IN THE SUPREME COURT

STATE OF CALIFORNIA

ROBERT E. STARK, Petitioner, vs. SUPERIOR COURT OF SUTTER COUNTY, Respondent, THE PEOPLE, Real Party in Interest.	Case No. S145337 Court of Appeal Nos. C051073 and C051074 Sutter County Nos. CRMS051001 and CRMS051031
and Companion Case	
RONDA G. PUTMAN, Petitioner, vs. SUPERIOR COURT OF SUTTER COUNTY, Respondent, THE PEOPLE, Real Party in Interest.	Court of Appeal No. C051075 Sutter County No. CRMS051030 [Consolidated Cases]

PETITIONER'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

Respondent candidly concedes that ". . . the legislature must have intended that proof of a species of guilty knowledge of the fact that ones [sic] actions are unauthorized is required in order to impose liability under [Penal Code] section 424." (Respondent's Answer Brief on the Merits, p.12, hereafter "RAB".) Nevertheless, the grand Jurors were instructed by prosecutors that "ignorance of the law is no excuse" and that "knowledge of the unlawfulness of an act or

omission is not required" to return an indictment for a violation of section 424. (Tab M, pp. 1076-1077; 1090.)[1]

Respondent also concedes that the Court of Appeal incorrectly interpreted Government Code section 3060 and that ". . . the peculiar nature of the willful misconduct allegations in this case requires proof that Stark had a culpable mental state with respect to his knowledge of the legal requirements bearing on his official duties." (RAB, pp. 21, 25.) Nevertheless, the grand jurors were instructed by prosecutors, among an array of conflicting statements on Government Code section 3060, that an accusation could be returned for a breach of good faith or neglect of the duties of office. (Tab M, p. 1081, Tab J, p. 314.)

Respondent does not argue that Mr. Stark was not substantially prejudiced by the prosecutor's patent misdirection of grand jurors, but instead asks this Court to deny relief upon the basis that Mr. Stark has no remedy. The Court should reject this invitation to render the grand jury's historic function of standing between citizen and prosecutor no more than an illusory promise.

Mr. Stark's claim of instructional error on the mens rea required to establish a violation of Penal Code section 424 fits squarely within this Court's holding in *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018. There is no legal distinction between the claim allowed in *Cummiskey* (that grand jurors were misinstructed on the definition of probable cause) and Mr. Stark's claim here that grand jurors were misled concerning the required mens rea. Both claims relate to, in the words of

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[1] Citations to the record herein are to tabs and pages in the 11 volume appendix submitted to the Court of Appeal, cited as "Tab ___, p. ___." Page references are to consecutive pagination.

this Court in *Cummiskey*, "the minimum standard of proof required to indict." (*Id.*)

Mr. Stark is also entitled to relief because the district attorney suffers from a disabling conflict of interest that prejudiced him and his office against Mr. Stark and appeared to have affected his ability to impartially perform the discretionary functions of his office. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 269.) The Court should reject respondent's invitation to rewrite the plain language of Penal Code section 1424, which has no application to a motion to set aside an indictment or accusation based upon a prosecutor's conflict of interest.

I.

A VIOLATION OF PENAL CODE SECTION 424 REQUIRES PROOF OF AN INTENTIONAL VIOLATION OF A KNOWN DUTY.

Respondent concedes that the prosecution was required to prove Stark's guilty knowledge of the requirements of law. (RAB, pp. 11-14.) However, respondent urges the Court to permit proof of the required mens rea by criminal negligence in the absence of actual knowledge. (RAB, p. 16.) Respondent's argument is not based upon the statutory language, does not define exactly what standard should apply, and fails to distinguish between distinct concepts of mens rea encompassing entirely different levels of culpability. In this regard, respondent's argument refers to "criminal negligence in not knowing the facts" (RAB, p. 16), asserts a public official should not avoid liability by "willful ignorance", and suggests that liability should attach "to the extent the official fails to take ordinary actions to determine the appropriateness of his use of public funds" (RAB, p. 19), the latter reference suggesting liability for mere negligence.

The Court should decline to determine whether criminal negligence in failing to ascertain the requirements of law is sufficient to establish a violation of section 424. The issue simply is not presented by this case. There is no question presented here of Mr. Stark failing or refusing to ascertain the requirements of law. To the contrary, the record is replete with references to the specific authority of law relied upon by Stark. (See POB, pp. 27-41.)

Should the Court choose to resolve the issue raised by respondent, the Court should hold that criminal negligence is not sufficient to prove a violation of section 424. Of course, in ascertaining the required mens rea, the Court must begin with the words of the statute itself. (*Summers v. Newman* (1999) 20 Cal.4th 1021, at 1026.) The Court of Appeal in this case correctly held that actual knowledge was required by reference to the plain meaning of the words in the statute. For example, in construing subdivision (1) of section 424, the Court of Appeal stated:

> If the intent generally required for criminal liability is the intent to do the proscribed act, and the act proscribed by section 424(a)(1) is the appropriation of public money to the use of oneself or another *without authority of law*, then it is reasonable to conclude that the intent required to violate section 424(a)(1) is the intent to appropriate public money to the use of oneself or another *without authority of law.* Of course, a person cannot intend to act without authority of law unless the person *knows* his or her action is unauthorized. Thus, to be convicted of violating section 424(a)(1), the public official must have known he was acting without authority of law in appropriating the money and thereby *intended* to act without legal authority.

(Opinion at p. 22, emphasis in original.)

The approach taken by the Court of Appeal harmonizes the mens rea required in the various subdivisions of section 424. (See *Summers, supra,* at 1026.) Subdivision (3) of section 424 requires that a public official *knowingly* keep a false account. Such knowledge could not be established by recklessness, which manifestly is not equivalent to knowledge. It would be incongruous to hold that the same standard of actual knowledge does not apply to the authority of law element of subdivisions (1), (2), (5), (6) and (7).

Respondent's argument for a criminal negligence standard rests upon an unsupported assumption that public officials might otherwise willfully remain ignorant of the law to avoid criminal responsibility. (RAB, p. 16.) There is no reason, however, to believe that elected or appointed officials will purposefully remain ignorant of the requirements of law. Public officials ordinarily desire to faithfully execute the duties of their office. Failure to do so will likely result in discharge by the appointing body, loss of office at the next election, or recall. In the case of public finance laws, personal civil liability attaches if an official acts without due care in the expenditure of public funds. (*Stanson v. Mott* (1976) 17 Cal.3d 206, 227.)

Application of a criminal negligence standard by juries would prove difficult at best. What if a public official is unaware of a change in the law by Court decision or legislative enactment? If he or she were familiar with prior law and acted consistent with that prior knowledge, is the failure to keep abreast of changes in the law reckless? If so, how long after a change in the law would a failure to learn of the change ripen into recklessness as opposed to ordinary negligence? What if a public official consults the law but is mistaken in his

interpretation? Can a public official be *so mistaken* about the meaning of a statute or body of law which they actually consulted so as to be reckless?

Proof of actual knowledge of the requirements of law will not be a stumbling block to effective enforcement of Penal Code section 424. Prior prosecutions under section 424 confirm that guilty defendants often belie their knowledge by acts demonstrating a consciousness of guilt - - falsifying or destroying records which would prove how they handled public funds, inconsistent or demonstrably false statements, and efforts to keep the act or omission secret. (See, e.g., *People v. Sperl* (1976) 54 Cal.App.3d 640 (defendant directed preparation of false entries and destroyed radio logs which evidenced unlawful transportation of dignitaries); *People v. Johnson* (1936) 14 Cal.App.2d 373 (assessor denied authorizing refund contrary to law, but evidence showed he had authorized, knew the requirements of law, and had complied with the law on other occasions).)

Should the Court determine that something less than actual knowledge is sufficient, petitioner urges that the Court require proof of "willful ignorance," which addresses the public policy concern actually identified by respondent. (See, e.g., *Robin Charlow, Willful Ignorance and Criminal Culpability*, 70 Tex L. Rev. 1351 at 1385 (willful ignorance delineates a state of mind somewhere between recklessness and actual knowledge, and should not be equated with recklessness); *United States v. Alston-Graves* (D.C. Cir. 2006) 435 F.3d 331, 341 ("willful blindness" instruction should not be given in case requiring proof of knowledge unless evidence shows defendant purposefully contrived to avoid learning facts in

order to have a defense or defendant was aware of a high probability of fact in dispute and consciously avoided confirming that fact).)

II.

GOVERNMENT CODE SECTION 3060 REQUIRES PROOF OF A KNOWING AND PURPOSEFUL REFUSAL TO FOLLOW THE LAW.

Respondent concedes that Government Code section 3060 requires proof that ". . . Stark had a culpable mental state with respect to his knowledge of the legal requirements bearing on his official duties." (RAB, p. 25.) Respondent also argues, however, that reckless indifference to the requirements of law is sufficient. (RAB, p. 26.)

As with respondent's argument concerning section 424, the Court should decline to decide whether "recklessness" is sufficient, because the facts of this case do not present this issue. If the Court determines to reach the question, it should find that actual knowledge is required for the reasons already advanced by petitioner in his opening brief (POB, pp. 13-17) and because the public policy reason advanced by respondent is not persuasive. (See argument, supra, at pp. 5-6.) This Court's decision in *People v. Ward* (1890) 85 Cal. 585, construed the substantially identical predecessor statute to Government Code section 3060, and held that actual knowledge by a public official (there a justice of the peace) that he was acting contrary to the law must be shown. (POB, pp. 13-14.)

Respondent's references to tort law definitions of "willful misconduct" are not helpful in resolving the issue presented here. (RAB, pp. 26-27.) The definition of willful misconduct in a civil tort context is too dissimilar to the issue presented in a quasi-criminal proceeding to remove a public official from office. (See, e.g., *Cynthia M. v. Rodney E.* (1991) 228 Cal.App.3d 1040 (although minor

violated terms of criminal statute for unlawful intercourse conduct still did not amount to willful misconduct where girlfriend consented).)

Respondent's reliance upon *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, is also misplaced. *Broadman* does not support respondent's argument that willful misconduct may be established by recklessness. In *Broadman,* the Court discussed the mens rea required to establish "willful misconduct" within the meaning of subdivision (c) of Article VI, section 18, of the California Constitution:

> In the context of defining willful misconduct in office, we have equated bad faith with "actual malice," and we have contrasted it with a conscientious purpose to faithfully discharge judicial duties. (See e.g., *Doan v. Commission on Judicial Performance, supra*, 11 Cal.4th at p. 311; *Gonzalez v. Commission on Judicial Performance* (1983) 33 Cal.3d 359, 365 [188 Cal.Rptr. 880, 657 P.2d 372]; *Spruance v. Commission on Judicial Qualifications, supra,* 13 Cal.3d at p. 796.)
>
> . . . A judge acts in bad faith only by (1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge's lawful judicial power, or (3) performing a judicial act that exceeds the judge's lawful power with a conscious disregard for the limits of the judge's authority.

(*Broadman, supra,* at 1092.)

Broadman's requirement of "actual malice," including by proof of a "conscious disregard" for the limits of lawful authority, delineates a mens rea which is more culpable than criminal negligence - - criminal negligence does not require a subjective appreciation of risk. (See, e.g., *People v. Valdez* (2002) 27 Cal.4th 778.) The mens rea as described by the Court in *Broadman* most closely resembles Professor Charlow's explanation of willful ignorance - - willful,

deliberate, intentional or purposeful avoidance of knowledge of the fact (here, lawful authority) in question. (*Charlow, supra,* at pp. 1397-1398.) If the Court decides that something less than actual knowledge of the law is sufficient under Government Code section 3060, the Court should hold that willful ignorance or a conscious disregard for lawful authority is required.

III.

A DEFENDANT MAY MOVE TO SET ASIDE AN INDICTMENT OR OBJECT TO AN ACCUSATION ON THE GROUND THAT THE GRAND JURY WAS MISINSTRUCTED ON THE REQUIRED MENTAL STATE

A. Penal Code Section 995(a)(1)(B) Authorizes a Challenge to an Indictment for Instructional Error Concerning the Required Mental State.

Respondent may be correct in asserting that *Cummiskey* does not authorize *every* instructional error to be raised under Penal Code section 995 (RAB, p. 32.) However, that issue is not presented here. Consistent with the Petition for Review, Mr. Stark has argued before this Court only that an instructional error concerning the required mental state of a charged offense may be challenged under section 995. (POB, pp. 17 et seq.)

Indeed, petitioner agrees with respondent's characterization of the holding in *Cummiskey:* ". . . A misinstruction on the standard of proof required to indict [is] cognizable under section 995." (RAB, p. 32.) Here, the grand jury was patently misled concerning the mens rea necessary to establish an element of the charged offense. This ***is*** a misinstruction on the standard of proof. Such misdirection, which effectively removed the element of mens rea from any independent assessment by grand jurors, is arguably more prejudicial than any error in defining probable cause.

Respondent's reliance on *People v. Gordon* (1975) 47 Cal.App.3d 465, is unavailing. *Gordon* was decided over a decade before this Court's decision in *Cummiskey*. To the extent that it is inconsistent with *Cummiskey*, it should be disapproved.

The Court of Appeal in *People v. Gnass* (2002) 101 Cal.App.4th 1271 correctly applied the holding in *Cummiskey* and found that prejudicial instructional error upon the mens rea element of a charged offense could be challenged under section 995. Respondent's unsupported assertion that *Gnass* confused due process challenges with a motion under section 995 is simply wrong. The *Gnass* court held that the district attorney's failure to instruct the grand jury on the necessary mental state required the indictment to be set aside because the nature of the error made it possible, if not likely, that the grand jury indicted Gnass on something less than probable cause. (*Gnass, supra,* at p. 1313.) This is precisely the challenge authorized in *Cummiskey*, and presented by Mr. Stark.

B. The Instructional Errors Were Prejudicial and Require that the Remaining Counts in the Indictment and Accusation be Set Aside.

Respondent makes no attempt to argue that grand jurors were not misdirected on the mens rea required to support a violation of Penal Code section 424 and an accusation under Government Code section 3060. Respondent implicitly concedes that the instructional errors were prejudicial, arguing only that they cannot be challenged except under the rubric of due process. (RAB, p. 33.) For the reasons set forth in petitioner's opening brief at pages 27-41, the instructional errors were prejudicial, and the remaining counts in the indictment and accusation must be set aside.

C. *The Instructional Errors Violated Mr. Stark's Constitutional Rights to Due Process of Law.*

Mr. Stark moved to set aside the indictment and the accusation on due process grounds in addition to the provisions of Penal Code section 995. (Tab H, pp. 132-134; Tab I, pp. 136-137.) Petitioner cited this Court's decision in *Cummiskey* as authorizing the challenge to the charging documents for instructional error. (Tab J, p. 208.) The prosecution never argued in the trial court or in the Court of Appeal that such a claim was not cognizable under section 995. (Tab K, pp. 322 et seq.)[2] The issue was never raised until the Court of Appeal published its decision stating that Stark could only raise the claimed instructional errors under a due process standard.

Mr. Stark petitioned for a rehearing in the Court of Appeal upon the basis that the decision omitted reference to the facts in the record which demonstrated that he was denied due process of law when grand jurors were misinstructed upon the required mens rea necessary to return an indictment and accusation. (Petitioner Robert E. Stark's Petition for Rehearing, pp. 2-3.) The Court of Appeal denied the Petition on July 13, 2006. This Court may certainly grant Stark relief upon due process grounds if it determines the instructional errors are not cognizable under section 995. And, on the record here, such relief should be granted.

Respondent refuses to respond to the showing of substantial prejudice made by petitioner in his opening brief except to assert without explanation that ". . . [n]one of these [instructional] errors concerning the mens rea required to prove

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[2] By a stipulation approved by the Court of Appeal on March 21, 2006, the parties agreed to rely upon the briefs filed in the trial court in lieu of filing new briefs in the Court of Appeal.

these charges compromised the independence of the grand jury so as to render the proceedings fundamentally unfair." (RAB, p. 37.) The record demonstrates otherwise.

Substantial evidence was presented to grand jurors that Mr. Stark acted or refused to act as he believed the law required. (POB, pp. 27-41.) Prosecutors, however, effectively instructed grand jurors to disregard all of the evidence upon this issue by instructing them that knowledge of the requirements of law was not necessary to support an indictment or accusation. This direction to ignore exculpatory evidence, which grossly misled grand jurors regarding the minimum evidence required to establish a violation of section 424 or to support an accusation under Government Code section 3060, rendered an *independent* assessment of probable cause by grand jurors impossible and thereby violated Mr. Stark's rights to due process of law. (*People v. Backus* (1979) 23 Cal.3d 360, 392-393.)

If the Court holds that a challenge to instructions on mens rea can be raised only under the rubric of due process, the Court should also hold that instructional error which entirely removes the element of mens rea from consideration by grand jurors presumptively violates the due process clause by compromising the grand jury's independence. Further, the Court should hold that relief is required where, as here, substantial exculpatory evidence concerning mens rea was available to grand jurors which was effectively removed from their consideration by the erroneous instructions.

IV.

PENAL CODE SECTION 1424 IS INAPPLICABLE TO A MOTION TO SET ASIDE AN INDICTMENT OR ACCUSATION UPON THE BASIS THAT THE DISTRICT ATTORNEY'S PARTICIPATION IN THE GRAND JURY PROCEEDINGS CREATED A POTENTIAL FOR BIAS OR THE APPEARANCE OF A CONFLICT OF INTEREST

As this Court has stated:

> To determine legislative intent, a court begins with the words of the statute, because they generally provide the most reliable indicator of legislative intent." (*HSU v. Abbara* (1995) 9 Cal.4th 863, 871 [39 Cal.Rptr. 2d 824, 891 P.2d 804].) If it is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 348 [158 Cal.Rptr. 350, 599 P.2d 656].)

(*Diamond Multimedia Sys. v. Superior Court* (1999) 19 Cal.4th 1036, 1047.)

Mr. Stark has argued that the plain language of Penal Code section 1424, which by its terms is directed at ". . . a motion to disqualify a district attorney from performing an authorized duty," has no application to a motion to set aside an indictment or accusation based upon a prosecutor's conflict of interest. (POB, pp. 42-43.) This Court recognized as much in *People v. Eubanks* (1996) 14 Cal.4th 580, at 592, fn 4, observing that "one should note . . . the distinction between a motion to recuse the district attorney under section 1424, and a motion to set aside the information or indictment under section 995."

This Court noted the facial inapplicability of section 1424 to a motion to set aside an indictment or information over a decade ago. The Legislature has since amended section 1424 no less than four times, but has failed to amend the language so as to expressly make it applicable to a motion to set aside an indictment, information, or accusation. (See Stats. 1998, c. 51 (A.B. 1858), § 1;

Stats. 1998, c. 931 (S.B. 2139) § 406; Stats. 1998, c. 931 (S.B. 2139), § 406.5, Stats. 1999, c. 363 (A.B. 154, § 1).)

When the legislature undertakes to amend a statute which has been the subject of judicial construction, it is presumed that the Legislature was fully cognizant of such construction. (See *People v. Garcia* (2006) 39 Cal.4th 1070, at pp. 1087-1088). Assembly Bill 154, which amended section 1424 in 1999, was proposed in direct response to this Court's decision in *Eubanks*. As introduced, the bill would have permitted a crime victim to incur costs in obtaining information and presenting it to the district attorney and this assistance would not constitute grounds for disqualification. (Bill Analysis by Department of Justice, AB154, as amended 1/15/99, p. 35.) [3] This language was designed to "eliminate the effect of *People v. Eubanks* (1996) 14 Cal.4th 580 . . ." (*Id.*) The author deleted this provision in the bill to address the concerns of the opposition. (Author's Floor Statement for AB154, p. 20). Although the Senate Committee on Public Safety analysis of AB154 was prepared after this amendment, the analysis expressly referred to *Eubanks* in describing the requirements of existing law. (Sen. Com. On Public Safety, Rep. on Assembly Bill No. 154 (1999-2000 Reg. Sess., pp. 5-6).

Respondent seeks to avoid the plain language of section 1424 by resort to the canon of statutory construction which prefers an interpretation of a statute

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[3] All documents cited in reference to the legislative history of AB154 are appended to Petitioner's Motion for Judicial Notice filed concurrently herewith. Page references are to consecutive pagination in the lower right hand corner which were added by petitioner for reference after the documents were certified by the Secretary of State.

which avoids absurd results. As explained in *Unzueta v. Ocean View School District* (1992) 6 Cal.App.4th 1689, at 1698-1699:

> This exception should be used most sparingly by the judiciary and only in extreme cases else we violate the separation of powers principle of government. We do not sit as a "super-legislature."
>
> * * * * *
>
> Each time the judiciary utilizes the "absurd result" rule, a little piece is stripped from the written rule of law and confidence in legislative enactments is lessened.

Respondent has failed to demonstrate a compelling reason for this Court to ignore the plain language of section 1424. Respondent only asserts that failure to apply section 1424 to a motion to dismiss will result in successive motions and refilings, and that dismissals might be granted under a lesser standard than that required for recusal. (RAB, p. 39.) Many, if not most, conflicts of interest are personal to a prosecutor and do not extend to an office as a whole. When an individual prosecutor suffers from a conflict of interest which results in a motion being granted to set aside a charging document under *Greer*, the district attorney presumably will assign a different deputy who does not suffer from the conflict. No basis will then exist to set aside a new charging document under such circumstances.

When a disabling conflict extends to an entire office, there is nothing absurd about a legislative scheme which would require another prosecutorial agency to participate in the charging process only:

> The preservation of prosecutorial impartiality is perhaps most important during the charging process, the phase of a criminal proceeding when the

> prosecutor's discretion is most apparent. As the Court in *Pellegrino* noted, "the theme that runs throughout the criminal procedure in this state is that all persons should be protected from having to defend against frivolous prosecutions, and that one major safeguard against such prosecutions is the function of the district attorney in screening criminal cases prior to instituting a prosecution." (Fn. Omitted.) ([*People v. Municipal Court (Pellegrino)* (1972)] 27 Cal.App.3d [193], at pp. 205-206).

(*Greer, supra,* 19 Cal.3d 255, at 267, fn 8.) A prosecutor's charging discretion is often accomplished under circumstances where no judge is present to ensure fairness, as here in the case of an indictment or accusation sought by the prosecutor before a grand jury.

The legislature's decision to apply the terms of 1424 only to motions to recuse may reflect the significant difference between the nature of the relief sought and the question to be resolved. In applying section 1424, the Court must speculate to some degree about whether the district attorney will be able to treat the defendant fairly in the future proceedings based upon the alleged conflict or bias shown. Evaluating a motion to dismiss is less speculative in that the Court will often have, at least in the case of an indictment or information, a record of the actual proceedings.

As respondent does not attempt to argue that Mr. Stark failed to make an adequate showing of a conflict of interest under this Court's decision in *Greer,* the indictment and accusation should be set aside.

Should this Court determine that the showing required by Penal Code section 1424 applies to a motion to set aside a charging document, Mr. Stark is still

entitled to relief.[4] The patent conflict of interest here, as detailed in petitioner's opening brief, convincingly demonstrates that the district attorney's office has not exercised its discretion in a fair manner such that Mr. Stark actually did not receive a fair grand jury proceeding. The manner in which the prosecutor conducted the proceedings, including patently erroneous advice on the law, entitles Mr. Stark to relief whether the claim is evaluated under *Greer*, Penal Code section 1424, or under the rubric of due process.

CONCLUSION

For all of the foregoing reasons and those set forth in Mr. Stark's opening brief, petitioner respectfully requests that this Court direct the Court of Appeal to issue a peremptory writ of mandate or prohibition directing the Sutter County Superior Court to set aside the remaining counts in the indictment and accusation.

Respectfully submitted this 12th day of March, 2007 at Sacramento California.

ROTHSCHILD WISHEK & SANDS LLP

By: _____
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ROBERT E. STARK

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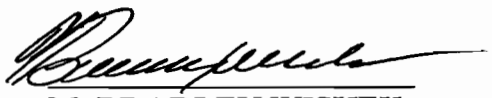
[4] Petitioner sought relief under section 1424 in a motion to recuse which was heard before the motion to dismiss. Mr. Stark argued there that the prosecutor's conflict of interest made it unlikely that he could receive a fair trial within the meaning of Penal Code section 1424 and also sought relief upon due process grounds. (Tab O, pp. 2793 et seq.) When this motion was denied, Mr. Stark challenged the indictment and accusation on the same grounds and pointed out to the trial court that a different standard, that set forth by this Court in *Greer*, applied. (Tab J, pp. 70 et seq.) The prosecution *never* challenged the applicability of the standard set forth in *Greer* to the motion to dismiss. (Tab K, p. 436.) Thus, Mr. Stark had no reason until now to analyze the conflict under the standard prescribed by section 1424.

CERTIFICATION OF WORD COUNT

I am counsel for Robert E. Stark. I hereby certify that the foregoing petition, exclusive of tables and this certificate under Rule 8.520(a)(c)(1), is 4,421 words. In making this certification, I am relying upon the word count of the computer program used to prepare the document.

DATED: March 12, 2007



M. BRADLEY WISHEK

PROOF OF SERVICE

I am a citizen of the United States and a resident of Sacramento County. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Rothschild Wishek & Sands LLP, 901 F Street, Suite 200, Sacramento, California 95814. On the below named date, I served the within:

PETITIONER'S REPLY BRIEF ON THE MERITS

on the parties in said action as follows:

_X_ (By REGULAR MAIL) by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States post office mail box at Sacramento, California, addressed as follows:

___ (By U.P.S.) by placing a true copy thereof enclosed in a sealed envelope, prepaid, deposited with the U.P.S. carrier/box at Sacramento, California, addressed as follows:

____(By PERSONAL SERVICE) delivering by hand and leaving a true copy with the person and address shown below.

____(By FACSIMILE) by placing a true copy thereof into a facsimile machine addressed to the person and address shown below:

Carl V. Adams
District Attorney of Sutter County
446 Second Street
Yuba City, CA 95991
Attorneys for Real Party in Interest

Office of the Attorney General
Clifford E. Zall, Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Attorneys for Real Party in Interest

Clerk of the Court
Sutter County Superior Court
446 2nd Street
Yuba City, CA 95991

Clyde M. Blackmon
Blackmon & Associates
813 Sixth Street, Suite 450
Sacramento, CA 95814
Attorneys for Ronda Putman

The Law Office of
MARILYN FISHER
P.O. Box 2509
Mendocino, CA 95460
Attorney for Robert E. Stark and
Ronda Putman

Robert Stark
1587 Holly Tree Drive
Yuba City, CA 95993
Petitioner

I, Keeley O'Farrell, declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of March, 2007 at Sacramento, California.

Keeley M. O'Farrell

Keeley O'Farrell

PROOF OF SERVICE

I am a citizen of the United States and a resident of Sacramento County. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is Rothschild Wishek & Sands LLP, 901 F Street, Suite 200, Sacramento, California 95814. On the below named date, I served the within:

PETITIONER'S REPLY BRIEF ON THE MERITS

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X___(By PERSONAL SERVICE) delivering by hand and leaving a true copy with the person and address shown below.

____(By FACSIMILE) by placing a true copy thereof into a facsimile machine addressed to the person and address shown below:

Clerk of the Court
Court of Appeal
Third Appellate District
900 N Street
Room 400
Sacramento, CA 95814

I, Keeley O'Farrell, declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of March, 2007 at Sacramento, California.

Keeley M. O'Farrell

Keeley O'Farrell