ATTORNEY GENERAL-OFFICE COPY

XAVIER BECERRA
Attorney General of California
LANCE E. WINTERS
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
JOYCE BLAIR
Supervising Deputy Attorney General
SHARON E. LOUGHNER
Deputy Attorney General
State Bar No. 197598
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 510-3819
Fax: (415) 703-1234
E-mail: Sharon.Loughner@doj.ca.gov
*Appearing Pursuant to Penal Code section 1424*

(ENDORSED)
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BY P. Soto DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>Plaintiff,<br>**v.**<br>**CHRISTOPHER SCHUMB, ET AL,**<br>Defendant. | Case No. C2010724<br>**ATTORNEY GENERAL'S OPINION IN OPPOSITION TO MOTION TO RECUSE THE DISTRICT ATTORNEY'S OFFICE**<br>Date: September 17, 2020<br>Time: 9:00 a.m.<br>Dept: 41<br>Judge: Eric S Geffon |

## INTRODUCTION

Defendant Christopher Schumb and three co-defendants were indicted for conspiring with employees of an international security company to offer a $90,000 bride to influence the Santa Clara County Sheriff to issue hard-to-get concealed firearms permits for the company's executive protection agents. Defendant contends that the entire Santa Clara County District Attorney's Office should be recused because (1) District Attorney Jeff Rosen and Chief Assistant District Attorney Jay Boyarsky might testify at trial if the defense calls them as character witnesses, and (2) the case appears to have been filed against defendant in retaliation for his role in an unrelated

dispute between the District Attorney and Santa Clara County Sheriff about jail telephone calls. (Def. Mot. at p. 1)

There is no basis for recusal. First, defendant relies on the incorrect legal standard, claiming that he only has to show the "appearance" of a conflict, when the statute requires him to show an actual conflict. Second, it is well established that a district attorney employee can be a witness in a case prosecuted by the same office. Third, defendant bases his claim of retaliatory prosecution entirely on speculation, and speculation alone cannot form the basis for recusal. Lastly, defendant has no right to an evidentiary hearing under the recusal statute; he has failed to meet his burden of affirmatively presenting evidence of an actual conflict and the recusal statute prohibits him from using an evidentiary hearing to search for a conflict. As a result, defendant's motion must be denied.

**PROCEDURAL HISTORY / STATEMENT OF FACTS**

On August 6, 2020, defendant Christopher Schumb was indicted for conspiring with employees of international security company AS Solution to offer a $90,000 bribe to influence the Santa Clara County Sheriff to issue hard-to-get concealed firearms permits (CCW licenses) for the company's executive protection agents. Santa Clara County Sheriff's Captain James Jensen, attorney Harpaul Nahal, and firearms parts manufacturer Michael Nichols were also indicted in the conspiracy. (See Grand Jury Indictment attached to Def. Mot.)

The conspiracy began in early May 2018 when Defendant Nichols initiated a lunchtime meeting for the two security executives to discuss CCW licenses and potential donations with Defendants Schumb and Nahal. Defendant Schumb then referred them to Defendant Jensen, who had great influence over the issuance and renewals of CCW licenses at the Sheriff's Office. (*Ibid.*)

By the end of May, the conspirators had reached an agreement that AS Solution would donate $90,000 to some then-unnamed organization to get 10 to 12 CCW licenses for its agents. After submitting 7 CCW license applications to Defendant Jensen later that summer, AS Solution manager Martin Nielsen donated the first half ($45,000) of the promised amount to the Santa Clara County Public Safety Alliance ("PSA"), an independent expenditure committee supporting

Santa Clara County Sheriff Laurie Smith, who was in the midst of a runoff race for reelection. (*Ibid.*)

On December 13, 2018, District Attorney Jeff Rosen received an emailed tip from a local newspaper publisher that an "Executive Protection Specialist" had made an unusually large donation in October 2018 to PSA. DA Rosen forwarded the information to Public Integrity Unit Deputy District Attorney John Chase who determined that an investigation was warranted. (See separately filed Declaration of DDA John Chase at ¶ 4.)

At the outset of the investigation, DDA Chase knew that defendant was the treasurer of the PSA. In April 2019, DDA Chase learned from phone records that Mr. Nielsen conducted phone calls with defendant on the day before, and the day of, the $45,000 donation. However, DDA Chase had no evidence or information about defendant's involvement in Mr. Nielsen's quest for CCW licenses until July 21, 2019, when Mr. Nielsen was first interviewed and revealed defendant's role in the conspiracy to obtain CCW licenses through bribery. (DDA Chase Decl. at ¶ 10.)

Many months later, after several CCW licenses had been issued to AS Solution employees, plans for the second $45,000 donation were interrupted when investigators from the District Attorney's Office served a search warrant on Mr. Nielsen. (See Grand Jury Indictment attached to Def. Mot.)

Prior to this prosecution, DA Jeff Rosen developed a political relationship with defendant. DA Rosen first met defendant in 2011 after being elected. Defendant became a political supporter, helped raise money for DA Rosen's subsequent re-election campaigns, and provided DA Rosen with political advice. Defendant's introductions to his associates and fundraising assistance helped DA Rosen raise approximately 2% of the total amount of money he has raised running for District Attorney from 2009 to the present. Defendant was never DA Rosen's attorney, and DA Rosen never retained defendant's legal services. (See separately filed Declaration of District Attorney Jeff Rosen at ¶¶ 1-3.)

## ARGUMENT

### I. DEFENDANT HAS THE BURDEN OF DEMONSTRATING A SERIOUSLY GRAVE CONFLICT SHOWING AN ACTUAL LIKELIHOOD OF UNFAIR TREATMENT

Penal Code section 1424 provides that a motion to recuse a district attorney "shall not be granted unless it is shown by the evidence that a conflict of interest exists such as would render it unlikely that the defendant would receive a fair trial." "Section 1424 was enacted in 1980 'in response to the substantial increase in the number of unnecessary prosecutorial recusals under the 'appearance of conflict' standard set forth in [*People v. Superior Court* (*Greer*) (1977) 19 Cal.3d 255].' [Citation.]" (*People v. Petrisca* (2006) 138 Cal.App.4th 189, 194.)

A defendant has the burden to prove two elements in order to justify recusal under Penal Code section 1424. (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711.) First, a defendant must show a conflict of interest. (*Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833.) A conflict only exists where "'the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner.' [Citation.]" (*Ibid.*) Second, the defendant must show that any such conflict is "so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings." (*Ibid.*) In other words, "there must be '*an actual likelihood of unfair treatment.*'" (*People v. Cannedy, supra*, 176 Cal. App. 4th 1474, citing *Haraguchi, supra*, 43 Cal. 4th at p. 719 [emphasis added].)

The party seeking recusal bears the burden of proof. (*People v. Hamilton* (1988) 46 Cal.3d 123, 140; *Love v. Superior Court* (1980) 111 Cal.App.3d 367, 372.) Placing the burden on the party seeking recusal is consistent with the presumption that a district attorney "has performed [his or her] official duty properly." (*People v. Superior Court* (*Martin*) (1979) 98 Cal.App.3d 515, 521.) In order to satisfy defendant's burden of proof he must present "*evidence of overriding bias.*" (*People v. Millwee* (1998) 18 Cal.4th 96, 123.)

Defendant's burden is especially high where, as here, he seeks recusal of an entire district attorney's office. California courts have emphasized that "[d]isqualification of an entire prosecutorial office from a case is disfavored." (*People v. Petrisca, supra*, 138 Cal.App.4th at p.

195; *People v. Hernandez* (1991) 235 Cal.App.3d 674, 679-680.) This principle has been stated in a number of ways: "Recusal of an entire district attorney's office is an extreme step. The threshold necessary for recusing an entire office is higher than that for an individual prosecutor." (*People v. Cannedy, supra,* 176 Cal. App. 4th 1474, 1481.) "The showing must be especially persuasive when the defendant seeks to recuse an entire prosecutorial office. . . ." (*People v. Hamilton* (1988) 46 Cal.3d at 123,139; *People v. Alcocer* (1991) 230 Cal.App.3d 406, 414.) "Recusal of an entire District Attorney's Office is not a step to be taken lightly. . . ." (*People v. McPartland* (1988) 198 Cal.App.3d 569, 574.) "Particular caution should be exercised when the request is that an entire prosecutorial office be recused." (*Kain v. Municipal Court* (1982) 130 Cal.App.3d 499, 504.) "[T]here are instances in which recusal of an entire prosecutor's office is justified in order to protect the integrity of the judicial process. *But such cases are rare.*" (*Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 120, superseded by Pen. Code, § 1424 on other grounds (emphasis added); *People v. Petrisca, supra,* 138 Cal.App. 4th at p. 195.)

The judicial reluctance to recuse entire district attorneys' offices reflects the law's disdain for outcomes where "'the district attorney is prevented from carrying out the statutory duties of his elected office and, perhaps even more significantly, the residents of the county are deprived of the services of their [locally] elected representative in the prosecution of crime in the county.' [Citation.]" (*People v. Eubanks* (1996) 14 Cal.4th 580, 594, fn. 6.) Motions to disqualify are also disfavored because they are often used as just another trial tactic, brought to delay, shop for a perceived less aggressive prosecutor, or to unfairly tarnish the name and reputation of an adversary. As one federal court has warned:

> [T]he attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to parties.
>
> (*J.P. Foley & Co. v. Vanderbilt* (2d Cir. 1975) 523 F.2d 1357, 1360; City of Santa Barbara v. Superior Court (2004) 122 Cal.App.4th 17, 23 ["[m]otions to disqualify counsel are especially prone to tactical abuse"].)

## II. DEFENDANT HAS NOT MET HIS BURDEN OF DEMONSTRATING A SERIOUSLY GRAVE CONFLICT

Defendant fails to meet his burden of proving with admissible evidence that the entire Santa Clara County District Attorney's Office must be recused from this case. First, defendant relies on the incorrect legal standard, claiming that he only has to show the "appearance" of a conflict. Second, defendant has not presented evidence to support his claim that if DA Jeff Rosen and Chief Assistant DA Jay Boyarsky testify as defense witnesses at trial, recusal is required. Third, defendant bases his claim of retaliatory prosecution entirely on speculation, and speculation alone cannot form the basis for recusal. The motion should be denied.

### A. Defendant Relies on the Incorrect Legal Standard of "Appearance" of a Conflict

Defendant alleges recusal is necessary because it "appears" that a conflict may exist in this case. (Def. Mot. at p. 8.) Defendant is incorrect. Defendant has the burden of proving an actual conflict, not merely the appearance of a conflict.

A conflict requiring recusal must be "real, not merely apparent," and disqualification is not permitted under Penal Code section 1424 "merely because the district attorney's further participation in the prosecution would be unseemly, would appear improper, or would tent to reduce public confidence in the impartiality and integrity of the criminal justice system." (*People v. Eubanks, supra*, 14 Cal.4th at p. 591; *Haraguchi v. Superior Court, supra*, 43 Cal.4th at p. 719; *People v. Millwee, supra*, 18 Cal.4th at pp. 122-124; see e.g., *People v. Cannedy* (2009) 176 Cal.App.4th 1474, 1485 [reversing an office-wide grant of recusal where, "[p]rior to ruling on the motion, the [trial] court expressed, in essence, that it would be cleaner if the Attorney General, rather than the district attorney, prosecuted the case"]; *People v. McPartland* (1988) 198 Cal.App.3d 569, 574 ["recusal cannot be warranted solely by how a case may appear to the public"].) "Thus, failing 'the smell test' is not enough to deny parties representation by the attorney of their choice," (*Smith, Smith & King v. Superior Court* (*Oliver*) (1966) 60 Cal.App.4th 573, 582), and even the appearance of an impropriety which "would be highly destructive of public trust" is, standing alone, "no longer a ground for recusal of the district attorney" (*People v.*

*Eubanks*, *supra*, 14 Cal.4th at p. 593).

Penal Code section 1424 prohibits recusal "solely on the ground of the appearance of impropriety" (*People v. Jenan* (2006) 140 Cal.App.4th 782, 791-792), and it is well settled that "neither a district attorney nor an entire district attorney's office could be recused for a mere appearance of impartiality, but could only be recused when there existed an actual likelihood of unfair treatment" (*Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th at p. 104).

This Court must focus on the legal recusal standard - - whether defendant has come forward with competent evidence demonstrating an actual likelihood he will not receive a fair trial if he is prosecuted by the Santa Clara County District Attorney - - and not on how proceeding with the current prosecutor may appear to the public. "There is simply no basis, in Penal Code section 1424 or case law, to infer that the "appearance of a conflict" standard has any application in a criminal matter." (*Spaccia v. Superior Court*, *supra*, 209 Cal.App.4th at p. 753.)

**B. Defendant Fails to Meet His Burden of Proving that Recusal Is Warranted If DA Rosen and Chief Assistant DA Boyarsky Testify for the Defense at Trial.**

Defendant alleges that his motion to recuse should be granted because DA Jeff Rosen and Chief Assistant DA Jay Boyarsky might be called by the defense at trial to testify about defendant's good character. (Def. Mot. at p. 7.) The law is to the contrary.

The fact that district attorney staff members, prosecutors or investigators might testify does not necessitate recusal. The general rule is that "a district attorney's office should not be recused from a case merely because one or more of its attorneys will be called as witnesses for the defense." (*People v. Superior Court (Hollenbeck)* (1978) 84 Cal.App.3d 491, 500-501.) Contrary to defendant's assertion, it is well-established that when a district attorney employee is a witness at trial, recusal in unnecessary. (*People v. Merritt*, *supra*, 19 Cal.App.4th 1573, 1581.)

This rule has been applied even where one or more deputy district attorneys were witnesses at trial. The mere fact that an employee of the district attorney's office may be a potential witness, and the credibility of that witness may have to be argued by the prosecuting attorney, does not create a sufficient basis to recuse an entire prosecutorial office. (*People v. Cannedy*, *supra*, 176 Cal.App.4th at p. 1478, disapproving *People v. Jenan* (2006) 140 Cal.App.4th 782.)

"Merely because an employee may be a potential witness and credibility of that witness may have to be argued by the prosecuting attorney, there is no sufficient basis for that reason alone to recuse an entire prosecutorial office." (*Id.* at p. 158.)

Defendant speculates that his allegedly "personal and legal relationship" with DA Rosen constitutes a recusable conflict due to "Rosen and Boyarsky's roles as trial witnesses." (Def. Mot at p. 8) He argues that various email exchanges with DA Rosen (that also included numerous other individuals) regarding meetings with donors and fundraising activities support this claim about the nature of their relationship. To the contrary, the emails demonstrate that defendant and DA Rosen had nothing more than a political relationship.

DA Rosen met defendant in 2011 after being elected. Defendant became a political supporter, helped raise money for DA Rosen's subsequent re-election campaigns, and provided DA Rosen with political advice. Defendant's introductions to his associates and fundraising assistance helped DA Rosen raise only approximately 2% of the total amount of money he has raised running for District Attorney from 2009 to the present. Defendant was never DA Rosen's attorney, and DA Rosen never retained defendant's legal services.[1] (See DA Rosen Decl. at ¶¶ 1-3.)

Defendant posits numerous possible scenarios that might occur if the defense calls DA Rosen and Chief Assistant DA Boyarsky as defense character witnesses at trial. (Def. Mot. at p. 8, fn. 5.) His entire claim is based on speculation about what could happen and "[s]heer speculation does not constitute sufficient evidence of potential bias to recuse an entire prosecutorial office from a case." (*People v. Hernandez* (1991) 235 Cal.App.3d 674, 680.) Indeed, the legal presumption is that the District Attorney will properly perform his official duties (Evid. Code, § 664) and defendant fails to present any evidence to the contrary. For example, defendant has presented no evidence that DDA Chase, who investigated and prosecuted this case, has treated or will treat defendant differently. Moreover, there is no guarantee that the trial court will allow DA

[1] Defendant's claim that DA Rosen's prosecution of him violates the Santa Clara County District Attorney's internal policy prohibiting the prosecution of "friends" hinges on the erroneous assumption that the two are actually "friends." As shown above, there relationship was political in nature. Moreover, defendant cites no authority to support his assertion that a violation of the District Attorney's internal policy constitutes a recusable conflict.

Rosen and/or Chief Deputy Boyarsky to testify. The claim is based on assumptions about events that may or may not occur in the future.

In fact, defendant offers no evidence that DDA Chase has been influenced by DA Rosen's alleged interest in the case. Influence on a continuing prosecution is a major factor courts consider when determining whether to recuse a district attorney or her office. (See *Packer v. Superior Court*, *supra*, 60 Cal.4th at pp. 699, 709-711.) In *Packer*, recusal was not required where the prosecutor's children socialized with the defendant and may have been called by the defense to testify. Similarly, recusal in not required where DA Rosen has nothing more than a political relationship with defendant, Chief Assistant DA Boyarsky has a political/social relationship with defendant[2], and the possibility of either testifying for the defense is completely speculative.

Here, there is no evidence DDA Chase has treated or will treat defendant differently than he treats other defendants merely because of DA Rosen's alleged interest. In every case, there is a presumption that the prosecutor has "properly and conscientiously discharge[d] his duties" and that "he has performed official duty properly." (Evid. Code 664; *People v. Superior Court (Martin)* (1979) 98 Cal.App.3d 515, 521. This presumption of propriety extends to DA Rosen as well as DDA Chase and serves to highlight the complete lack of evidence to the contrary.

### C. Defendant Fails to Meet his Burden of Proving that a Recusable Conflict Exists Due to his Political Relationship with DA Rosen

Defendant claims that DA Rosen initiated this "vindictive prosecution" in "retaliation" for defendant's failure to assist DA Rosen in a dispute with Santa Clara County Sheriff Laurie Smith regarding jail phone calls. (Def. Mot. at pp. 9-10.) Defendant provides no evidence to support this claim and instead offers unsubstantiated speculation. Even assuming defendant produced some evidence of animus (which he has not), differences of opinion or feelings of personal antagonism toward a defendant generally do not establish a reasonable basis for recusal of a prosecutor. To warrant recusal, the personal feelings of the prosecutor must be so intense and personal that they present a real danger that his impartiality will be impaired and he will be

[2] Chief Assistant DA Jay Boyarsky attended a few social events (a football game and a couples' dinner) with defendant.

unable to perform his duties effectively in an objective fashion.

In *People v. Battin*, supra, 77 Cal.App.3d at 668, 672, the appellate court upheld the denial of a recusal motion based on the alleged personal animosity between the district attorney and the defendant. The court conceded there was a "certain amount of friction" between District Attorney Hicks and Supervisor Battin, but nonetheless stated the issue was whether the friction "brought about defendant's prosecution." (*Id.* at p. 668.) The appellate court found substantial evidence in the record to support the trial court's conclusion that it had not.

In *People v. Millwee*, supra, 18 Cal.4th at page 122, a capital case, the prosecutor (Lough) was alleged to strongly dislike the defendant because years before, the prosecutor obtained his conviction, which was later overturned on appeal. The defendant argued the bias "could be inferred from the fact that special circumstances were not alleged in this case until after Lough became involved, and that defendant purportedly overheard Lough state at the preliminary hearing that there was insufficient evidence to support such allegations." The trial court held a hearing at which Lough and the defendant testified, and concluded there was nothing in Lough's contact with and familiarity with the defendant that caused the disdain or resentment alleged by the defendant, there was sufficient evidence to support the special circumstance allegations, and there was no evidence Lough believed the contrary was true, or that Lough was motivated by a "secret grudge" against the defendant. (*Id.* at pp. 122-123.) "Other evidence of overriding bias must be present to warrant disqualification." (*People v. Millwee*, *supra*, 18 Cal.4th at pp. 113-114.)

Here, defendant alleges that this case is the product of "retaliatory conduct" and "vindictiveness" on the part of DA Rosen who is supposedly upset that Schumb failed to resolve his longstanding disagreement with Sheriff Smith about jail phone calls. (Def. Mot. p. 10.) Defendant offers nothing but speculation to support his claim. It "*appears* that Rosen is now using the power of his office to harm both the Sheriff and Schumb." (Def. Mot. at p. 10.) Rosen "*appears* to have an emotional stake in this prosecution." (*Ibid.*) Defendant offers no evidence that "friction" between DA Rosen and defendant regarding defendant's involvement in the jail call conflict "brought about defendant's prosecution." (*People v. Battin*, *supra*, 77 Cal.App.3d at

668.)

Here, defendant merely speculates that this criminal case is retaliatory, and "[s]heer speculation does not constitute sufficient evidence of potential bias to recuse an entire prosecutorial office from a case." (*People v. Hernandez*, *supra*, 235 Cal.App.3d 674, 680.) Rather, the legal presumption is that the District Attorney properly performed his official duties when investigating and prosecuting this case (Evid. Code, § 664), and defendant fails to present evidence to the contrary.

The only evidence before this Court is that the investigation started with a tip from a newspaper publisher to DDA Rosen on December 13, 2018. Mr. Rosen frequently relayed such tips to DDA Chase. (See DDA Chase Decl. at ¶ 4.) At no time, did DA Rosen or Chief Assistant DA Boyarsky direct, or even suggest, that the investigation focus on a particular individual. Nor did they ever direct, or suggest, that attention turn away from any individual. The assigned prosecutor, DDA Chase, and his investigative team followed the evidence where it led without any influence or pressure from anyone in the District Attorney's Office. (See DDA Chase Decl. at ¶ 8.) In fact, the District Attorney's Office had no evidence or information about defendant's involvement in the conspiracy until seven months after the investigation started when Martin Nielsen was first interviewed on July 21, 2019. DDA Chase reported the results of that interview to DA Rosen that same afternoon, including the information about defendant's involvement in the conspiracy. (See DDA Chase Decl. at ¶ 8.)

DA Rosen and defendant did have a relationship prior to defendant's prosecution in this case, however, contrary to defendant's assertions, that relationship was based on defendant providing DA Rosen with political advice and assistance. To justify recusal, the relationship must be so intense and so personal that it constitutes a debilitating conflict; a casual friendship, social acquaintance or political relationship will not suffice. In this case, since 2011, defendant has been a political supporter of DA Rosen who helped raise money for re-election campaigns, and provided political advice. Defendant's fundraising efforts resulted in contributions that totaled only 2% of the total amount of money DA Rosen has raised from 2009 to the present. Defendant was never DA Rosen's attorney, and DA Rosen never retained defendant's legal services. (See

DA Rosen Decl. at ¶¶ 1-3.)

It is defendant's burden under recusal law to offer evidence through sworn declarations that his relationship with DA Rosen has resulted in a likelihood of unfair treatment in this case. Defendant fails to meet that burden. His claim is based purely on speculation. (See Def. Mot. at p. 10 [Rosen "appears to have an emotional stake in this prosecution;" it "appears that Rosen is now using the power of his office to harm [defendant];" "Public perception . . . demands the entire District Attorney's Office be disqualified."].) It is well established that "section 1424 does not authorize disqualification merely because the defense has shown that the prosecutor's involvement 'would be unseemly, would appear improper, or would tend to reduce public confidence in the impartiality and integrity of the criminal justice system.'" *Packer v. Superior Court* (2014) 60 Cal.4th 695, 710; see also *People v. Gamache* (2010) 48 Cal.4th 347, 363 ["the possibility that a prosecutor might be influenced does not alone establish the requisite likelihood or probability that a defendant will be treated unfairly"].)

Furthermore, in addition to being speculative, defendant's claims are also unsupported by evidence that demonstrates the type of close, personal relationship that creates a recusable conflict. For example, in *People v. Vasquez* (2006) 39 Cal.4th 47, the California Supreme Court found that longtime employees of the district attorney's office who were the mother and stepfather of the defendant created a conflict of interest. The *Vasquez* court further found that recusal was necessary because of the resulting likelihood of unfair treatment as *the prosecuting attorney admitted that the relationship influenced her treatment of the case*. "Where the record on the recusal motion indicates that the conduct of any deputy district attorney assigned to the case, or of the office as a whole, would likely be influenced by the *personal* interest of the district attorney or an employee, the motion is properly granted." (*Id.* at p. 57, emphasis added.)

Here, even assuming that a conflict of interest exists, defendant fails to provide evidence upon which this Court could conclude that there exists a likelihood of unfair treatment. Defendant does not produce any evidence that his political relationship with DA Rosen is likely to influence DDA Chase who is prosecuting the case. In addition, defendant does not produce any evidence that he has been treated differently than the other defendants in this case. Furthermore, unlike the

prosecutor in *Vasquez* who admitted that the relationship between the defendant and the district attorney employees influenced her treatment of the case, here defendant has produced no similar evidence of disparate treatment. The only evidence before this Court is the sworn declaration of DDA Chase demonstrating a typical prosecution, driven by evidence discovered during a standard investigation. (DDA Chase Decl. at ¶ 8.) Finally, contrary to *Vasquez*, defendant cannot point to a personal interest on the part of DA Rosen; the only evidence before this Court demonstrates a professional relationship based on political advisement and assistance. (See DA Rosen Decl.)

Defendant has not met his burden of proving the existence of "an *actual likelihood* of unfair treatment." (*Spaccia v. Superior Court, supra*, 209 Cal.App.4th at p. 104). He simply speculates about an unproven retaliatory motivation for this prosecution. Therefore, the motion to recuse should be denied.

## III. DEFENDANT IS NOT ENTITLED TO AN EVIDENTIARY HEARING

Defendant is not entitled to an evidentiary hearing under the recusal statute. (Pen. Code, § 1424.) In 1998, the Legislature amended Penal Code section 1424, imposing a mandatory duty upon defendants to support recusal motions with competent affidavits and also imposing a similar requirement on trial courts to review those affidavits and then to decide whether or not an evidentiary hearing is "necessary." The intent of Legislature was to reduce the number of unnecessary evidentiary hearings in recusal cases. When Assemblyman Cunneen offered his amendment to § 1424, the Bill Analysis for the State Senate Committee on Public Safety noted:

> Motions to recuse a district attorney's office are rarely granted. Unfortunately, they are being filed with greater frequency. . . . Recusal motions are being filed without any declarations under oath, based simply on unverified assertions by the defendant's lawyers. These attorneys rely on the fact that the statute, in its present form, does not specifically require the filing of a declaration. Deep-pocketed defendants are using recusal motions to unfairly force pre-trial evidentiary hearings where they conduct lengthy fishing expeditions at the expense of the crime victims and the prosecutors who are often forced to testify under oath for several hours.
>
> AB 154 would limit these abuses by adopting some commonsense procedural rules that are consistent with motion practice in general. Specifically, the bill would require . . . the motion to be supported by affidavits of witnesses competent to testify to the facts as set forth in the affidavits. . . . *Lastly, the measure would provide that no hearing would occur unless there are disputed issues of fact that could not be resolved through the use of affidavits.*

(AB 154 (1999) Bill Analysis, *http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_0151-*

0200/ab_154_cfa_19990713_1634 (emphasis added).)

In *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572, the court of appeal outlined the factors to guide a trial court's discretion in determining whether to permit testimony at a recusal hearing. Justice Chin, then writing for the court of appeal, stated:

> An evidentiary hearing should be held only when the court cannot with confidence decide the issue on the written submissions. Such instances should be rare, as when an important evidentiary gap in the written record must be filled, or a critical question of credibility can be resolved only through live testimony. [Citation.] Of course, whether to conduct an evidentiary hearing is a matter left to the discretion of the trial court.

(*Id.* at p. 583, fn. 5.)

The trial court's decision whether to hold an evidentiary hearing on a recusal motion is reviewed on appeal using an abuse of discretion standard. (*Spaccia v. Superior Court* (2012) 209 Cal.App.4th 93, 109.) In order to meet that standard when an evidentiary hearing is denied, "the party seeking an evidentiary hearing must make a prima facie showing by affidavit...[containing] *admissible* evidence, which would sustain a favorable decision if the evidence submitted by the movant is credited." (*Id.* at pp. 111-112, italics in original.)

In this case, there is no basis for an evidentiary hearing because there is no fundamental dispute as to any facts which could result in recusal. This is not a case where there are "gaps" in the written record. Defendant is not entitled to an evidentiary hearing to "go fishing" for facts or issues that his motion fails to provide. This is prohibited by the statute. Defendant is not allowed to use an evidentiary hearing to develop the facts supporting the alleged conflict. Rather, he has the affirmative burden to show the existence of those facts in his moving papers via sworn declarations. Defendant has failed to meet that burden. He has failed to comply with the statutory requirements of Penal Code section 1424. The request for an evidentiary hearing should be denied.

## CONCLUSION

Defendant fails to satisfy his burden of presenting admissible evidence of any conflict, let alone a conflict so grave as to render it unlikely he will not receive fair treatment during all portions of the criminal proceedings. For all of the foregoing reasons, defendant's motion to

disqualify the Santa Clara County District Attorney's Office should be denied.

Dated: September 9, 2020

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
JOYCE BLAIR
Supervising Deputy Attorney General

SHARON E. LOUGHNER
Deputy Attorney General
*Appearing Pursuant to Penal Code section 1424*

SF2020401076

(ENDORSED)

FILED

SEP 10 2020

Clerk of the Court
Superior Court of CA County of Santa Clara
BY P. Soto DEPUTY

**DECLARATION OF SERVICE BY OVERNIGHT COURIER AND U.S. MAIL**

Case Name: ***People v. Schumb, et al.***

No.: **C2010724**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On September 9, 2020, I served the attached **ATTORNEY GENERAL'S OPINION IN OPPOSITION TO MOTION TO RECUSE THE DISTRICT ATTORNEY'S OFFICE** by placing a true copy thereof enclosed in a sealed envelope with the **General Logistics Systems (GLS)**, addressed as follows:

J. Joseph Wall, Jr.
Wall Law Firm
10 Almaden Blvd., Suite 1200
San Jose, CA 95113
*Attorney for Defendant Christopher Schumb*

On September 9, 2020, I also served the attached **ATTORNEY GENERAL'S OPINION IN OPPOSITION TO MOTION TO RECUSE THE DISTRICT ATTORNEY'S OFFICE** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Christian E. Picone Esq.
Attorney at Law
Berliner Cohen LLP
10 Almaden Boulevard, 11th Floor
San Jose, CA 95113-2233
*Attorney for Co-Defendant Harpaul Nahal*

Harry S. Stern Esq.
Rains Lucia Stern, PC
2300 Contra Costa Boulevard, Suite 500
Pleasant Hill, CA 94523
*Attorney for Co-Defendant James Jensen*

Sam J. Polverino Esq.
Attorney at Law
The Singletary Mansion
1565 The Alameda, Suite 100
San Jose, CA 95126
*Attorney for Co-Defendant Michael Nichols*

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on September 9, 2020, at San Francisco, California.

A. Bermudez
Declarant

A. Bermudez
Signature

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document in