IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

Gregory Pellerin, Petitioner

vs.

Superior Court for Nevada County, Respondent,

The People of the State of California, Real Party in Interest.

From the Superior Court for Nevada County,
The Honorable Candace S. Heidelberger

Court of Appeal Case No. C069031; Criminal Case No. F10-159

REPLY TO THE OPPOSITION OF THE PEOPLE OF THE STATE OF CALIFORNIA TO A PETITION FOR WRIT OF MANDAMUS AND/OR OTHER APPROPRIATE RELIEF

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II. **Reply Argument**

The People of the State of California, represented by the Attorney General of California (hereafter the "People"), have filed an opposition to the Petition for Mandamus ("Opposition") that is based upon both an incorrect statement of the law and an incorrect analysis of the facts. The same mistakes were made by the lower court and constitute a an abuse of discretion in denying the Petitioner's Motion to Recuse.

A. **The People Have Applied The Incorrect Legal Test**

1. **Either An Actual Or Apparent Conflict Will Suffice**

The People assert that the correct legal standard under PC §1424 is that the defendant must make a showing that an "actual" conflict of interest exists and that the "mere appearance" of a conflict is insufficient. See page 11-12 of the Opposition where the People cite to *People v. Conner* (1983) 34 Cal. 3d 141, 148, and to *People v. Lopez* (1984) 155 Cal. App. 3d 813, 823, for the legal assertion that "[t]he mere appearance of a conflict is insufficient to merit recusal."

This is an incorrect statement of the law. The correct statement of the law was presented by Petitioner in his Motion for Recusal. To meet the first test, the defendant may make a showing of either an actual conflict or the appearance of a conflict. In *People v. Cannedy* (2009) 176 Cal. App. 4th 1474, 1479-80, the Court of Appeal clearly affirmed this simple rule: "[a] conflict under 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.' See

also *People v. Lam Choi* (2000) 80 Cal. App. 4th 476, 480.

Indeed, the California Supreme Court, in *Haraguchi v. Superior Court* (2008) 43 Cal. 4th 707, 711-712, stated that: "[t]hus, the first half of the inquiry asks only whether a 'reasonable possibility' of less than impartial treatment exists." The *Haraguchi* ruling fully supports Petitioner's argument that there is no absolute requirement that a defendant prove that an actual conflict exits.[1]

2. Is It More Likely Than Not That The Defendant Will Be Treated Unfairly During Some Portion Of The Criminal Proceedings

The second error in the People's legal argument is that the Defendant must prove that "(2) the conflict would render a fair trial unlikely." See Opposition, page 11, next to last paragraph. This is not a correct statement of the law. The California Court of Appeal in *People v. Cannedy* at 1483 followed the recent ruling of the California Supreme Court in *Haraguchi* at 713, where the Supreme Court held that "the second half of the inquiry asks whether any such possibility is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings."

The People have based their argument squarely on the premise that the defendant must show that the conflict *would render a fair trial unlikely.* This is, for all practical purposes, an impossible standard of proof that no defendant is capable of meeting, is absurd on its face, and renders the statute meaningless. By the time a

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[1] The Supreme Court explained in *Haraguchi* at 717-18, "the two parts of the test are to some extent continuous rather than discrete, as many factors relevant to the overarching inquiry may be framed in terms of their effect on the existence of a conflict or its gravity."

defendant gets to a trial, the entire process could have been seriously impacted by a biased prosecution arising from a conflict of interest.

That is why, in stark contrast to the argument of the People, the California Supreme Court has enunciated a very different standard: i.e., can the defense show that *"it is more likely than not the defendant will be treated unfairly ...*" This is preponderance of the evidence standard, not a standard of absolute proof.

Even more importantly, the People have focused *entirely on the defendant proving that he will receive an unfair trial.* This completely ignores the California Supreme Court's ruling in *Haraguchi* that the focus is not limited solely to trials, but to any "portion of the criminal proceedings. *Id.* at 713.

B. The Petitioner Has Shown An Apparent, If Not Actual Conflict

The evidence produced by Petitioner is overwhelming as to the existence of a conflict. The People have tacitly admitted that Petitioner's evidence is true by failing to dispute a single factual allegation in the Motion to Recuse filed with the lower court by declaration or otherwise.

The Petitioner's factual evidence concerning the conflict includes the following:

1. DA Newell had millions of dollars in Loans with Olympic Mortgage during 2004 through 2009 (see Exhibit A, pg. 4 to the Petition for Mandamus in this case, C069031);

2. Petitioner was an Olympic borrower in 2005 and then Olympic sold his loan to Tom Hastert (now in prison for mortgage fraud).[2] Petitioner filed a complaint with the Grass Valley Police Department about Olympic in July 2007 and also discussed the matter directly with deputy DA Jim Philips

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[2] The loan was never fully funded as required by contract and state law, and all of the loan origination "points" on the full face amount of the loan were taken up front by Olympic, just like on the loans that Hastert was later convicted for making.

shortly thereafter. However, DA Newell never opened an investigation of Petitioner's Olympic complaint and never investigated Olympic's loan transaction with Petitioner. Olympic's loan to Petitioner was illegal in the same manner as his second loan from Hastert, which was investigated and was prosecuted by DA Newell. The only difference was that DA Newell had loans with Olympic and not with Hastert. (see Exhibit A, pg. 4-6 to the Petition for Mandamus in this case, C069031)

3. Olympic did not want the information about its illegal loan to the Petitioner to become public knowledge. This is the loan that DA Newell had refused to investigate and prosecute. (see Exhibit A, pg. 5, and Exhibit E to the Petition for Mandamus in this case, C069031)

4. Petitioner was scheduled to testify at the restitution proceedings concerning Tom Hastert on April 20, 2010, the date of Petitioner's arrest. Petitioner's arrest prevented him from testifying about the Olympic Mortgage loan that was sold to Tom Hastert and the losses that Petitioner suffered as a result of the wrongful actions by Olympic and Hastert. (see Exhibit A, pg. 5 to the Petition for Mandamus in this case, C069031)

5. Mr. Gillespie, who was responsible for witnesses testifying at the restitution hearing for Hastert was seen and heard laughing about Petitioner's arrest just after noon when Petitioner had not even been processed by the Sheriffs Department. (see Exhibit E to the Petition for Mandamus in this case, C069031). Mr. Gillespie could have only learned about the arrest from the DA's office.

The foregoing facts demonstrate that, at the time of the Petitioner's complaints to the Grass Valley Police Department and to the DA's office, DA Newell had millions of dollars of loans with Olympic Mortgage. This is as strong an "actual" conflict of interest as can exist, yet DA Newell refused to refer the investigation and possible prosecution of Petitioners Olympic loans to the Attorney Generals Office in the same manner as he eventually turned over the investigation and prosecution of the Thomas Hastert loans to the Attorney Generals office.

The People argue that the arrest of Petitioner was outside of the purview of the DA's office, and therefore, DA Newel's relationship with Olympic could not be relevant.

See Opposition, page 19, paragraph 2. This is wrong for two reasons: (a) the decision as to whether and with what crime(s) to charge Petitioner was entirely within the discretion of the DA who obviously did not want his Olympic loan "problem" to become public; and (b) it is quite possible that the decision to arrest Petitioner was made by the DA in consultation with the Sheriffs Department at the time of the incident, especially since we have eye witness testimony about Mr. Gillespie being informed about the arrest even before Petitioner was released. There is little doubt that the conflict of interest would provide ample motive for such conduct by the DA's office. ***The only way to learn the truth about these matters is to hold an evidentiary hearing.***

C. The Prosecution of The Case To Date Evidences That Petitioner Has Been Treated Unfairly In Violation Of PC §1424

The Supreme Court made it clear that a conflict of interest under PC §1424 goes beyond just the trial portion of any criminal proceeding and includes the entire handling of the case by the prosecution. See *Haraguchi*, supra. A review of the facts about the handling of this case to date by the DA's Office reveals that the Supreme Court's breadth of concern about unfair treatment during any stage of a criminal proceeding is justly warranted. In this case, there is an extensive history of unfair and oppressive tactics by the People that provide strong evidence that the conflict of interest on the part of the DA's office has already caused Petitioner serious harm in many respects. This history demonstrates beyond any doubt the clear "trajectory" of the prosecution in this case as it moves towards trial: the DA's office is going to continue its refusal to look at the evidence, continue to delay and obfuscate discovery, and is going to bulldog the case through a preliminary hearing to trial any way it can. Further, It provides solid

evidence that the conflict of interest has infected the entire DA's office. Here is a summary of the most glaring procedural wrongdoings to date:

1. The DA's office has never looked at the video evidence[3] that has been in its possession from the incident, including at the time of decision about whether and what charges to file against the Petitioner (see the Petition For Mandamus, pgs. 13-14, case C069016);

2. The DA's office deliberately turned over to the Defense only a small fraction of the video evidence (see the Petition For Mandamus, pgs. 16-17, case C069016);

3. The DA's office refused to comply with the informal discovery rules and produce a variety of types of evidence, not just the video evidence. This forced the Petitioner to file a Motion to Compel and a Motion for Sanctions that took over four months to resolve (see the Petition For Mandamus, pgs. 22-24, case C067033);

4. The DA's office conceded at the end of the evidentiary hearing (March 29-30, 2011) on the video evidence that it had never even looked at the video evidence (see the Petition For Mandamus, pg. 20, and Exhibit D, pgs. 165-176, case C069016);

5. The DA's office again admitted at the August 4, 2011, hearing regarding the Petitioner's Motion to Dismiss and the Motion to Recuse that it had still refused to look at the video evidence, but nonetheless wanted to set the case for an immediate preliminary hearing.

From the foregoing record, it is obvious that the DA's office is going to continue to make every effort to deny Petitioner a fair judicial process. Why is the DA's Office doing this? The answer is simple: The DA's office is beholden to Olympic Mortgage and is trying to "bury" the Petitioner so that the real facts about the Newell-Olympic relationship do not receive any more publicity and that Olympic Mortgage is never investigated and/or prosecuted for the fraudulent loan to the Pellerins or to any of the many others that filed a complaint against Olympic.

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[3] This is evidence that the Defense has repeatedly told the DA is exculpatory.

D. The People's Argument That Vindictive Prosecution, Prosecutorial Misconduct In Discovery, And Multiple Violations Of The Brady Rule Are Not The Basis For Recusal Under PC 1424 Is Absurd On Its Face

The People next ague in their Opposition at pages 13-16 that the Petitioner's "proffered reasons" for recusal amount to nothing more than accusations of "vindictive/selective prosecution", "prosecutorial misconduct" and *Brady* violations[4], and therefore, cannot serve as the basis for a motion to recuse. This is the epitome of legal absurdity. The language of the Supreme Court in *Haraguchi*, *supra*, makes it clear that any prosecutorial wrongdoing anywhere in the course of a criminal proceeding that is the result of a conflict of interest is what PC §1424 was designed to prevent, and therefore, is grounds for recusal. If vindictive prosecution, prosecutorial misconduct, and *Brady* violations are not tantamount to "wrongdoing" as conceived by the Supreme Court, then what type of misconduct could ever serve as the basis for recusal?

Furthermore, the Supreme Court in *Haraguchi* stated that the question for recusal was a prospective one: i.e., *whether the conflict would make it more likely than not that the defendant will be treated unfairly during some portion of the proceedings*. Here, the Petitioner has already shown extensive discriminatory and unfair treatment by the prosecution: i.e., not that it might happen, ***but that it has been happening***.

To reiterate, the People have not attempted to dispute any of Petitioner's extensive factual allegations extending well over a year of criminal proceedings. The People just take the attitude that what has happened in this case is the "norm" and as the lower court ruled, are nothing more than "wispy strands of groundless accusation".

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[4] *Brady v. Maryland* (1963) 373 US 83.

E. There Is A Real Need For An Evidentiary Hearing and The Court's Denial Was A Clear Abuse Of Discretion

The lower court based its decision to deny the Petitioner's request upon the finding that there was no apparent or actual conflict of interest and that there is nothing in the record made by petitioner that "indicates the defendant would not receive a fair trial ...". Opposition, page 17, paragraph 1. The lower court further stated that "I don't see anything that would indicate or would render it unlikely that [petitioner] could receive a fair trial. Number one, fair trials are handled by the jury." Ibid.

This ruling is in direct conflict with the rule laid down by the California Supreme Court in *Haraguchi* and followed by the Court of Appeals in cases like *People v. Cannedy*, *supra*. The trial court is relying entirely upon the jury to bring about the result of a "fair trial" and is completely discounting the role of the prosecution in the entire trial process. That is not the law and it is a very dangerous proposition. The role of the prosecution in bringing about a fair jury trial goes without question. All kinds of prosecutorial misconduct can lead to wrongful suppression of evidence, false testimony, and other problems with what the jury is given to deliberate upon.

Moreover, the lower court has completely ignored that PC §1424 apples to all of the criminal proceeding, not just the trial. Yes, the trial is generally the most important part. However, a conflict of interest that leads to the wrongful charging of crimes, failure to abide by the informal discovery rules (PC §§1054 et seq.), *Brady* violations, evidence tampering, and the failure to even look at the evidence must be the basis for a recusal.

F. **The Entire DA's Office Should Be Recused**

Yes, the law is clear that the recusal of the entire DA's office requires an elevated

showing of the conflict of interest and the possibility of unfairness in the criminal prosecution process. See *People v. Gamache* (2010) 48 Cal. 4th 347 as cited by the People. But Petitioner has already more than made just such a showing to recuse the entire DA's office. If he is granted an evidentiary hearing, Petitioner believes that he can add substantially to the body of evidence supporting recusal of the entire DA Office.

First, recall that Petitioner reported the problem with his Olympic Loan both to the police and directly to DDA Jim Philips in July 2007 (Mr. Philips is still a DDA). See Exhibit A, pg. 40, to the Petition for Mandamus in this case, C069031. He then sent a letter to the California Bureau of Investigation specifically stating that he was concerned about the conflict of interest with DA Newell. Ibid. He followed up with another visit to the police in October 2007 and inquired about the investigation. He was informed that a report about the Olympic Loan had been sent to the DA. Ibid. Why wasn't his complaint referred to the Attorney Generals Office for Investigation by DA Newell, who clearly had to recuse himself and his office at that time?

During the course of the prosecution of this present case, first, DDA Katherine Francis handled the case, but after a motion to recuse was filed by the Defense in June 2010, DDA Gregory Weston took over the prosecution. Thus far, DA Newell, and DDA's Philips. Francis, and Weston have all been involved in the prosecution of a case that should have been referred out to the Attorney Generals Office from the outset.

In addition to the fact that Newell, the head of the DA's office is the prime source of the conflict, at least three of his deputy DA's have also been involved in the matter. When combined with the overwhelming evidence showing the pattern of unfair prosecution of this case since its inception, it becomes clear that the entire DA's office is

tainted or afraid. If the conflict of interest and the history of prosecutorial misbehavior could have been resolved by a simple transfer to another DDA, then the problem would already have been cured. But it is clear that nobody in the DA's office wants to "deal" with Newell's multi-million dollar loan conflict with Olympic other than by doing everything possible to railroad the Petitioner to jail.

III. Conclusion

The Opposition fails to argue the correct legal standard for recusal as established by the California Supreme Court in *Haraguchi v. Superior Court*. First, the Opposition mistakenly argues that only "actual" and not "apparent" conflict must be demonstrated. Second, the People argue that the defendant must prove that an actual conflict "would render a fair trial unlikely." Again, this is not the rule laid down by the Supreme Court. The rule in *Haraguchi* is simple: "the first half of the inquiry asks only whether a "reasonable possibility" of less than impartial treatment exists, while the second half of the inquiry asks whether any such possibility is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings." The People's Opposition, being based entirely upon incorrect law, is completely misplaced and has no merit.

The Petitioner has provided more than sufficient evidence that there was an apparent and actual conflict on the part of the DA's Office. Tainted by his millions in loans with Olympic, DA Newell should have referred all investigations and reports about Olympic loans to the Attorney General, but he did not.

Petitioner has overwhelmingly demonstrated a grossly unfair and biased course of prosecution in his case as a result of the gross conflict of interest on the part of DA

Newell, which in turn, has influenced his entire office. From the charging of two felonies (with strikes) for the mere citizen's arrest of a trespasser and batterer by Petitioner, to the deliberate tampering with the evidence, to the refusal to turn over the evidence, and then the complete refusal of the DA's office to even look at the video evidence after over a year of prosecution, there can be no doubt that, in the words of the California Supreme Court in *Haraguchi*, "the defendant ... [has already been] treated unfairly during some portion of the criminal proceedings." Accordingly, the Petitioner's Motion to Recuse Should be granted.

The Petitioner would like to remind the Court that the prosecution of this case has been exhausting to Petitioner as a result of the DA's office wrongdoing. However, If this Court still thinks that additional evidence is still necessary to gather further evidence to decide the motion, then Petitioner's request for an evidentiary hearing should be granted. If this is the decision of the Court, Petitioner thinks the Court should make it clear that Petitioner must be allowed all reasonable discovery necessary to ascertain the truth.

Respectfully Submitted,

September 22, 2011

Patrick H. Dwyer,
Attorney for Petitioner

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections II through III) is approximately 3,402.

Patrick H. Dwyer,
Attorney for Petitioner

Date: September 22, 2011

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Reply to the Opposition of The People of the State of California to Defendant's Petition for a Writ of Mandamus And/Or Other Extraordinary Relief Regarding the Superior Court's Denial of the Defendant's Motion to Recuse in the matter of People v. Pellerin, Case No. F10-159 was served by personal service upon the following:

1. Nevada County District Attorney, 110 Union Street, Nevada City, CA 95959;
2. The Superior Court for the County of Nevada, Department 1, The Honorable Candace S. Heidleberger, 201 Church Street, Nevada City, California 95959;
3. The Attorney General For the State of California, 1300 I Street, Sacramento, CA 95814; and
4. The Court of Appeal, Third Appellate District, 621 Capitol Mall, 10th Floor, Sacramento, California 95814.

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Signature

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Print Name

Date: September __, 2011