary hearing unless, at a minimum, he makes a prima facie showing that recusal is warranted, and does so using only signed affidavits containing competent evidence. (Pen. Code, § 1424, subd. (a)(1)); *Spaccia v. Super. Ct.* (2012) 209 Cal.App.4th 93, 111 (*Spaccia*).)[1] Defendant Joshua Graham Packer (Packer) argues that this procedure violates his constitutional right to compulsory process by denying him an evidentiary hearing at which he can subpoena those persons who will not sign affidavits or who cannot be located. He further contends that the trial court erred in finding that he did not

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

make a prima facie showing. We reject both contentions, and accordingly deny Packer's petition for writ of mandate seeking to overturn the trial court's denial of an evidentiary hearing and denial of his motion to recuse the prosecutor in his case.

## *FACTS AND PROCEDURAL HISTORY*

### I. *Pending Charges*

Packer is charged with three counts of first-degree murder (§§ 187, 189) in the May 2009 deaths of Davina Husted, her husband Brock and their unborn child. The information also charges several enhancements. The People are seeking the death penalty. The Ventura County District Attorney's office is prosecuting the case, and Deputy Chief Michael Frawley ("prosecutor") is the lead prosecutor.

### II. *Motion to Recuse the Prosecutor*

#### A. *The Motion*

Packer moved to recuse the prosecutor under section 1424, and objected on compulsory process grounds to the statute's requirement that he use "affidavits of witnesses who are competent to testify to the facts set forth in the affidavit" to make his prima facie showing. The motion and objection were filed after the prosecutor disclosed that his two adult children, Kyle and Elizabeth, had participated in the same youth group as Packer. Packer sought recusal on three grounds: (1) Packer would be calling Kyle and Elizabeth as witnesses for the defense during any penalty phase of the trial; (2) Elizabeth once dated Thomas Cathcart (Cathcart), who would be a witness for the prosecution and defense; and (3) the prosecutor "appears to have known" Davina Husted through his former wife, Lisa West (West).

#### B. *The Evidence Presented*

In support of his recusal motion, Packer submitted 54 pages of affidavits from 7 people, along with 350 pages of attachments. In opposing Packer's motion and compulsory process objection, the Ventura County district

attorney's office and the Attorney General's office submitted 12 pages of affidavits from two people, along with 68 pages of attachments.[2]

1. *The prosecutor's relationship to Packer through his adult children*

The prosecutor's adult children did not attend the same high school as Packer, but participated with Packer and more than 50 others in a youth group called "Young Life." The prosecutor's current wife was a co-chair of the local chapter of Young Life between 2001 and 2003. Between 2001 and 2008, while Kyle or Elizabeth participated, Young Life events were sometimes held at the prosecutor's home, and Packer attended some of those gatherings. The prosecutor was present for some of these events, but he stayed "in the background" and never interacted with Packer.

Kyle participated in Young Life from 2001 through 2006. Kyle took a snowboarding trip to Utah with this group in 2003 or 2004, and also attended a summer camp in Northern California in 2005. On each trip, Kyle was housed in the same cabin as Packer and between eight and twenty-five other boys. At the summer camp, Packer told Kyle and others he had a religious breakthrough. Kyle, Packer and others appeared in group photos taken at these events. Kyle did not have any one-on-one conversations with Packer. After Packer was charged in this case, Kyle signed up for a "Prayers for Josh" webpage because Kyle's friend asked him to do so, because Kyle wondered if the charges were true, and because Kyle prayed for Packer's soul.

Elizabeth participated in Young Life while she was in high school, from 2004 through 2008. She attended the same summer camp in 2005 that Kyle and Packer attended, and also appeared in group photos from that

---

[2] The parties also moved to strike portions of one another's affidavits and attachments. The trial court partially granted the motions to strike. The trial court nevertheless considered *all* of the proffered evidence in making its rulings. We will do the same.

camp. In 2005 or 2006, Elizabeth and two other girls hosted a MySpace webpage that contained a photograph of all three girls and Packer in a silly pose.

Although more than 50 children participated in Young Life with Packer, he named Kyle and Elizabeth as witnesses to present mitigation evidence in the penalty phase of his trial. He did this because, in his view, "a jury would likely be more favorably impressed with the testimony of a child of a prosecutor."

2. *The prosecutor's relationship to Packer through Cathcart*

Cathcart participated in Young Life. In 2005 or 2006, he dated Elizabeth for "a couple of months." He had been to the prosecutor's home at least 10 times during this period.

3. *The prosecutor's relationship to Davina Husted*

The prosecutor and West divorced in 1997. Ten years later, West served on the Junior League's board of directors while Davina Husted, one of the murder victims, was president. West was also listed on the Husted's Christmas card distribution list for 2008. A January 2008 spreadsheet recovered from Davina Husted's computer listed the prosecutor and his current wife as Junior League supporters.

C. *The Trial Court's Rulings*

The trial court held two days of hearings on Packer's motions. The court overruled Packer's constitutional challenge to section 1424. On the merits of the recusal motion, the People conceded that Packer had demonstrated an "apparent conflict" of interest. The trial court accepted this concession, noting that the prosecutor's children and Packer had had "some degree of relationship" for a "very brief period of time" "prior to the [charged] crime[s]." However, the court found that Packer had not established "the link between the apparent conflict . . . and unfairness on behalf of the prosecution." Any link was, in the court's view, based on "speculation and innuendo."

The court concluded that the evidence Packer presented did not warrant an evidentiary hearing because his affidavits and supporting documentation did "not support a finding of a prima facie showing of a disabling conflict of interest." The trial court denied the recusal motion.

D. *Appellate Review*

Packer petitioned this court for a writ of mandate. We summarily denied the petition, and Packer petitioned the Supreme Court for review. The Supreme Court granted review and transferred the matter to us with directions to vacate our order denying mandate and to issue an alternative writ. We gave the trial court an opportunity to reconsider its ruling and grant Packer's request for an evidentiary hearing. When the trial court declined to do so, we issued an order to show cause and set the matter for oral argument.

## *DISCUSSION*

### I. *Section 1424's Procedures Do Not Violate a Defendant's Right to Compulsory Process*

Section 1424, subdivision (a)(1), empowers a criminal defendant to move "to disqualify a district attorney." It prescribes a two-stage process courts must use when evaluating such motions. The first stage relies on written submissions: "The [defendant's] notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported *by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit.* The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue." (*Ibid.*, italics added.) The second stage is an evidentiary hearing. The statute provides that "[t]he judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary." (*Ibid.*) No evidentiary hearing is necessary unless, at a minimum, the defendant makes a prima facie

showing of his entitlement to recusal during the first stage. (*Spaccia, supra,* 209 Cal.App.4th at p. 111.)

Packer argues that this procedure violates his right to compulsory process. Specifically, he contends that conditioning the right to an evidentiary hearing on a showing made solely through affidavits containing competent evidence "interferes with the exercise of his right [under compulsory process] to present witnesses on his own behalf. [Citations & fn. omitted.]" (*People v. Martin* (1987) 44 Cal.3d 1, 30 (*Martin*).) He recognizes that the trial court considered the hearsay statements of Kyle, Cathcart and others, but asserts that he is constitutionally entitled to an evidentiary hearing in order to subpoena witnesses and develop additional evidence to help him prove that the prosecutor labors under a disabling conflict of interest. We review the constitutionality of section 1424 de novo. (*People v. Super. Ct. (Mudge)* (1997) 54 Cal.App.4th 407, 411.) We reject Packer's challenge to section 1424 for two reasons.

A. *Compulsory Process Has Not Been Extended To Pretrial Proceedings*

The United States and California Constitutions grant a criminal defendant the right "to have compulsory process for obtaining witnesses in his favor . . . ." (U.S. Const., amend VI; Cal. Const., art. I, § 15 ["The defendant in a criminal cause has the right . . . to compel attendance of witnesses in the defendant's behalf"].) At its core, compulsory process secures "the right to the government's assistance in compelling the attendance of favorable witnesses *at trial* . . . ." (*Pennsylvania v. Ritchie* (1987) 480 U.S. 39, 56 (*Ritchie*), italics added.) Compulsory process complements the right to confrontation (*Washington v. Texas* (1967) 388 U.S. 14, 19 (*Washington*)), which is also "a *trial* right" (*Ritchie, supra,* at p. 52 (plurality opinion); see also *People v. Gonzales* (2012) 54 Cal.4th 1224, 1267 ["[T]he right to confrontation is a trial right that does not apply with full force at a preliminary hearing"]; cf. *People v. Cain* (2000) 82 Cal.App.4th 81, 86 [no confrontation right at sentencing]).

In arguing that he has a right to an evidentiary hearing in support of his recusal motion at which he can subpoena and question any witnesses who will not sign affidavits or whom he cannot locate, Packer is necessarily asking us to recognize a *pretrial* right to compulsory process. The United States Supreme Court has rejected arguments to recognize a pretrial right to compulsory process that would serve as a means of gaining access to witnesses or written discovery. (*Ritchie, supra*, 480 U.S. at p. 56.) So has our Supreme Court, which has repeatedly voiced reluctance to take "a long step in a direction the United States Supreme Court has not gone." (*People v. Hammon* (1997) 15 Cal.4th 1117, 1127 (*Hammon*); *People v. Clark* (2011) 52 Cal.4th 856, 983.) We are doubly reluctant to take an even longer stride into territory untouched by either the United States or California Supreme Courts—especially when, as we discuss next, "persuasive reason[s] exist[] not to do so" (*Hammon, supra*, at p. 1127).

B. *Section 1424's Procedures Proportionately Serve Legitimate Interests*

The constitutional right to compulsory process is not "an unfettered right to offer testimony" that "automatically and invariably outweigh[s] countervailing public interests." (*Taylor v. Illinois* (1988) 484 U.S. 400, 410, 414 (*Taylor*).) To the contrary, when a defendant contends that a statute or rule categorically deprives him of his constitutional right to compulsory process, as Packer does here, he must prove both that he was deprived of the opportunity to present material evidence in his favor *and* "that the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose." (*Government of Virgin Islands v. Mills* (3d Cir. 1992)

956 F.2d 443, 446, quoting *Rock v. Arkansas* (1987) 483 U.S. 44, 56 (*Rock*); *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-325 (*Holmes*).)[3]

Put differently, a statute or rule that excludes defense evidence does not transgress a defendant's right to compulsory process if it proportionately furthers a legitimate interest. It depends on the nature of the evidence excluded. (See *United States v. Scheffer* (1998) 523 U.S. 303, 309-315 (*Scheffer*) [ban on polygraph evidence serves three "legitimate interests" is constitutional]; *Taylor, supra*, 484 U.S. at pp. 410-413 [exclusion of defense witness as a discovery sanction furthers legitimate "interest in the orderly conduct of a criminal trial" is constitutional]; cf. *Holmes, supra*, 547 U.S. at pp. 325, 331 [rule excluding defense evidence that a third party committed the charged crime when *prosecution's* evidence is strong is "arbitrary" and unconstitutional]; *Washington, supra*, 388 U.S. at pp. 22-23 [rule barring testimony from an accomplice is "absurd[]" and unconstitutional]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 297-302 (*Chambers*) [rule precluding a defendant from confronting witnesses called by the defense with their prior inconsistent statements lacks any "underlying rationale" and is unconstitutional]; *Rock, supra*, 483 U.S. at p. 52 [rule barring a defendant from testifying based on any hypnotically refreshed testimony has "no justification" and is unconstitutional].)

Section 1424's procedures proportionately further three legitimate interests. Its two-stage procedure performs a screening function that furthers two state interests: (1) avoiding unnecessary harassment of prosecutors and

---

[3] Along the same lines, a defendant attacking the prosecutor's interference with the right to present material and favorable evidence in her particular case must establish that the interference was "'entirely unnecessary to the proper performance of the prosecutor's duties.'" (*In re Williams* (1994) 7 Cal.4th 572, 603, quoting *People v. Mincey* (1992) 2 Cal.4th 408, 460 and *Martin, supra*, 44 Cal.3d at p. 31; *People v. Jacinto* (2010) 49 Cal.4th 263, 269-270.)

trial witnesses; and (2) reducing the attendant disruption to the administration of justice flowing from unwarranted evidentiary hearings. These interests are legitimate. (*Holmes*, *supra*, 547 U.S. at pp. 326-327 [rules excluding evidence "'pos[ing] an undue risk of harassment'" are legitimate]; *People v. Dykes* (2009) 46 Cal.4th 731, 809, fn. 23 (*Dykes*) [same]; *Taylor*, *supra*, 484 U.S. at p. 415 [noting legitimate "interest in the fair and efficient administration of justice"]; see *Garcia v. Super. Ct.* (1984) 156 Cal.App.3d 670, 681-682 (*Garcia*) [two-stage process for evaluating judicial bias furthers "strong policy considerations" against harassment of judges, which "jeopardize[s] the integrity of the judicial process"].) Section 1424's further requirement that the prima facie showing be made on the basis of "affidavits of witnesses who are competent to testify" furthers a third "unquestionably" "legitimate interest"—namely, "ensuring that reliable evidence is presented to the trier of fact . . . ." (*Scheffer*, *supra*, 523 U.S. at p. 309.)

The interpretation of the compulsory process right Packer urges would affirmatively disserve two of these legitimate interests and, in the process, significantly alter California criminal procedure. Packer faults section 1424 for precluding defendants from presenting the statements of potential witnesses who refuse to sign affidavits or who cannot be located, and asserts that the remedy is to convene an evidentiary hearing at which those unwilling or unreachable affiants can be subpoenaed to testify. Although Packer contends that evidentiary hearings would be required only when affiants are "missing," the more likely effect is that evidentiary hearings would be requested (and hence required) with *every* recusal motion because it will almost always be possible to identify an uncooperative or absent witness. (Accord, *United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 866 [looking to practical impact of a ruling].) Packer's proposed solution would put the proverbial cart before the horse by mandating evidentiary hearings in order to help a defendant make a prima facie showing (instead of the other way around). It would also subject

prosecutors and trial witness to evidentiary hearings whenever a recusal motion is filed, which yields precisely the sort of harassment and concomitant disruption to the administration of justice that section 1424's procedures were specifically adopted to avoid. (See Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 154 (1999-2000 Reg. Sess.) as amended Aug. 17, 1999, p. 3.) [justifying adoption of two-stage procedure as needed to reduce the number of evidentiary hearings functioning as "lengthy fishing expeditions at the expense of the crime victims and the prosecutors who are often forced to testify under oath for several hours"].)

Furthermore, these adverse consequences would not be limited to motions under section 1424 because similar two-stage screening mechanisms are also used to evaluate allegations of bias and misconduct leveled against the other key participants in a criminal prosecution—namely, judges, jurors and defense counsel. (See *Garcia*, *supra*, 156 Cal.App.3d at pp. 680-682 [due process-based claims of judicial bias]; Code Civ. Proc. § 170.3, subd. (c)(1), (3) & (6) [statutory claims of judicial bias]; *People v. Hedgecock* (1990) 51 Cal.3d 395, 419 [claims of juror misconduct raised in motion for new trial]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 989-990 [requests for jurors' identifying information under Code Civ. Proc., § 237, subd. (b)]; *People v. Sharp* (1994) 29 Cal.App.4th 1772, 1787 (*Sharp*) [claims of defense counsel conflicts of interest raised prior to or during trial under *People v. Marsden* (1970) 2 Cal.3d 118], overruled on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434, 452; *People v. McCarthy* (1986) 176 Cal.App.3d 593, 597 [claims of defense counsel conflicts raised in habeas], overruled on other grounds by *People v. Goodson* (1990) 226 Cal.App.3d 277, 280.) If, as Packer contends, section 1424's procedures for evaluating prosecutorial bias are constitutionally infirm, the same is likely true for the procedures in these

analogous contexts.[4] Packer's reading would make evidentiary hearings mandatory, not discretionary.

Packer offers four reasons in support of his reading of the right to compulsory process. First, he contends that section 1424's procedures are arbitrary insofar as their sole goal is to conserve judicial resources and as they hamstring only a *defendant's* presentation of evidence. This argument not only understates the legitimacy of the interest in judicial economy (*People v. Tindall* (2000) 24 Cal.4th 767, 774; cf. *Superior Court v. Elkins* (2007) 41 Cal.4th 1337, 1353), but also overlooks all three legitimate interests, detailed above, that section 1424's procedures serve. It also ignores the plain language of section 1424 and the trial court's rulings in this case, which apply section 1424's competent-evidence requirement to prosecutorial submissions as well (*id.*, subd. (a)(1)).

Second, Packer asserts that criminal defendants are elsewhere permitted to make a prima facie showing (and hence establish entitlement to an evidentiary hearing) using otherwise inadmissible hearsay. He points to motions seeking law enforcement personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*City of Santa Cruz v. Muni. Ct.* (1989) 49 Cal.3d 74, 87-88 (*City of Santa Cruz*)), and motions to suppress illegally seized evidence under section 1538.5 (*People v. Johnson* (2006) 38 Cal.4th 717, 721, 729; see also *Blackman v. MacCoy* (1959) 169 Cal.App.2d 879, 879-880 [affidavits in support of a statutory claim of judicial bias may be based upon information and belief].) This is true, but of no constitutional significance. The movant's ability to rely on hearsay in these contexts is a function of legislative

---

[4] This would be just the tip of the iceberg. (See, e.g., *McCarthy*, *supra*, 176 Cal.App.3d at p. 597 [two-stage screening used for *all* habeas claims]; *Star Motor Imports, Inc. v. Super. Ct.* (1979) 88 Cal.App.3d 201, 204 [same, with writ petitions]; *People v. Super. Ct. (Zamudio)* (2000) 23 Cal.4th 183, 201 [same, with petitions to vacate a plea under § 1016.5]; *People v. Stanley* (1995) 10 Cal.4th 764, 791-792 [same, with venue motions].)

grace, not constitutional mandate. (See *City of Santa Cruz*, *supra*, at p. 88 ["[T]he Legislature may also *preclude* the use of affidavits on information and belief"]; see also *Star Motor Imports*, *supra*, 88 Cal.App.3d at p. 204 [petitions for writ of mandate cannot be supported by affidavits containing hearsay]; *Dykes*, *supra*, 46 Cal.4th at p. 810 [same, for motions for new trial for juror misconduct]; *Sharp*, *supra*, 29 Cal.App.4th at p. 1787 [same, for habeas petitions].) Our Legislature is not barred from insisting upon the use of competent evidence because the right to compulsory process does not encompass the "right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." (*Taylor*, *supra*, 484 U.S. at p. 410.)

Third, Packer argues that this is a capital case, and hence warrants a different constitutional standard. It does not. (See *Holmes*, *supra*, 547 U.S. at pp. 324-325 [capital case using standard compulsory process analysis]; see also *Hollywood v. Super. Ct.* (2008) 43 Cal.4th 721, 728 [§ 1424's standards same for all cases, including capital cases].)

Lastly, Packer posits that granting him an evidentiary hearing ends up conserving judicial resources in the long run because the refusal to grant him such a hearing now will inevitably necessitate an evidentiary hearing by a federal court reviewing any resulting conviction on habeas corpus. (See *Hurles v. Ryan* (9th Cir. 2013) 706 F.3d 1021, 1038.) We disagree with both premises of this argument. A federal court will convene an evidentiary hearing only if the state court did not provide one *and* provided no "other opportunity for the [defendant] to present evidence." (*Ibid.*) Because section 1424 permits defendants to present competent evidence through affidavits, this may well constitute a sufficient "opportunity . . . to present evidence." (*Hurles*, *supra*, at p. 1038.) Even if it does not, the potential for federal review of state convictions on habeas corpus has been around for well over a century (Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.) [extending federal habeas corpus writ

generally to all state prisoners]), and does not provide a basis unto itself for modifying state procedure, particularly when the modification sought comes with the deleterious consequences outlined above.

In sum, we hold that section 1424 does not violate a defendant's right to compulsory process by conditioning eligibility for an evidentiary hearing on the ability to make a prima facie showing made solely with affidavits containing competent evidence.[5]

II. *The Trial Court Did Not Abuse Its Discretion In Declining To Hold An Evidentiary Hearing*

Packer also argues that the trial court erred in not granting him an evidentiary hearing. Section 1424 contemplates an "exercise of discretion on the part of the trial court in determining whether an evidentiary hearing is necessary." (*Spaccia*, *supra*, 209 Cal.App.4th at p. 109.) But a trial court's discretion in this regard is not boundless. An evidentiary hearing is necessary if the defendant's prima facie showing raises factual disputes on which relief turns (see *People v. Romero* (1994) 8 Cal.4th 728, 739-740), but is pointless if the defendant is unable to point to facts in his prima facie case which, if credited, would entitle him to relief (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 974, 962 [noting "an evidentiary hearing [would] serve[] no legitimate purpose or function" in that situation]). A trial court will accordingly abuse its discretion in denying an evidentiary hearing in support of a recusal motion under section 1424 only if the defendant has made a prima facie showing of entitlement to recusal and that showing includes facts that are disputed and material to the court's ruling on the merits of recusal.

---

[5] It also does not offend due process, as Packer also argues, because the statute's two-stage procedure, with the guarantee of post-trial judicial review, provides an adequate opportunity to be heard. (Accord, *Garcia*, *supra*, 156 Cal.App.3d at pp. 680-682 [rejecting due process challenge to two-stage process for evaluating judicial bias claims].)

Because the trial court's denial of an evidentiary hearing in this case rested solely on its finding that Packer had not made the requisite prima facie showing, we begin by reviewing this finding. Our review is limited. "The trial court's findings of fact are reviewed for substantial evidence, . . . and its application of the law to the facts is reversible only if arbitrary and capricious. [Fn. omitted.]" (*Haraguchi v. Super. Ct.* (2008) 43 Cal.4th 706, 711-712 (*Haraguchi*).)

In making a prima facie showing for recusal under section 1424, it is not enough to show that the prosecutor's involvement "would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system." (*People v. Eubanks* (1996) 14 Cal.4th 580, 592 (*Eubanks*).) Instead, a defendant has the burden of asserting facts which, if credited, establish: (1) a "conflict of interest"; (2) "so grave as to make a 'fair treatment' unlikely." (*Id.* at pp. 593-594.) A "conflict of interest" involving the prosecutor exists when he or she is shown to have a personal "axe to grind" (*id.*, at p. 590, quoting *Wright v. United States* (2d Cir. 1984) 732 F.2d 1048, 1056 (*Wright*)) that creates a "reasonable possibility" that he or she will not exercise prosecutorial discretion "in an evenhanded manner" (*People v. Conner* (1983) 34 Cal.3d 141, 148 (*Conner*)). The prosecutor's personal interest must be more than an advocate's usual interest in prevailing. (*People v. Vasquez* (2006) 39 Cal.4th 47, 65 (*Vasquez*) ["Zealous advocacy in pursuit of convictions forms an essential part of the prosecutor's proper duties and does not show the prosecutor's participation was improper"].) Because proof of a conflict does not alone

warrant recusal[6] (*Spaccia*, *supra*, 209 Cal.App.4th at p. 112, fn. 33), the defendant must also prove that it is more likely than not, that due to the conflict, he or she will not be treated fairly during the criminal proceedings. (*Haraguchi*, *supra*, 43 Cal.4th at p. 713; *Eubanks*, *supra*, at p. 593 ["the need for prosecutorial impartiality extends to all portions of the proceedings, not only to the trial"].)

Packer argues that the prosecutor's conflict of interest springs from a personal interest in this case. Packer specifically alleges three sources of conflict. We consider each.

A. *The Prosecutor's Adult Children*

*May Be Penalty Phase Witnesses*

Packer asserts that his decision to call the prosecutor's two adult children as witnesses warrants recusal. Packer has listed them solely as penalty phase witnesses to offer mitigating evidence under section 190.3, subdivision (k), and argues that this creates a disabling conflict of interest for the prosecutor in two ways.

1. *Prosecutor's "Emotional Embroilment"*

Packer asserts that his decision to call Kyle and Elizabeth as witnesses has angered the prosecutor, and that his "emotional embroilment" has already manifested itself and will likely result in an unfair trial. For support, Packer points to: (1) the prosecutor's late discovery disclosures and refusal to provide discovery not mandated by section 1054.1; (2) the prosecutor's pretrial

---

[6] Prior to the enactment of section 1424, an apparent conflict alone *had been* sufficient. (*People v. Super. Ct. (Greer)* (1977) 19 Cal.3d 255, 269 [authorizing recusal of prosecutor under Code Civ. Proc., § 128, subd. (a)(5), based on a showing of a conflict of interest that "appear[s] to affect" the prosecutor's impartiality].) Our Legislature enacted section 1424 to overrule *Greer* because, in its view, *Greer* prompted a "substantial increase in the number of unnecessary prosecutorial recusals under [its] 'appearance of conflict' standard . . . ." (*People v. Petrisca* (2006) 138 Cal.App.4th 189, 194, quoting *People v. Merritt* (1993) 14 Cal.App.4th 1573, 1578.)

litigation tactics; (3) the prosecutor's expressions of annoyance with defense counsel's litigation strategy, including the statement that calling his children as witnesses constitutes "the lowest sort of trial tactics"; (4) the prosecutor's minimal cooperation with defense investigators insofar as he would only give Elizabeth their contact information but would not provide her address, coupled with Elizabeth's "tweet" that she was "really over not being able to tweet [her] whereabouts. This better pay off. #attorneyfatherprobs"; (5) Kyle's conduct in skipping his first interview with defense investigators and making two edits to the investigator's summary of that interview, even though prosecutor told him it was okay to be interviewed and to tell the truth; and (6) the prosecution investigator's instruction to Cathcart not to mention Elizabeth during an interview with the prosecutor, and Cathcart's unwillingness to be re-interviewed by the parties.

Packer presented no direct evidence that the prosecutor had any role in Elizabeth's, Kyle's, Cathcart's or the prosecution investigator's conduct, or that any of the prosecutor's own conduct was motivated by a personal grievance against Packer. To be sure, the trial court could have reasonably inferred that the prosecutor was upset with Packer and was grinding that personal axe by tampering with witnesses and taking positions in pretrial litigation unhelpful to the defense. (See *People v. Super. Ct. (Humberto S.)* (2008) 43 Cal.4th 737, 747 ["the persistent, bad faith use of [lawful] litigation tactics" can constitute circumstantial evidence of "an underlying conflict"].) But the trial court could also reasonably infer that the prosecutor's litigation positions were zealous but evenhanded discretionary calls, that the prosecutor had nothing to do with the witnesses' reluctance to fully cooperate with either party, and that the prosecutor's statements constituted public posturing in a high-profile case rather than an admission of a personal vendetta. (See *People v. Zapien* (1993) 4 Cal.4th 929, 970-971 [impermissible conflict not proven by showing different prosecutor might have made different discretionary litigation

decisions].) We may not gainsay the trial court's decision to draw one reasonable inference over another (*Lake v. Reed* (1997) 16 Cal.4th 448, 457 ["'Where the evidence supports more than one inference, we may not substitute our deductions for the trial court's'"]), especially when the trial court is in a "better position" than we are to "evaluate the consequences of a potential conflict in light of the entirety of a case." (*Haraguchi*, *supra*, 43 Cal.4th at p. 713; *Conner*, *supra*, 34 Cal.3d at p. 149.) The trial court accordingly did not abuse its discretion in finding that Packer had not sufficiently proved the "link between the apparent conflict . . . and unfairness on behalf of the prosecution." (Accord, *Vasquez*, *supra*, 39 Cal.4th at pp. 62, 63 ["a personal interest that might add to [a prosecutor's] zeal" is "not always regarded as creating so substantial a conflict as to deprive the defendant of fundamental fairness"].)

2. *Automatic Recusal Rule*

Packer alternatively argues that his decision to call the prosecutor's children itself created a disabling conflict because the jury will be more inclined to discredit his children's testimony if he, as their father, argues that it is not credible. We disagree.

We are not convinced that Packer's proffered rule of automatic recusal is implicated in this case. At this point, we do not know if the trial court will find Kyle and Elizabeth's testimony to be cumulative under Evidence Code section 352 or whether that court will admit evidence of their familial link to the prosecutor.[7] Moreover, because Kyle's and Elizabeth's likely testimony would address Packer's behavior many years ago that is unrelated to the charged crimes, the prosecutor in this case would likely be arguing the *significance* of his children's testimony on the question of whether death is an appropriate penalty rather than contesting their credibility.

[7] We express no opinion on these evidentiary questions.

Packer's proffered rule is flawed in any event. It is categorical, because it would automatically and without exception mandate recusal of a prosecutor whenever a defendant can find and name as a witness anyone with a connection to the prosecutor. Our Supreme Court generally eschews categorical disqualification rules. (E.g., *Eubanks*, *supra*, 14 Cal.4th at p. 599 [rejecting notion that *all* cases in which a victim provides financial assistance to the prosecutor's office "necessarily subjects the defendant to unfair . . . treatment"]; *Vasquez*, *supra*, 39 Cal.4th at p. 65 [rejecting notion that kinship between defendant and employees of the prosecutor's office necessarily mandates recusal].) It can be manipulated, because it would empower defendants to create disabling conflicts of interest whenever they can find anyone with a connection to their case and the prosecutor. (*Millsap v. Super. Ct.* (1999) 70 Cal.App.4th 196, 203.) And it is not justified, because courts have not treated the existence of a prior connection between a member of the prosecutor's family, or the prospect that a prosecutor may argue a particular witness's credibility, as a *per se* ground for disqualification. (See *Wright*, *supra*, 732 F.2d at pp. 1051, 1058 [prosecutor not disqualified, under due process principles, when his wife previously reported defendant's other misdeeds to the authorities]; see also *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1480-1489 [trial court did not abuse its discretion in not recusing prosecutor who will argue credibility of a colleague]; *People ex rel. Younger v. Super. Ct.* (1978) 86 Cal.App.3d 180, 206-210, superseded on other grounds by § 1424, subd. (a)(1) [same]; cf. *People v. Jenan* (2006) 140 Cal.App.4th 782, 791-793 [trial court did not abuse its discretion in recusing prosecutor who will argue credibility of colleague from a small office, when that colleague witnessed the defendant's crime].)

B. *The Prosecutor's Daughter's*

*Ex-Boyfriend May Be a Witness*

Packer argues that Cathcart's status as a guilt and penalty phase witness also constitutes a conflict of interest. Packer does not explain why Cathcart's brief relationship with the prosecutor's daughter seven or eight years ago would create a personal reason for the prosecutor to treat Packer unfairly, and the trial court did not abuse its discretion in perceiving none.

C. *The Prosecutor Had Some Relationship*

*With One of the Alleged Murder Victims*

Packer articulates two connections between the prosecutor and Davina Husted. Packer notes that the prosecutor's former wife was actively involved in the Junior League with Husted. Because this involvement occurred more than a decade after the prosecutor and his former wife divorced, the trial court did not abuse its discretion in rejecting this as a basis for recusal.

Packer alternatively asserts that the prosecutor and his current wife appear in a January 2008 spreadsheet listing Junior League supporters that was found on Davina Husted's computer. This demonstrates that Husted possessed the prosecutor's current address. But Husted was president of the Junior League, so her possession of a list of supporters does not show that she knew the prosecutor or had any relationship with him.

In sum, the trial court did not abuse its discretion in concluding that Packer had not made a prima facie showing that the prosecutor's apparent conflict of interest was so grave as to result in an "actual likelihood of unfair treatment." (*Haraguchi*, *supra*, 43 Cal.4th at p. 719.) The court consequently did not abuse its discretion in denying an evidentiary hearing or in denying his recusal motion.

*DISPOSITION*

The petition for a writ of mandate is denied. The Order to Show Cause, having served its purpose, is discharged.

CERTIFIED FOR PUBLICATION.

HOFFSTADT, J.*

We concur:

GILBERT, P. J.

PERREN, J.

*(Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice pursuant to art. 6, § 6 of the Cal. Const.).

Patricia M. Murphy, Judge

Superior Court County of Ventura

---

Stephen P. Lipson, Public Defender and Michael C. McMahon, Chief Deputy for Petitioner.

No appearance for Respondent.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez, Deputy Attorney General, for Real Party in Interest.

## DECLARATION OF SERVICE

**Case Name:** ***JOSHUA GRAHAM PACKER, Petitioner v. THE SUPERIOR COURT OF VENTURA COUNTY Respondent; THE PEOPLE, Real Party in Interest.***

**Case No.** **S_____ from Ct. App. 2/6 B245923 [Superior Court No. 2010013013])**

---

On October 8, 2013, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender. My business address is 800 South Victoria Avenue, Ventura, California, 93009. On this date I personally served the following named person(s), at the place indicated herein, with a full, true and correct copy of the attached **PETITION FOR REVIEW of PACKER V. SUPERIOR COURT (2013) 219 Cal.App.4th 226:**

Gregory Totten, District Attorney
**MICHELLE CONTOIS, Assigned DDA**
800 South Victoria Avenue, 3rd Floor
Ventura, CA 93009
[Counsel for the People]

**HON. PATRICIA MURPHY** and
**MICHAEL PLANET, Executive Officer, Sup. Ct.**
800 South Victoria Ave., 2nd Floor
Ventura, CA. 93009
[Trial Judge]

I am "readily familiar" with the County of Ventura's practice of collection and processing correspondence for mailing. Under that practice outgoing correspondence would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Ventura, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one business day after date of deposit for mailing affidavit. On this date, I served the attached **PETITION FOR REVIEW of PACKER V. SUPERIOR COURT (2013) 219 Cal.App.4th 226** by placing in the U. S. Mail, a full, true, and correct copy thereof in an envelope addressed to the persons named below at the addresses set out below, by sealing and depositing said envelope in the Ventura County U.S. Mail collection center in the ordinary course of business.

**California Court of Appeal, Clerk's Office**
Second District, Division Six
200 East Santa Clara Street
Ventura, CA 93001

**Kamala Harris, Attorney General**
300 S. Spring St., 5th Flr/N Twr
Los Angeles, CA 90013

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on the above date at San Buenaventura, California.

STEPHEN P. LIPSON, Public Defender

By _____

Jeane Renick, Legal Mgmt. Asst. III
Public Defender's Office