In the Supreme Court of the State of California

JOSHUA GRAHAM PACKER, **Petitioner,** **v.** **THE SUPERIOR COURT OF VENTURA COUNTY,** **Respondent,** **THE PEOPLE,** **Real Party in Interest.**	Case No. S213894

Second Appellate District, Division Six, Case No. B245923
Ventura County Superior Court, Case No. 2010013013
The Honorable Patricia M. Murphy, Judge

THE ATTORNEY GENERAL'S ANSWER BRIEF ON THE MERITS

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Did the trial court abuse its discretion by denying a motion for recusal without an evidentiary hearing on the grounds that defendant failed to make a prima face showing that recusal was warranted?

INTRODUCTION

This case presents a narrow review of a straightforward ruling by a trial court exercising its discretion when considering the evidence and ruling upon a motion to disqualify the assigned prosecuting attorney pursuant to Penal Code section 1424. Nevertheless, Petitioner asks this Court to reverse the Court of Appeal and make a sweeping ruling that any time a criminal defendant puts forward enough admissible evidence to suggest the assigned prosecutor has a conflict of interest, the defendant is thereafter entitled to compulsory process and an evidentiary hearing in an attempt to discover additional evidence and testimony to help him prove the conflict was so grave as to render it unlikely he will receive a fair trial. The request for such a sweeping ruling finds no support by reference to Penal Code section 1424 or this Court's well-settled case law, and as such it should be rejected and the trial court's exercise of discretion upheld.

Petitioner filed a motion in the trial court to recuse the assigned prosecutor, Chief Deputy District Attorney Michael K. Frawley of the Ventura County District Attorney's Office, pursuant to Penal Code section 1424, alleging: (1) Chief Deputy Frawley "appears to have known the victim, Davina Husted, through his former wife, Lisa West, and to have contributed to the local charity [the Junior League] of which she was the President at the time of her death"; (2) because two of Chief Deputy Frawley's children knew Petitioner long before the capital crimes he is charged with, the children "*will be* witnesses for the defense in the penalty phase of Mr. Packer's capital murder trial if Mr. Packer is found guilty";

and (3) "[Chief Deputy] Frawley's daughter formerly dated prosecution (and defense) witness Thomas Cathcart, and both of his children knew Mr. Cathcart as well as two other prosecution witnesses, Oscar Martinez and Steven Infante." (Mot. at 4.) Petitioner also filed declarations from Deputy Public Defender Ben Maserang and Public Defender Investigators Charles J. Wiggins, Wendy Carlton and Aron Miller concurrently with his motion.

The Ventura County District Attorney's Office filed an opposition, appending the declaration of Chief Deputy Frawley. In addition, the Ventura County District Attorney's Office filed a motion to strike the declarations and portions of the declarations submitted by Petitioner. The Attorney General joined in the District Attorney's motion and filed an opposition to the recusal motion. The trial court thereafter held a thorough and full hearing, carefully considering and reviewing line-by-line each declaration and all the documentary evidence submitted by the People and by Petitioner. The trial court then entered detailed evidentiary rulings on the motions to strike. After argument, the trial court denied recusal, specifically ruling that Petitioner failed to show a disabling conflict pursuant to Penal Code section 1424 whether it considered the evidence and declarations in their entirety or whether she considered them stripped of the objectionable and inadmissible matters therein.

Petitioner thereafter filed a petition for a writ of mandate in the California Court of Appeal, Second Appellate District, Division Six, Case number B245923. The Court of Appeal denied the petition.

Petitioner next filed a petition for writ of mandate in this Court, which the Court granted with directions to the Court of Appeal to vacate the order denying the petition for a writ of mandate and issue an alternative writ. The parties briefed the matter, argument was held, and the Court of Appeal issued a published opinion denying the writ of mandate and finding that conditioning the right to an evidentiary hearing on a showing made solely

through affidavits containing competent evidence did not violate a defendant's right to compulsory process, and that the trial court did not abuse its discretion in declining to hold an evidentiary hearing.

Petitioner next filed a petition for review, which this Court granted, limited to the issue of whether the trial court abused its discretion by denying a motion for recusal without an evidentiary hearing on the grounds that petitioner failed to make a prima face showing that recusal was warranted.

The sweeping ruling sought by Petitioner—granting every criminal defendant the right to a fishing expedition to search for testimony and evidence to help support an otherwise insufficiently supported recusal motion—is neither required under the facts and circumstances of the instant case, nor can it be justified by reference to the Constitution, statute or case law. Indeed, the well-settled standard of review dictates the trial court's denial of recusal must be upheld because, under the facts and circumstances of the instant case, it was not an abuse of discretion.

Here, any reasonable review of the full record demonstrates the trial court properly denied the recusal motion after exhaustively reviewing, and carefully considering and ruling upon, all of the multiple declarations and evidence submitted by the parties. Moreover, the trial court specifically ruled that Petitioner failed to set forth a disabling conflict pursuant to Penal Code section 1424, whether the documentary evidence and the multitude of declarations submitted were considered in their entirety or whether they were stripped of the objectionable and inadmissible material contained therein.

The trial court's ruling was a thorough, factually supported and well-reasoned exercise of its discretion. As a result, review must be denied.

ARGUMENT

I. STANDARD OF REVIEW

On review of a trial court's denial of a recusal motion, the Court's role is to determine whether there is substantial evidence to support the trial court's factual findings, and, based on those findings, determine whether the trial court abused its discretion in denying the motion. (*People v. Vasquez* (2006) 39 Cal.4th 47, 56 (*Vasquez*).) "The trial court's ruling is reviewed under the abuse-of-discretion standard; factual findings are reviewed for substantial evidence, conclusions of law are reviewed de novo, and 'application of the law to the facts is reversible only if arbitrary and capricious.'" (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 387 (*Haworth*), citing *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-12 (*Haraguchi*).

"[T]hat the trial court's findings were based on declarations and other written evidence does not lessen the deference due those findings." (*Haraguchi, supra*, 43 Cal.4th at p. 711, fn. 3.) This same standard of review applies whether review is sought pre-trial or post-trial (*id.* at p. 713) and in capital cases (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728-729 (*Hollywood*)).[1]

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[1] Petitioner no longer argues that the denial of an evidentiary hearing violated his right to compulsory process. In any event, the harmless error standard applies to alleged compulsory process violations. (*Crane v. Kentucky* (1986) 476 U.S. 683, 691 [106 S.Ct. 2142, 90 L.Ed.2d 636]; see also *Arizona v. Fulminante* (1991) 499 U.S. 279, 306 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Allen* (2008) 44 Cal.4th 843, 870.)

II. RECUSAL IS PERMITTED ONLY IN A NARROW CATEGORY OF CASES IN WHICH THE DEFENDANT HAS SHOWN A CONFLICT OF INTEREST SO SEVERE AS TO RENDER IT UNLIKELY HE WILL RECEIVE A FAIR TRIAL

The standards governing a recusal motion are now very well settled. Penal Code section 1424 ("section 1424") provides that a motion to recuse a district attorney or an entire prosecutorial agency "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." Section 1424 establishes a two-part test: The first part asks whether there is a conflict of interest. A "conflict" exists "whenever the circumstances of a case evidence a reasonable possibility that the District Attorney's office may not exercise its discretionary function in an evenhanded manner." If such a conflict is shown, the second step then asks: "Was this conflict so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings?" (*People v. Conner* (1983) 34 Cal.3d 141, 148; see also *People v. Gamache* (2010) 48 Cal.4th 347, 362; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746; *Hollywood v. Superior Court, supra,* 43 Cal.4th at pp. 727-728; *Haraguchi, supra*, 43 Cal.4th at pp. 711, 713; *People v. Vasquez, supra*, 39 Cal.4th at p. 56; *People v. Griffin* (2004) 33 Cal.4th 536, 569; *People v. Maury* (2003) 30 Cal.4th 342, 437, fn. 23; *People v. Snow* (2003) 30 Cal.4th 43, 86-87; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833; *People v. Millwee* (1998) 18 Cal.4th 96, 122-124; *People v. Eubanks* (1996) 14 Cal.4th 580, 592; *People v. Petrisca* (2006) 138 Cal.App.4th 189, 194-195.)

Thus, while a "conflict" exists whenever there is a "reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner," the conflict is disabling only if it is "so grave as to render it unlikely that defendant will receive fair treatment." (*Eubanks*,

supra, 14 Cal.4th at p. 594, citations omitted; see *Gamache*, *supra*, 48 Cal.4th at p. 363 ["[T]he possibility that a prosecutor might be influenced does not alone establish the requisite likelihood or probability that a defendant will be treated unfairly"].)

Put another way, even if a court determines there is a "'reasonable possibility' that a District Attorney's Office might not exercise, or might not have already exercised, its discretionary function in an evenhanded manner," "such a determination would satisfy only the first part of the two-part test outlined in *Eubanks* and *Hambarian*," and recusal must nevertheless be denied unless the defendant has also made a competent showing that "prosecution by that office would render fair treatment unlikely." (*Snow*, *supra*, 30 Cal.4th at p. 86.) "[T]he two parts of the test are to some extent continuous rather than discrete, as many factors relevant to the overarching inquiry may be framed in terms of their effect on the existence of a conflict or its gravity." (*Haraguchi*, *supra*, 43 Cal.4th at p. 718, fn. 13.)

Section 1424 was enacted in response to the substantial increase in unnecessary prosecutorial recusals allowed under the prior, abrogated "appearance of conflict" standard of *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255. (See *Vasquez*, *supra*, 39 Cal.4th at pp. 58-59; *Griffin*, *supra*, 33 Cal.4th at p. 569; *Eubanks*, *supra*, 14 Cal.4th at p. 591, and fn. 3 [taking judicial notice of the legislative history of section 1424 which "indicate[s] the bill was drafted and sponsored by the Attorney General in response to *Greer*; the Attorney General's office sought the measure as a means of reducing the number of disqualifications and thereby alleviating an increase in that office's disqualification workload"]; *Priceline.com, Inc. v. City of Anaheim* (2010) 180 Cal.App.4th 1130, 1146 ["Penal Code section 1424 supersedes cases like *Greer*, [] ... which required recusal for the mere appearance of impropriety"]; *People v. Jenan*

(2006) 140 Cal.App.4th 782, 792; *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 199; *Lewis v. Superior Court (People)* (1997) 53 Cal.App.4th 1277, 1282; *People v. Merritt* (1993) 19 Cal.App.4th 1573, 1578.)

Aside from its purpose of "reducing the number of disqualifications" (*Eubanks*, *supra*, 14 Cal.4th at p. 591, fn. 3), section 1424 was drafted to eliminate an obvious problem inherent in the prior recusal standard: What may appear "bad" to an uninformed observer may not influence—or, more importantly, may not have any real possibility of influencing—the prosecutorial decision-making process. In short, under section 1424, appearances of mere potential conflicts do not dictate granting recusal unless the defendant has made a competent showing of a real likelihood he will not receive a fair trial.

Indeed, in *Eubanks*, this Court held:

> [W]hether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus, section 1424, unlike the *Greer* standard, does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system. (Accord, *People v. McPartland* (1988) 198 Cal.App.3d 569, 574 [243 Cal.Rptr. 752] ["recusal cannot be warranted solely by how a case may appear to the public"]; *People v. Lopez*, *supra*, 155 Cal.App.3d at pp. 827-828.)

(*Eubanks*, *supra*, 14 Cal.4th at p. 591, italics in original; see also *Haworth, supra,* 50 Cal.4th at p. 387; *Vasquez*, *supra*, 39 Cal.4th at pp. 56, 59 ["The statute demands a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential 'rise to the level of a likelihood of unfairness,'" and "[Section 1424] no longer includ[es]

circumstances where a conflict only appears to affect the prosecutor's impartiality"]; *Griffin*, *supra*, 33 Cal.4th at p. 569; *Hambarian*, *supra*, 27 Cal.4th at p. 834; *Millwee*, *supra*, 18 Cal.4th at pp. 122-124; *Petrisca*, *supra*, 138 Cal.App.4th at pp. 194-195.)

Accordingly, because "the enactment of section 1424 eliminated the appearance of impropriety as an independent ground for prosecutorial disqualification" (*Eubanks*, *supra*, 14 Cal.4th at p. 592), recusal is not appropriate based upon "the trial court's feeling that it would be cleaner or better for the Attorney General to handle the case, or that it would be 'more appropriate' for that office to conduct the prosecution[.]" (*People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1486.)

Importantly, it is now clear that mere "appearances of impropriety"—whether to the public, to the parties, or to the court—are no longer "an independent ground for prosecutorial disqualification"; now, the focus must be on the gravity of the conflict—i.e., the "actual likelihood of prejudice . . . rather than on whether . . . [the situation] would . . . be 'unseemly' or create 'the perception of improper influence.'" (*Eubanks*, *supra*, 14 Cal.4th at p. 592; see also *Vasquez*, *supra*, 39 Cal.4th at pp. 56, 59; *People v. Neely* (1999) 70 Cal.App.4th 767, 776; *People v. McPartland* (1988) 198 Cal.App.3d 569, 574.) As noted by this Court: "*Only an actual likelihood of unfair treatment*, not a subjective perception of impropriety, can warrant a court taking the significant step of recusing an individual prosecutor or prosecutor's office." (*Haraguchi*, *supra*, 43 Cal.4th at p. 719, italics in original.) Thus, even the appearance of an impropriety which "would be highly destructive of public trust" is, standing alone, "no longer a ground for recusal of the district attorney." (*Eubanks*, *supra*, at p. 593.)

In sum, section 1424 requires that a criminal defendant make an affirmative, competent, and *factual* showing of the "real, not merely apparent, potential for unfair treatment." (*Vasquez*, *supra*, 39 Cal.4th at p.

56; see also *Haworth, supra,* 50 Cal.4th at p. 387 ["The application of that test appropriately is characterized as primarily factual"]; *Eubanks*, *supra*, 14 Cal.4th at p. 592; *People v. Breaux* (1991) 1 Cal.4th 281, 294; *Conner*, *supra*, 34 Cal.3d at p. 148; see also *People v. Zapien* (1993) 4 Cal.4th 929, 968.)[2] The focus thus must be exclusively on the legal recusal standard—here, whether Petitioner came forward with competent evidence of an actual likelihood he would not receive a fair hearing if Chief Deputy Frawley remained the prosecutor—and not on how proceeding with Chief Deputy Frawley might appear to the press or to those who are uninformed and outside the courtroom.

III. THE TRIAL COURT'S DENIAL OF THE RECUSAL MOTION AND THE REQUEST FOR A FURTHER EVIDENTIARY HEARING WAS NOT AN ABUSE OF DISCRETION

The trial court's denial of recusal and a further evidentiary hearing was not an abuse of discretion.

Petitioner's recusal motion alleged:

> (1) Chief Deputy Frawley, the assigned prosecuting attorney, "appears to have known the victim, Davina Husted, through his former wife, Lisa West, and to have contributed to the local charity [the Junior League] of which she was the President at the time of her death";
>
> (2) Two of Chief Deputy Frawley's children knew Petitioner, and these the children "*will be* witnesses for the defense in the penalty phase of [Petitioner's] capital murder trial if [Petitioner] is found guilty"; and
>
> (3) "[Chief Deputy] Frawley's daughter formerly dated prosecution (and defense) witness Thomas Cathcart, and both of

[2] "In contrast, deciding whether an appearance of partiality exists requires application of an objective, reasonable-person test." (*Haworth, supra*, 50 Cal.4th at p. 387.)

his children knew Mr. Cathcart as well as two other prosecution witnesses, Oscar Martinez and Steven Infante."

(Recusal Mot. at 4.) Petitioner also filed declarations from Deputy Public Defender Ben Maserang and Public Defender Investigators Charles J. Wiggins, Wendy Carlton and Aron Miller concurrently with his motion.

The Ventura County District Attorney's Office filed an opposition, appending the declaration of Chief Deputy Frawley, and also separately filed a motion to strike portions of the declarations submitted by Petitioner. The Attorney General joined in this motion and filed an opposition to the recusal motion. After argument, the trial court undertook a painstakingly detailed and thorough review of all of the submitted evidence, going through and ruling upon each objection raised page-by-page, line-by-line. (Mandate Pet., Ex. AA.) After a virtually unlimited argument, the trial court thereafter ruled on the recusal motion as follows:

> THE COURT: Well, the Court has read all of the moving papers, all of the declarations prior to being stricken and after being stricken. I've read the cases. I understand the issues and I understand the arguments of counsel. There's nothing further that I can say to augment the record. I think it's one fully briefed and fully argued.
>
> What I do find is that there's little doubt that there is some degree of relationship between Mr. Frawley's children and the defendant at a period of time, very brief period of time I might add, from the Court's view, prior to the crime that occurred. And that these witnesses may very well have positive factor K type of evidence that will be admissible, from some witness during the trial.
>
> The Court finds that the affidavits stricken of irrelevant hearsay information do not support a finding of a prima facie showing of a disabling conflict of interest. There is a lapse in the link between the apparent conflict, conflict, and unfairness on behalf of the prosecution.
>
> I will note for the record, and this is the reason I brought this up at the very beginning, because my decision would be

> exactly the same had the People not moved to strike the hearsay and lack of foundation evidence from the declarations, it just doesn't demonstrate to the Court that there is evidence on which to conclude that a hearing would demonstrate that there is a disabling conflict.
>
> There is speculation and innuendo. And the Court is not going to allow an evidentiary hearing to support allegations made at this stage of the proceedings. So the motion to recuse is denied.

(Mandate Pet., Ex. BB, at pp. 942-943.)

A full review of the record demonstrates the trial court thoroughly and specifically addressed and ruled upon the evidence presented in support of and opposing the recusal motion. The trial court's measured findings and conclusions were more than amply supported.

Moreover, few actual and significant facts were genuinely contested. There were, for the most part, no material facts disputed beyond ordinary discrepancies that exist when a witness has been interviewed multiple times.

Further, and most importantly, the trial court specifically stated that its ruling would have been the same had Petitioner's declarations and documentary evidence not been stripped of the inadmissible and objectionable matters contained therein. This is precisely the thorough and careful manner in which such motions should be considered and ruled upon.

"A trial court has inherent as well as statutory discretion to control the proceedings to ensure the efficacious administration of justice. (See, e.g., [Penal Code] § 1044;[3] Evid.Code, § 765; *People v. Melton* [(1988)]

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[3] Section 1044, adopted in 1927, provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and

(continued...)

44 Cal.3d [713] at p. 734, 244 Cal.Rptr. 867, 750 P.2d 741; *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 301-302, 10 Cal.Rptr. 842, 359 P.2d 274.)" (*People v. Cox* (1991) 53 Cal.3d 618, 700; see also *People v. Strum* (2006) 37 Cal.4th 1218, 1237 ["The trial court has a statutory duty to control trial proceedings, including the introduction and exclusion of evidence."].)

"Discretion is the power to make the decision, one way or the other." (*People v. Carmony* (2004) 33 Cal.4th 367, 375.) "A discretion which can be exercised in one way only, or which is shackled by rigid rules regarding its exercise, is no discretion at all." (*People v. Crandell* (1988) 46 Cal.3d 833, 863, abrogated on other grounds as stated in *People v. Crayton* (2002) 28 Cal.4th 346, 361.) A trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it. (See *People v. McDowell* (2012) 54 Cal.4th 395, 429-430; *People v. Thomas* (2011) 52 Cal.4 336, 354-355 ["'outside the bounds of reason'"]; *People v. Giordano* (2007) 42 Cal.4th 644, 663 [same]; *People v. Ramirez* (2006) 39 Cal.4th 398, 439 [same]; *People v. Manriquez* (2005) 37 Cal.4th 547, 634 [same]; *People v. Carmony*, *supra*, 33 Cal.4th at p. 377; *People v. Catlin* (2001) 26 Cal.4th 81, 122 [same].) Or, as noted by this Court in another context, a trial court's exercise of discretion "will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Geier* (2007) 41 Cal.4th 555, 585 [accord]; *People v. Lancaster*

(...continued)
material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved."

(2007) 41 Cal.4th 50, 71; see also *People v. Giminez* (1975) 14 Cal.3d 68, 72 ["capricious disposition or whimsical thinking"].)

The Court would be hard-pressed to deem the trial court's thorough and reasonable ruling to be arbitrary, capricious, patently absurd or outside the bounds of reason. Indeed, "[m]easured against virtually every aspect of this standard, [the trial judge] is immune from the charge of abuse." (*People v. Stringham* (1988) 206 Cal.App.3d 184, 200.) As this Court has said in the recusal context: "We review rulings on motions to recuse only for abuse of discretion precisely because trial courts are in a better position than appellate courts to assess witness credibility, make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case, a case they inevitably will be more familiar with than the appellate courts that may subsequently encounter the case in the context of a few briefs, a few minutes of oral argument, and a cold and often limited record." (*Haraguchi, supra,* 43 Cal.4th at p. 713; accord *Haworth v. Superior Court*, *supra*, 50 Cal.4th at p. 388.) And the fact that "the trial court's findings were based on declarations and other written evidence does not lessen the deference due those findings." (*Haraguchi*, *supra*, 43 Cal.4th at p. 711, fn. 3.)

The trial court's ruling denying recusal and a further evidentiary hearing fell well within the proper exercise of its discretion.

IV. THE TRIAL COURT'S DENIAL OF RECUSAL WITHOUT TAKING ADDITIONAL TESTIMONY AT AN EVIDENTIARY HEARING WAS NOT AN ABUSE OF DISCRETION

Petitioner specifically argues the trial court abused its discretion when it denied his recusal motion without hearing from live witnesses at an evidentiary hearing because Petitioner made a prima facie case which satisfied the first part of Penal Code section 1424, showing the assigned deputy had a conflict of interest. (Opening Brief at pp. 2-4.) Petitioner

argues that once a defendant has demonstrated a "prima facie" showing of a "conflict" (the first step of the Penal Code section 1424 two-part test), he is thereafter entitled to a full and unfettered evidentiary hearing to permit him to discover evidence and testimony as to whether the alleged conflict was so grave as to render it unlikely that he will receive fair treatment during all portions of the criminal proceedings (the second step of the section 1424 two-part test).

The Attorney General disagrees with Petitioner's unsupported attempt to parse out the showing he was required to make pursuant to Penal Code section 1424. As set forth above, it is well-settled a "conflict" pursuant to Penal Code section 1424 exists *only* if: (1) there is a reasonable possibility that the prosecutor's impartial exercise of discretion might be affected; *and* (2) there is likelihood or probability that the criminal defendant will be treated unfairly. As this Court found, "the two parts of the test are to some extent continuous rather than discrete, as many factors relevant to the overarching inquiry may be framed in terms of their effect on the existence of a conflict or its gravity." (*Haraguchi*, *supra*, 43 Cal.4th at p. 718, fn. 13.) Similarly, in *People v. Hamilton* (1989) 48 Cal.3d 1142, the defendant argued that where he could show an "actual, as opposed to a technical, conflict of interest" he did not need to present evidence of a likelihood of unfairness. This Court noted that Penal Code section 1424 "does not draw the distinction defendant suggests" and held that the defendant was required to come forward with a showing both of a conflict and that the conflict would render it unlikely the defendant would receive fair criminal proceedings. (*Id.* at p. 1155-1156.)

In sum, it is not a "conflict" pursuant to Penal Code section 1424 unless the criminal defendant has met his or her burden of establishing *both* a reasonable possibility that the prosecutor's impartial exercise of

discretion might be affected *and* a likelihood or probability that the criminal defendant will be treated unfairly.

This precise issue was recently addressed by the California Court of Appeal in *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93 (*Spaccia*). There, the Court of Appeal, after reviewing and taking judicial notice of the legislative history of Penal Code section 1424, specifically addressed the issue of a trial court's exercise of discretion in determining the necessity of a hearing on a recusal motion. The *Spaccia* court concluded that "at a minimum, in order to establish an abuse of discretion in the denial of [an evidentiary] hearing, the moving party must show that it submitted sufficient affidavits to establish a prima facie case for disqualification." (*Id.* at p. 111.) The Court of Appeal specifically rejected the defendant's argument that "in order to obtain an evidentiary hearing, she need only make a showing of evidence as to the first element necessary for recusal (an actual or apparent conflict), without any showing as to the second element (likelihood of unfairness)." (*Id.* at p. 112, fn. 33.)

Petitioner now agrees that the request for an evidentiary hearing in *Spaccia* was "properly denied" because the defendant there had sought an evidentiary hearing only to show that there was an "appearance of an impropriety" which is insufficient to support recusal, and because of the "unique facts (and rather inept presentation by Spaccia's counsel [defense attorney Harlan Braun])." (Opening Brief at pp. 3-4.) Petitioner nevertheless argues that *Spaccia*'s holding "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," and that in any event, the defendant's "entire theory for recusal [in *Spaccia*] was fatally flawed" and that "this portion of the opinion appears to be dicta." (Opening Brief at p. 4.)

Any reasonable reading of the *Spaccia* court's holding on this issue shows that it was not dicta. Indeed, the Court of Appeal specifically addressed and rejected the identical argument Petitioner makes here—"that in order to obtain an evidentiary hearing, [he] need only make a showing of evidence as to the first element necessary for recusal (an actual or apparent conflict), without any showing as to the second element (likelihood of unfairness)." (*Id.* at p. 112, fn. 33; compare Opening Brief at pp. 2-4.) The *Spaccia* court found this argument "simply unpersuasive":

> The undisputed purpose behind the enactment of Penal Code section 1424 was to guarantee that a district attorney would not be disqualified unless it was established that the conflict would render it unlikely that the defendant would receive a fair trial. As such, we cannot infer that, when the Legislature amended the statute to expressly provide for an evidentiary hearing on a disqualification motion, the Legislature intended to provide for evidentiary hearings when no prima facie showing had been made that the conflict would, in fact, render it unlikely that the defendant would receive a fair trial.

(*Ibid.*)

Petitioner further argues that *Spaccia* has "not been cited in any published opinion concerning the prima facie case." (Opening Brief at p. 4.) *Spaccia* was issued in September 2012. Since that date, there appears to have been only one published California case (other than the instant case, which cited *Spaccia* with approval) addressing recusal pursuant to Penal Code section 1424, and that case did not discuss or address a defendant's request for an evidentiary hearing on the motion. (See *People v. Sy* (2014) 223 Cal.App.4th 44, __.) Thus, it can equally be said that no subsequent cases distinguish, disagree or disapprove of *Spaccia.*

Further, any reasonable evaluation of the full record below clearly demonstrates the trial court's decision not to conduct a further evidentiary hearing at which additional live testimony was to be taken was not an abuse of discretion. As set forth above and in the Answer Brief on the Merits

filed by the Ventura County District Attorney's Office, the trial court exhaustively examined all of the evidence and declarations before it, page-by-page and line-by-line. Indeed, the trial court's hearing, addressing the multiple declarations and the mountain of evidence put before it, and then ruling upon the recusal motion took in excess of two days, permitted virtually unlimited argument, and resulted in the court making detailed and specific findings on all of this evidence. It is hard to imagine a trial court being more careful or more cognizant of its obligations to thoroughly review all of the evidence before it. And, as stated above, this Court in *Haraguchi* explained, in the precise recusal context at issue here, the fact that "the trial court's findings were based on declarations and other written evidence does not lessen the deference due those findings." (43 Cal.4th at p. 711, fn. 3.)

Likewise, in *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, the defendant sought to vacate his plea for inadequate immigration advisements pursuant to Penal Code section 1016.5 and claimed the trial court erred when it denied him an evidentiary hearing, including live testimony and cross-examination, "on whether and when defendant faced, and knew he faced, immigration risks." (*Id.* at p. 200.) This Court "decline[d] to burden trial courts with a requirement that they conduct live evidentiary hearings" on such motions, finding as follows:

> Even assuming petitioner is correct that a factual showing is required, we are not persuaded the trial court abused its discretion in denying a further evidentiary hearing and ruling on the basis of the record before it, which included the parties' written submissions. "There is simply no authority for the proposition that a trial court necessarily abuses its discretion, in a motion proceeding, by resolving evidentiary conflicts without hearing live testimony." (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 414 [58 Cal.Rptr.2d 875, 926 P.2d 1061].)

> Petitioner cites no authority specifically requiring courts to hold live evidentiary hearings on section 1016.5 motions or, more generally, on plea withdrawal motions. On the other hand, California law affords numerous examples of a trial court's authority, in ruling upon motions, to resolve evidentiary disputes without resorting to live testimony. (See, e.g., § 1050, subd. (b) [affidavits or declarations sufficient to support motion for continuance]; *People v. Cox* (1991) 53 Cal.3d 618, 697 [280 Cal.Rptr. 692, 809 P.2d 351] [whether to conduct live hearing on new trial motion alleging juror misconduct is within court's discretion]; *Garcia v. Superior Court* (1984) 156 Cal.App.3d 670, 681-682 [203 Cal.Rptr. 290] [evidentiary hearing on motion to disqualify trial judge not required]; *People v. Eastman* (1944) 67 Cal.App.2d 357, 359 [154 P.2d 37] [implying court properly could rule on motion to vacate judgment of conviction on affidavits only].)
>
> For the foregoing reasons, we decline to burden trial courts with a requirement that they conduct live evidentiary hearings on all section 1016.5 motions. The trial court did not err in this regard.

(*Id.* at p. 201.) All of the cases cited by this Court in *Zamudio* as examples of a trial court's authority to resolve evidentiary disputes without live testimony involved motions by criminal defendants.

Similarly, this Court in *People v. Hedgcock* (1990) 51 Cal.3d 395, discussed a trial court's discretion to hold a hearing on allegations of jury misconduct, holding as follows:

> For the reasons set forth above, we hold that it is within the discretion of a trial court to conduct an evidentiary hearing to determine the truth or falsity of allegations of jury misconduct, and to permit the parties to call jurors to testify at such a hearing. This does not mean, however, that a trial court must hold an evidentiary hearing in every instance of alleged jury misconduct. The hearing should not be used as a "fishing expedition" to search for possible misconduct, but should be held only when the defense has come forward with evidence demonstrating a strong possibility that prejudicial misconduct has occurred. Even upon such a showing, an evidentiary hearing will generally be unnecessary unless the parties' evidence

presents a material conflict that can only be resolved at such a hearing.

(*Id.* at p. 419, footnote omitted.)

The Court "stress[ed], however, that the defendant is not entitled to such a hearing as a matter of right. Rather, such a hearing should be held only when the trial court, *in its discretion*, concludes that an evidentiary hearing is necessary to resolve material, disputed issues of fact." (*People v. Hedgecock*, *supra*, 51 Cal.3d at pp. 415-416, emphasis added.) Here, of course, Petitioner acknowledges that he seeks an evidentiary hearing as a fishing expedition to discover additional evidence and testimony to help him try to prove that the alleged conflict was so grave as to render it unlikely he will receive a fair trial.

Finally, and most importantly, the trial court specifically ruled that Petitioner failed to set forth a disabling conflict pursuant to Penal Code section 1424, whether the documentary evidence and the multitude of declarations submitted on his behalf were considered as a whole or whether they were stripped of all of the objectionable and inadmissible material contained therein.

In sum, on the record in the instant case, the trial court's decision to not conduct a further live hearing and hear from additional witnesses at an evidentiary hearing was not an abuse of discretion. Under all of the circumstances, the court did not abuse its discretion when it found no disabling conflict of interest pursuant to Penal Code section 1424 on the record before it, without an evidentiary hearing or additional live witnesses.

V. THE WELL-SETTLED RECUSAL STANDARD ALREADY PROPERLY ACCOUNTS FOR THE COMPETING AND IMPORTANT STATUTORY AND CONSTITUTIONAL INTERESTS AT STAKE; IF ALTERED AS PETITIONER SUGGESTS IT WOULD SIGNIFICANTLY ALTER CALIFORNIA CRIMINAL PROCEDURE

Penal Code section 1424 already properly accounts for the competing and important interests at stake. In this regard, the Court of Appeal correctly determined that Petitioner's articulation of a new or different standard, compelling a trial court to hold an evidentiary hearing on a recusal motion which was not supported by competent evidence, would "affirmatively disserve" two of the three legitimate interests Penal Code section 1424 serves; would subject prosecutors and trial witnesses 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;" and would "significantly alter California criminal procedure." As noted by the Court of Appeal:

> 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 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, 126 S.Ct. 1727 [rules excluding evidence "'pos[ing] an undue risk of harassment'" are legitimate]; *People v. Dykes* (2009) 46 Cal.4th 731, 809, fn. 23, 95 Cal.Rptr.3d 78, 209 P.3d 1 (*Dykes*) [same]; *Taylor*, *supra*, 484 U.S. at p. 415, 108 S.Ct. 646 [noting legitimate "interest in the fair and efficient administration of justice"]; see *Garcia v. Super. Ct.* (1984) 156 Cal.App.3d 670, 681–682, 203 Cal.Rptr. 290 (*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, 118 S.Ct. 1261.)

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, §66, 102 S.Ct. 3440, 73 L.Ed.2d 1193 [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,

> 203 Cal.Rptr. 290 [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, 272 Cal.Rptr. 803, 795 P.2d 1260 [claims of juror misconduct raised in motion for new trial]; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 989-990, 77 Cal.Rptr.3d 912 [requests for jurors' identifying information under Code Civ. Proc., § 237, subd. (b)]; *People v. Sharp* (1994) 29 Cal.App.4th 1772, 1787, 36 Cal.Rptr.2d 117 (*Sharp*) [claims of defense counsel conflicts of interest raised prior to or during trial under *People v. Marsden* (1970) 2 Cal.3d 118, 84 Cal.Rptr. 156, 465 P.2d 44], overruled on other grounds by *People v. Martinez* (1995) 11 Cal.4th 434, 452, 45 Cal.Rptr.2d 905, 903 P.2d 1037; *People v. McCarthy* (1986) 176 Cal.App.3d 593, 597, 222 Cal.Rptr. 291 [claims of defense counsel conflicts raised in habeas], overruled on other grounds by *People v. Goodson* (1990) 226 Cal.App.3d 277, 280, 277 Cal.Rptr. 60.) 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.[] Packer's reading would make evidentiary hearings mandatory, not discretionary.

(Opinion at pp. 8-11.)

In a footnote, the Court of Appeal aptly noted that if Petitioner's arguments were accepted, it would be the "just the tip of the iceberg" and that such evidentiary hearings would be required in analagous contexts. (Opinion at p. 11, fn. 4 ["(See, e.g., *McCarthy*, *supra*, 176 Cal.App.3d at p. 597, 222 Cal.Rptr. 291 [two-stage screening used for all habeas claims]; *Star Motor Imports, Inc. v. Super. Ct.* (1979) 88 Cal.App.3d 201, 204, 151 Cal.Rptr. 721 [same, with writ petitions]; *People v. Super. Ct. (Zamudio), supra,* 23 Cal.4th at p. 201, 96 Cal.Rptr.2d 463, 999 P.2d 686 [same, with petitions to vacate a plea under § 1016.5]; *People v. Stanley* (1995) 10 Cal.4th 764, 791-792, 42 Cal.Rptr.2d 543, 897 P.2d 481 [same, with venue motions].)"].)

Moreover, Petitioner is a criminal defendant seeking an unfettered right to compel an elected District Attorney and designated members of his

Office to be sworn and testify at a pretrial proceeding concerning their executive functions and prosecutorial decision-making, in an attempt to discover a basis to disqualify them from discharging their constitutional role as prosecutor. However, the Constitution and the separation of powers doctrine mandate that a criminal defendant come forward with competent evidence of an alleged disabling conflict of interest (under *both* parts of Penal Code section 1424) *before* compelling these Executive officers to testify and be cross-examined at an evidentiary hearing.

Pursuant to the Article V, Section 13, of the California Constitution, law enforcement and the prosecution of crimes are part of the executive branch of government. "The district attorney is an executive officer exercising executive branch authority and generally is not subject to judicial supervision." (*People v. Parmar* (2001) 86 Cal.App.4th 781, 793.) In this regard, in the absence of a competent factual basis for recusal, the choice of which prosecuting agency prosecutes a particular case is exclusively that of the People, and "the separation of powers doctrine precludes courts from interfering with the executive decisions of prosecutorial authorities." (*People v. Honig* (1996) 48 Cal.App.4th 289, 355; see also *Daily Journal Corp. v. Superior Court* (1999) 20 Cal.4th 1117, 1133 ["[O]versight of the district attorney's exercise of investigative and charging discretion . . . is a matter reserved to the Attorney General and to the Governor, who has constitutional and statutory authority to oversee the Attorney General. (Cal. Const., art. V, § 13; see also Gov. Code, §§ 12010, 12550.)"]; *Pitts v. County of Kern* (1998) 17 Cal.4th 340, 363.)

As noted by this Court in *Eubanks*:

> The district attorney of each county is the public prosecutor, vested with the power to conduct on behalf of the People all prosecutions for public offenses within the county. Subject to supervision by the Attorney General, therefore, the district attorney of each county independently exercises all the

> executive branch's discretionary powers in the initiation and conduct of criminal proceedings. The district attorney's discretionary functions extend from the investigation of and gathering of evidence relating to criminal offenses, through the crucial decisions of whom to charge and what charges to bring, to the numerous choices the prosecutor makes at trial regarding "whether to seek, oppose, accept, or challenge judicial actions or ruling."

(*Eubanks, supra*, 14 Cal.4th at p. 589, citations omitted.)

In this regard, the California Constitution gives the Attorney General broad supervisory powers over the various district attorneys and authorizes the Attorney General instead of the district attorney to prosecute crimes. (*Daily Journal Corp. v. Superior Court, supra*, 20 Cal.4th at p. 1133; *Pitts v. County of Kern, supra*, 17 Cal.4th at p. 363.) Specifically, article V, section 13, of the state Constitution, provides in relevant part:

> Whenever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.

Moreover, Government Code section 12550, the legislative enactment of this authority, provides as follows:

> The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge. [¶] When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process.

These Constitutional and statutory provisions confer "broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case," and in this context the provisions suggest that the Attorney General's discretion is not reviewable by the superior court unless there has been a showing of "a manifest abuse of discretion." (*Honig, supra*, 48 Cal.App.4th at pp. 354-355.) This means "the Attorney General's decision must be upheld unless no reasonable person could reach the same conclusion." (*Id.* at p. 355; see also *People ex rel. Younger v. Superior Court (Rabaca)* (1978) 86 Cal.App.3d 180, 221, fn. 5.)

Accordingly, a criminal defendant has, at best, a narrow and limited right to compel a witness's presence and testimony at a pretrial evidentiary hearing upon a recusal motion, subject to the court's discretion. A requirement that a criminal defendant seeking to compel discovery and the testimony from witnesses and members of the District Attorney's Office must first advance competent evidence of a disabling conflict—pursuant to *both* parts of Penal Code section 1424—fully comports with the separation of powers and exclusive executive functions as set forth by statute and in the California Constitution. (See, e.g., *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] ["In the exercise of [the right to present witnesses], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."]; *People v. Gurule* (2002) 28 Cal.4th 557, 593 [noting that even if a criminal defendant had a Sixth Amendment right to compulsory process of confidential communications, it was outweighed under the circumstances of the case by the attorney-client and psychotherapist privileges].)

Indeed, as found by the Court of Appeal, and in light of the foregoing significant statutory and constitutional separation of powers provisions, a trial court must be permitted to reasonably exercise its discretion, pursuant

to Penal Code section 1424, by requiring a criminal defendant to come forward with a prima facie showing with competent evidence of an actual or apparent conflict that renders it a real likelihood the defendant will receive an unfair trial.

VI. PETITIONER'S INVENTION OF A NEW RECUSAL STANDARD FINDS NO SUPPORT IN PENAL CODE SECTION 1424 OR IN CASE LAW AND, IN ANY EVENT, THE SUGGESTED NEW STANDARD OFFERS NOTHING TO AID TRIAL COURTS OR CHANGE THE RESULT IN THE INSTANT CASE

Petitioner next argues "alternatively" for this Court to create and announce an entirely new recusal standard, whereby a criminal defendant is entitled to an evidentiary hearing on a recusal motion whenever he or she has "presented an *intolerable risk* that the defendant will not receive fair treatment." (Opening Brief at pp. 5-6.) In support, Petitioner cites cases discussing judicial disqualification and the articulated standard in those cases of an "intolerable risk of bias," while recognizing, as he must, that there are "important differences between judicial recusal and recusal of a prosecutor." (*Ibid.*)

Petitioner is, of course, correct as to the "important differences" between judicial and prosecutorial disqualification. "Cases regarding judges are wholly inapt from cases involving criminal prosecutors[.]" (*Priceline.com Inc. v. City of Anaheim*, *supra*, 180 Cal.App.4th at p. 1148.) In *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238 [100 S.Ct. 1610, 64 L.Ed.2d 182] (*Marshall*), the United States Supreme Court held that the "rigid requirements . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity" because "[o]ur legal system has traditionally accorded wide discretion to criminal prosecutors in the enforcement process," "[p]rosecutors need not be entirely 'neutral and detached,'" as

"[i]n an adversary system, they are necessarily permitted to be zealous in their enforcement of the law" and "[t]he constitutional interests in accurate finding of facts and application of law, and in preserving a fair and open process for decision, are not to the same degree implicated if it is the prosecutor, and not the judge, who is offered an incentive for securing civil penalties." (*Id.* at p. 248.)

Similarly, this Court cited *Marshall* in *People v. Vasquez, supra*, 39 Cal.4th 47, in holding that "[t]o show a due process violation arising from a prosecutor's conflicting interest should be more difficult than from a judge's, for the 'rigid requirements' of adjudicative neutrality . . . designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity." (*Id.* at p. 64.) In *Vasquez*, this Court held disqualification of a prosecutor pursuant to Penal Code section 1424 "demands a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential 'rise to the level of a *likelihood* of unfairness." (*Id.* at p. 56, emphasis in original, citing *Eubanks*, *supra*, 14 Cal.4th at p. 592.)[4]

Petitioner now suggests that rather than requiring a defendant to show with competent evidence that an alleged conflict created a real likelihood of unfairness, the showing to be entitled to compulsory process and an evidentiary hearing should instead be whether there is "an *intolerable risk*

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[4] Even as to judges, the United States Supreme Court has distinguished between "matters of kinship [and] personal bias," which "seem generally to be matters merely of legislative discretion," and a judge's "direct, personal, substantial pecuniary interest in reaching a conclusion against" a defendant, which deprives the defendant of due process. (*Tumey v. Ohio* (1927) 273 U.S. 510, 523 [47 S.Ct. 437, 71 L.Ed. 749]; see also *Haas v. County of San Bernadino* (2002) 27 Cal.4th 1017, 1025.)

that the defendant will not receive fair treatment." (Opening Brief at pp. 5-6.)

As far as the Attorney General is aware, no California court has ever articulated "intolerable risk" as a standard for determining a defendant's entitlement to an evidentiary hearing on a recusal motion or, indeed, as to a hearing in any other comparable context.[5] In any event, no authority has directly or impliedly suggested importing this as standard in the recusal context. Moreover, Petitioner does not provide any persuasive argument or authority which suggests how this new legal standard, if articulated by this Court, would offer anything which would aid or direct a trial court in ruling on such motions. Nor does Petitioner suggest how his evidentiary showing

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[5] The phrase "intolerable risk" seems to have been articulated most frequently in the context of the review of whether evidence was more prejudicial than probative pursuant to Evidence Code section 352. (See, e.g., *People v. Duff* (2014) __ Cal.4th __, __ [2014 WL 321872, *23; *People v. Jones* (2013) 57 Cal.4th 899, 948-949; *People v. Edwards* (2013) 57 Cal.4th 658, 709, 713, 757; *People v. Maciel* (2013) 57 Cal.4th 482, 527; *People v. Thomas* (2012) 53 Cal.4th 771, 808; *People v. Eubanks* (2011) 53 Cal.4th 110, 144, 146; *People v. Dement* (2011) 53 Cal.4th 1, 36; *People v. Clark* (2011) 52 Cal.4th 856, 893; *People v. Tran* (2011) 51 Cal.4th 1040, 1047; *People v. Booker* (2011) 51 Cal.4th 141, 188; *People v. Alexander* (2010) 49 Cal.4th 846, 905; *People v. Hamilton* (2009) 45 Cal.4th 863, 951; *People v. Lindberg* (2008) 45 Cal.4th 1, 49; *People v. Riggs* (2008) 44 Cal.4th 248, 290; *People v. Richardson* (2008) 43 Cal.4th 959, 1006; *People v. Jablonski* (2006) 37 Cal.4th 774, 805; *People v. Waidla* (2000) 22 Cal.4th 690, 724; see also *People v. Tully* (2012) 54 Cal.4th 952, 1077 ["prosecution may not rely on biblical authority in urging the jury to return a verdict of death, as this would 'create and encourage an intolerable risk that the jury will abandon logic and reason and instead condemn an offender for reasons having no place in our judicial system,'" citing *People v. Roldan* (2005) 35 Cal.4th 646, 743; *People v. Enraca* (2012) 53 Cal.4th 735, 768 ["'[t]he combination of the evidentiary and instructional errors present[ed] an intolerable risk that the jury did not consider all or a substantial portion of the penalty phase defense, which was lingering doubt.'"], citing *People v. Gay* (2008) 42 Cal.4th 1195, 1226; *People v. Gonzales* (2011) 52 Cal.4th 254, 326 [same].)

in the trial court arguably met a standard of an "intolerable risk of unfair treatment," but not the well-settled standard of showing a real or actual potential for unfair treatment.

As a result, Petitioner has not offered a legal or practical justification for departing from Penal Code section 1424 and this Court's well-settled cases requiring a showing, with competent evidence, of a conflict that renders it unlikely the defendant will receive a fair trial.

VII. PETITIONER'S ARGUMENT THAT A DIFFERENT RECUSAL STANDARD SHOULD APPLY AS TO "JUDGMENTS OF DEATH" WHICH WILL EVENTUALLY LEAD TO "FEDERAL HABEAS REVIEW" DOES NOT SUPPORT A NEW OR DIFFERENT STANDARD FOR RECUSAL

Petitioner next suggests the Court should view his arguments through a different prism because it is a capital case and because any evidentiary rulings made by the trial court without a hearing "will not be afforded deference in federal habeas proceedings." (Opening Brief at 19.) Of course, this Court has already specifically determined that the Penal Code section 1424 recusal standard applies in *all* cases, including capital cases. (*Hollywood*, *supra*, 43 Cal.4th at p. 728.)

Petitioner further cites *Hurles v. Ryan* (9th Cir.2013) 706 F.3d 1021, a case involving judicial disqualification, and argues from it that without an evidentiary hearing any factual findings will not be afforded deference. (*Id.* at pp. 19-20.) "First, these authorities deal with a different, although similarly worded, statute. Second, 'lower federal decisional authority is neither binding nor controlling in matters involving state law.'" (*People v. Beltran* (2013) 56 Cal.4 935, 953 [addressing out of state authorities on the issue of provocation]; see *Marshall, supra,* 446 U.S. at p. 248 [noting differences between judicial and prosecutorial disqualification]; *Vasquez*, *supra*, 39 Cal.4th at p. 64 [same].)

In any event, the Court of Appeal properly addressed and rejected this claim as follows:

> 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.

(Opinion at pp. 12-13.)

The Attorney General agrees. A criminal defendant who has not come forward with competent and sufficient evidence of a disabling conflict pursuant to Penal Code section 1424 should not be not entitled as a matter of right to an evidentiary hearing to discover supporting grounds for his motion. The Court should not rewrite Penal Code section 1424, and reverse well-settled case law, based upon Petitioner's unsupported prediction of what may occur in a future habeas corpus proceeding in a lower federal court.

CONCLUSION

The trial court's denial of the recusal motion was a straightforward application of its discretion. Petitioner has not come close to demonstrating that the trial court's exercise of discretion was arbitrary, capricious, or exercised in a patently absurd manner. For the foregoing reasons, the Attorney General respectfully requests that the Court of Appeal's ruling be affirmed.

Dated: February 19, 2014

Respectfully submitted,

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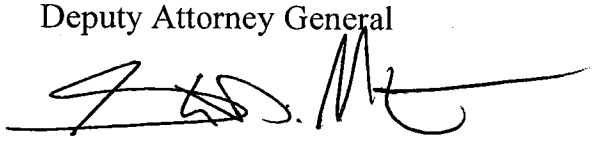

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CERTIFICATE OF COMPLIANCE

I certify that the attached THE ATTORNEY GENERAL'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9,549 words.

Dated: February 19, 2014

KAMALA D. HARRIS
Attorney General of California

STEVEN D. MATTHEWS
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Joshua Graham Packer v. Superior Court of Ventura County, The People**
No.: **S213894**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 20, 2014, I served the attached **THE ATTORNEY GENERAL'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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On February 20, 2014, I caused thirteen (13) copies of **The Attorney General's Answer Brief on the Merits** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, CA 94102-4797 by FedEx Overnight Service tracking number 8040 9495 4120.

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 February 20, 2014, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature

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