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SUPERIOR COURT of CALIFORNIA
COUNTY of SANTA BARBARA

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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF SANTA BARBARA
12 SANTA MARIA DIVISION
13

14 THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

15 v.

16 MICHAEL JOE JACKSON,

17 Defendant.
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Case No. 1133603

OPPOSITION OF THE ATTORNEY
GENERAL TO DEFENDANT
MICHAEL JOE JACKSON'S
SECOND MOTION TO RECUSE THE
SANTA BARBARA COUNTY
DISTRICT ATTORNEY'S OFFICE

~~FILED UNDER SEAL~~

Date: February 28, 2005
Time: 9:30 a.m.
Dept: 8
Judge: Hon. Rodney S. Melville

OPPOSITION OF THE ATTORNEY GENERAL TO DEFENDANT MICHAEL JOE JACKSON'S SECOND
MOTION TO RECUSE THE SANTA BARBARA COUNTY DISTRICT ATTORNEY'S OFFICE

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Date: February 28, 2005
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22
23 The Office of the Attorney General hereby submits the following opposition to the second
24 motion brought by defendant Michael Joe Jackson seeking to recuse Santa Barbara County District
25 Attorney Thomas W. Sneddon from prosecuting the instant case.

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INTRODUCTION

Defendant Jackson has already filed a recusal motion which was fully briefed and argued by all sides, and which was denied by the Court after a hearing on November 4, 2004. Defendant Jackson now renews his motion, once again alleging recusal of the District Attorney of Santa Barbara County and his entire staff of prosecutors (or, in the alternative, "District Attorney Thomas Sneddon and Deputy District Attorneys Ronald Zonen, Gordon Auchincloss and Gerald McC. Franklin") is required based on a change of circumstances since the last hearing. The "new facts" purportedly justifying this renewed recusal motion are: (1) "the District Attorney, through his deputy Gordon Auchincloss, has announced that he intends to testify at trial;" and (2) "the matters previously raised are now further illustrated by the conduct of Mr. Auchincloss;" and (3) "the cumulative effect of the other matters, plus this matter, require the remedy of recusal." (Mot. at 2.)

The "new facts" defendant Jackson puts forward are not new: each was either specifically articulated in support of his prior recusal motion or was known or should reasonably have been known when the prior motion was filed. In either event, this second recusal motion is more appropriately and accurately characterized as a motion asking this Court to revisit, rethink and reconsider its denial and come to a different conclusion. As such, the motion should be summarily denied.

Even if the motion is once again considered on the merits, it is without merit. The Santa Barbara County District Attorney's Office has filed an Opposition to defendant Jackson's second recusal motion, attaching the Declaration of District Attorney Thomas Sneddon. The Opposition and the Declaration refute the same factual allegation made in the first motion -- that the District Attorney will be a necessary witness at defendant Jackson's trial.

The Attorney General opposes recusal as defendant Jackson has not demonstrated a reasonable possibility that the Santa Barbara County District Attorney's Office has not exercised, or may not exercise, discretionary functions in an evenhanded manner, nor has he established that any conflict is so grave as to render it unlikely he will receive fair treatment, as is required by Penal Code section 1424 before recusal may be granted.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I.

3 **RECUSAL MUST BE DENIED AS THE DEFENDANT HAS NOT**
4 **DEMONSTRATED, WITH SUPPORTING FACTS, A DISABLING**
5 **CONFLICT OF INTEREST**

6 The Attorney General opposes recusal as defendant Jackson has not demonstrated a
7 reasonable possibility that the Santa Barbara County District Attorney's Office may not exercise
8 discretionary functions in an evenhanded manner, nor has he established that any conflict alleged is
9 so grave as to render it unlikely he will receive fair treatment, as required by Penal Code section
10 1424.

11 **A. The Applicable Recusal Standards**

12 **1. Defendant Jackson Must Show A Conflict Of Interest So Serious As To**
13 **Render It Unlikely He Will Receive A Fair Trial**

14 Penal Code section 1424 (hereinafter "section 1424") provides that a motion to recuse a
15 district attorney or an entire prosecutorial agency "may not be granted unless the evidence shows that
16 a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial."
17 It is now well settled that section 1424 establishes a two-part test: The first part asks whether there
18 is a conflict of interest. A "conflict" exists, "whenever the circumstances of a case evidence a
19 reasonable possibility that the District Attorney's office may not exercise its discretionary function
20 in an evenhanded manner." (*People v. Conner* (1983) 34 Cal.3d 141, 148; see also *People v. Griffin*
21 (2004) 33 Cal.4th 536, 569; *People v. Maury* (2003) 30 Cal.4th 342, 437, fn. 23; *People v. Snow*
22 (2003) 30 Cal.4th 43, 86-87; *Hambarian v. Superior Court* (2002) 27 Cal.4th 826, 833; *People v.*
23 *Millwee* (1998) 18 Cal.4th 96, 122-124; *People v. Eubanks* (1996) 14 Cal.4th 580, 592.)

24 If such a conflict is shown, the second step then asks: "Was this conflict so grave as to
25 render it unlikely that defendant will receive fair treatment during all portions of the criminal
26 proceedings?" (*Conner, supra*, 34 Cal.3d at p. 147; see also *Griffin, supra*, 33 Cal.4th at p. 569.)

27 Thus, while a "conflict" exists whenever there is a "reasonable possibility that the
28 DA's office may not exercise its discretionary function in an evenhanded manner," the

1 conflict is disabling only if it is "so grave as to render it unlikely that defendant will
2 receive fair treatment."

3 (*Eubanks, supra*, 14 Cal.4th at p. 594, citations omitted.)

4 Put another way, even if the Court determines there is a "reasonable possibility" that the
5 District Attorney's Office might not exercise, or might not have already exercised, its discretionary
6 function in an evenhanded manner," "such a determination would satisfy only the first part of the
7 two-part test outlined in *Eubanks* and *Hambarian*," and recusal must nevertheless be denied unless
8 there has also been a "showing that prosecution by that office would render fair treatment unlikely."
9 (*People v. Snow, supra*, 30 Cal.4th at p. 86.)

10 Section 1424 was enacted in response to the substantial increase in unnecessary
11 prosecutorial recusals allowed under the "appearance of conflict" standard of *People v. Superior*
12 *Court (Greer)* (1977) 19 Cal.3d 255. (See *Griffin, supra*, 33 Cal.4th at p. 569; *Eubanks, supra*, 14
13 Cal.4th at p. 591; *Millsap v. Superior Court* (1999) 70 Cal.App.4th 196, 199; *Lewis v. Superior*
14 *Court (People)* (1997) 53 Cal.App.4th 1277, 1282; *People v. Merritt* (1993) 19 Cal.App.4th 1573,
15 1578.) Aside from its purpose of "reducing the number of disqualifications" (*Eubanks, supra*, 14
16 Cal.4th at p. 591, fn. 3), section 1424 was drafted to eliminate an obvious problem inherent in the
17 prior recusal standard: what may appear "bad" to an uninformed observer may not influence -- or,
18 more importantly, may not have any real possibility of influencing -- the prosecutorial
19 decision-making process. In short, under section 1424, appearances of mere potential conflicts do
20 not dictate granting recusal without a competent showing of a real likelihood the defendant will not
21 receive a fair trial.

22 In *Eubanks*, the California Supreme Court further held:

23 whether the prosecutor's conflict is characterized as actual or only apparent, the potential
24 for prejudice to the defendant -- the likelihood that the defendant will not receive a fair
25 trial -- must be real, not merely apparent, and must rise to the level of a likelihood of
26 unfairness. Thus, section 1424, unlike the *Greer* standard, does not allow disqualification
27 merely because the district attorney's further participation in the prosecution would be
28

1 unseemly, would *appear* improper, or would tend to reduce public confidence in the
2 impartiality and integrity of the criminal justice system.
3 (*Eubanks, supra*, 14 Cal.4th at p. 591, italics in original; see also *Griffin, supra*, 33 Cal.4th at p. 569;
4 *Hambarian, supra*, 27 Cal.4th at p. 834; *Millwee, supra*, 18 Cal.4th at pp. 122-124.)

5 Importantly, it is now clear that mere “appearances of impropriety” -- whether to the
6 public, to the parties, or to the court -- are no longer “an independent ground for prosecutorial
7 disqualification,” now, the focus must be on the gravity of the conflict -- i.e., the “actual likelihood
8 of prejudice . . . rather than on whether . . . [the situation] would . . . be ‘unseemly’ or create ‘the
9 perception of improper influence.’” (*Eubanks, supra*, at p. 592; see also *People v. Neely* (1999) 70
10 Cal.App.4th 767, 776; *People v. McPartland* (1988) 198 Cal.App.3d 569, 574.) Thus, even the
11 appearance of an impropriety which “would be highly destructive of public trust” is, standing alone,
12 “no longer a ground for recusal of the district attorney.” (*Eubanks, supra*, 14 Cal.4th at p. 593.)

13 In sum, section 1424 requires an affirmative competent showing of the potential effect the
14 conflict will have on the criminal proceedings. (*Eubanks, supra*, 14 Cal.4th at p. 592; *People v.*
15 *Breaux* (1991) 1 Cal.4th 281, 294; *Conner, supra*, 34 Cal.3d at p. 148; see also *People v. Zapien*
16 (1993) 4 Cal.4th 929, 968.) The focus is now exclusively on the legal recusal standard -- here,
17 whether defendant Jackson has come forward with competent evidence of an actual likelihood he
18 will not receive a fair trial if prosecuted by the District Attorney -- and *not* on how he may feel
19 proceeding with the Santa Barbara County District Attorney’s Office as that agency may appear to
20 the press or to those uninformed outside the courtroom.

21 **2. Defendant Jackson’s Showing Of A Disabling Conflict Must Be “Especially**
22 **Persuasive” When (As Here) Recusal Of An Entire Prosecutorial Agency**
Is Sought

23 The showing of a disabling conflict must be “especially persuasive” when, as here, the
24 question is whether there should be recusal of an entire prosecutorial office. (*People v. Hamilton*
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1 (1988) 46 Cal.3d 123, 139; see also *Eubanks, supra*, 14 Cal.4th at p. 594, fn. 6; *People v. Hamilton*
2 (1989) 48 Cal.3d 1142, 1156.)¹⁷ In this regard,
3 [t]he recusal of an entire prosecutorial office is a *serious step*, imposing a substantial
4 burden on the People, and the Legislature and courts may reasonably insist upon a
5 showing that such a step is *necessary* to assure a fair trial.

6 (*Hamilton, supra*, 48 Cal.3d at p. 1156 (emphasis added).)

7 “Disqualification of an entire prosecutorial office from a case is disfavored by the courts,
8 absent a substantial reason related to the proper administration of justice.” (*People v. Hernandez*
9 (1991) 235 Cal.App.3d 674, 679-680; accord, *Millsap, supra*, 70 Cal.App.4th at p. 200; *Merritt,*
10 *supra*, 19 Cal.App.4th at pp. 1578-1579.) The burden of making the requisite showing rests with
11 the defendant. (*Hamilton, supra*, 46 Cal.3d at p. 140.)

12 Thus, even assuming a conflict exists as to a particular prosecutor, and further assuming
13 this conflict is so grave as to render it unlikely the defendant will receive fair treatment during all
14 portions of the criminal proceedings, it is nonetheless impermissible to recuse an entire prosecutorial
15 staff unless “there is substantial evidence that a [district attorney’s] animosity toward the accused
16 may affect his colleagues.” (*Hamilton, supra*, 46 Cal.3d at p. 140.) This suggests that recusal of an
17 entire office is required *only* when the conflict, bias or animosity of the District Attorney is
18 substantially likely to affect the entire prosecutorial office to such an extent that it would preclude
19 any deputy in the office from filing and prosecuting the case in an evenhanded manner. (*Id.* at
20 p. 139.)

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23 1. See also *People v. Hernandez, supra*, 235 Cal.App.3d at p. 678 [where entire prosecutorial
24 office has been recused, showing of conflict of interest must be “especially persuasive”]; *People v.*
25 *Lopez* (1984) 155 Cal.App.3d 813, 827 [Despite the “probable intimacy” of a 10-member district
26 attorney’s office, the court found no actual or probable “leak in the wall of silence” between the
27 prosecuting attorney and a deputy who was the defendant’s former attorney.]; *Love v. Superior Court*
28 (1980) 111 Cal.App.3d 367, 374-375 [recusal decided under common law prior to enactment of
Penal Code, § 1424, limited to deputy who had previously worked as public defender law clerk on
defendant’s case and to the five-person unit to which he was assigned; recusal of remainder of
95-attorney office not required to avoid appearance of impropriety].

1 Where the recusal would extend to the entire staff of prosecutors, rather than only one or
2 more individual members of a District Attorney's Office, the granting of the recusal motion would
3 involve a commitment of resources of a second prosecutorial agency, also at public expense, and
4 would inevitably require a costly duplication of work. In this regard, cautious deliberation as to the
5 magnitude of the perceived conflict of interest is especially critical. (*People ex rel. Younger v.*
6 *Superior Court (Rabaca)* (1978) 86 Cal.App.3d 180, 204; see also *Eubanks, supra*, 14 Cal.4th at p.
7 593, fn. 6.)

8 In sum, as noted by the Court of Appeal in *People v. Merritt, supra*, 19 Cal.App.4th 1573,
9 to grant recusal of an entire staff of prosecutors, there must be "no other alternative available but to
10 recuse the entire District Attorney's Office." (*Id.* at p. 1579; accord, *Millsap, supra*, 70 Cal.App.4th
11 at p. 200; *People v. Alcocer* (1991) 230 Cal.App.3d 406, 414 [a major prosecution witness had spent
12 nine years working for the Santa Barbara County District Attorney's Office]; *McPartland, supra*,
13 198 Cal.App.3d at pp. 572-575 [an investigator for the district attorney's office was the brother of
14 an informant in the case]; *People v. Superior Court (Hollenbeck)* (1978) 84 Cal.App.3d 491, 500-
15 503 [one former and three present deputy district attorneys were possible witnesses in pretrial
16 proceedings challenging electronic surveillance of defendants].)

17 **B. Defendant Jackson Should Not Be Permitted To Relitigate Recusal On Factual**
18 **Allegations Previously Alleged Or On Facts It Is Clear That He Knew Or**
Reasonably Should Have Known When He Filed His First Motion

19 In defendant Jackson's first recusal motion, he argued the District Attorney's Office should
20 be disqualified because the District Attorney "made himself a witness," "has already testified in one
21 pre-trial hearing," and has a "role as a chain of custody witness" after he personally retrieved from
22 the victim's mother a "CD disk and jacket." (First Mot. at 3, 6-7, 28.) Defendant Jackson
23 specifically argued in this motion that on November 8, 2003, the District Attorney "left the
24 jurisdiction," traveling alone to Beverly Hills, to interview the victim's mother and to "retrieve items
25 of evidence." (First Mot. at 6.) It was further alleged in this first recusal motion that the District
26 Attorney: (1) met alone with the victim's mother; (2) gave her an application for victim
27 compensation; (3) brought along a photo array and asked her to identify individuals under
28 investigation; (4) failed to record the interview; (5) gathered evidence from her; (6) prepared a

1 memorandum of his investigation; and (7) delivered the evidence to the investigators. (*Id.*)
2 Defendant Jackson further specifically cited in his first recusal motion the District Attorney's
3 telephone conversation with Henry Russell Halpern. (First Mot. at 11-16.) Defendant Jackson
4 devoted much of his first recusal motion to lengthy citations to the transcripts of the grand jury
5 proceedings. (First Mot. at 8-24.)

6 This Court denied defendant Jackson's first recusal motion after a hearing on November
7 4, 2004. Nevertheless, defendant Jackson has now filed this second recusal motion *on the same*
8 *grounds and facts raised in his first motion*. Defendant Jackson *again* raises as a ground for recusal
9 that the District Attorney met alone with the victim's mother on November 3, 2003. (Mot. at 6.)
10 Defendant Jackson cites the victim's mother's testimony in the grand jury proceedings. (Mot. at 11.)
11 And defendant Jackson *again* raises as a ground for recusal the District Attorney's telephone
12 conversation with Mr. Halpern, citing the grand jury transcripts. (Mot. at 7, 13.) Indeed, defendant
13 Jackson *again* raises all of the "District Attorney's conduct raised in the prior recusal motion."
14 (Mot. at 7-8.)

15 The "new" fact upon which defendant Jackson justifies this second recusal motion is an
16 allegation that the District Attorney in a prosecution *in limine* motion has now "announced that he
17 intends to testify at trial" (Mot. at 2), "declared himself to be a witness in this case" and "threatened
18 that, at trial, Mr. Sneddon will testify to 'everything he knows about the defendant,' if [defendant
19 Jackson] calls Mr. Sneddon's motives for prosecuting this case into question" (Mot. at 6). However,
20 even a cursory review of the *in limine* motion filed demonstrates it contains nothing resembling an
21 "announcement" or "declaration" of the District Attorney's intention to testify as a necessary witness
22 at defendant Jackson's trial.^{2f}

23 The only other facts now raised that were not specifically alleged in defendant Jackson's
24 first motion concern an allegation that the District Attorney is a "material witness to a meeting with
25 Mark Geragos." (Mot. at 6-7, 12.) But these "new" facts are taken from a December 21, 2003,
26

27 2. Any lingering doubt as to the District Attorney's intention or desire to testify at trial was
28 definitely resolved by the Opposition and attached declaration by the District Attorney's Office in
response to defendant Jackson's second recusal motion.

1 police report, and there is no allegation that this report was only recently disclosed. Thus, this
2 allegation was clearly known to defendant Jackson when his prior motion was filed, argued, and
3 denied.

4 Under these circumstances, defendant Jackson's second recusal motion is more accurately
5 characterized as a motion seeking this court to reconsider and rethink its prior denial. (Cf. Code Civ.
6 Proc., § 1008.) The California Supreme Court in *People v. Delouize* (2004) 32 Cal.4th 1223,
7 recently discussed such motions in a different context, stating as follows:

8 Orders and judgments are deemed final in the superior court, and not subject to
9 reconsideration by that court, to preserve confidence in the integrity of judicial procedures
10 and to avoid the delays and inefficiencies associated with repeated examination and
11 relitigation of the same facts and issues. (See *Custis v. United States* (1994) 511 U.S. 485,
12 497, 114 S.Ct. 1732, 128 L.Ed.2d 517.) The concept of finality "rests upon the sound
13 policy of limiting litigation by preventing a party who has had one fair adversary hearing
14 on an issue from again drawing it into controversy and subjecting the other party to further
15 expense in its reexamination." (*In re Crow* (1971) 4 Cal.3d 613, 622-623, 483 P.2d 1206;
16 accord, *In re Rogers* (1980) 28 Cal.3d 429, 438, 169 Cal.Rptr. 222, 619 P.2d 415.) This
17 court has recognized that "[e]ndless litigation, in which nothing was ever finally
18 determined, would be worse than occasional miscarriages of justice. . . ." (*Pico v. Cohn*
19 (1891) 91 Cal. 129, 134, 25 P. 970; accord, *United States v. Throckmorton* (1878) 98 U.S.
20 61, 68-69, 25 L.Ed. 93; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th
21 1, 11, 74 Cal.Rptr.2d 248, 954 P.2d 511.)

22 (*Id.* at p. 1232.)

23 There is nothing new in this second recusal motion that defendant Jackson did not know,
24 or that he should not have reasonably known, when making his first motion less than four months
25 ago. Thus, this second recusal motion in reality is a motion for reconsideration, asking this Court
26 to rethink what it has already thought through. As noted by one court, such a motion is not a "license
27 for a losing party's attorney to get a second bite at the apple." (*Shields v. Shetler* (D.Colo. 1988) 120
28 F.R.D. 123, 125-126.) Were it otherwise,

1 then there would be no conclusion to motions practice, each motion becoming nothing
2 more than the latest installment in a potentially endless serial that would exhaust the
3 resources of the parties and the court--not to mention its patience. Hindsight being
4 perfect, any lawyer can construct a new argument to support a position previously rejected
5 by the court, especially once the court has spelled out its reasoning in an order. It is hard
6 to imagine a less efficient means to expedite the resolution of cases than to allow the
7 parties unlimited opportunities to seek the same relief simply by conjuring up a new
8 reason to ask for it.

9 (*Potter v. Potter* (D.Md. 2001) 199 F.R.D. 550, 552.)

10 Defendant Jackson should not be granted a license to get a "second bite at the apple" by
11 using a word processor to move around the paragraphs from a previously submitted brief, and file
12 a retread of the old brief," thinly disguised as a motion on "new" facts. (*Shields v. Shetler, supra*,
13 120 F.R.D. at p. 126.) Such a motion "based on recycled arguments only serves to waste the
14 resources of the court." (*Baustian v. State of La.* (E.D.La. 1996) 929 F.Supp. 980, 981.) Defendant
15 Jackson's second recusal motion, brought entirely on facts either previously alleged or facts that
16 were known or that reasonably should have been known when he filed his first motion, should be
17 summarily denied.

18 **C. In Any Event, Defendant Jackson's Motion Again Fails As He Has Not Shown A**
19 **Disabling Conflict Pursuant To Penal Code Section 1424**

20 As stated above, there is absolutely nothing new in this second motion which would in any
21 way dictate or suggest that the Court should now revisit, rethink and rehear a recusal motion based
22 on allegations and facts which the Court has already found were insufficient to demonstrate a
23 disabling conflict. In any event, should the Court again address these allegations and facts, it is clear
24 they still do not raise a disabling conflict pursuant to section 1424.

25 As stated above, defendant Jackson *again* raises as a ground for recusal that the District
26 Attorney met alone with the victim's mother on November 3, 2003, and that he collected evidence
27 from her. (Mot. at 6 [Compare: First Mot. at 3, 6-7, 28].) At the last recusal hearing, it was shown
28 that the District Attorney would not in fact be a material witness concerning this brief meeting, and

1 the Court rejected this allegation as a ground for recusal.² Defendant Jackson has offered no
2 additional facts or further support for this allegation, and thus there is no reason in fact, law, or logic
3 which would dictate this Court should revisit and reverse its prior findings as to this issue.

4 Similarly, defendant Jackson *again* raises as a ground for recusal the District Attorney's
5 telephone conversation with Mr. Halpern, citing the grand jury transcripts. (Mot. at 7, 13 [Compare:
6 First Mot. at 11-16.].) As stated above, defendant Jackson's first motion containing this allegation
7 was denied. In any event, defendant Jackson makes no new argument that the District Attorney will
8 in fact be a necessary witness at trial concerning this telephone conversation. Indeed, defendant
9 Jackson argues precisely to the contrary: that this Court "will not allow him to testify under the guise
10 of cross-examining Mr. Halpern." (Mot. at 13.) Defendant Jackson's own motion thus refutes a
11 claim that the District Attorney will in fact be a witness at trial as to this conversation.

12 As to one of the two allegedly "new" facts not specifically alleged in defendant Jackson's
13 first motion -- the allegation that the District Attorney is a "material witness to a meeting with Mark
14 Geragos" (Mot. at 6-7, 12) -- the District Attorney has now submitted a declaration directly refuting
15 any allegation that he would ever be called as a necessary witness to testify at defendant Jackson's
16 trial as to this conversation (See Sneddon Decl., ¶¶ 5-10).

17 Defendant Jackson's other "new" factual allegation is that the District Attorney in a
18 recently filed prosecution *in limine* motion has "announced that he intends to testify at trial" (Mot.
19 at 2), "declared himself to be a witness in this case" and "threatened that, at trial, Mr. Sneddon will
20 testify to 'everything he knows about the defendant,' if [defendant Jackson] calls Mr. Sneddon's
21 motives for prosecuting this case into question" (Mot. at 6). As accurately reported in the District
22 Attorney's Opposition, the *in limine* motion is before the Court, and it contains nothing resembling
23 an "announcement" or "declaration" of the District Attorney's intention to testify as a necessary
24 witness at defendant Jackson's trial.

25
26 3. In response to defendant Jackson's first recusal motion, the District Attorney confirmed
27 that the "'chain of custody' of the property Mr. Sneddon received can be established by other
28 witnesses in the unlikely event that becomes an issue." (Dist. Atty. Opp., at 5.) And, in any event,
it has been held by one state court that a prosecutor's testimony to establish chain of custody did not
dictate recusal. (See *Jones v. State* (Okla.Crim.App. 1995) 899 P.2d 635, 653.)

1 In any event, this is far too slender a reed upon which to disqualify the District Attorney
2 and his entire staff. In *People v. Hernandez* (2003) 30 Cal.4th 835, 853-854, the California Supreme
3 Court held that the fact that a chief deputy was called as a material witness by the prosecution in a
4 capital case did not dictate recusal of the entire prosecutorial agency where the prosecutor/witness's
5 testimony "pertained only to tasks she performed in her official capacity with the district attorney's
6 office," as such testimony "did not create a conflict of interest 'that would render it unlikely that the
7 defendant would receive a fair trial' (§ 1424) if the district attorney's office handled the
8 prosecution." (*Id.* at pp. 853-854.)

9 And in *People ex rel. Younger v. Superior Court (Rabaca)*, *supra*, 86 Cal.App.3d 180, the
10 court addressed the issue of the attorney-witness, and discussed the fact that while the Attorney
11 General may undertake a prosecution in the event a district attorney and all of his or her deputies are
12 disqualified from prosecuting a case, and even though there is no doubt that the Attorney General
13 is "equally as competent as the district attorney as a prosecutor," nevertheless,

14 when the entire prosecutorial office of the district attorney is recused and the Attorney
15 General is required to undertake the prosecution or employ a special prosecutor, the
16 district attorney is prevented from carrying out the statutory duties of his elected office
17 and, perhaps more significantly, the residents of the county are deprived of the services
18 of their elected representative in the prosecution of crime in the county.

19 (*Id.* at pp. 203-204.)

20 The *Younger* court further noted that the problem of interest and appearance of interest
21 which might otherwise normally exist in a civil litigation context is simply nonexistent where one
22 deputy district attorney is the prosecutor and another is the witness, because neither has any financial
23 interest in the outcome of the criminal prosecution. (*Id.* at pp. 204, 206.)

24 The other basis of interest, the *Younger* court pointed out, is the partnership thought to be
25 implicit in the role of trial advocate. This problem is attenuated by the duty of a district attorney to
26 temper prosecutorial zeal in light of his or her special obligation to seek justice for the accused, as
27 well as the government. (*Id.* at p. 206; see also *Eubanks*, *supra*, 14 Cal.4th at p. 589.)

1 The *Younger* court noted any residual interest in the outcome of the case which might be
2 exhibited by the attorney-witness comes not from the relationship between the attorney-witness and
3 the fellow deputy district attorney who will prosecute the case, but rather from the attorney-witness'
4 training, background and experience in prosecuting crime and his connection with law enforcement.

5 (*Id.* at p. 207.) The court also determined that if the case were prosecuted by a deputy attorney
6 general, that would not cure the attorney-witness' residual interest in the outcome of the case. (*Ibid.*)

7 The *Younger* court held that no problems concerning witness credibility militated in favor
8 of recusal. "To the extent defense counsel might be inhibited in cross-examining or arguing the
9 credibility of the attorney-witness because he is an attorney or because he is a deputy district
10 attorney," the court noted, "such inhibition would in no way be diminished if the Attorney General
11 were to assume prosecution of the case. The attorney-witness would still be an attorney and he
12 would still be a deputy district attorney." (*Id.* at p. 206.) Such considerations likewise militate
13 against recusal of the District Attorney and his entire staff in the instant case.

14 Moreover, that the District Attorney or a member of his staff may have some knowledge
15 of some facts relevant to the prosecution does not mean he or she must be recused. It is not the
16 prosecutor's knowledge that is the key; rather, it is whether he or she will be a necessary, material
17 witness and will actually testify in the case. Thus, in *People v. Partlow* (1978) 84 Cal.App.3d 540,
18 557, the district attorney who prosecuted the case participated in the investigation, witnessed the
19 crime along with other law enforcement personnel, and signed the complaint. Nevertheless, the
20 court denied a recusal motion and the decision was upheld on appeal.

21 Here, there is no support for the argument that the District Attorney or any member of his
22 staff will in fact be a necessary witness before the jury at defendant Jackson's trial. These allegations
23 thus cannot support a motion to recuse the District Attorney and his entire staff.⁴¹

24
25 4. The Attorney General further notes that other courts have likewise held recusal of the
26 prosecutor should *not* be granted on a mere *possibility* he or she may be a witness, *State v. Frames*
27 (Kan. 1973) 515 P.2d 751, 756 ["To require a prosecutor to withdraw from a case on the mere
28 possibility that he could be called as a witness would enable defendant's counsel to hamper seriously
effective prosecution."], and have also held that recusal should *not* be granted if the prosecutor-
witness's testimony is on a merely formal or uncontested matter, *Flowers v. Stute* (Mo.App. 1979)

1 **D. No Basis Exists For The Recusal Of Deputy District Attorneys Zonen, Auchincloss**
2 **And Franklin**

3 Once again, as in his prior motion, should the Court deny recusal of the District Attorney
4 and his entire staff, defendant Jackson seeks as alternative relief the recusal of "District Attorney
5 Thomas Sneddon and Deputy District Attorneys Ronald Zonen, Gordon Auchincloss and Gerald
6 McC. Franklin." (Mot. at 2.) However, as in last motion, defendant Jackson has set forth no
7 argument, authority or analysis, nor does he provide any declarations or affidavits, which explain
8 precisely why there is a disabling conflict pursuant to section 1424 if he is prosecuted by these
9 particular deputies.

10 As stated above, section 1424, subdivision (a)(1), now clearly requires that allegations of
11 a conflict of interest "shall" be supported by a competent showing of facts and by "affidavits of
12 witnesses who are competent to testify to the facts set forth in the affidavit." An allegation made
13 without argument, analysis, authority or supporting declarations or affidavits should be summarily
14 denied. (See, e.g., *People v. Karis* (1988) 46 Cal.3d 612, 656 ["Conclusory allegations made without
15 any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary
16 hearing."]; *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1301; *People v. Sierra* (1995) 37
17 Cal.App.4th 1690, 1693, fn. 2; *People v. Dougherty* (1982) 138 Cal.App.3d 278, 282-283; *People*
18 *v. Ham* (1970) 7 Cal.App.3d 768, 783.)

19 Moreover, where there is no evidence that any alleged bias or conflict has spread to an
20 identified prosecutor or prosecutors, and where there is (at best) only speculation that it has spread,
21 recusal should be denied. (See, e.g., *Hernandez, supra*, 235 Cal.App.3d at p. 680.)

22 As was the case with his first recusal motion, defendant Jackson has once again nowhere
23 set forth an argument specifically addressing why, if recusal of the entire District Attorney's Office
24 is denied, Deputy District Attorneys Zonen, Auchincloss and Franklin should nevertheless be
25 specifically recused. Nor has defendant Jackson offered any admissible, competent evidence
26 suggesting a basis in law, fact, or logic for doing so. As a result, defendant Jackson's request for an

27 776 S.W.2d 444, 448-449 [testimony that prosecutor operated a tape recorder during an interview,
28 that the office made a transcription, and that he checked it for accuracy].

1 alternative remedy of recusing Deputy District Attorneys Zonen, Auchincloss and Franklin should
2 be denied.

3 **CONCLUSION**

4 Defendant Jackson has not demonstrated a reasonable possibility that the District
5 Attorney's Office has not exercised or may not exercise discretionary functions in an evenhanded
6 manner, nor has he established that any conflict is so grave as to render it unlikely he will receive
7 fair treatment in future proceedings. The Attorney General respectfully requests that recusal be
8 denied.

9 Dated: February 22, 2005

10 Respectfully submitted,

11 BILL LOCKYER
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23 SDM:mol
24 LA2004RE0012

DECLARATION OF SERVICE

Case Name: *People v. Michael Joe Jackson*

Case No.: 1133603

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the Bar of this Court at which member's direction this service is made. I am 18 years of age or older and not a party to the within entitled cause; I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On February 22, 2005, I placed the attached

OPPOSITION OF THE ATTORNEY GENERAL TO DEFENDANT MICHAEL JOE JACKSON'S SECOND MOTION TO RECUSE THE SANTA BARBARA COUNTY DISTRICT ATTORNEY'S OFFICE (FILED UNDER SEAL)

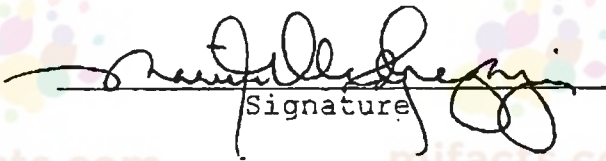
in the internal mail collection system at the Office of the Attorney General, 300 S. Spring Street, Los Angeles, California, 90013, for deposit in the United States Postal Service that same day in the ordinary course of business, in a sealed envelope, postage thereon fully prepaid, addressed as follows:

PLEASE SEE ATTACHED SERVICE LIST

I certify that the document was produced on paper purchased as recycled paper.

I declare under penalty of perjury the foregoing is true and correct and that this declaration was executed on February 22, 2005, at Los Angeles, California.

M.O. LEGASPI


Signature

SDM:mol
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