COPY

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 213894

Ct. App. 2/6 B245923

Ventura County
Super. Ct. No. 2010013013

OPENING BRIEF ON THE MERITS

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

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

Petitioner respectfully submits this opening brief on the merits:

THE ISSUE

Did the trial court abuse its discretion by denying a motion for recusal without an evidentiary hearing on the grounds that petitioner failed to make a prima facie showing that recusal was warranted? (Mr. Packer (Packer) respectfully submits that the court's discretion was abused.)

Discussion

I.

This Court should write an opinion holding that a defendant makes a prima facie showing for an evidentiary hearing when he presents facts and circumstances demonstrating a reasonable possibility that the conflicted prosecutor may not exercise his discretionary decisions in an evenhanded manner *and* an evidentiary hearing is necessary to determine whether the conflict is so grave as to render it unlikely that the defendant will receive fair treatment.

In *People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255, this Court considered whether, and under what circumstances, a trial court possesses the authority to recuse a district attorney's office from a case and to direct the Attorney General to take over the prosecution. Three years later, section 1424 was added to the Penal Code. Since its enactment in 1980, section 1424 has governed motions to disqualify the prosecuting attorney. The statute requires the defense to make a motion in writing with notice, and to include affidavits. (*Id.*, at subd. (a)(1).) The statute further provides, "[t]he judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary." (*Ibid.*)

Under section 1424, the defendant must demonstrate the existence of a conflict of interest. A conflict of interest exists "whenever the circumstances of a case evidence a reasonable possibility that the [conflicted person or entity] may not exercise its discretionary function in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, p. 148; accord, *People v. Snow* (2003) 30 Cal.4th 43, 86; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833; *People v. Millwee* (1998) 18 Cal.4th 96, 123; *People v. Eubanks* (1996) 14 Cal.4th 580, 592.)

Packer respectfully asserts that the circumstances of this case evidence a reasonable possibility that Michael Frawley may not exercise his discretionary function in an evenhanded manner.

The closer question is whether Michael Frawley's conflict is so grave as to render it unlikely that Packer will receive fair treatment. Under the circumstances of this case, an evidentiary hearing is necessary to assess the gravity of the conflict and the likelihood of unfair treatment.

In this case, the trial judge denied the recusal motion based solely on the affidavits submitted by both sides, and refused to conduct any evidentiary hearing. The Court of Appeal affirmed this action, ruling, "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. The court consequently did not abuse its discretion in denying an evidentiary hearing or in denying his recusal motion." (Slip opn., p. 19; citation and quotation marks omitted.)

Section 1424 should be construed to permit an evidentiary hearing when such a hearing is necessary to make that determination. The record in this case suggests that the trial court believed (as was argued by the prosecutor) that an evidentiary hearing was not authorized for this purpose.

This point of law should be clarified. Because this Court's recusal jurisprudence arises from cases in which the defendant was at least afforded *the opportunity* of an evidentiary hearing, it is unclear under what circumstances a court may determine that an evidentiary hearing is necessary.

Spaccia v. Superior Court (2012) 209 Cal.App.4th 93, was a case in which a court did not abuse its discretion to deny a recusal motion without an evidentiary hearing, but it is quite different than the circumstances of the instant case. Spaccia's request for an evidentiary hearing was based on her attempt to show an appearance of impropriety if the district attorney's office continued to prosecute her case. (*Id.*, at p. 108.) An evidentiary hearing was properly denied because a mere

appearance of impropriety is an insufficient basis on which to recuse a prosecutor's office as a matter of law. Packer concurs: when the defendant's *legal theory* for recusal is, itself, defective no evidentiary hearing is necessary. An appearance of impropriety is not a conflict. When no conflict is demonstrated, no evidentiary hearing is ever necessary.

The charges against Spaccia related, in part, to her involvement in a transaction in which Randy Adams was purportedly hired by the city of Bell to act as the city's chief of police, for a very substantial salary, the amount of which was hidden from the City Council. Spaccia requested an evidentiary hearing to take testimony from Adams, whom she predicted would refuse to testify by asserting his privilege against self-incrimination. Under such odd circumstances, it was not an abuse of discretion to deny the motion without an evidentiary hearing.

Because of its unique facts (and rather inept presentation by Spaccia's counsel), *Spaccia v. Superior Court* offers this court little guidance here.

Packer contends that the court's formulation in *Spaccia* of what is *required* to warrant an evidentiary hearing (*Id.*, at pp. 111-112) may be inappropriate in cases where reluctant or hostile witnesses could not assert a privilege against self-incrimination at the hearing, thereby defeating the purpose of an evidentiary hearing. However, given that Spaccia's entire theory for recusal was fatally flawed, this portion of the opinion appears to be dicta. "Even if an evidentiary hearing established everything Spaccia had hoped it would establish," recusal was barred by law. (*Id.*, at p. 112.) Clearly in *Spaccia*, no evidentiary hearing was necessary. It does not appear that *Spaccia* has been cited in any published opinion concerning the prima facie case.

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II.

Alternatively, this Court should write an opinion holding that a defendant makes a prima facie showing for an evidentiary hearing when he presents facts and circumstances demonstrating *an intolerable risk* that the defendant will not receive fair treatment.

The likelihood of an unfair trial described in section 1424, should not call for a pretrial prediction that any conviction at trial would likely be overturned on appeal. Such a standard is impracticable.

The doctrine of harmless error dictates that unfairness by the prosecutor may ultimately be determined to be harmless, but only after careful scrutiny of the entire appellate record - which does not exist at the time a recusal motion is considered.

Packer contends that the trial court abused its discretion in denying an evidentiary hearing because he presented facts and circumstances demonstrating an *intolerable risk* that the defendant will not receive fair treatment.

If the prima facie showing for an evidentiary hearing is an intolerable risk of unfairness, the standard promotes judicial economy. No court should be forced to deny an evidentiary hearing when confronted by such a showing. It reasonably appears that the Legislative intent behind section 1424 was the promotion of judicial economy. That goal would be furthered by adoption of an intolerable risk standard for the prima facie showing.

Use of an unreasonably burdensome legal standard for evaluating the prima facie showing frustrates judicial economy. Here, had the court conducted an evidentiary hearing, it is likely it could have been concluded in a day or two.

Packer is aware that there are important differences between judicial recusal and recusal of a prosecutor. Nevertheless, both involve some pretrial

assessment of the likelihood of bias and prejudice. In neither context should the defendant be called upon to prove actual prejudice before trial, and both contexts implicate important due process protections. (Cf. *Hurles v. Ryan* (9th Cir. 2011) 650 F.3d 1301 [due process requires judicial recusal where the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable]; see also *Caperton v. A.T. Massey Coal Co., Inc.* (2009) 556 U.S. 868.)

In the instant case, a trial prosecuted by Michael Frawley presents an intolerable risk of unfairness.

III.

When determining whether or not an evidentiary hearing is necessary, the court should consider whether witnesses material to the recusal issue are unavailable to the defendant absent use of the compulsory process of the court.

In the instant case, an evidentiary hearing is necessary because witnesses who are material to the issue of recusal include witnesses who are not readily available to the defendant absent the compulsory process of the court. At an evidentiary hearing in the Packer case, the defense would subpoena witnesses who will not voluntarily submit an affidavit in support of recusing Michael Frawley. These witnesses are:

- Kyle Frawley, Michael Frawley's son;
- Elizabeth "Ellie" Frawley, Michael Frawley's daughter:
- Linda Frawley, Michael Frawley's wife:
- Thomas Cathcart, Ellie Frawley's former boyfriend;
- Lisa West, Michael Frawley's ex-wife;
- Deputy Sheriff Scott Bauer; and,
- District Attorney Investigator Matt Harvill.

These witnesses, because of their relationship to the assigned prosecutor, are not available to the defense to voluntarily provide an affidavit in support of the recusal of the assigned prosecutor.

"The process by which the attendance of a witness before a court or magistrate is required is a subpoena." (Pen. Code section 1326, subd. (a).) However, there is no process to compel a reluctant or hostile witness to provide a capital defendant in a high-profile prosecution with a voluntary affidavit.

In determining whether an evidentiary hearing is necessary, the court should consider the circumstance that witnesses material to the recusal issue are not available to the defendant other than by subpoena.

In a letter to this Court urging your grant of review, the Public Defender of Los Angeles County put it this way: "In these situations, a trial judge should not be permitted to deny a recusal motion based solely on what will amount to incomplete affidavits. It should not, and cannot, be the rule that one party can refuse to cooperate with the other and thereby prevent that party from conducting an evidentiary hearing where the information can be fully developed and explored. Yet this is the inevitable consequence of the Court of Appeal's opinion. * * * In those cases, . . .where the prosecution refuses to cooperate with the defense, and the defense seeks an evidentiary hearing to compel disclosure of information about the conflict, a rule permitting the trial judge to deny the recusal motion solely on the basis of the affidavits would be quite unfair. This court should not permit that result, a result the Court of Appeal endorses."

That well-written letter from the largest criminal defense office in the world supports Packer's position before this court. It is in this Court's file and was served on all of the parties. It is "worth the candle" for a second reading, but for purposes of brevity, Packer will leave that to the discretion of the Court and other parties.

In *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, a prosecutor from the same district attorney's office (Ventura County) used her investigator to eavesdrop on a courtroom conversation between defendant and his attorney. Morrow moved to dismiss because of prosecutorial misconduct. The defense called the prosecutor and the investigator as witnesses at the hearing on the motion to dismiss. They exercised the right to remain silent and refused to answer questions claiming the privilege against self-incrimination. The privilege was sustained.

After limiting access to the facts, the prosecution then took the position that dismissal was inappropriate because Morrow had not proven prejudice by the misconduct. Reviewing an order denying the motion, the Court of Appeal held that: "Where a prosecutor orchestrates courtroom eavesdropping on a privileged attorney-client communication and the witnesses thereto invoke the privilege against self-incrimination, the prosecution may not successfully oppose a motion to dismiss on the ground that no prejudice has been shown." (*Id.*, at p. 1258.)

Here, Packer finds himself in a similar predicament. Circumstantial evidence supports the conclusion that Michael Frawley has had conversations with many of the witnesses material to the recusal issues. Frawley has made factual representations that could not be made without such conversations. (Vol. 1, pp. 28-32.) Frawley has revealed what he chooses to reveal, but no more, stating only that "I do not believe any further information is necessary or required, legally or ethically...." (*Id.*, at p. 30.)

After refusing to provide "any further information" despite the very specific and focused questions from the defense, (*Id.*, at p. 29) Frawley then takes the position that no evidentiary hearing is authorized because Packer's prima facie showing is inadequate. Frawley's position makes an evidentiary hearing not only necessary, but essential. The court abused its discretion in denying further hearing, but may have done so by adopting Frawley's standard for a prima facie showing. That standard does not sit well on these facts.

IV.

The trial court abused its discretion by denying the motion for recusal without an evidentiary hearing on the grounds that defendant failed to make a prima facie showing that recusal was warranted.
Frawley's conflict of interest infects pretrial discovery and investigation as well as both the guilt and penalty phases of the trial.

This is a "cold-hit," capital murder case in which the People continue to seek death. As in all capital cases, the circumstances of the crime are horrific. Although the prosecution may get this case to a penalty phase, the defense has powerful evidence in mitigation, and has an excellent chance of an LWOP verdict if given a fair trial after full and fair discovery and unimpeded pretrial investigation.

Joshua Packer's (Packer) upbringing was unimaginably horrible. Direct damage was done to Packer from being molested as a child on multiple occasions by separate men who were given access to him by negligent caregivers; from being abandoned by caregivers; from receiving a head injury at age 6 and disfigurement at age 8 due to parental neglect; from being attacked in his home by a drug addict at age 6; from being attacked in his bed by a wanted sex offender at age 11; and from being exposed in his home to drug use, drug trafficking, and domestic violence. In addition, the cumulative turmoil from every single caregiver in Packer's life having run-ins with the law; having to get cars out of impound; calling from the jail to make bail; coming to court; being on probation; having confrontations with former spouses, each other, and strangers; struggling with drug and alcohol addiction; and dealing with addicted and mentally ill family and household members resulted in utter chaos in Joshua Packer's life. The defense hopes to present that chaos in a manner understandable to jurors at a fair trial.

Following his arrest in another county, a DNA sample was taken from Packer which eventually identified him as a potential perpetrator in the Ventura

County case. Michael Frawley was quickly designated as the lead prosecutor.

On October 14, 2010, Packer offered to plead guilty in exchange for a sentence of life in prison without the possibility of parole. That settlement offer was rejected, but has not been withdrawn. (Vol. 1, at p. 27.)

1V-A Defense counsel summarized Packer's prima facie showing for recusal in the superior court.

Defense counsel summarized Packer's prima facie showing in the superior court. This is an illuminating part of the record which petitioner will not repeat here. The summary is memorialized in a reporter's transcript located in Volume 4 at Bates numbered pages 782 through 816. (The attention of the Court of Appeal was directed to that same summary in the Verified Petition for Writ of Mandate in paragraph #20 on page 6, however the page numbers referred to the original pagination of the Reporter's Transcript of Proceedings on November 19, 2012; in that transcript, the relevant pages are 1075 through 1109. From its opinion, there is no indication the Court of Appeal was confused by paragraph #20.)

Although Ventura cannot be considered a small town with a small district attorney's office, in a unique set of circumstances, defendant Packer was friends with prosecutor Frawley's children (Kyle and Ellie) and Thomas Cathcart (Cathcart). Cathcart, at the time, was Packer's best friend and dating Ellie. With Cathcart, and individually, Packer attended many social events in the Frawley home, as well as faith-based activities in the Frawley home at which Frawley's current wife, Linda, was a leader.

A further circumstance: Frawley's former wife, Lisa West (West), was friends with the victims, the Husteds. Davina Husted (Davina) and West were very active together in the Junior League. While Davina served as President of the Junior League, West served as a member of her Board of Directors. Davina's documents note that Frawley and his current wife Linda are Junior League supporters. Davina's

community service in the Junior League with West, and the support of Frawley and his current wife Linda, will be important "victim-impact" evidence at trial.

The activities and relationships which took place during three, formative teen years are important in Packer's social history. Frawley's children were good kids who lived in a good home, and were raised by caring parents and a step-parent active in their church and community. Packer's life was a dreadful saga of physical and sexual abuse, plus drug-ridden parental emotional abuse and neglect. His experience with the Frawley family reflect desperate attempts to "fit in," have quality friends, worship God, and escape the anguish of his daily home-life of abuse and trauma.

IV-B The Frawley family members and their intimate friends will be essential witnesses for the defense. They are not fungible. They are the witnesses who have the most personal knowledge of mitigating facts, and are the most articulate and credible witnesses to present to the jury. Mr. Frawley's role as the assigned trial attorney places these witnesses in an untenable position and creates an inevitable conflict of interest for the witnesses.

The Court of Appeal misses the point by repeatedly emphasizing and stating there were some 50 students involved in the Young Life Christian ministry. Nearly all of the 50 were only involved in some marginal, peripheral, or temporary manner. As was made clear in Packer's prima facie case, only four have the capacity to be compelling and persuasive witnesses at trial:

- Frawley's son, Kyle Frawley,
- Frawley's daughter, Ellie Frawley,
- Ellie's former boyfriend, and Packer's best friend, Thomas Cathcart, (who will be an important witness at both the guilt and penalty phase of the trial) and,
- Kristy Benscoter.

These four were the core members of Young Life and those most intimately familiar with Packer's redeeming traits of character, pro-social behavior, and charitable activities. For three years, they, together with Packer, attempted to understand their

spiritual connection to Christ. The testimony of these four witnesses lies at the very heart of Packer's defense.

Numerous exhibits submitted in support of the application for an evidentiary hearing support the conclusion that Packer had a special relationship with Michael Frawley's daughter, and that Frawley's attempts to minimize the relationship are misleading. An evidentiary hearing would resolve these factual disputes.

This photo from a Woodleaf camping trip by a gathering of both the Oxnard and Ventura Chapters of Young Life depicts Thomas Cathcart, Kristie Benscoter, and Ellie Frawley, with Packer draped affectionately over Kristy to place his head in Ellie's lap:

↑Ellie Frawley ↑Kristy Benscoter, seated.

↑Thomas Cathcart (blond), standing, blue shirt.

↑Joshua Packer, red shorts

In contrast to the four, only Packer was attempting to understand his spiritual connection to Christ after a lifetime of unspeakable trauma, abuse, and betrayal by sexually-perverted caretakers.

1V-C Frawley's conflict of interest has infected every stage of the pretrial proceedings and investigation, and renders it unlikely that Packer will receive a fair trial.

A fair trial begins long before the swearing of the first witness. Among other things, a fair trial requires the absence of pretrial publicity that creates an irrepressibly hostile attitude in the jury pool and community. In *Patton v. Yount* (1984) 467 U.S. 1025, the High Court noted that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed, ..." (*Id.*, at p. 1031 [abrogated by later cases as to the standard of review of such claims].) Nevertheless, from the inception of the case, Frawley has publicly maligned and disparaged defense counsel, primarily because of his family's inevitable role as defense witnesses.

Frawley told the Ventura County Star that, "*My children have nothing to do with the case. If I wasn't the prosecutor, you wouldn't hear anyone mention them with regard to the case. * * * [I]t's probably the lowest sort of trial tactics I've ever seen.*" The article noted that, "*After the hearing, Frawley said Maserang would apparently stop at nothing to get what he wanted.*" (Recusal Exhibit LL; Petition Exhibit Vol. I, p. 51.)

These attempts to publicly and unfairly vilify defense counsel demonstrate that Frawley's embroilment and emotional bias are likely to infect his discretionary duties. With Frawley at the helm, the case will never settle.

A fair trial also requires full and fair discovery. There is strong circumstantial and direct evidence that Frawley and his team have instructed witnesses not to discuss their relationship with the Frawley family, and held back evidence of Packer's relationships with the Frawley family and intimate friends.

Due process imposes an "inescapable" duty on the prosecutor "to disclose known, favorable evidence rising to a material level of importance." (*Kyles v. Whitley* (1995) 514 U.S. 419, 438.) Favorable evidence includes both exculpatory and impeachment material that is relevant either to guilt or punishment. (See *United States v. Bagley* (1985) 473 U.S. 667, 674-76; *Giglio v. United States* (1972) 405 U.S. 150, 154.)

Penal Code section 1054.1 provides: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) *Any exculpatory evidence.* [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial." (Italics added.)

The duty to disclose exculpatory evidence under section 1054.1, subdivision (e) is not circumscribed by any reference to trial, which suggests that a California prosecutor's codified duty to disclose exculpatory evidence applies to pretrial proceedings. (Cf. *People v. Gutierrez* (2013) 214 Cal.App.4th 343, 355 [disclosure duty before the preliminary hearing].)

The conflicted impairment of Frawley's "legal discovery obligations" was an important part of Packer's prima facie case. (Vol. 4, at pp. 1082-1083.) Frawley did not want his children to be witnesses for the defense, and this conflict infected his judgment.

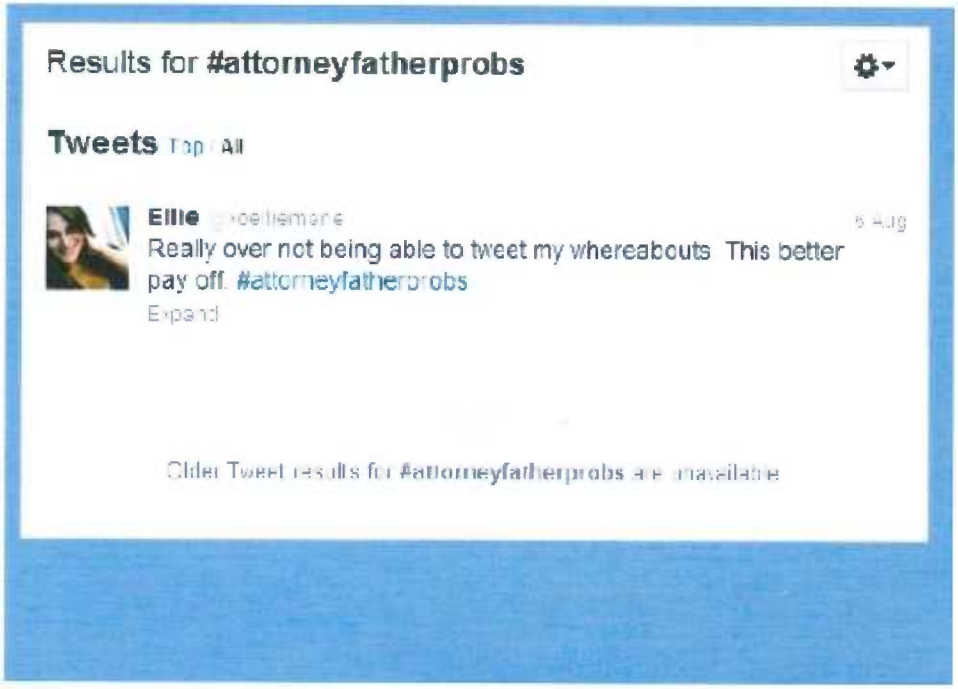
Mischief by the prosecution intervening in the defense mitigation investigation has already occurred. Former prosecution witness Thomas Cathcart dated Mr. Frawley's daughter, Elizabeth, in high school. Cathcart was one of Joshua Packer's best friends in middle school and high school. Mr. Frawley has sworn that he did not know about his daughter's dating relationship to Cathcart. Nonetheless, right before an interview at the prosecutor's office, Matt Harvill, Mr. Frawley's investigator, instructed Cathcart not to mention Elizabeth Frawley during the interview. Harvill apparently *did know* of the relationship. Harvill's attempt to circumscribe the scope of Cathcart's statement should be scrutinized at an evidentiary hearing.

In a death penalty case in which Thomas Cathcart, Packer, and Ellie Frawley spent time together at Frawley's home for Young Life events, as well as social events and parties unrelated to Young Life, such disclosures might be embarrassing to Frawley, yet mitigating to Packer. Paring off the mitigating testimony in this way to shield his own personal interests, including the interests of his daughter, wife, and family, is another example of why Frawley cannot reasonably serve as a gatekeeper to potential defense mitigation.

In an apparent effort to sanitize himself from the recusal conflict, Frawley subsequently removed Cathcart from the list of prosecution witnesses. Despite Cathcart's removal from that list, an aggravating incident in which Cathcart was the victim remains noticed in aggravation and has been re-noticed multiple times since his delisting. Cathcart was with Packer the day following the murders and is likely to be called by the defense during the guilt phase.

Additionally, when the defense attempted to subpoena Ellie Frawley as a mitigation witness at her family home while she was on a break from college, Michael Frawley angrily informed Deputy Sheriff Scott Bauer that his daughter had nothing to do with this case. (Mr. Frawley and the deputy may now deny this, but the deputy informed a defense investigator that this occurred. An evidentiary hearing would resolve this dispute.) Thereafter, the deputy ceased his efforts to serve Ms.

efforts to serve Ms. Frawley. Ms. Frawley even "tweeted" about her attempts to avoid being subpoenaed by the defense:



Similarly, Ellie's brother, Kyle Frawley, attempted to avoid a defense subpoena. He told a defense investigator that he did so after his father told him he might be subpoenaed if he spoke with a defense investigator about his relationship to Mr. Packer. Later, Kyle was interviewed by a District Attorney investigator in the presence of his father. Kyle's statement then changed to the detriment of his former friend, Joshua Packer.

Prior to the recusal motion, there were constant fights over SDT's issued by the defense. Allowing Frawley to make determinations about the defendant's social history investigation invites arbitrary, capricious, mischievous, and uninformed decision making. The personal, professional, and political interests and aspirations of this prosecutor who seeks Packer's death could not be more adverse to the Packer's interests. As lead prosecutor, he has been willing to pursue this case despite knowing from the very beginning that to do so would place his own children in the midst of litigation in this high profile death penalty case. (See R.T. at p. 1319,

lines 22-24, 6/25/2013: "I knew that the motion to recuse me was going to be brought three years ago, right after I disclosed what I disclosed to the defense.") Having Frawley as the gatekeeper to records that concern a significant, large portion of. Packer's social history investigation is a recipe for mischief.

Counsel's Sixth Amendment responsibilities include a duty to engage in a reasonable investigation concerning aspects of the defendant's background that would support a mitigation case. (*Wiggins v. Smith* (2003) 39 U.S. 510, 522-23.) Circumstantial evidence supports the conclusion that Frawley is impeding that investigation.

V.

A prima facie case is shown when a father will be litigating the weight, credibility, and significance of the testimony of his children and spouse(s). This should be viewed as a form of "reverse vouching."

Frawley's children, Kyle and Ellie will testify at trial. Cathcart will testify and be testified about by other witnesses. (Cathcart is the alleged victim in a matter in aggravation.) Frawley's wife and former wife may both testify. The jury will be called upon to assess the credibility of these witnesses.

When the jury is left with the impression that the prosecutor has important information regarding the credibility of a witness based upon information other than what was presented to the jury at trial, federal due process is threatened. This is often referred to as "vouching." (See, e.g., *Maurer v. Minnesota Department of Corrections* (8th Cir. 1994) 32 F.3d 1286, 1290-1291 [prosecutor's vouching in rape case violated due process]; *United States v. Edwards* (9th Cir. 1998) 154 F.3d 915 [a prosecutor's continued representation of government following his discovery of a key piece of evidence, the circumstances of which were in dispute, was a form of vouching that undermined the fundamental fairness of the trial]; *Floyd v. Meachum*

(2nd Cir. 1990) 907 F.2d 347 [cumulative effect of repeated misconduct including vouching for the credibility of state's witness, rendered trial fundamentally unfair].)

California cases are in accord with the federal cases. (See *People v. Medina* (1995) 11 Cal.4th 694, 776 ["prosecutors should not purport to rely in jury argument on their outside experience or personal beliefs based on facts not in evidence"].) Impermissible vouching occurs when "prosecutors [seek] to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.'" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336; see *People v. Zambrano* (2007) 41 Cal.4th 1082, 1167.)

Packer is not asking the court to speculate in advance as to the content of prosecutor Frawley's argument at trial. However, in the circumstances of the instant case, it is inevitable that the jury will *infer* that Frawley has information regarding the credibility of his own family above and beyond that which was presented at trial. When he stands before the jury and argues for a verdict of death, it will be very difficult for the jury to impartially weigh and assess the testimony of his children and others intimately associated with the Frawley family regarding Packer's redeeming traits of character. "If their own father was unswayed," they will surely ask, "why should we find the testimony to be significant."

This unspoken subtext should be viewed as a form of "reverse vouching." In traditional vouching, jurors are put in a position to *credit* the testimony of the witness, despite the instruction to evaluate the testimony based solely on the evidence introduced at trial.

In this "reverse vouching" situation, jurors are at great risk of *discounting* the testimony of the witness because the prosecutor's special, long-standing, and intimate relationship with the witness means he knows far more about the witness then ever could be presented at trial. But the likelihood of prejudice is quite similar.

In case that are reversed for "vouching," the reversal is rarely based upon actual proof of prejudice from testimony of the trial jurors. Such evidence of actual prejudice is barred by Evidence Code section 1150 for extrinsic policy reasons. The reversal is based upon a reviewing court's assessment that the risk of prejudice is intolerably high.

VI.

Judgments of death inevitably lead to federal habeas review. Factual findings made by state courts that improperly deny capital defendants evidentiary hearings will not be afforded deference in federal habeas proceedings. Denial of an adequate state hearing is a false economy.

In *Hurles v. Ryan* (2013) 706 F.3d 1021, 1038-1039, 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 Hilliar'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')."

Those observations underscore the false economy and unfairness of a court denying an evidentiary hearing when confronted with a compelling 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 the 9th Circuit.

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Conclusion

This court should reverse the judgment of the Court of Appeals with directions to grant Packer an evidentiary hearing to demonstrate that Frawley's conflict is likely to lead to unfair proceedings and trial.

Dated: January 17, 2013.

Respectfully Submitted,

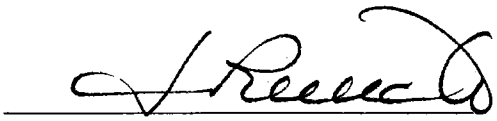
STEPHEN P. LIPSON,
Public Defender

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 6,758 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated January 17, 2014.



Jeane Renick
Legal Mgmt Asst. III

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. S213894 (from Ct. App. 2/6 B245923 [Superior Court No. 2010013013])

On January 17, 2014, 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 **OPENING BRIEF ON THE MERITS:**

Gregory Totten, District Attorney
Attn: Michael Schwartz, Spec Asst DA
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 **OPENING BRIEF ON THE MERITS** 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