IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSHUA GRAHAM PACKER,

Petitioner,

vs.

SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

COURT NO. **S213894**

Court of Appeal
No. B245923

Ventura County
Superior Court
No. 2010013013

DISTRICT ATTORNEY'S ANSWER BRIEF ON THE MERITS

GREGORY D. TOTTEN
District Attorney
MICHELLE J. CONTOIS SB# 174208
Deputy District Attorney
800 South Victoria Avenue
Ventura, CA 93009
Telephone (805) 654-3078

Attorney for Real Party in Interest

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSHUA GRAHAM PACKER,

Petitioner,

vs.

SUPERIOR COURT OF VENTURA COUNTY,

Respondent;

THE PEOPLE OF THE STATE OF CALIFORNIA,

Real Party in Interest.

COURT NO. **S213894**

Court of Appeal
No. B245923

Ventura County
Superior Court
No. 2010013013

DISTRICT ATTORNEY'S ANSWER BRIEF ON THE MERITS

GREGORY D. TOTTEN
District Attorney
MICHELLE J. CONTOIS SB# 174208
Deputy District Attorney
800 South Victoria Avenue
Ventura, CA 93009
Telephone (805) 654-3078

Attorney for Real Party in Interest

Table of Contents

Table of Authorities

Cases

Table of Authorities

Cases

Table of Authorities

Cases

Table of Authorities

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

Real Party in Interest, the People of the State of California, by and through Gregory D. Totten, District Attorney of the County of Ventura, hereby submits this Answer Brier on the Merits.

ISSUE PRESENTED

This court has requested briefing on one issue: "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 facie showing that recusal was warranted?"

SUMMARY OF ARGUMENTS

Reversal under the abuse of discretion standard is reserved for cases where the trial court's actions have been proven arbitrary, capricious, whimsical, or so lacking in reason that no reasonable person could agree with the trial court's determination. None of these descriptions fits the evenhanded, careful, and considered manner in which the trial court reached its determination in this case.

The trial court was entrusted with the discretion to determine whether an evidentiary hearing was necessary. The determination it was not was the reasonable result of careful consideration of over 450 pages of evidence and lengthy legal arguments. Based on the evidence, the trial court's determination was guided by the policies and procedures provided by the Legislature and this court, which have consistently condemned the use of evidentiary hearings as "fishing expeditions."

Petitioner urged details of the relationship between the prosecutor's children and petitioner as teenagers, but conceded that relationship did not create a conflict. Instead the alleged conflict arose only from petitioner's decision to list the now adult children as witnesses. Given the nature of the alleged conflict, the trial court was able to assess its gravity without an evidentiary hearing. Based on consideration of all of petitioner's evidence the court reasonably concluded petitioner had not made a prima facie showing that recusal was warranted.

Petitioner's arguments for recusal relied on conclusions about the prosecutor's litigation tactics. But the trial judge, who had presided over the various litigation disputes, did not require an evidentiary hearing to determine whether those disputes were fueled by the alleged conflict.

Alternatively, petitioner argued for a categorical rule of exclusion based on the fact that the prosecutor's children had been designated as witnesses. But such a rule would apply regardless of the details of the relationships which petitioner wished to explore at an evidentiary hearing, and so an evidentiary hearing was not necessary.

THE TRIAL COURT'S RULING

The trial court's complete ruling, found at 4 PE[1] 842-843, is as follows:

> 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 [been] fully briefed and fully argued.

---

[1] References designated "PE" are to Petitioner's Exhibits lodged in the Court of Appeal in support of his petition for writ of mandate.

> What I do find is that there's little doubt that there is some degree of a 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 the allegations made at this stage of the proceedings. So the motion to recuse is denied.

FACTUAL BACKGROUND

I.

THE CHARGED CRIMES

On May 20, 2009, the Husted family was watching "American Idol" in their beachfront home. As the show was ending, petitioner, Joshua Packer, clad in a motorcycle helmet, entered through an open glass door wielding a firearm and demanding money. Brock and Davina Husted's nine-year-old son, Brockie, retrieved his mother's purse, threw it at petitioner, and hid. Petitioner chased

Brock and Davina Husted, six months pregnant, into their bedroom. Brockie cowered behind the living room couch and heard his mother scream as petitioner forced Davina Husted to orally copulate him and stabbed Davina and Brock Husted over and over again. Davina and Brock Husted and their unborn child, Grant, died from the stab wounds inflicted by petitioner.

Petitioner was identified from a "cold hit" obtained from DNA collected when he was arrested for an unrelated robbery. Petitioner was arraigned on April 13, 2010, for the Husted homicide, burglary and robbery charges, and related allegations. The forced oral copulation charge and related allegations were added by indictment in May 2012. (1 PE 5-12.)

II.

ISSUES RELATED TO THE RECUSAL MOTION

On April 23, 2010, the prosecutor, Chief Deputy District Attorney Michael Frawley [hereafter the prosecutor or Mr. Frawley] alerted petitioner's counsel via e-mail that his children Kyle Frawley and Elizabeth Frawley (hereafter Kyle or Elizabeth) had known petitioner through their mutual participation in meetings and social events (including a group ski trip and a group camp) related to a Christian youth group known as "Young Life." (1 PE 28-29.) The prosecutor revealed that petitioner had been at the prosecutor's house in association with at least two of these social events. (1 PE 28-29.)

Petitioner filed a motion to recuse on September 4, 2012, pursuant to Penal Code[2] section 1424. (1 PE 13.) The motion was supported by "54 pages of affidavits from 7 people, along with 350 pages of attachments." (*Packer v. Superior Court* (2013) 219 Cal.App.4th 226 [161 Cal.Rptr.3d 595, 599] (*Packer*),

---

[2] Further statutory references are to the California Penal Code unless otherwise designated.

slip op. at p. 2, review granted and opinion superseded *Packer v. S.C.* (Cal. 2013) 165 Cal.Rptr.3d 249.) The evidence from the recusal motion is well summarized by the Court of Appeal.

> 1. *The prosecutor's relationship to Packer through his adult children*
>
> The prosecutor's adult children did not attend the same high school as Packer, but participated with Packer and more than 50 others in a youth group called "Young Life." The prosecutor's current wife was a co-chair of the local chapter of Young Life between 2001 and 2003. Between 2001 and 2008, while Kyle or Elizabeth participated, Young Life events were sometimes held at the prosecutor's home, and Packer attended some of those gatherings. The prosecutor was present for some of these events, but he stayed "in the background" and never interacted with Packer.
>
> Kyle participated in Young Life from 2001 through 2006. Kyle took a snowboarding trip to Utah with this group in 2003 or 2004, and also attended a summer camp in Northern California in 2005. On each trip, Kyle was housed in the same cabin as Packer and between eight and twenty-five other boys. At the summer camp, Packer told Kyle and others he had a religious breakthrough. Kyle, Packer and others appeared in group photos taken at these events. Kyle did not have any one-on-one conversations with Packer. After Packer was charged in this case, Kyle signed up for a "Prayers for Josh" webpage because Kyle's friend asked him to do so, because Kyle wondered if the charges were true, and because Kyle prayed for Packer's soul.
>
> Elizabeth participated in Young Life while she was in high school, from 2004 through 2008. She attended the same summer camp in 2005 that Kyle and Packer attended, and also appeared in group photos from that camp. In 2005 or 2006, Elizabeth and two other girls hosted a MySpace webpage that contained a

> photograph of all three girls and Packer in a silly pose. Although more than 50 children participated in Young Life with Packer, he named Kyle and Elizabeth as witnesses to present mitigation evidence in the penalty phase of his trial. He did this because, in his view, "a jury would likely be more favorably impressed with the testimony of a child of a prosecutor."
>
> 2. *The prosecutor's relationship to Packer through Cathcart*
>
> Cathcart participated in Young Life. In 2005 or 2006, he dated Elizabeth for "a couple of months." He had been to the prosecutor's home at least 10 times during this period.
>
> 3. *The prosecutor's relationship to Davina Husted*
>
> The prosecutor and [Lisa] West divorced in 1997. Ten years later, West served on the Junior League's board of directors while Davina Husted, one of the murder victims, was president. West was also listed on the Husted's Christmas card distribution list for 2008. A January 2008 spreadsheet recovered from Davina Husted's computer listed the prosecutor and his current wife as Junior League supporters.

(*Packer*, *supra*, at pp. 599-600, slip op. at pp. 3-4.)

In opposition to the motion, the prosecutor declared under penalty of perjury that, despite his children's past acquaintance with petitioner, he had never met nor heard petitioner's name prior to his involvement in this case in April 2010. (2 PE 340-341.) This was not contested. The prosecutor declared further that his "decisions in this case have been made in the usual and customary manner" with "[n]o extraordinary or unusual pressure . . . imparted to me concerning my decisions in this case." (2 PE 341:7-17.) The prosecutor explained further:

> I have no personal or vested interest in this case beyond my obligation to independently review and

> evaluate the evidence, ethically use the legitimate means at my disposal to bring about a just result, and to aggressively urge that view by any fair and ethical means.

(2 PE 341:18-23.)

The prosecutor declared that nothing about his children's past relationship with petitioner, nor about the prosecutor's current relationship with his adult children would "cause me to exercise my discretion and professional duties differently than I would if they had never met Defendant or any witness in the case." (2 PE 343:8-12.) Addressing claims of interference with defense counsel the prosecutor said:

> I never attempted to or actually did interfere with defense counsel's attempts to interview them. I told them they should feel free to speak with the defense and to tell the truth as is actually documented by the defense relative to my son in exhibit K of their recusal motion.

(2 PE 343:12-17.)

Exhibit K, which can be found in Petitioner's Exhibits, Volume 1, at pages 93-95, relates this statement by Kyle Frawley to a defense investigator: "His father told him that it was okay to talk to the investigator and that he should tell the truth. He also told him to be aware that he could be subpoenaed to court. His father never told him that he would be a witness." (1 PE 94-95.)

The prosecutor also declared he was not influenced by the fact his children knew Thomas Cathcart:

> The fact that my children knew Mr. Cathcart and Mr. Packer is irrelevant to my professional duties and I harbor no favoritism or other feelings toward either. I had no professional reason to question Mr. Cathcart with regard to my son or daughter. I do not know if it is accurate to represent that my daughter had a dating relationship with Mr. Cathcart. I do not know if the

> People will call Mr. Cathcart to testify as other witnesses saw Defendant batter Mr. Cathcart, as alleged in a circumstance in aggravation. I am unaware of anyone discouraging Mr. Cathcart from speaking with the defense. Mr. Cathcart gave an interview to the defense immediately after leaving my office according to defense reports.

(2 PE 347-348.)

The defense report referenced in the above quoted passage was submitted by petitioner as Exhibit T to the motion to recuse. (1 PE 122-124.) In the report, authored by a defense investigator, Mr. Cathcart relates that he was interviewed by the prosecutor "earlier the same afternoon . . . . just before he came to the Public Defender's office." (1 PE 122.) In that same report Mr. Cathcart describes his past relationship with Elizabeth Frawley. These statements corroborate the prosecutor's declaration that he did not discourage Mr. Cathcart from speaking with the defense.

The prosecutor addressed the claims regarding his ex-wife, explaining they have been divorced more than 15 years and that his ex-wife's relationship with Davina Husted had no impact on him. (2 PE 346:16-23.) The prosecutor explained he did not know his ex-wife's name appeared on a CD, or that his own name appeared on a DVD, which both had been provided to the defense by the prosecution. (2 PE 346-347.) The prosecutor concluded: "Nothing about the fact Davina Husted was involved in the National Charity Junior League has presented and nothing about it will present any conflict of interest for me in prosecuting this case." (2 PE 347:19-22.)

The trial court found the past "relationship" between Kyle, Elizabeth, and petitioner lasted a "very brief period of time." (4 PE 842:11-18.) As the Court of Appeal observed, "[a]lthough more than 50 children participated in Young Life with Packer, he named Kyle and Elizabeth as witnesses to present mitigation

evidence in the penalty phase of his trial. He did this because, in his view, 'a jury would likely be more favorably impressed with the testimony of a child of a prosecutor.'" (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 600, slip op. at p. 3.)

After hearing lengthy argument about admissibility of evidence and the merits of the motion, the trial court denied the motion to recuse without an evidentiary hearing. (4 PE 842-843.)

ANALYSIS

I.

STANDARD OF REVIEW

Trial courts possess broad discretion to "determine whether or not an evidentiary hearing is necessary." (§1424, subd. (a)(1) [1424(a)(1)].) "The Legislature has not undertaken to enumerate the facts, or even to indicate the character of the showing" upon which the trial court's determination should be made. (See *People v. Stein* (1948) 31 Cal.2d 630, 633 [191 P.2d 409, 410-411](*Stein*).) "Hence, the field of discretion is large." (*Ibid.*) It is the exercise of this broad discretion by the trial court below which this court now reviews with great deference.

This court has repeatedly declared "that motions to recuse a prosecutor are reviewed for an abuse of discretion." (*People v. Superior Court* (*Humberto S.*) (2008) 43 Cal.4th 737, 746 [76 Cal.Rptr.3d 276, 283, 182 P.3d 600, 606-607].) As relevant here, the court's determination to forgo an evidentiary hearing also is reviewed for an abuse of discretion. (*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 109 [146 Cal.Rptr.3d 742, 756] (*Spaccia*).) The deferential nature of the review accorded the determination to forgo an evidentiary hearing is not lessened by the fact that such a determination necessarily is based on declarations and other written evidence. (*Haraguchi v. Superior Court* (2008) 43

Cal.4th 706, 711, fn. 3 [76 Cal.Rptr.3d 250, 256, 182 P.3d 579, 584] (*Haraguchi*).)

Petitioner alone bears the burden to prove to this court that the trial court abused the considerable discretion entrusted to it. To do so, petitioner must prove the trial court's decision was arbitrary and capricious, based on whimsy, or exceeded the bounds of reason. (*People v. Rist* (1976) 16 Cal.3d 211, 219 [127 Cal.Rptr. 457, 463, 545 P.2d 833, 839] [arbitrary and capricious]; *Harris v. Superior Court* (1977) 19 Cal.3d 786 [140 Cal.Rptr. 318, 326, 567 P.2d 750, 758][same]; *Stein, supra*, 31 Cal.2d 630 at p. 633 [based on whimsy]; *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 773 [149 Cal.Rptr.3d 614, 633, 288 P.3d 1237, 1253](*Sargon*)[same]; *Baggett v. Gates* (1982) 32 Cal.3d 128, 143 [185 Cal.Rptr. 232, 240, 649 P.2d 874, 882][same]; *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195, 204 [252 Cal.Rptr. 817, 823, 763 P.2d 480, 485-486][no reasonable basis]; *People v. Benavides* (2005) 35 Cal.4th 69, 88 [24 Cal.Rptr.3d 507, 520-521, 105 P.3d 1099, 1110][beyond bounds of reason]; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1226 [9 Cal.Rptr.2d 628, 644, 831 P.2d 1210, 1211][same].) Put differently, petitioner must demonstrate not merely that some reasonable jurists might disagree with the trial court's decision, but that the "decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377 [14 Cal.Rptr.3d 880, 888, 92 P.3d 369, 375]; *Sargon, supra*, 55 Cal.4th at p. 773; *People v. McDowell* (2012) 54 Cal.4th 395, 429-430 [143 Cal.Rptr.3d 215, 248, 279 P.3d 547, 575].)

In a case where petitioner characterizes his own showing as a close question (Petitioner's Opening Brief at p. 3) the abuse of discretion standard cannot be met. Reversal is not appropriate unless petitioner can prove the trial court's discretion could "be exercised in only one way." (*Harris v. Superior*

Court, *supra*, 19 Cal.3d at p. 796, fn. 9]; see *Williams v. City of Los Angeles*, *supra*, 47 Cal.3d at p. 204, citing *Baggett v. Gates*, *supra*, 32 Cal.3d at p. 143.) But as the Court of Appeal noted, the record in this case supported a reasonable inference "that the prosecutor's litigation positions were zealous but evenhanded discretionary calls, that the prosecutor had nothing to do with the witnesses' reluctance to fully cooperate with either party, and that the prosecutor's statements constituted public posturing in a high-profile case rather than an admission of a personal vendetta." (*Packer*, *supra*, 161 Cal.Rptr.3d at pp. 607-608, slip op. at p. 16.)

When there is conflict as to the inferences to be drawn from the evidence presented to the trial court, "the decision of the trial court, either way, would appear to be authorized and beyond appellate intervention. (*Stein*, *supra*, 31 Cal.2d at pp. 633-634.) A showing that merely "affords an opportunity for a difference of opinion" is "wholly insufficient." (*Estate of Gilkison* (1998) 65 Cal.App.4th 1443, 1448-1149 [77 Cal.Rptr.2d 463, 466].) "An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge." (*Ibid.*) Because the evidence supports the trial court's decision, not even this court may substitute its judgment for that of the trial court. (*People v. McDowell*, *supra*, 54 Cal.4th at pp. 429-430.)

This high level of deference is appropriate here because even without an evidentiary hearing, "the trial court has the superior vantage point." (*Haraguchi*, *supra*, 43 Cal.4th at p. 713; see *Packer*, *supra*, 161 Cal.Rptr.3d at p. 607, slip op. at p. 17.) This is true even in capital cases (*Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 729 [76 Cal.Rptr.3d 264, 270, 182 P.3d 590, 596]) and is especially so in this case where many allegations centered around litigation disputes, which previously had been adjudicated by the same trial judge. Additionally, the alleged conflict stemmed not from any prior relationship (4 PE

654:12-13), but from petitioner's placement of the prosecutor's children on his witness list, and petitioner's arguments regarding the significance of their testimony. For this reason, the trial court, with its knowledge of the entire case, truly had the best vantage point to evaluate and reject this claim.

Moreover, when the evidence proffered in support of the motion constitutes hearsay – as did the vast majority of petitioner's evidence – the trial court does not abuse its discretion in declining to conduct an evidentiary hearing. (*People v. Dykes* (2009) 46 Cal.4th 731, 809-811 [95 Cal.Rptr.3d 78, 154-156, 209 P.3d 1, 65-66](*Dykes*); *People v. Avila* (2006) 38 Cal.4th 491, 604-605 [43 Cal.Rptr.3d 1, 93-94, 133 P.3d 1076, 1154-1155](*Avila*); *People v. Carter* (2003) 30 Cal.4th 1166, 1216-1217 [135 Cal.Rptr.2d 553, 590-591, 70 P.3d 981, 1013].) In this manner, trial courts can assure a hearing is not misused as a fishing expedition. (See *Avila, supra*, 38 Cal.4th at p. 604.)

To determine if the trial court abused its discretion, this court must consider "the legal principles and policies that should have guided the court's actions." (*Sargon, supra*, 55 Cal.4th at p. 773, citing *People v. Carmony, supra,* 33 Cal.4th at p. 377.) Where "the material facts in evidence [were] known and considered, together also with the legal principles essential to an informed, intelligent and just decision," the trial court's exercise of discretion will not be disturbed. (See *People v. Rist, supra*, 16 Cal.3d at p. 219.)

The legal principles and policies that informed the trial court's intelligent decision have been well documented by this court. Foremost is the principle that recusal of a prosecutor is an extraordinary act that requires more than a mere appearance of impropriety or apparent conflict. Thus the Legislature enacted the substantive and procedural safeguards found in section 1424 to quash the growing numbers of unnecessary prosecutorial recusals that followed *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255 [137 Cal.Rptr. 476, 561 P.2d

1164]. (*People v. Lopez* (1984) 155 Cal.App.3d 813, 824 [202 Cal.Rptr. 333]; see *People v. Eubanks* (1996) 14 Cal.4th 580, 591 [59 Cal.Rptr.2d 200, 927 P.2d 310](*Eubanks*).) Next is the policy against abuse of the recusal motion as a tool for discovery. To this end, procedural safeguards were enacted to reduce abuse in the form of recusal motions being filed "based simply on unverified assertions by the defendant's lawyers" in order to "force pre-trial evidentiary hearings where they conduct lengthy fishing expeditions at the expense of the crime victims and the prosecutors who are often forced to testify under oath for several hours." (Sen. Com. on Public Safety, Rep. on Assem. Bill No. 154 (1999-2000 Reg. Sess.) as amended May 18, 1999, pp. 3-4.)[3]

Respect for the Legislature's unquestionable right to set these policies and procedures (see *People v. Lawley* (2002) 27 Cal.4th 102, 154-155 [115 Cal.Rptr.2d 614, 38 P.3d 461], quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [93 S.Ct. 1038, 1049, 35 L.Ed.2d 297]) demands that the trial court's discretion be broad, that courts recognize recusal motions should be decided without evidentiary hearings whenever possible, and that a trial court's decision to deny an evidentiary hearing be reviewed with pronounced deference.

II.

THE TRIAL COURT'S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

The abuse of discretion standard comprises three questions: "whether the trial court's findings of fact are supported by substantial evidence, whether its rulings of law are correct, and whether its application of the law to the facts was not arbitrary or capricious." (*Humberto S.*, *supra*, 43 Cal.4th at p. 746, citing *Haraguchi*, *supra*, 43 Cal.4th at pp. 711–712.)

---

[3] Available at http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml.

Inherently deferential, review for an abuse of discretion begins with an examination of the evidence in the light most favorable to the trial court's ruling. (*People v. Jones* (2013) 57 Cal.4th 899, 931 [161 Cal.Rptr.3d 295, 321, 306 P.3d 1136, 1158], citing *People v. Carter* (2005) 36 Cal.4th 1114, 1148 [32 Cal.Rptr.3d 759, 117 P.3d 476]; *People v. Fuiava* (2012) 53 Cal.4th 622, 711-712 [137 Cal.Rptr.3d 147, 228-229, 269 P.3d 568, 637](*Fuiava*).) The reviewing court's inquiry is limited to evidence available to the trial court at the time of its determination which is not reweighed. (*Fuiava, supra*, 53 Cal.4th at p. 703, 712.) Trial courts, which are "genuinely in the best position 'to . . . make findings of fact, and evaluate the consequences of a potential conflict in light of the entirety of a case'" are given "primacy in fact finding and in assessing whether and how great a conflict exists." (*Hollywood, supra*, 43 Cal.4th at p. 729.)

The trial court's findings will be upheld "if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question." (See *Fuiava, supra*, 53 Cal.4th at p. 703, 711 [emphasis original].) Deferential review applies whether the court's findings are express or implied. (See *People v. Carter, supra*, 36 Cal.4th at p. 1210 [motion for new trial, implied finding regarding juror's state of mind].) Thus the trial court's implied finding that the prosecutor's litigation positions were not motivated by the alleged conflict, is entitled to the same deference as the trial court's express finding that there was a very brief prior relationship.

A single witness's account may suffice. "Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding." (*Fuiava, supra*, 53 Cal.4th at pp. 711-712.) In *Haraguchi*, this court found the trial court's determination was supported by substantial evidence contained in the prosecutor's declaration.

(*Haraguchi*, *supra*, 43 Cal.4th at pp. 714-715.) In this case as well, Mr. Frawley's declaration contains evidence supporting the court's conclusion that petitioner's intentions to call Kyle and Elizabeth as witnesses did not create a disabling conflict. (2 PE 340-351.) In *Haraguchi*, as here, "[t]he trial court was entitled to credit [the prosecutor's] declaration." (*Haraguchi*, *supra*, 43 Cal.4th at pp. 714.)

The prosecutor's declaration contained reasonable, credible, and solid evidence upon which the trial court could have relied. As already noted, key portions of the prosecutor's declaration were supported by other evidence. For example, the prosecutor's declaration that he had not interfered with defense access to his adult children (2 PE 343) was supported both by petitioner's own interview report of Kyle Frawley (1 PE 93-95 [the prosecutor told Kyle "it was okay to talk to the investigator" and to "tell the truth"]), by Deputy Baugher's signed declaration (3 PE 422-423), and by the fact the prosecutor informed the defense that Elizabeth Frawley lived in Indiana. (1 PE 160.)

III.

THE TRIAL COURT APPLIED THE CORRECT RULE OF LAW

A. Section 1424 Requires a Showing of Both a Conflict and a Likelihood of Unfair Treatment.

A prosecutor may not be recused unless the defendant's evidence shows "that a conflict of interest exists that would render it unlikely the defendant would receive a fair trial." (§ 1424(a)(1).) As this court has explained: "[T]he 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." (*Eubanks*, *supra*, 14 Cal.4th at p. 592

[emphasis original].) "[O]nly an *actual likelihood of unfair treatment,* not a subjective perception of impropriety, can warrant a court's taking the significant step of recusing an individual prosecutor or prosecutor's office." (*Haraguchi, supra*, 43 Cal.4th at p. 719 [emphasis original].)

Thus by its very terms, section 1424 requires more than a mere appearance of a conflict, but instead requires that any conflict must be so significant as to create a likelihood of unfair treatment. The trial court did not err in holding petitioner responsible for a prima facie case as to each of these two prongs. "An evidentiary hearing is necessary if the defendant's prima facie showing raises factual disputes on which relief turns (citation), but is pointless if the defendant is unable to point to facts in his prima facie case which, if credited, would entitle him to relief." (*Packer, supra*, 161 Cal.Rptr.3d at p. 605, slip op. at p. 13.) If petitioner could not make a prima facie showing that the alleged conflict warranted recusal, he would not have met the higher burden of proving recusal was warranted at an evidentiary hearing.

Any policy permitting evidentiary hearings on less than a full prima facie showing, would undercut the statutory safeguards designed to protect victims and prosecutors from harassment. The Legislature's concerns about the misuse of evidentiary hearings as discovery tools are squarely implicated in this case as demonstrated by petitioner's arguments in this court (see Petitioner's Opening Brief at pages 6, 8) and in the trial court:

> And I'd like to indicate for the Court that all of the information that is currently before the Court legally is something that at an evidentiary hearing would be explored more fully when we had a substantive opportunity to develop this information for the Court.

(4 PE 786:12-16.) Two and a half years after the prosecutor first revealed his children's past acquaintance with petitioner, the motion to recuse was not the

place to "develop information" or to "explore," and the trial court was not required to entertain petitioner's request to do so in an evidentiary hearing. The trial court's decision was thus well within the bounds of reason and guided by the policies and procedures set by the Legislature and recognized by this court.

The discretion not to conduct an evidentiary hearing absent a complete prima facie showing is not unique to the context of recusal motions. For example, trial courts have discretion to determine whether to conduct an evidentiary hearing to resolve factual disputes raised by a claim of juror misconduct. (*Dykes*, *supra*, 46 Cal.4th at pp. 809-810, citing *Avila*, *supra*, 38 Cal.4th at p. 604.) But defendants are not entitled to evidentiary hearings. Instead a defendant first must demonstrate both misconduct and prejudice. (*Avila*, *supra*, 38 Cal.4th at p. 604; *People v. Davis* (2009) 46 Cal.4th 539, 624-625 [94 Cal.Rptr.3d 322, 399-400, 208 P.3d 78, 143].) Even upon this showing, an evidentiary hearing is not conducted unless the trial court concludes that "the parties' evidence presents a material conflict that can only be resolved at such a hearing." (*Ibid.*) This court has required a multi-pronged prima facie showing in this context because "[t]he 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." (*Avila*, *supra*, 38 Cal.4th at p. 604 [citations omitted].)

A bilateral showing is also required before an evidentiary hearing may be conducted for determining a petition for a modification of a dependency order, under Welfare and Institutions Code section 388. (See *Spaccia*, *supra*, 209 Cal.App.4th at p. 111.) To succeed on such a petition, the petitioner must prove there has been a change in circumstances and that the proposed change promotes the best interests of the child. (Welf. & Inst. Code, § 388, subds. (a), (d).)

Before an evidentiary hearing is held, the moving party must make a prima facie showing of both elements, a mere change in circumstances in insufficient. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642 [146 Cal.Rptr.3d 908, 913]; citing *In re Zachary G.* (1999) 77 Cal.App.4th 799, 807-808 [92 Cal.Rptr.2d 20].)

On habeas corpus, an evidentiary hearing is required only if, after consideration of the pleadings, affidavits, and declarations, "the court finds there is a reasonable likelihood that the petitioner may be entitled to relief and the petitioner's entitlement to relief depends upon the resolution of an issue of fact." (Cal. Rules of Court, rule 4.551(f). See *Spaccia*, *supra*, 209 Cal.App.4th at pp. 111-112, citing *In re Martinez* (2009) 46 Cal.4th 945, 955 [95 Cal.Rptr.3d 570, 209 P.3d 908]; *In re David* (2012) 202 Cal.App.4th 675, 681 [135 Cal.Rptr.3d 855].) A similar standard is appropriate here. Because petitioner had not alleged facts which, if proven, would constitute a disabling conflict, there was no contested issue of material fact that could determine the outcome of petitioner's motion. The trial court's determination was thus reasonably based on the record and the law.

B. Petitioner's Alternative Suggestions Lack Authoritative Support and Are Unsound.

Rather than be guided by the established legal principles, petitioner argues for a new standard for trial courts' determinations whether to hold an evidentiary hearing. Petitioner suggests a hearing should be mandated whenever a defendant makes a partial showing but asserts an evidentiary hearing is needed to assess the gravity of an apparent conflict. In the alternative, he proposes a new "intolerable risk" standard. As a third option, petitioner argues an evidentiary hearing should be mandated whenever a defendant is faced with an uncooperative witness. Each of petitioner's proposals is flawed and each should be rejected.

First, petitioner's proposals conflict with both the letter and spirit of section 1424 which imposes no restrictions on a trial court's discretion other than that the decision not be arbitrary, capricious, or beyond reason. (See *Spaccia, supra*, 209 Cal.App.4th at p. 104.) To the extent adoption of petitioner's proposals would restrict trial courts' discretion and thereby open the doors to more evidentiary hearings, the proposals disregard the Legislature's intent to curtail the abusive use of evidentiary hearings as fishing expeditions. (See Sen. Com. on Public Safety, Rep. on Assem. Bill No. 154 (1999-2000 Reg. Sess.) as amended May 18, 1999, pp. 3-4.)

Petitioner's suggestion that a hearing should be mandated on a partial showing has been rejected by the Court of Appeal. (*Spaccia, supra*, 209 Cal.App.4th at p. 112, fn. 33.) For this reason, petitioner attempts to distinguish *Spaccia*, arguing that Spaccia demonstrated only an appearance of impropriety and that such a modest showing was insufficient to support her motion to recuse. (Petitioner's Opening Brief at p. 4.) But "appearance of impropriety" is simply another term for "apparent conflict." Thus the Court of Appeal has explained, "[s]ection 1424 was the Legislature's response to *Greer* and other criminal cases stressing the importance of the *appearance of impropriety and other 'apparent' conflicts* as bases for prosecutorial disqualification." (*People v. Lopez, supra*, 155 Cal.App.3d at p. 824 [emphasis added].) Spaccia therefore was denied an evidentiary hearing not because she demonstrated an "appearance of impropriety" rather than an "apparent conflict," but because section 1424 requires defendants demonstrate an actual likelihood of unfairness and thus prohibits recusal "solely on the ground of the appearance of impropriety." (*People v. Jenan* (2006) 140 Cal.App.4th 782, 791-792 [44 Cal.Rptr.3d 771, 775-776], citing *People v. Conner* (1983) 34 Cal.3d 141, 147-148 [193 Cal.Rptr. 148, 151, 666 P.2d 5, 8]; *Eubanks, supra*, 14 Cal.4th at p. 592.)

The People agree that a mere appearance of impropriety is insufficient to support recusal of a prosecutor. On this point, *Spaccia* cannot be distinguished from this case because petitioner's evidence showed no more than an apparent conflict based on his decision to place Kyle's and Elizabeth's names on his witness list.

Factually, *Spaccia* dealt with allegations similar to those lodged in this case, namely that a witness was being favored and hidden by prosecutors in order to hide exonerating evidence. (*Spaccia, supra*, 209 Cal.App.4th at p. 98.) Like petitioner, Spaccia wanted the evidentiary hearing to force the witness to provide answers she could not otherwise discern. (*Id.*, at p. 112.) The Court of Appeal assumed the defendant had demonstrated an apparent conflict (*id.*, at p. 107), but noted her attempt to establish an actual likelihood of unfairness, like petitioner's herein, was based on speculation and was unpersuasive. (*Ibid.*) Thus Spaccia failed to show an actual likelihood of unfairness and her request for an evidentiary hearing was denied. Likewise, petitioner's arguments were circular and speculative. Because petitioner did not establish an actual likelihood of unfairness, the trial court acted reasonably in denying his request for an evidentiary hearing.

Like the partial showing argument, petitioner's uncooperative witness proposal would usurp the Legislature's authority and sanction section 1424 motions as alternative discovery proceedings. Petitioner's argument for this rule is not supported by his citation to *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252 [36 Cal.Rptr.2d 210]. That case involved circumstances wherein prosecutorial misconduct had already been established. Due to the nature of the misconduct, it was the People's burden to establish not only that the defendant had not suffered prejudice, but also "that there was no substantial threat of demonstrable prejudice." (*Id.*, at p. 1258.) The case was dismissed then

not to penalize the refusal to testify, but because the People could not meet their burden without the testimony. For this reason, *Morrow* does not advance petitioner's argument that an evidentiary hearing is necessary whenever a witness is uncooperative.

Arguing for an uncooperative witness rule, petitioner refers to a letter authored by a deputy public defender in Los Angeles County. (Petitioner's Opening Brief at p. 7.) The letter relies primarily on two cases, *People v. Brophy* (1992) 5 Cal.App.4th 932 [7 Cal.Rptr.2d 367](*Brophy*), and *People v. Williams* (1999) 20 Cal.4th 119 [83 Cal.Rptr.2d 275, 973 P.2d 52](*Williams*), neither of which provides support for the uncooperative witness rule petitioner proposes.

In. *Brophy,* the trial court had ordered the People to provide discovery as to whether or not a search had been conducted pursuant to a warrant. (*Brophy, supra*, 5 Cal.App.4th at pp. 937-938.) The discovery was not provided. (*Ibid.*) The Court of Appeal held the trial court should have either enforced its discovery order or shifted the burden to the prosecution to prove the search was authorized by a warrant. (*Id.,* at p. 938.) Unlike the circumstances in *Brophy*, there were no discovery violations in this case. In fact the trial court specifically refused to order the prosecutor to answer the interrogatories posed by defense counsel. (See 4 PE 818:14-26, 830:16-19 [People's argument that defense request the prosecutor answer counsel's questions had been denied by trial court].) Because there was no discovery order to enforce, there was no reason to shift or alter the burden of proof as a sanction.

Likewise, the concerns at issue in *Williams* are not relevant here. At issue in *Williams* was "the burden of raising an issue" which the court noted "is distinct from the burden of proof." (*Williams, supra*, 20 Cal.4th at p. 130.) Moreover, "[i]t is axiomatic" "that warrantless searches are per se unreasonable . . . and that the People have the burden of proving that any search without a

warrant comes within one of [the carefully circumscribed] exceptions." (*People v. Laiwa* (1983) 34 Cal.3d 711, 725 [195 Cal.Rptr. 503, 511, 669 P.2d 1278, 1286]; *People v. Schmitz* (2012) 55 Cal.4th 909, 933 [149 Cal.Rptr.3d 640, 663, 288 P.3d 1259, 1277].)

The *Williams* court was concerned that "requiring defendants to guess what justification the prosecution will offer" would lead to voluminous motions "filled with pages of unnecessary argument about justifications that the prosecution is readily willing to concede are inapplicable." (*Williams*, *supra*, 20 Cal.4th at pp. 129-130.) This pragmatic concern justified the court's apportionment of pleading requirements, but did not alter the burden of proof. Petitioner's uncooperative witness proposal however would alter both the burden of pleading and of proof and would undercut the Legislature's justified response to pragmatic concerns about unnecessary recusal motions and the potential for misuse of evidentiary hearings.

Finally, the proposed standards fail to provide meaningful guidance to trial courts. Contrary to petitioner's assertion, no court is ever "forced" to deny an evidentiary hearing. Section 1424 already permits a trial court to conduct an evidentiary hearing when the court – and not merely the defendant – determines a hearing is necessary to assess the gravity of any alleged or proven conflict or apparent conflict. The broad discretion to hold an evidentiary hearing might also permit a trial court to conduct such hearings when the judge believes a prosecutor has wrongfully withheld evidence.

There is thus no sound reason to create a new rule or to interpose a new "intolerable risk" standard. This conclusory term simply means a party has successfully demonstrated he is entitled to a remedy. But the Legislature and this court have already determined a defendant is entitled to the remedy of recusal only upon proof of "an *actual likelihood of unfair treatment.*" (*Haraguchi*,

supra, 43 Cal.4th at p. 719 [emphasis original].) This court has applied this standard many times and has never suggested, as does petitioner, that the standard is unreasonably burdensome.

C. Petitioner's Suggestions Rest on a Flawed Premise because the Trial Court Did Assess the Gravity of the Conflict.

Petitioner's arguments for new prima facie standards presuppose that the trial court needed to conduct an evidentiary hearing to assess the gravity of the apparent conflict or to hear from additional witnesses. But this assumption is not supported by the trial court's conclusions. Instead, the court, discussing the impact of the entirety of petitioner's submissions, pointedly stated, "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." (4 PE 842-843.)

It is important to note that the trial court considered far more than the law required. Although the statute demands defendants present verified non-hearsay affidavits in support of a motion to recuse (§1424(a)(1)), the majority of petitioner's evidentiary submissions consisted of hearsay and other inadmissible material such as opinion and speculation: so much so that striking the inadmissible material – with minimal oral argument – required several hours of the court's time.

Excluding the inadmissible submissions was appropriate. (*Spaccia*, *supra*, 209 Cal.App.4th at p. 98, fn. 10.) "Normally, hearsay is not sufficient to trigger the court's duty to make further inquiries." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1256 [91 Cal.Rptr.2d 211, 241, 989 P.2d 645, 672] [motion for new trial].) "'[A]n affidavit which is to be used as evidence must be positive, direct and not based upon hearsay.' [Citation.] A ruling 'of the court is to be based upon facts which may be presented to it, and not upon the belief of the

affiant.'" (*Star Motor Imports, Inc. v. Superior Court* (1979) 88 Cal.App.3d 201, 204 [151 Cal.Rptr. 721] [writ of mandate]. See also *People v. Madaris* (1981) 122 Cal.App.3d 234, 241-242 [175 Cal.Rptr. 869] disapproved of on another point by *People v. Barrick* (1982) 33 Cal.3d 115 [187 Cal.Rptr. 716]; *Brown v. Superior Court* (1987) 189 Cal.App.3d 260, 265 [234 Cal.Rptr. 416] [motion to continue]; *People v. Oppel* (1990) 222 Cal.App.3d 1146, 1153 [272 Cal.Rptr. 340] [disclosure of confidential informant identity under Evidence Code section 1042(d)].)

Though the court could have ignored the voluminous hearsay, the record demonstrates all of petitioner's submissions were considered. "I have read it all. You can't unring the bell." (4 PE 841:10-11.) At the conclusion of the hearing the court noted "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." (4 PE 842-843.)

The record thereby demonstrates the trial court did assess the gravity of the apparent conflict and did so with the benefit of petitioner's entire presentation. The court permitted petitioner to present his entire claim largely through reports and declarations authored by his own attorneys and investigators unfettered by the rules of evidence and untested by cross-examination. Yet even this unencumbered presentation fell short.

The trial court's conclusion that an evidentiary hearing was unnecessary was therefore neither arbitrary nor capricious. As the court had already considered petitioner's unencumbered presentation there was no reasonable probability an evidentiary hearing, where petitioner's burden would be even greater, would cure petitioner's failure to make a prima facie showing that the

alleged conflict warranted recusal. (Cf. *People v. Vasquez* (2006) 39 Cal.4th 47, 66 [45 Cal.Rptr.3d 372, 385, 137 P.3d 199, 211]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243]; Cal. Const. art. VI, § 13 [harmless error standard met if no reasonable probability absence of alleged error would have led to result more favorable to petitioner].)

IV.

THE TRIAL COURT'S DETERMINATION WAS REASONABLE

Petitioner did not make a showing sufficient to justify an evidentiary hearing. As petitioner conceded in his pleadings, the amicable relationship between Kyle and Elizabeth Frawley and petitioner did not create a disabling conflict. (4 PE 654:12-13.) Instead petitioner claims the apparent conflict created by placing Kyle and Elizabeth on the defense witness list, an action petitioner admits was taken precisely because they are *the prosecutor's children* (4 PE 657:27 – 658:2), transforms the otherwise innocuous relationship into a disabling conflict per se. Still, throughout the proceedings on his motion to recuse, petitioner has devoted substantial space and effort to persuade the trial court, the Court of Appeal, and now this court of the significance of Kyle's and Elizabeth's former acquaintance with petitioner and of the relevance of the testimony petitioner desires to elicit from them. Exploring and developing the details of these relationships was the reason petitioner sought an evidentiary hearing.

Petitioner's theories as to how his evidence established that recusal was warranted, however, do not rely on the relationships about which evidence would have been presented at an evidentiary hearing. Nothing about the details of Kyle's and Elizabeth's relationship with petitioner (or Thomas Cathcart) would have impacted petitioner's categorical arguments for recusal. If accepted,

petitioner's theories would require recusal whether the teenagers were mere acquaintances or dear friends or whether they might provide favorable or damaging evidence. Under petitioner's theories, petitioner either already has received an unfair trial or he will receive one by the mere fact that the prosecutor would present a closing argument. For this reason, the trial court did not abuse its discretion in denying petitioner's request for an evidentiary hearing.

First, petitioner argues that the prosecutor's litigation tactics have been demonstrably unfair because of the alleged conflict. The trial court was well within its discretion to reject these arguments. Not only had the prosecutor addressed the issue in his declaration, stating his decisions had been not been impacted by any of the circumstances of the alleged conflict (2 PE 341:7-12; 343:5-12; 347:28 – 348:2: 350:11-13), but the trial court judge was *the same judge* who had ruled on the various discovery and associated motions.[4] Having had a prior opportunity to assess the merits of the contested prosecutorial actions, the trial court was already in the best position to determine if those actions reflected misconduct due to the alleged conflict or permissible litigation tactics. An evidentiary hearing would not have assisted the trial court in making this determination.

---

[4] For the People's arguments that the disputed actions did not evidence a disabling conflict, see 4 PE 818:14-26, 830:16-19 [trial court denied defense request the prosecutor answer counsel's questions]; 4 PE 830:27 – 831:24 [proceedings regarding sealed document – trial court found no misconduct]; 4 PE 831:25 – 832:2 [disputed fingerprint discovery not withheld]; 4 PE 832:3-8 [reasons for moving to find defense counsel in contempt]; 4 PE 832:26 – 833:12 [comments in newspaper]; 4 PE 834:13–835:4 [misstatement in SDT].

Petitioner's alternate theory for recusal – a per se rule based on "reverse vouching" – fails not only because the suggested per se rule is unsound, but more importantly because an evidentiary hearing would not have assisted the trial court in reaching a decision based on a per se rule. Because petitioner's arguments made the evidentiary hearing unnecessary, the trial court's decision to forgo the hearing was not an abuse of discretion.

As noted by the Court of Appeal, the nature of Kyle's and Elizabeth's "likely testimony" means the prosecutor will be arguing the significance of the testimony and not their credibility. (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 608, slip op. at p. 17.) Still, petitioner asserts "reverse vouching" will occur in this case regardless of what the prosecutor argues to the jury. Taken to its logical extreme, any prosecutor's closing argument would be considered a form of vouching. There is no authority for this position in part because what petitioner describes is not vouching at all. Impermissible vouching occurs when a prosecutor bolsters the veracity of a witness's testimony "by referring to evidence outside the record" or by "offering the impression that [he] has taken steps to assure a witness's truthfulness at trial." (*People v. Stewart* (2004) 33 Cal.4th 425, 499 [15 Cal.Rptr.3d 656, 717, 93 P.3d 271, 322], citing *People v. Frye* (1998) 18 Cal.4th 894, 971 [77 Cal.Rptr.2d 25, 959 P.2d 183], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 [87 Cal.Rptr.3d 209, 239, 198 P.3d 11, 36].)

No case cited by petitioner suggests otherwise. The problem in *United States v. Edwards* occurred not just because the prosecutor discovered evidence, and not just because this fact was revealed to the jury even though the prosecutor was not subject to cross-examination, but because the new and critical evidence was discovered in the midst of trial, after the defense had committed to a theory

that relied upon the absence of the new evidence. (*United States v. Edwards* (9th Cir. 1998) 154 F.3d 915, 918-919, 923.)

The Court of Appeal found petitioner's reverse vouching theory unsupportable for three additional reasons. First, the type of categorical recusal rule suggested by petitioner is disfavored. (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 608, slip opinion at p. 18; citing *Eubanks, supra,* 14 Cal.4th at p. 599; *People v. Vasquez, supra,* 39 Cal.4th at p. 65.) Instead, section 1424 demands an individualized assessment of the facts of each case.

Moreover, petitioner's categorical rule is subject to manipulation, permitting defendants to control executive discretion "whenever they can find anyone with a connection to their case and the prosecutor." (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 608, slip op. at p. 18; accord *Millsap v. Superior Court.* (1999) 70 Cal.App.4th 196, 203, [82 Cal.Rptr.2d 733].) Such manipulation is present here. Petitioner's "reverse vouching" scenario can only materialize if petitioner calls Kyle and Elizabeth to testify and also insists on identifying them as the prosecutor's children. Both of these decisions rest with petitioner who possesses ample alternatives, such as relying on similar testimony from other witnesses, or, as suggested by petitioner in argument on the motion to recuse, having Kyle and Elizabeth testify under a pseudonym. (4 PE 811:22-24.)

Finally, the "reverse vouching" rule "is not justified, because courts have not treated the existence of a prior connection between a member of the prosecutor's family, or the prospect that a prosecutor may argue a particular witness's credibility, as a *per se* ground for disqualification." (*Packer*, *supra*, 61 Cal.Rptr.3d at p. 608, slip op. at p. 18, and cases cited therein.)

V.

THE PROSECUTOR DID NOT INTERFERE WITH PETITIONER'S INVESTIGATION

Petitioner's accusations that the prosecutor has interfered with the defense investigation are untrue and are refuted by the evidence available to the trial court. Notably, of the "witnesses" listed on page 6 of Petitioner's Opening Brief, only one, Deputy Baugher, was asked to sign a declaration – an invitation he refused because the declaration was false. (3 PE 423:2-4.) Further, despite petitioner's unsupported speculations about the People's victim impact evidence, neither the prosecutor's current nor ex-wife is listed as a witness in this case.

Petitioner claims the prosecutor "pared off" mitigating evidence when interviewing Thomas Cathcart who, at the time of the recusal motion, was listed as a prosecution penalty phase witness. Mr. Cathcart's anticipated testimony, as explained by the prosecutor, involved a battery committed by petitioner upon Mr. Cathcart the day after the charged homicides. (1 PE 127:9; 2 PE 348:12-14.) As the prosecutor declared, there are other witnesses to the battery (2 PE 348:11-14) and as petitioner notes, Mr. Cathcart is uncooperative and is no longer listed as a prosecution witness.

Information was submitted to the trial court to demonstrate Elizabeth Frawley once dated Mr. Cathcart in high school, years prior to both the charged homicides and the battery alleged as an aggravating circumstance. (1 PE 122, 123.) For this reason, when Mr. Cathcart was interviewed by the prosecutor and an investigator there was no professional reason to speak with Mr. Cathcart about Elizabeth Frawley. (2 PE 347:25 – 348:18.) But Mr. Cathcart was not dissuaded from speaking with the defense about anything, and, as alleged by petitioner, Mr. Cathcart did speak with the defense about Elizabeth *after* speaking with the prosecutor. (2 PE 348:14-18.) It was therefore neither arbitrary nor

unreasonable for the trial court to conclude that the prosecutor did not interfere with petitioner's access to Mr. Cathcart.

Petitioner's own evidence repudiates the claim of misconduct. Kyle Frawley spoke with defense investigators on at least two occasions. Both of these interviews occurred after Kyle spoke with the prosecutor who – according to petitioner's evidence – told Kyle to make his own choice about an interview and to speak the truth. (1 PE 95; 4 PE 813:13-15.)

Petitioner alleges, here as below, that the prosecutor interfered with his attempts to serve Elizabeth Frawley, but the record does not support this contention. The "tweet" (Petitioner's Opening Brief at 16) indicates only that Elizabeth may not wish to be found. The "tweet" does not support the inference that the prosecutor created or encouraged the behavior described. To the contrary, petitioner's own evidence established that the prosecutor informed the defense that Elizabeth lived in Indiana. (1 PE 160.) Moreover, the prosecutor declared, "I never attempted to or actually did interfere with defense counsel's attempts to interview them. I told them they should feel free to speak with the defense and to tell the truth." (2 PE 343:12-16.) The prosecutor's declaration in this respect is supported by petitioner's own evidence indicating the prosecutor told Kyle Frawley he could speak to the defense investigator and should tell the truth. (1 PE 95; 4 PE 813:13-15.)

Petitioner submitted a report and an unsigned declaration, both prepared by a defense investigator, alleging the prosecutor interfered with Ventura County Sheriff's Deputy Scott Baugher's attempt to serve Elizabeth Frawley. The trial court was entitled to disregard the statements attributed to Deputy Baugher that he specifically was unwilling to verify. (See *People v. Cox* (1991) 53 Cal.3d 618, 697 [280 Cal.Rptr. 692, 740, 809 P.2d 351, 399] disapproved of on another ground by *People v. Doolin*, *supra*, 45 Cal.4th 390.) This is especially so given

that the People submitted a signed declaration from Deputy Baugher stating, under penalty of perjury, that the unsigned declaration prepared by petitioner was false: that the prosecutor never denied knowing where his daughter lived, and that Deputy Baugher's concern about serving a subpoena at a prosecutor's home had nothing to do with Mr. Frawley in particular. (3 PE 422-423.)

The trial court therefore possessed sufficient evidence to conclude the prosecutor had not interfered with petitioner's access to Kyle and Elizabeth Frawley.

VI.

PETITIONER HAS BEEN AFFORDED AN ADEQUATE OPPORTUNITY TO BE HEARD

In following the procedural requirements set for a recusal motion by the Legislature and California's appellate courts, the trial court did not deprive petitioner of a meaningful opportunity to be heard. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 2600, 33 L.Ed.2d 484].) The motion itself was the opportunity to be heard and petitioner took full advantage of that opportunity. Petitioner's primary submission, the declaration of trial counsel Benjamin Maserang, appended 45 exhibits, for a total submission of 228 pages. In all, petitioner submitted 56 exhibits consisting primarily of interview reports and declarations, for a total of 404 pages. (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 599, slip op. at p. 2.) The trial court read and considered it all. (4 PE 841:10-11; 4 PE 842-843.) Arguments, on the motions to strike and the motion to recuse, lasted eight hours. Especially given these facts, due process does not require an evidentiary hearing. The trial court's decision was neither arbitrary nor capricious, but was based on careful consideration of extensive evidence and argument.

Federal habeas corpus "does not provide a basis unto itself for modifying state procedure, particularly when the modification sought comes with the deleterious consequences outlined above." (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 605, slip op. at pp. 12-13.) *Hurles v. Ryan* (9th Cir. 2013) 706 F.3d 1021, 1038-1039, does not provide any reason to deviate from this understanding. In *Hurles*, the Ninth Circuit reviewed a claim of judicial bias and repudiated the fact finding process in which the trial court not only refused to hold an evidentiary hearing but also failed to "provide another mechanism for Hurles to develop evidence in support of his claim." (*Ibid.*) Contrary to petitioner's argument, the Ninth Circuit neither required nor recommended an evidentiary hearing in every instance, but insisted only on an "opportunity for the petitioner to present evidence." (*Ibid.*) "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.'" (*Packer*, *supra*, 161 Cal.Rptr.3d at p. 605, slip op. at p. 12.) The record in this case demonstrates not only that petitioner had an opportunity to present evidence, but that he utilized that opportunity to present extensive factual and legal assertions.

There is no reason to believe a federal court would disapprove of the procedures employed in this case. As in California, a federal district court's refusal to disqualify a prosecutor as well as its determination to forgo an evidentiary hearing is reviewed for abuse of discretion. (*United States v. Plesinski* (9th Cir. 1990) 912 F.2d 1033, 1035; *United States v. Robles* (9th Cir. 2002) 44 Fed.Appx. 832.) More pointedly, federal review of a state court's discretionary determinations about evidentiary hearings is deferential. (*Dykes*, *supra*, 46 Cal.4th at p. 810, fn. 23, citing *United States v. Hendrix* (9th Cir.1977) 549 F.2d 1225, 1227-1228 [Ninth Circuit accords broad discretion to trial court's

determination "whether and when to hold an evidentiary hearing on [juror misconduct] allegations."].)

Post-conviction review of this case, moreover, would look not just to the particulars of the recusal proceedings, but to the entire trial proceedings to assess whether petitioner received a fair trial. In *Vasquez v. Cate*, a case where this court found that the prosecutor should have been recused, the federal district court affirmed the conviction, noting that "based on what [United States] Supreme Court authority there is regarding the impact of attorney conflicts in the criminal context, it appears that, at a minimum, petitioner would have to prove that the conflict had some adverse impact on the prosecutor's performance." (*Vasquez v. Cate* (C.D. Cal., Jan. 22, 2010, CV 08-5668 GW (CT)) 2010 WL 364641, citing *Mickens v. Taylor* (2002) 535 U.S. 162, 174 [122 S.Ct. 1237, 152 L.Ed.2d 291].) "[E]ven assuming that petitioner could establish a due process violation, he nevertheless could not show that the violation had a substantial and injurious impact on his trial." (*Ibid.*)

For these reasons, petitioner's suggestion that an evidentiary hearing is necessary to foreclose federal review is without merit. Because petitioner had an adequate opportunity to present evidence, and because the court considered all the evidence petitioner presented, a federal court will review the trial court's determination of petitioner's recusal motion with deference.

CONCLUSION

The trial court's determination in this case reflected careful and reasonable consideration of petitioner's evidence and arguments, in compliance with the applicable statutory procedures and substantive requirements. The trial court's findings, express and implied, were supported by the evidence and the record of the entire case over which the trial judge had presided. The decision to deny

petitioner's request for an evidentiary hearing respected the Legislature's policy determinations and properly rejected petitioner's call to create a new categorical standard for recusal.

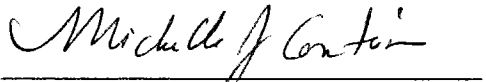
The trial court reasonably concluded no evidentiary hearing was necessary. The court had assessed the gravity of the alleged conflict created by placing the prosecutor's children on the witness list and had reasonably determined the various litigation disputes were not the product of a disabling conflict. No additional evidence was required for these determinations.

On this record, petitioner cannot prove that no reasonable person can agree with the trial court's decision not to conduct an evidentiary hearing. For these reasons, the People respectfully request this honorable court affirm the trial court's decision.

Respectfully submitted,

GREGORY D. TOTTEN, District Attorney
County of Ventura, State of California

DATED: February 20, 2014

By: 

MICHELLE J. CONTOIS
Deputy District Attorney

CERTIFICATE OF WORD COUNT

According to the word count of the computer program used to prepare the brief, this answer is 9,817 words long, excluding the tables and this certificate.

DATED: February 20, 2014 By: Michelle J. Contois

MICHELLE J. CONTOIS
Deputy District Attorney

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

I, Pamela Potter, say that:

I am a citizen of the United States, over the age of 18 years, a resident of the County of Ventura, and am not a party to the above-entitled action; my business address is 800 South Victoria Avenue, Ventura, California; on February 21, 2014, I served the within **DISTRICT ATTORNEY'S ANSWER BRIEF ON THE MERITS,**

on:

MICHAEL MCMAHON
Office of the Public Defender
c/o Reception Desk
800 S. Victoria Avenue
Ventura, CA
(2 copies)

HONORABLE PATRICIA M. MURPHY
Judge of the Ventura County Superior Court
800 S. Victoria Avenue
Ventura, CA

by personal service, and enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Ventura, California, addressed as follows:

STEVE MATTHEWS
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

COURT OF APPEAL
Second Appellate District
Division Six
200 E. Santa Clara Street
Ventura, CA 93001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 21, 2014, at Ventura, California.

Pamela Potter
Pamela Potter