

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

GREGORY PELLERIN,

Petitioner,

Case No. C069031

**THE SUPERIOR COURT OF NEVADA
COUNTY,**

Respondent,

**THE PEOPLE OF THE STATE OF
CALIFORNIA,**

Real Party in Interest.

Nevada County Superior Court, Case No. F10159
The Honorable Candace S. Heidelberger, Judge

**OPPOSITION TO PETITION
FOR WRIT OF MANDATE**

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TABLE OF CONTENTS

	Page
Opposition to Petition for Writ of Mandate.....	1
Memorandum of Points and Authorities in Support of Opposition to Petition for Writ of Mandate.....	3
Statement of the Case.....	3
Argument	8
I. The superior court acted within its discretion in denying petitioner’s motion for recusal.....	8
A. The superior court’s ruling	8
B. Relevant law	11
C. Analysis	13
1. Vindictive/selective prosecution	13
2. Prosecutorial misconduct.....	15
3. Alleged <i>Brady</i> or discovery violation.....	16
II. The superior court acted within its discretion in denying petitioner’s request for an evidentiary hearing	16
A. The superior court’s ruling	17
B. Relevant law	18
C. Analysis	19
Conclusion	21

TABLE OF CONTENTS

	Page
Opposition to Petition for Writ of Mandate	1
Memorandum of Points and Authorities in Support of Opposition to Petition for Writ of Mandate.....	3
Statement of the Case.....	3
Argument	8
I. The superior court acted within its discretion in denying petitioner’s motion for recusal	8
A. The superior court’s ruling	8
B. Relevant law	11
C. Analysis	13
1. Vindictive/selective prosecution	13
2. Prosecutorial misconduct.....	15
3. Alleged <i>Brady</i> or discovery violation.....	16
II. The superior court acted within its discretion in denying petitioner’s request for an evidentiary hearing	16
A. The superior court’s ruling	17
B. Relevant law	18
C. Analysis	19
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

<i>Brady v. Maryland</i> (1963) 373 U.S. 83	7, 13, 16
<i>Dix v. Superior Court</i> (1991) 53 Cal.3d 442	15
<i>Hollywood v. Superior Court</i> (2008) 43 Cal.4th 721.....	13
<i>Palma v. U.S. Industrial Fasteners, Inc.</i> (1984) 36 Cal.3d 171	3
<i>People v. Bracey</i> (1994) 21 Cal.App.4th 1532	14
<i>People v. Conner</i> (1983) 34 Cal.3d 141	11
<i>People v. Eubanks</i> (1996) 14 Cal.4th 580	12, 13
<i>People v. Gamache</i> (2010) 48 Cal.4th	12, 13
<i>People v. Hamilton</i> (1988) 46 Cal.3d 123	13
<i>People v. Lopez</i> (1984) 155 Cal.App.3d 813	12
<i>People v. Owens</i> (1997) 59 Cal.App.4th 798	15
<i>People v. Vasquez</i> (2006) 39 Cal.4th 47	13

TABLE OF AUTHORITIES
(continued)

Page

United States v. Goodwin
(1982) 457 U.S. 368 13, 14

STATUTES

Penal Code
 § 1424 11, 12, 15, 18
 § 1424, subd. (a)(1)..... 1, 4, 11, 18

CONSTITUTIONAL PROVISIONS

United States Constitution, 5th Amendment..... 13

OPPOSITION TO PETITION FOR WRIT OF MANDATE

Petitioner, Gregory Pellerin, stands charged in Nevada County Superior Court with felony misconduct involving an alleged assault on a process server that took place on April 20, 2010.

On June 23, 2011, petitioner filed a motion for recusal of the Nevada County District Attorney's Office (Pen. Code, § 1424, subd. (a)(1)). (Pet., Exh. A, pp. 1-93.) Petitioner requested "an evidentiary hearing at which he may call witnesses and present documentary and other evidence prior to the Court's ruling on [the] motion." (Pet., Exh. A, pp. 1-2; see also Pet., Exh. A, pp. 8-9.)

Following the submission of further briefing (see Pet., Exh. B, pp. 94-121 [opposition of Attorney General]; Pet., Exh. C, pp. 122-132 [opposition of District Attorney of Nevada County]; Pet., Exh. D, pp. 133-138 [petitioner's reply]), the superior court heard argument on and denied both petitioner's motion for recusal and his request for an evidentiary hearing. (Pet., Exh. F, pp. 153-172.) The superior court thereafter set the preliminary hearing for August 30, 2011. (See Pet., Exh. F, p. 188.)

On August 24, 2011, petitioner filed the instant petition for writ of mandate and request for stay in this Court. Petitioner raises two issues: (1) "whether the Superior Court abused its discretion when it failed to find that there was neither [*sic*] the appearance of a conflict of interest nor an actual conflict of interest based upon the factual evidence submitted with [petitioner's] Motion to Recuse[]" and (2) "whether the Superior Court abused its discretion when it denied [petitioner's] request for an evidentiary hearing for the purpose of obtaining further evidence concerning conflict of interest and how such conflict might make it unlikely that [petitioner] would obtain a fair trial." (Pet., p. 1.)

On August 25, 2011, this Court issued a stay of all further proceedings in the superior court pending filing of opposition and further

order of this Court. On September 2, 2011, this Court requested that real party in interest, the People, serve and file written opposition to the petition.

Real party in interest contends that the superior court acted well within its discretion in denying petitioner's motion for recusal. Real party in interest further contends that the superior court acted well within its discretion in denying petitioner's request for an evidentiary hearing.

This opposition is based on the attached memorandum of points and authorities, which is incorporated by reference as though fully set forth herein.

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF OPPOSITION TO PETITION FOR WRIT OF MANDATE**

STATEMENT OF THE CASE

Petitioner stands charged in Nevada County Superior Court, case no. F10159, with felony misconduct involving an alleged assault on a process server which took place on April 20, 2010, and which resulted in petitioner's arrest on that same date.

On January 5, 2011, prior to the preliminary hearing, petitioner filed a petition for writ of mandate in this Court, case no. C067033, in which he challenged (1) the superior court's denial of a motion for sanctions against Nevada County Deputy District Attorney Gregory Weston for failure to comply with a previously-issued order for discovery; and (2) the superior court's denial of a motion for an evidentiary hearing aimed at discovering whether evidence favorable to petitioner's defense (specifically, a videotape) had been destroyed by the Nevada County Sheriff's Department. On February 23, 2011, this Court issued a letter pursuant to *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171 in which it asserted that its initial review suggested that the superior court had erred in denying petitioner's motion for an evidentiary hearing and that it was considering issuing a peremptory writ of mandate in the first instance, i.e., without first issuing an alternative writ. On March 2, 2011, the superior court issued a written notice of its intention to vacate the order denying petitioner's motion for an evidentiary hearing and to enter a new order granting the motion.¹ On March 7, 2011, the superior court did in fact vacate the order

¹ On March 3, 2011, petitioner filed a "Motion for Final Decision on Petition for Mandate Concerning the Lower Court's Ruling on Sanctions." On March 11, 2011, this Court denied the motion. On March 21, 2011, petitioner filed a petition for review in the California Supreme Court, case
(continued...)

denying petitioner's motion for an evidentiary hearing and entered an order granting the motion.

On June 23, 2011, petitioner filed a motion for recusal of the Nevada County District Attorney's Office (Pen. Code, § 1424, subd. (a)(1)). (Pet., Exh. A, pp. 1-93.) Petitioner argued in support of his motion as follows:

. . . [I]n this case, there is overwhelming evidence that the entire District Attorneys [*sic*] Office should be recused. As the preliminary evidence discussed below will show, there was:

(a) a blatant, multi-million dollar conflict of interest between [Nevada County District Attorney] Clifford Newell and Olympic (now Olympia) Mortgage (hereafter 'Olympic' [*sic*]);

(b) a complete and unexplained failure of the DA to investigate Olympic or to recuse himself and refer to the Attorney General for investigation any complaint about Olympic, especially the very specific complaint filed by [petitioner] in on [*sic*] or about July 1, 2007, with the Grass Valley Police Department about the wrongful mortgage practices employed against him by Olympic;

(c) a complete and unexplained failure of the DA's office to investigate Olympic after [petitioner] had a direct conversation with Deputy District Attorney Jim Phillips about the Olympic loan and the conflict of interest on the part of Clifford Newell;

(d) an arrest of the [petitioner] on the morning of the very day that he is going to testify about the Olympic loan and the harm that he suffered as a result;

(e) serious intentional mishandling of the video evidence by the DA's office in violation of *Brady v. Maryland* (see the Motion to Dismiss);

(...continued)

no. S191584. On May 18, 2011, the California Supreme Court denied the petition.

(f) a failure of the DA's office to even look at the video evidence that exonerates [petitioner] of the charges before filing the felony complaint;

(g) outrageous charging of [petitioner] with two felony "strikes" when he was merely making a citizens [sic] arrest on someone that had repeatedly assaulted and battered him, violated a court order by coming to [petitioner's] residence, and trespassed;

(h) continued prosecution of the case against [petitioner] even after the mishandling of the evidence was overwhelmingly demonstrated; and

(i) involvement of at least three other deputy DAs in the filing and prosecution of the charges against [petitioner].

(Pet., Exh. A, pp. 4-5, fn. omitted.) Petitioner requested "an evidentiary hearing at which he may call witnesses and present documentary and other evidence prior to the Court's ruling on [the] motion." (Pet., Exh. A, pp. 1-2; see also Pet., Exh. A, pp. 8-9.) Petitioner's motion was supported by the following: the declaration of his attorney (Pet., Exh. A, pp. 11-12); copies of deeds of trust arising out of transactions between District Attorney Newell and Olympic Mortgage (Pet., Exh. A, pp. 13-35); and the declaration of petitioner—which in turn was supported by numerous exhibits (Pet., Exh. A, pp. 36-80). Petitioner simultaneously filed a request that the superior court take judicial notice of two newspaper articles published in the Sacramento Bee that pertained to financial dealings between District Attorney Newell and Olympic Mortgage. (Pet., Exh. A, pp. 81-93.)

Both the Attorney General of the State of California (Pet., Exh. B, pp. 94-121) and the District Attorney of Nevada County (Pet., Exh. C, pp. 122-132) filed written opposition to petitioner's motion to recuse. Attached to the former opposition was a copy of the crime report pertaining to the charges now pending against petitioner (Pet., Exh. B, pp. 111-117) as well

as a copy of a previous crime report pertaining to a report by petitioner's wife that her landlord, John Schema, had violated a court order by posting a three-day notice to quit on the door of her residence (Pet., Exh. B, pp. 118-120). Attached to the latter opposition was the declaration of District Attorney Newell. (Pet., Exh. C, pp. 129-131.) District Attorney Newell declared therein that he had recused himself and his office from the prosecution of Thomas Hastert² "due to the potential for a perceived conflict of interest based on a personal business relationship with Olympic Mortgage"; that he had had no further relationship with Olympic Mortgage after October 2009; that he did not personally become aware of the case against petitioner until petitioner made a "request for discovery involving the Nevada County Sheriff's Department computer in June and July of 2010"; that he did not become aware that petitioner "was related" to the case against Mr. Hastert until petitioner filed his motion for recusal; and that "[e]xcept for being consulted by the Sheriff's Office about the discovery request for a Department computer, [he] was not involved in the investigation, analysis, strategy or any matter related to [petitioner's] case." (Pet., Exh. C, pp. 129-131.)

² According to the instant petition:

During 2005, [petitioner] arranged a construction loan with Olympic Mortgage. . . . [H]is loan was forced into default through a wrongful failure to fund. [Petitioner's] loan was then sold by Olympic to Thomas Hastert, who paid off the Olympic loan and gave [petitioner] a new loan. However, the same game was played and Tom Hastert failed to fully fund the loan as required by law and placed the loan into default. . . .

(Pet., p. 11, para. number and fn. omitted.) Also according to the instant petition, Hastert ultimately pleaded guilty "to dozens of counts of mortgage fraud and is now serving time in a state correctional facility." (Pet., p. 11, fn. 2.)

Petitioner thereafter filed a reply (Pet., Exh. D, pp. 133-138) and his own supplemental declaration speaking to the timing of his arrest on April 20, 2010 (Pet., Exh. E, pp. 139-140). Petitioner also submitted the declaration of Melissa Kaput, who asserted that she had been in the courthouse to testify at the Thomas Hastert restitution hearing on the date of petitioner's arrest and that, while at the courthouse, during a break in the proceedings, she heard certain persons, including Probation Officer Gillespie and Deputy Attorney General Lyons, laughing and/or smiling about the fact that petitioner had been arrested and thus would not be appearing at the hearing to testify. (Pet., Exh. E, pp. 141-143.)

A hearing on petitioner's motion for recusal was held on August 4, 2011, at the same time as a hearing on his then-pending motion to dismiss.³ (Pet., Exh. F, pp. 144-191.) The superior court first heard argument on petitioner's request for an evidentiary hearing in association with his recusal motion. (Pet., Exh. F, pp. 153-163.) The superior court denied the request. (Pet., Exh. F, pp. 164-167.)⁴ The superior court next considered the other grounds on which petitioner's motion for recusal was based and denied the motion. (Pet., Exh. F, pp. 167-172.)⁵ The superior court proceeded to hear argument on and deny petitioner's motion to dismiss

³ Apparently the motion to dismiss was based "on the grounds of evidence tampering, multiple failure to produce exculpatory evidence to [petitioner] in violation of *Brady v. Maryland*, the failure of the Nevada County Sheriffs [*sic*] Department and the Nevada County District Attorney's Office to have any policies, practices, procedures, and training whatsoever in the handling of electronic evidence, and the failure of the prosecution to even look at certain video evidence favorable to [petitioner] after 16 months of prosecution of the case." (Pet., pp. 2-3.)

⁴ The basis for the superior court's ruling will be set forth *post* in Argument II.

⁵ The basis for the superior court's ruling will be set forth *post* in Argument I.

(Pet., Exh. F, pp. 172-186), and then it set the preliminary hearing for August 30, 2011 (see Pet., Exh. F, p. 188).

On August 22, 2011, petitioner filed a petition for writ of mandate and request for stay in this Court, case no. C069016. Apparently that petition pertained to the denial of his motion to dismiss. (See Pet., pp. 2-3.) On August 25, 2011, without requesting opposition, this Court issued an order denying the petition and request for stay.

Meanwhile, on August 24, 2011, petitioner filed the instant petition for writ of mandate and request for stay in this Court, case no. C069031. On August 25, 2011, this Court issued a stay of all further proceedings in the superior court pending filing of opposition and further order of this Court. On September 2, 2011, this Court requested that real party in interest serve and file written opposition to the petition.

ARGUMENT

I. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN DENYING PETITIONER'S MOTION FOR RECUSAL

Petitioner contends that the superior court abused its discretion when it failed to find that there was either the appearance of a conflict of interest or an actual conflict of interest based upon the factual evidence submitted with his motion to recuse. (Pet., pp. 10-14.) Real party in interest disagrees.

A. The Superior Court's Ruling

In denying petitioner's motion for recusal, the superior court asserted as follows:

. . . In your motion you're . . . basing it upon the following. A blatant multi million dollars conflict of interest between Mr. Newell and Olympic -- . . . I don't see that that is a conflict that Mr. Newell like many other people in the community was involved in a loan during the time that the market went south and was hurt by that. I don't see that that's a

conflict. I can't see how that would possibly tie into him not wanting [petitioner] to testify [at the restitution hearing arising out of the prosecution of Thomas Hastert].

[¶] . . . [¶]

. . . The second one is a complete and unexplained failure of the DA to investigate Olympic or to recuse himself. I do see that in Mr. Newell's declaration when the Hastert matter came up, he did recuse himself. And the AG's office did proceed on that.

[¶] . . . [¶]

. . . When I look at Mr. Newell's Declaration . . . , it doesn't say what the status of any investigation with respect to Olympic Mortgage is or whether they've received request [*sic*] from an investigating authority to investigate that.

[¶] . . . [¶]

. . . I don't think the fact that there has not yet been or that maybe we're not aware of an investigation, that's not a sufficient basis to find a conflict.

That goes to the third point as well, the DA's failure to investigate. The law enforcement, I don't know if they're in the process of investigating or if any reports have been forwarded to the district attorney for investigation.

[¶] . . . [¶]

. . . An arrest of the defendant the morning of the day that he was about to testify. . . . I don't see how that could possibly have been orchestrated by the District Attorney's office.

The serious and intentional mishandling of the video. And that is subject of your motion to dismiss. But we've had a number of evidentiary hearings on that issue. You've received . . . that video in its entirety at this point. And I believe based upon my prior ruling that I did not find that the conduct of the District Attorney's office amounted to contempt. I disagree with your characterization of it as a serious intentional mishandling. It wasn't necessarily the best of handling, but it

certainly wasn't -- I didn't find intentional or serious mishandling.

The failure of the DA to even look at video [*sic*]. I do recall [Deputy District Attorney] Weston make something comment [*sic*] at the last hearing that he hadn't actually viewed the video up to this point. I don't know if that's changed. I thought it would be a good idea for the DA to look at video [*sic*]. And I don't know why that hasn't occurred. But that is not, I must say, distinctive to this case I guess would be the best way of saying it. I mean, the District Attorney's office has -- oftentimes does rely on the officers and doesn't always look at all the evidence prior to the preliminary examination.

[¶] . . . [¶]

. . . They may have, but I don't know if they have. The outrageous charging of the defendant with two felony strikes. I mean, that's one of the issues that needs to be resolved is whether or not [petitioner] did in fact assault and batter or whether or not there is an affirmative defense that he's going to be raising. And that's an issue for the trier of fact. District attorney can certainly exercise his charging discretion based upon what information he is given.

Continued prosecution despite the mishandling [of the videotape]. Again, I'm not sure I characterize it quite the same fashion that you do. But we're dealing with that in the next motion.

Involvement of at least three other deputy DA's in the filing of prosecution. I can only guess you're referring to the fact that Ms. Francis I think started with this case. Then she had some medical issues is my recollection. Mr. Weston was then assigned to the case. I'm not sure who the third DA is, but that's not that uncommon, especially given the over a year that we've been dealing with this case.

You did ask the court to take judicial notice of the article in the Sacramento Bee. Although taking judicial notice that the document exists is different than the court finding that the issues that are set forth in the article are true. So I don't know that taking judicial notice really adds anything.

. . . [Y]ou've attached a number of documents that deal with the loans that I think are just simply not a basis to support a recusal of Mr. Newell's office.

[¶] . . . [¶]

So as far as the motion to recuse, it is denied. . . . I do not find that you've met your burden to show, number one, that there is a conflict, or that if there is a conflict that it rises to the level that would prevent the defendant from having a fair trial. So that's the court's decision on that motion.

(Pet., Exh. F, pp. 167-172.)

B. Relevant Law

Penal Code section 1424 provides in pertinent part as follows:

(a)(1) Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary. *The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. . . .*

(Pen. Code, § 1424, subd. (a)(1), italics added.) On its face, Penal Code section 1424 requires that both: (1) a conflict of interest be shown to exist; and (2) the conflict would render a fair trial unlikely.

A conflict exists “whenever the circumstances of a case evidence a reasonable possibility that the [district attorney’s] office may not exercise its discretionary function in an evenhanded manner.” (*People v. Conner*

(1983) 34 Cal.3d 141, 148.) The mere appearance of a conflict is insufficient to merit recusal. In *People v. Eubanks* (1996) 14 Cal.4th 580, the California Supreme Court asserted:

[W]hether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a *likelihood* of unfairness. Thus, section 1424 . . . does not allow disqualification merely because the district attorney's further participation in the prosecution would be unseemly, would *appear* improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system. [Citations.]

(*Id.* at p. 592, fn. omitted.)

In *People v. Lopez* (1984) 155 Cal.App.3d 813, the Court of Appeal noted that the enactment of Penal Code section 1424 was a clear intent to base recusal motions on the fairness of a defendant's trial. (*Id.* at pp. 824-825.) The *Lopez* court noted the dangers of relying upon a mere appearance of impropriety:

The appearance of impropriety . . . is a malleable factor having the chameleon-like quality of reflecting the subjective views of the percipient. [Citations.] Judicial decision making should not turn on the psychological or philosophical perceptions of those involved. Matters as significant to the public and the parties as removing the entire staff of a district attorney's office in a criminal case require reliance upon more objective criteria. . . .

(*People v. Lopez, supra*, at p. 823.)

When “a defendant seeks to recuse not just an individual prosecutor but also an entire prosecuting office, he must make an especially persuasive showing.” (*People v. Gamache* (2010) 48 Cal.4th at 347, 361.) Recusal of an entire office is required only where the prosecutor's conflict, bias, or animosity is likely to affect the entire prosecutorial office substantially to such an extent that it would preclude any deputy from prosecuting the case

in an evenhanded manner. (See *People v. Hamilton* (1988) 46 Cal.3d 123, 139-141, disagreed with by *People v. Eubanks, supra*, 14 Cal.4th at p. 590.)

A trial court's decision to deny a recusal motion is reviewed for an abuse of discretion. (*People v. Gamache, supra*, 48 Cal.4th at p. 361, citing *Hollywood v. Superior Court* (2008) 43 Cal.4th 721, 728-729.)

Accordingly, the reviewing court "must determine whether the trial court's findings were supported by substantial evidence and whether, in turn, those findings support the decision to deny recusal." (*People v. Gamache, supra*, at pp. 361-362, citing *People v. Vasquez* (2006) 39 Cal.4th 47, 56.)

C. Analysis

In the instant case, petitioner articulated only an appearance of a conflict which did not justify recusal of the entire Nevada County District Attorney's Office. Petitioner's proffered reasons for recusal—which real party in interest believes to be fairly characterized as (1) vindictive/selective prosecution based on petitioner's allegations against Olympic Mortgage; (2) prosecutorial misconduct in failing to investigate or prosecute Olympic Mortgage and in the handling of his own criminal case; and (3) an alleged *Brady*⁶/discovery violation—failed to present a conflict of interest that rendered a fair trial unlikely.

1. Vindictive/selective prosecution

Petitioner appears to argue that he is currently being prosecuted due to allegations he made against Olympic Mortgage. However, recusal is not the remedy for vindictive prosecution. A vindictive prosecution, if proved, violates a defendant's Fifth Amendment right to due process. (See *United States v. Goodwin* (1982) 457 U.S. 368, 372 (*Goodwin*).)

⁶ *Brady v. Maryland* (1963) 373 U.S. 83.

Moreover, to show vindictiveness in a pretrial setting, the defendant must prove actual vindictiveness. (*Goodwin, supra*, 457 U.S at p. 381.) “California courts have followed the [United States] Supreme Court in refusing to apply a presumption of vindictiveness for prosecutorial action before commencement of trial.” (*People v. Bracey* (1994) 21 Cal.App.4th 1532, 1544.)

Here, the superior court reasonably determined that petitioner had failed to prove that the Nevada County District Attorney’s Office was pursuing felony charges against him because he had made allegations of wrongdoing against Olympic Mortgage. Petitioner’s main argument in support of a claim of vindictive prosecution appears to be the fact that he was arrested on April 20, 2010, the morning he was scheduled to testify about Olympic Mortgage at “restitution proceedings” concerning Thomas Hastert. (See Pet., Exh. A, pp. 4-5.) However, the superior court reasonably determined that petitioner has failed to substantiate a connection between his arrest and the Nevada County District Attorney’s Office. A law enforcement agency’s decision to arrest someone is separate and distinct from a prosecutor’s decision to charge a person with criminal violations. Petitioner has presented no connection between the two actions. It is undisputed that petitioner was arrested on the current case on location just after the actual incident took place. And insofar as news of petitioner’s arrest may have been quickly conveyed to Probation Office Gillespie and/or Deputy Attorney General Lyons, petitioner engages in rank speculation when he asserts that the information was conveyed by a member of the District Attorney’s Office.

To the extent petitioner is arguing that his prosecution was selective or discriminatory, such a claim is also not grounds for recusal. A defendant’s claim that he has been selectively or discriminatorily prosecuted is not enough to warrant recusal of a particular prosecutor or an

entire prosecutorial agency because it does not establish that a conflict of interest exists. A claim of a “conflict of interest” in this regard is not a claim of a “conflict” at all; rather, it is a statement of a defendant’s perception of the prosecutor’s motivations. “The prosecutor ordinarily has sole discretion to determine whom to charge, what charges to file and pursue, and what punishment to seek.” (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 451; accord, *People v. Owens* (1997) 59 Cal.App.4th 798, 801.) As the superior court observed in denying petitioner’s motion for recusal, whether petitioner did engage in felonious conduct during his April 20, 2010, confrontation with a process server is a question that will ultimately be resolved by the trier of fact.

2. Prosecutorial misconduct

Petitioner appears to argue that the prosecutor has committed misconduct by failing to investigate his allegations against Olympic Mortgage and by not considering videotaped evidence of the assault in question. However, allegations of prosecutorial misconduct, standing alone, do not suffice to justify recusal. Recusal is not the remedy for prosecutorial misconduct; it is a protection against unfair trials. The fairness of the process, not the virtue of the attorneys, is the concern under Penal Code section 1424.

Here, in denying petitioner’s motion for recusal, the superior court correctly noted as follows: District Attorney Newell had recused himself from the prosecution of Thomas Hastert; other than petitioner’s speculative assertions, there was no basis for a finding that law enforcement had not investigated Olympic Mortgage or that the District Attorney’s Office had failed to act upon a referral from law enforcement; and there was no legal obligation upon the prosecutor to personally view all of the evidence in the case prior to the preliminary hearing. All of those reasons support the superior court’s decision to deny petitioner’s motion for recusal.

3. Alleged *Brady* or discovery violation

Petitioner further argues that the prosecution failed to provide timely discovery in association with a previously-granted discovery motion. However, the lack of timely disclosure of *Brady* or discovery material is an issue entirely separate from the merits of a recusal motion. Generally, recusal is not a remedy for a *Brady* or discovery violation.

Insofar as petitioner suggests that the failure to provide timely discovery is evidence of a conflict of interest that renders it unlikely he will receive a fair trial, the superior court reasonably rejected that contention. Petitioner characterizes the actions of Deputy District Attorney Weston as “serious intentional mishandling of the video evidence.” (Pet., Exh. A, p. 5.) The superior court, however, with the benefit of multiple evidentiary hearings, flatly disagreed with that characterization. (See Pet., Exh. F, pp. 169-170.) Indeed, as detailed *ante* in the Statement of the Case, petitioner’s attempts to have sanctions levied against Deputy District Attorney Weston were unsuccessful. Petitioner provides this Court with no reasoned basis to reject the superior court’s assessment of the intentions of Deputy District Attorney Weston.

For all of these reasons, the superior court’s denial of petitioner’s motion for recusal should not be disturbed.

II. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN DENYING PETITIONER’S REQUEST FOR AN EVIDENTIARY HEARING

Petitioner contends that the superior court abused its discretion when it denied his request for an evidentiary hearing aimed at obtaining further evidence about the alleged conflict of interest and showing that he was unable to obtain a fair trial. (Pet., pp. 14-16.) Once again, real party in interest disagrees.

A. The Superior Court's Ruling

In denying petitioner's request for an evidentiary hearing in association with his recusal motion, the superior court asserted as follows:

. . . I do not believe that there is an evidentiary [*sic*] hearing that's going to be required or necessary in this case. I haven't heard anything that convinces me that there is a conflict of interest with the district attorney prosecuting this case.

I haven't heard anything that indicates the defendant would not receive a fair trial. . . .

. . . Have you shown that there's a conflict of interest in the District Attorney's office[?] The fact that Mr. Newell or any other number of people in the community had loans with Olympic Mortgage, that in and of itself clearly isn't going to create a conflict because the loans were foreclosed upon or because there were money problems, things like that.

I guess what I think I'm hearing you say is you think that because Mr. Newell had loans with Olympic Mortgage and because those loans were ultimately resolved . . . that somehow you think the District Attorney's office is now motivated to protect Olympic Mortgage from whatever. That is so far from where we are in these proceedings that the connection is so tenuous. And I haven't heard anything that convinces the court that that is true. . . .

[¶] . . . [¶]

. . . I didn't hear anything from you as to what possible motivation the District Attorney's office would have had to prevent [petitioner] from testifying at the restitution hearing. . . . I'm looking at is there a sufficient basis to find that there's a conflict of interest in this case. And I don't find that there's a conflict of interest.

But even if you could tie in all those wispy strands . . . and find that there's some kind of an appearance of conflict, I don't see anything that would indicate or that would render it unlikely that [petitioner] could receive a fair trial. Number one, fair trials normally are handled by the jury. [Deputy District Attorney] Weston is not [District Attorney] Newell. He's the

one that's been handling this case. I just don't see that there would be any risk of him not receiving a fair trial on these proceedings.

. . . I can't imagine how the District Attorney's office would have orchestrated [petitioner's] arrest on April the 20th. I mean, that's something that happened. They weren't even aware of that. That's something that was completely outside the District Attorney's office. Sheriff's office responded. Sheriff's office made the arrest. Even if you look at Ms. Kaput's Declaration and question why or how Mr. Lyons with the AG's office or Mr. Gillespie with the victim witness office knew that he had been arrested, I don't know that even that would arise to enough of a concern that there's some way that there would be not a fair trial. . . .

(Pet., Exh. F, pp. 164-167.)

B. Relevant Law

Penal Code section 1424 provides in pertinent part as follows:

(a)(1) Notice of a motion to disqualify a district attorney from performing an authorized duty shall be served on the district attorney and the Attorney General at least 10 court days before the motion is heard. The notice of motion shall contain a statement of the facts setting forth the grounds for the claimed disqualification and the legal authorities relied upon by the moving party and shall be supported by affidavits of witnesses who are competent to testify to the facts set forth in the affidavit. The district attorney or the Attorney General, or both, may file affidavits in opposition to the motion and may appear at the hearing on the motion and may file with the court hearing the motion a written opinion on the disqualification issue. *The judge shall review the affidavits and determine whether or not an evidentiary hearing is necessary.* The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. . . .

(Pen. Code, § 1424, subd. (a)(1), italics added.) Pursuant to Penal Code section 1424, then, the trial judge reviews the affidavits provided by the parties, assuming they are from witnesses competent to testify to their

contents. After that review, the trial court determines whether an evidentiary hearing is necessary to settle any material factual disputes.

C. Analysis

The superior court reasonably concluded that no evidentiary hearing was necessary for its resolution of whether the evidence showed that a conflict of interest exists such that petitioner is unlikely to receive a fair trial. In support of his argument to the contrary, petitioner poses the following question:

[H]ow was [petitioner's] arrest known to anyone before he had even been processed by the Sheriff and why was the person in charge of witnesses for the restitution hearing [i.e., Probation Officer Gillespie] laughing and making jokes about [petitioner] at the lunchtime break? *How was it possible that these people even knew that [petitioner] had been arrested unless someone from the Nevada County District Attorneys [sic] Office had called them and informed them of [petitioner's] arrest?*

(Pet., p. 14.) Petitioner's rank speculation fails to provide a basis for an evidentiary hearing. First, even assuming that a phone call was made to inform Probation Officer Gillespie or some other person that petitioner had been arrested, it is not the logical conclusion that it was a representative of the District Attorney's Office who made the call. As the superior court noted, petitioner's arrest "was completely outside the District Attorney's office. Sheriff's office responded. Sheriff's office made the arrest." (Pet., Exh. F, p. 166.) Second, even assuming that such a phone call was made and that the person who placed the call was a representative of the District Attorney's Office, it does not logically follow that petitioner's arrest was orchestrated by the District Attorney's Office. As noted *ante* in Argument I, it is undisputed that petitioner was arrested on the current case on location just after the actual incident took place.

Petitioner further argues:

The behavior of the District Attorneys [*sic*] Office regarding the video camera is clear evidence of how the prosecution has acted with bias towards [petitioner], and more importantly, intends to continue prosecuting this case against [petitioner] with bias resulting from Mr. Newell's relationship with Olympic Mortgage. . . .

(Pet., p. 15.) In so arguing, petitioner fails to point to any material factual dispute that needed to be resolved at an evidentiary hearing. As noted *ante* in Argument I, the superior court has already held multiple evidentiary hearings with regard to the videotape evidence. And the fact that at one point District Attorney Newell had a financial relationship with Olympic Mortgage has never been in dispute.

Petitioner also suggests that an evidentiary hearing was necessary to answer the following questions: (1) why he was arrested; (2) why he was charged with two felonies; (3) why his complaints against Olympic Mortgage were not investigated; and (4) why District Attorney Newell did not recuse himself from any and all matters involving Olympic Mortgage. (See Pet., p. 15.) However, even assuming that these questions were relevant to the superior court's determination of petitioner's recusal motion, questions of such a nature (i.e., asking "why" something did or did not happen) are not factual in nature and are not the proper subject of an evidentiary hearing.

In short, the superior court acted well within its discretion in denying petitioner's request for an evidentiary hearing. Its decision should not be disturbed.

CONCLUSION

For the foregoing reasons, real party in interest respectfully requests that the petition for writ of mandate be denied.

Dated: September 12, 2011 Respectfully submitted,

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