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# IN THE SUPREME COURT OF CALIFORNIA

JOSHUA GRAHAM PACKER,
Petitioner,

v.

THE SUPERIOR COURT OF
VENTURA COUNTY,
Respondent,

THE PEOPLE,
Real Party in Interest.

S 213894

Ct. App. 2/6 B245923

Ventura County
Super. Ct. No. 2010013013



## PETITIONER'S REPLY BRIEF ON THE MERITS

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

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michael.mcmahon@ventura.org
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TO CHIEF JUSTICE TANI CANTIL-SAKAUYE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

The District Attorney filed an Answer Brief on the Merits for the People. Without leave of Court, the Attorney General also filed a separate and additional Answer Brief on the Merits on behalf of the People. In this pleading, petitioner replies to the two separate answers filed on behalf of the People.

Mr. Packer's sole contention is that the trial court abused its discretion by denying an evidentiary hearing on his recusal motion. In some limited instances, a court abuses its discretion by denying a recusal motion without affording the movant an evidentiary hearing. This is likely to occur when the assigned prosecutor, his children, and other reluctant or hostile witnesses control and withhold from the defense material evidence relating to the extent of the conflict and its gravity.

## I.

## Prejudice is likely because if Mr. Frawley is not recused, there is a *reasonable possibility* that the jury will discount and not give proper weight to the positive factor (k) testimony from his children.

The trial court was forced to acknowledge the "relationship between Mr. Frawley's children and the defendant," and the fact that "these witnesses may very well have positive Factor K type evidence," which will be admissible at the penalty phase. (Ex. BB, at p. 942-943. [Pen. Code, § 190.3, factor (k); CALCRIM 763.]) Nevertheless, the trial court erroneously concluded that an evidentiary hearing on the motion was unnecessary.

Obviously, neither the court nor the parties could point to any other case with this bizarre factual circumstance. The defense will be requesting the jury to credit and give great weight to the testimony of Mr. Frawley's children. Nevertheless, despite the testimony from these family members, Mr. Frawley will still be asking the jury to attach little significance to their evidence and to return a verdict for death. Because of the family relationship between the witnesses and their father, this is prejudicial and operates like a form of "reverse vouching."

If Mr. Frawley is unmoved by the testimony of his own family, why should the jury give weight to that evidence? Surely the jurors will infer that Mr. Frawley has knowledge of a wealth of "insider" family information and experiences that put him in a superior position to weigh and reject the testimony from his own children. The temptation for at least some jurors to unfairly draw adverse inferences regarding these witnesses and their critical factor (k) evidence will be strong as long as the father of these witnesses is preparing and presenting the People's case for death. There is a palpable likelihood of an unfair trial.

At trial, it will inevitably appear that Mr. Frawley has knowledge of information regarding his own children, and their testimony, that was not presented to the jury. (Cf. *People v. Zambrano* (2007) 41 Cal.4th 1082, 1167.) This is inherently unfair

to the defense. The likelihood of unfairness is sufficient to warrant an evidentiary hearing. Even if the Frawley children were to be cross-examined and impeached by some other felony trial attorney (who is supervised by Mr. Frawley, a high level manager in his office), the likelihood of unfairness remains because Mr. Frawley is still lead counsel for the prosecution.

Either way, the defense will be asking the jury to give weight to the children's testimony, while their father remains un-swayed. Mr. Frawley has a conflict because there is *a reasonable possibility* his impartial exercise of discretion might be affected because his family members will be testifying as defense witnesses at the penalty phase.

This is an unusual case. Although Ventura County has many experienced prosecuting attorneys available, the currently assigned prosecutor and his family are personally involved in the defendant's social history, and two or more members of Mr. Frawley's family will be testifying as defense witnesses.

At the conclusion of the trial, Mr. Frawley will be arguing that their testimony is insufficient to support a verdict of life without possibility of parole. Because a father is inherently viewed as having "insider information" about his own children beyond any information presented to the jury, there is a reasonable possibility his impartial exercise of discretion might be affected. This reasonable possibility of prejudice establishes a conflict for Mr. Frawley.

"In our view, a 'conflict,' within the meaning of [Penal Code] section 1424, exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict." (*People v. Conner* (1983) 34 Cal.3d 141, 148, [*Conner*]; accord: *People v. Eubanks* (1996) 14 Cal.4th 580, 594.) "[A] court must determine whether a conflict exists, that is, whether 'the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.'" (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 713 [quoting *Conner*].)

## II.

**The facts and circumstances presented in the instant case in support of an evidentiary hearing are clearly more compelling than those presented to the court in *Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93.**

In *Spaccia,* there was no claim that an evidentiary hearing would contribute to the reliability of the fact-finding aspect of the motion. While the Court of Appeal may have reached the right decision in *Spaccia*, the opinion is of limited utility here, a case with very different facts and legal contentions. Spaccia merely asked the court to prevent "an appearance of impropriety," which is an inadequate basis on which to recuse. (*Id.*, at p. 108.)

## III.

**Although a defendant may elect to submit his recusal motion on declarations and other written evidence, here, petitioner specifically demanded an evidentiary hearing because his motion is based upon the testimony of witnesses who did not voluntarily provide him with affidavits.**

The People point out that a party will sometimes submit a recusal motion for a decision on the merits based solely on affidavits, declarations, and written exhibits. (See, e.g., *Haraguchi v. Superior Court, supra,* 43 Cal.4th 706.)

This will allow for reliable fact-finding in some cases. But here, petitioner made it very clear that he was having difficulty getting affidavits from some of the material witnesses, and that he was demanding to use the compulsory process of the court to marshal and present the facts favorable to his motion.

One of those witnesses is Ventura County Deputy Sheriff Scott Baugher, who was unsuccessful in serving a subpoena on Elizabeth Frawley. Deputy Baugher provided a declaration to the prosecution, but refused to provide a declaration to the defense.

Packer demanded the compulsory process of the court to allow him to cross-examine and to impeach Deputy Baugher's prosecution declaration with prior inconsistent statements he had made to defense investigators. Under California law, these prior inconsistent statements are admissible for their truth.

The Law Revision Commission Comment to Evidence Code section 1235 makes the following argument in support of this California law: "[T]he dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turn-coat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case."

All of these observations apply to witness Baugher, who had told defense investigators that Mr. Frawley had frustrated and hampered his ability to locate Elizabeth Frawley. At an evidentiary hearing, the trier of fact could assess both inconsistent versions of events described by Deputy Baugher. However, as it turned out, petitioner was denied compulsory process to compel the testimony of the witness, and denied the opportunity to confront and cross-examine Baugher about the inconsistent representations he made in the prosecution declaration.

The three-fold purpose of confrontation is (1) to insure reliability by means of the oath, (2) to expose the witness to the probe of cross-examination, and (3) to permit the trier of fact to weigh his demeanor. (*California v. Green* (1970) 399 U.S 149, 158.)

Because the court denied Packer an evidentiary hearing, Baugher was never exposed to the probe of cross-examination and the court lost all opportunity to weigh his demeanor.

## IV.

## Petitioner agrees with the Attorney General's original assertion that an effective "ethical wall" shielding the "conflicted employee" from "a newly assigned prosecutor" would cure the conflict.

In the original answer filed by the Attorney General in case number S209164, the People pointed out that "the appropriate and most obvious method for eliminating any likelihood that [petitioner Packer] might not receive fair proceedings would be to erect an 'ethical wall' to shield the case from the alleged conflict or the conflicted employee." (A. G.'s Answer in S209164, at p. 10.) Petitioner agrees.

However, the People go on to claim that Packer was "required to show that any conflict could not be cured by the creation of an 'ethical wall.'" (*Ibid.*) Petitioner finds this assertion confusing, because at no time has he claimed that the case cannot be tried by the Ventura County District Attorney. An evidentiary hearing would provide the trial court with the information needed to "fashion an 'ethical wall' around the case. . . ." (*Ibid.*)

In *People v. Choi* (2000) 80 Cal.App.4th 476, 483, recusal of the entire office was necessary, but only because the prosecution failed to put in place an effective ethical wall. Although the district attorney's office had allegedly set up such a wall, in practice, the conflicted district attorney continued to communicate with others in the office about the case.

Because the assigned prosecutor in the instant case is also a high-ranking supervisor in the Ventura County District Attorney's Office, petitioner again agrees with the People that an ethical wall would be appropriate to isolate and insulate any newly assigned prosecutor from Mr. Frawley. (See A. G.'s Answer in S209164, at p. 10.) Petitioner believes that here, as in *People v. Gamache* (2010) 48 Cal.4th 347, 366, an

effective ethical wall can be created to protect the federal Due Process rights of the defendant from the corrosive effects of the conflicted supervisor. (U. S. Const., 14th Amend.)

## V.

## Although Mr. Frawley may strive hard to be fair and equitable, cognitive bias operates unconsciously and cannot be eliminated by good intentions and force of will.

A well accepted maxim of the legal profession is that "*He who is his own lawyer has a fool for a client.*" For similar reasons, attempting to try a case in which close relatives and loved ones are parties or key witnesses presents an intolerable risk of peril. Although we all strive to be fair and objective, intimate relationships create a cognitive bias that operates unconsciously and cannot be eliminated by will power or good intentions. Intimate personal relationships create a tendency to seek evidence and viewpoints that agree with our initial position and to dismiss evidence and input that does not. The manner in which the many forms of cognitive bias inevitable undermine objectivity and good judgment is now generally accepted in the scientific community. (See, e.g., National Research Council, *Strengthening Forensic Science in the United States: A Path Forward.* Washington, DC: The National Academies Press, 2009.) By parity of reasoning, the same conclusion must be accepted in the legal community. Bias often deceives its host by distorting his view not only of the world around him, but also of himself. A person's estimation of his or her own fair-mindedness is often highly inaccurate. (See Friendly & Goldfarb, "Crime and Publicity" (1967) p. 103.)

In civil cases, attorneys are wise to avoid conflicted representations. In criminal cases, the court has a legal obligation to ensure that assigned prosecutors do not try cases in which they have disabling conflicts. Here, an evidentiary hearing is necessary to fairly assess the gravity of Mr. Frawley's conflict because the material witnesses have not provided the defense and the court with voluntary affidavits.

## VI.

## In other analogous contexts, this court has acknowledged the unfairness of requiring the defense to present evidence which is not readily available to them and more readily available to the prosecution.

In a letter brief submitted by the Los Angeles County Public Defender on December 3, 2013, the court's attention was directed to two cases relevant to the issues presented here. As that prominent and well-respected office points out, when the prosecution restricts the information provided to the defense concerning their own conflict of interest, the court abuses its discretion by denying the defense an evidentiary hearing to establish the gravity of the conflict and the measures necessary to ensure fairness in the proceedings.

The letter cites this court's opinion in *People v. Williams* (1999) 20 Cal.4th 119. In that opinion, this court held that "Because law enforcement personnel, not the defendant, made the decision to proceed without a warrant, they, not the defendant, are in the best position to know what justification, if any, they had for doing so." (*Id.*, at p. 129.) By analogy, here the prosecution is in a better position than the defense to provide the court with the necessary information to assess the gravity of its conflict.

The letter also directs the attention of the court to the opinion in *People v. Brophy* (1992) 5 Cal.App.4th 932. That opinion holds that, "We are convinced, however, that what happened here was fundamentally unfair. The postal service possessed all the information about the Omaha search of the package. Defendant has the burden of proving that the search was illegal, but he was told, in effect, that he failed to meet that burden because the postal service asserted privilege as to all those facts known only to it. In this instance by failing to enforce its discovery order against the federal officials or in some manner to sanction the prosecution for the failure of the postal service to comply with that order, the trial court placed defendant in the untenable position of requiring him to prove the nonexistence of a search warrant, but denying him the only means of showing there was no warrant. Because defendant's discovery order was neither

enforced nor complied with, he was unable to meet his evidentiary burden of showing there had been an unlawful search. (*Id.*, at pp. 937-938.)

By analogy, the assigned prosecutor in the instant case took the position that he was not ethically or legally obligated to provide the defense with the information regarding the gravity of his conflict and then turned around and took the position that the defense failed to meet its burden of proof. (Exhibits, Vol. 1, p. 30.) This is unfair under the circumstances of this case.

The Ventura County District Attorney has a history of limiting the information provided to the defense only to turn around and argue that the defense has failed to meet an evidentiary burden. "Where a prosecutor orchestrates courtroom eaves-dropping on a privileged attorney-client communication and the witnesses thereto invoke the privilege against self-incrimination, the prosecution may not successfully oppose a motion to dismiss on the ground that no prejudice has been shown. (*Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1258.) For similar reasons, under the unusual circumstances of the instant case, an evidentiary hearing is necessary to assess the gravity of the conflict and the measures necessary to avoid unfair proceedings.

## VII.

## A death penalty trial presents risks of unfairness that are different than cases in which the jury plays no role in selecting the penalty. The risk of unfairness resulting from a conflicted prosecutor is simply greater in a capital trial.

California's recusal law is the same whether the case involves the death penalty or not. This does not mean, however, that the nature of the case is irrelevant to a recusal motion or the application of the law to the particular case. A death penalty trial presents risks of unfairness that are different than cases in which the jury plays no role in selecting the penalty. Because a capital penalty jury uses individualized discretion to make a normative determination whether the defendant should live or die, the likelihood

or risk of unfairness is greater than for a jury which merely finds facts and elements of an offense.

This court has recognized this important distinction in slightly different contexts. Indeed, this court employs a special test for the likelihood of prejudice based upon state law error at the penalty phase of a capital trial. (*People v. Brown* (1988) 46 Cal.3d 432, 447 ["we have long applied a more exacting standard of review when we assess the prejudicial effect of state-law errors at the penalty phase of a capital trial."].) This court does so because the risk of prejudice is greater in a penalty phase.

A jury's selection of the penalty is inherently more subjective than a decision that a defendant committed an offense. Because of the increased subjectivity of the death penalty decision, a jury is more likely to be influenced (or prejudiced) by subtle courtroom atmospherics at the trial. When, as here, the attorney arguing the case has such an intimate bond with important witnesses, it invites distraction from the content of the testimony to speculative inferences and a search for subtext: unspoken thoughts and motives of trial participants - what they really think and believe.

This court cannot ignore the United States Supreme Court's mandate that a capital jury must retain and exercise vast, subjective discretion different from that possessed by any guilt phase jury. (E.g., *Caldwell v. Mississippi* (1985) 472 U.S. 320, 329-330.) In a penalty phase, there is simply a greater risk of unfairness resulting from a conflicted prosecutor. This greater risk cannot be ignored when determining whether an evidentiary hearing is necessary on a recusal motion.

## Conclusion

The pleadings demonstrate the requisite likelihood that Mr. Packer will be treated unfairly because no effective ethical wall is in place regarding the defense testimony of the Frawley family members. Because the pleadings contain sufficient evidence to support a grant of the motion, the court abused its discretion by denying an evidentiary hearing. Pretrial recusals serve the important function of avoid conflicts that

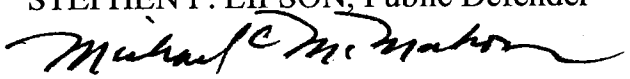
might lead ultimately to due process violations and hence to reversals or mistrials. The facts and circumstances of this case cry out for an evidentiary hearing.

If California denies Mr. Packer an evidentiary hearing on these issues now, its factual findings (if any) will be virtually worthless years from now in any federal post-conviction review. The court's denial of an evidentiary hearing is a capricious abuse of discretion, a denial of the right to use the court's compulsory process to present favorable evidence from uncooperative witnesses, and a classic example of a false judicial economy.

This court should reverse the decision of the Court of Appeal and write an opinion directing the superior court to conduct an evidentiary hearing on the motion.

DATED: April 14, 2014

Respectfully Submitted,
STEPHEN P. LIPSON, Public Defender

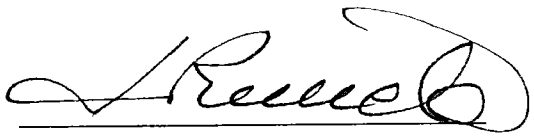


By Michael C. McMahon, Chief Deputy
*State Bar Certified Specialist – Appellate Law*
*State Bar Certified Specialist – Criminal Law*
SBN 71909
Attorney for Petitioner

## CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that by utilization of MSWord 2007 Word Count feature there are 4,050 words in Times New Roman 13 pt. font in this document, excluding Declaration of Service.

Dated: April 14, 2014.



Jeane Renick
Legal Mgmt. Asst. III

## DECLARATION OF SERVICE

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

**Case No.** **S213894 (from B245923 [Superior Court No. 2010013013])**

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On April 14, 2014, I, Jeane Renick, declare: I am over the age of 18 years and not a party to the within action or proceeding. I am employed in the Office of the Ventura County Public Defender. My business address is 800 South Victoria Avenue, Ventura, California, 93009. On this date I personally served the following named person(s), at the place indicated herein, with a full, true and correct copy of the attached **PETITIONER'S REPLY BRIEF ON THE MERITS:**

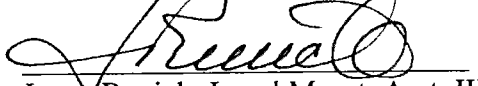
1. Gregory Totten, District Attorney, Attn: Michelle Contois, Snr. DDA, 800 S. Victoria Avenue, Ventura, CA 93009 [Counsel for the People];
2. Hon. Patricia Murphy, Judge, Superior Court, 800 S. Victoria Ave., Ventura, CA 93009 [Trial Judge];
3. Michael Planet, Exec. Officer, Superior Court, 800 S. Victoria Ave., Ventura, CA 93009;
4. Benjamin Maserang, Snr. DPD; 800 S. Victoria Ave., Ventura, CA 93009 [Counsel for Petitioner].

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

5. California Court of Appeal, Clerk's Office, 2d Dist, Div. 6, 200 E. Santa Clara Street Ventura, CA 93001;
6. Kamala Harris, Atty. General, Attn: Steven D. Matthews, Spvsg. DAG, 300 S. Spring St., Ste. 1702, Los Angeles, CA 90013

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

STEPHEN P. LIPSON, Public Defender

By 

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