

**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**

Criminal Case No. F10-159

PETITION FOR WRIT OF MANDAMUS AND/OR OTHER APPROPRIATE RELIEF;

STAY OF THE PROCEEDINGS REQUESTED [NEXT PROCEEDING IS A

PRELIMINARY HEARING SET FOR AUGUST 30, 2011];

MEMORANDUM OF POINTS AND AUTHORITIES;

SUPPORTING EXHIBITS.

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August 22, 2011

Certificate of Interested Parties

There are no other interested entities or persons to list in this certificate. Cal. Rules of Court, Rule 8.208(e)(3).

Dated: August 22, 2011

Patrick H. Dwyer, counsel
For Petitioner

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I. **Table of Authorities**

[Note: For The Convenience Of The Court, This Table of Authorities Contains The Legal Authorities Cited In Both This Petition And In The Defendant’s Motion to Recuse, Exhibit A Hereto.]

	Page
United States Supreme Court	
<i>Brady v. Maryland</i> (1963) 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194	2, 15n4, 17and Ex. A, 3, 5
California Supreme Court	
<i>Maine v. Superior Court</i> (1968) 68 Cal. 2d 375	6
California Court of Appeal	
<i>People v. Cannedy</i> (2009) 176 Cal. App. 4 th 1474	Ex. A, 1-2
<i>People v. Lam Choi</i> (2000) 80 cal. App. 4 th 476	Ex. A, 2
<i>Haraguchi v. Superior Court</i> (2008) 43 Cal. 4 th 707	Ex. A, 2
Statutes	
California Penal Code §1424	Ex. A, 1-2

II. **Introduction**

A. **Issues Raised In This Petition**

There are two issues brought to the Court of Appeals under this petition.

1. The first issue is whether the Superior Court abused its discretion when it failed to find that there was neither the appearance of a conflict of interest nor an actual conflict of interest based upon the factual evidence submitted with the Defendant's Motion to Recuse.

2. The second issue is whether the Superior Court abused its discretion when it denied the Defendant's request for an evidentiary hearing for the purpose of obtaining further evidence concerning conflict of interest and how such conflict might make it unlikely that the Defendant would obtain a fair trial.

The Defendant is bringing this petition for a writ of mandamus because the correction of these errors at this time is needed to preserve his constitutional right to a fair trial. The availability of appeal after an un-fair trial in this case will fall far short of providing the Defendant with adequate protection or remedy. Indeed, based upon the facts and procedural status of this case as discussed below, an order staying the proceedings until these matters can be resolved is the only way to prevent further unnecessary and harmful burden, expense and delay to the Defendant.

B. Factual Summary of Case

1. Background Facts

This petition arises from the Superior Court's denial of the Defendant's Motion to Recuse the Nevada County District Attorneys Office, filed on June 23, 2011, on the grounds that there was a conflict of interest and that, as a result, Defendant was unlikely to receive a fair trial. A true and correct copy of the Defendant's Motion to Recuse is attached hereto as Exhibit A. The Attorney General appeared and represented the People of the State of California and filed an Opposition to the Defendant's Motion to Recuse on July 28, 2011. A true and correct copy of this Opposition is attached hereto as Exhibit B. The Nevada County District Attorneys Office appeared on its own behalf and filed an Opposition on July 28, 2011. A true and correct copy of this Opposition is attached hereto as Exhibit C. The Defendant filed a Reply to the Opposition on August 2, 2011. A true and correct copy of the Defendant's Reply is attached hereto as Exhibit D. The hearing on the Motion to recuse was held on August 4, 2011. At the hearing the Defendant introduced two additional Declarations, one by Defendant and one by Melissa Kaput. These declarations were accepted by the Superior Court into the record. A true and correct copy of these declarations are attached hereto as Exhibit E. A true and correct copy of the transcript of the proceedings is attached hereto as Exhibit F.

This petition is a "sister" to another petition for a writ of mandamus filed concurrently by the Defendant in this Third District Court of Appeal regarding the denial of the Defendant's Motion to Dismiss the action on the grounds of evidence tampering, multiple failures to produce exculpatory evidence to the Defendant in violation of *Brady v. Maryland*, the failure of the Nevada County Sheriffs Department and the Nevada County District Attorney's

Office to have any policies, practices, procedures, and training whatsoever in the handling of electronic evidence, and the failure of the prosecution to even look at certain video evidence favorable to the Defendant after 16 months of prosecution of the case.

These two new petitions follow on the heels of a petition for a writ of mandamus filed by the Defendant in this Third District Court of Appeal on January 5, 2011, regarding an order by the Superior Court denying the Defendant an evidentiary hearing to inquire about possible tampering with video camera evidence (see C067033). an order by the Superior Court denying the Defendant an evidentiary hearing to inquire about possible tampering with video camera evidence (see C067033). This Court of Appeal issued a *Palma* letter on February 23, 2011, directing the Superior Court to reverse its denial of the motion for an evidentiary hearing. Promptly after receiving the *Palma* letter, the Superior Court reversed its earlier ruling and granted the Defendant an evidentiary hearing.

At the August 4, 2011, hearing, the Superior Court first found that there was no conflict of interest or even the appearance of a conflict. Then the Court found that it saw no reason for an evidentiary hearing. Finally, the Court ruled that it saw no reason why the defendant would not receive a fair trial.

Defendant has filed this petition on the grounds that the Superior Court's ruling denying the Motion to Recuse and the Defendant's request for an evidentiary hearing was an abuse of discretion in light of the evidence that the Defendant presented showing that there was a conflict of interest and that the Defendant was not likely to receive a fair trial.

**III. Petition for Writ of Mandamus And/Or Other Appropriate Relief;
Stay of Proceedings Requested**

1. Authenticity of Exhibits

All Exhibits accompanying this Petition are true and correct copies of original documents on file with the Respondent Nevada County Superior Court, except for Exhibit F, which is a true and correct copy of the reporter's transcripts of the hearings of August 4, 2011. The exhibits are incorporated herein by reference as though fully set forth in this Petition.

2. Beneficial Interest of Petitioners; Capacities of Respondent and Real Parties in Interest

Petitioner Gregory Pellerin is the Defendant in the action now pending in Respondent Nevada County Superior Court entitled The People of the State of California v. Gregory Pellerin, Case No. F10-159. Respondent Nevada County District Attorney represents the People of the State of California as the real party in interest.

3. Chronology of Pertinent Events

Incident at Defendant's Home and Arrest April 20, 2010

Criminal Complaint filed May 7, 2010

June 23, 2011, the Defendant files a Motion to Recuse the Nevada County District Attorneys Office

July 28, 2011, the Attorney General files an Opposition to the Motion to Recuse

July 28, 2011, the Nevada County District Attorney files an Opposition to the Motion to Recuse

August 2, 2011, the Defendant files a Reply to the People's Opposition

August 4, 2011, the Defendant files two additional declarations as evidentiary

Support for his motion and these were received into the record.

August 4, 2011, the Superior Court rules on the Defendant's Motion to Recuse,
denying every aspect of the motion

4. **Basis For Relief**

The California Court of Appeal has made it very clear that a writ of mandamus is appropriate in a wide variety of pre-trial criminal matters involving interlocutory orders.

Perhaps the best case discussing the basis for relief though mandamus is *Maine v. Superior Court* (1968) 68 Cal. 2d 375, at 377-378, where the California Supreme Court instructed that the mandamus:

“remedy has been adapted to a spectrum of pretrial circumstances and in each instance was found to be consistent with traditional criteria for issuance of the extraordinary writ ... The common thread woven through the foregoing examples of mandamus antedating trial is the responsiveness of appellate tribunals when initiative is required to protect a defendant's fundamental right to a fair trial. Availability of appeal often falls short of sufficient protection, since ‘the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy’, citing *Brown v. Superior Court* (1949) 34 Cal.2d 559, 562.

As demonstrated below, it is clear from the facts of this case that relief from the Superior Court’s denial of Defendant’s Motion to Recuse is absolutely necessary to correct an abuse of discretion. *This Petition deals with the most fundamental right to receive a fair trial by having a prosecutor that is unbiased and fair in the pursuit of justice.*

The evidence presented thus far by the Defendant was more than sufficient to raise the appearance of a conflict of interest on the part of the Nevada County District Attorneys Office, if not prove an actual conflict, together with a strong factual basis for a further evidentiary hearing into the facts of the conflict. The Defendant’s Motion to Recuse further demonstrated that he was unlikely to receive a fair trial.

5. **Absence of Other Remedies**

The only other remedy available to the Defendant is to go through the rest of the legal proceedings (preliminary hearing, trial, etc.) and then file an appeal. As discussed above in *Main v. Superior Court, supra*, an appeal often falls short of sufficient protection since “the burden, expense and delay involved in a trial render an appeal from an eventual judgment an inadequate remedy”. This is exactly the type of case that the California Supreme Court had in mind when it made this statement. It is made even more imperative here, where the Defendant has made a strong factual showing of a conflict of interest on the part of the Nevada County District Attorney’s Office and a showing that the Defendant is likely not to receive a fair trial.

The hearing of this Petition now will avoid the delay resulting from an unfair trial and subsequent appeal. This case should be reviewed in its entirety by an un-biased prosecutor (presumably by the Attorney General) to see if charges should be dropped or reduced, and if it is decided that any charges should be continued, then the prosecution should be done by someone that has no connection with the Defendant and the fraudulent loan scheme in which he was swept up.

IV. **Prayer**

Petitioner Gregory Pellerin prays that this court:

1. Issue an alternative writ directing Respondent Superior Court to grant Defendant's Motion to Recuse, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandamus and/or such other extraordinary relief as is warranted, directing the Respondent Superior Court to set aside and vacate its ruling of August 4, 2011, denying Defendant's Motion to Dismiss.
2. Award Petitioner his costs pursuant to California Rule of Court 8.278; and
3. Grant such other relief as may be just and proper.

Respectfully Submitted,

Patrick H. Dwyer,
Counsel for Petitioner
Gregory Pellerin

August 22, 2011

V. Verification

I, Patrick H. Dwyer, declare as follows:

I am counsel for the Petitioner. I have read the foregoing Petition for Writ of Mandamus And/Or Other Extraordinary Relief and know its contents. The facts alleged in the Petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the Superior Court proceedings, I, rather than the Petitioner, have verified this Petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on August 22, 2011, at Penn Valley, California.

Patrick H. Dwyer

VI. Memorandum of Points and Authorities in Support of Petition

Normally, an appellate court will not disturb a Superior Court ruling that is a mere exercise of its discretion. There must be a clear showing of an abuse of the court's discretion and a miscarriage of justice. See *Blank v. Kirwin* (1985) 39 Cal. 3d 311, 331; *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.

However, an abuse of discretion will be found when the decision "exceeds the bounds of reason, all the circumstances before it being considered." *Denham v. Superior Court*. In *Horseford v. Board of Trustees of Calif. State Univ.* (2005) 132 Cal. App. 4th 359, at 393, the appellate court established that "[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion."

A. **The Superior Court Abused Its Discretion When It Failed To Find That There Was Neither The Appearance Of A Conflict Of Interest Nor An Actual Conflict Based Upon The Factual Evidence Submitted With The Defendant's Motion to Recuse**

The Defendant's Motion to Recuse established the following factual basis for his motion:

1. That between 2004 and 2009, Clifford Newell, the Nevada County District Attorney, had 1.7 million¹ in loans with Olympic Mortgage, a local mortgage broker and hard money lender, secured by property that Mr. Newell had bought in Nevada County a few years earlier. See Exhibit A, pg. 3; see the Declaration of Patrick H. Dwyer accompanying the Defendant's Motion to Recuse, paragraphs 2-5; see the Defendant's Request for Judicial Notice of the investigative article in the Sacramento Bee published on June 5-6, 2011.

2. During 2005, the Defendant arranged a construction loan with Olympic

¹ This may have been as high as 2.5 million in loans.

Mortgage. As set forth in the Declaration of Greg Pellerin that accompanied the Motion to Recuse, his loan was forced into default through a wrongful failure to fund. Mr. Pellerin's loan was then sold by Olympic to Thomas Hastert,² who paid off the Olympic loan and gave Mr. Pellerin a new loan. However, the same game was played and Tom Hastert failed to fully fund the loan as required by law and placed the loan into default. The Pellerins eventually lost four separate properties as a result of these illegal loans. See the Declaration of Gregory Pellerin, paragraphs 2-9.

3. Mr. Pellerin reported these loan frauds to the Grass Valley Police in July, 2007. Mr. Pellerin also had a face to face meeting with Nevada County Deputy District Attorney Jim Philips about these loans in July or August, 2007. During this meeting, Mr. Pellerin raised the loans of Clifford Newell with Olympic Mortgage as a conflict of interest on the part of the Nevada County District Attorneys Office being able to conduct any disinterested investigation into Mr. Pellerin's claims against Olympic Mortgage. Mr. Pellerin sent a letter to the Attorney General's Office (with a copy to the Nevada County DA's Office) about the conflict of interest and also had further discussion with Detective Nelson of the Grass Valley Police to see what had happened to his complaint. He was informed that the matter had been referred to Mr. Newell's office for possible prosecution. However, no investigation or action of any kind was taken by the Nevada County District Attorney. See the Declaration of Gregory Pellerin, paragraphs 11-13. During all this time, Clifford Newell had millions of dollars of loans with Olympic and he never recused himself or referred the Pellerin's complaints about the Olympic loan to the Attorney General as would have been appropriate.

² Thomas Haster pled guilty to dozens of counts of mortgage fraud and is now serving time in a state correctional facility. See Nevada County Superior Court Case SF-058.

4. Mr. Pellerin was supposed to testify on April 20, 2010, at the restitution hearing for Thomas Hastert about his loans with Olympic Mortgage and Hastert. See the Declaration of Gregory Pellerin, paragraph 14. The Olympic loan to Mr. Pellerin was of crucial importance to keep from becoming public because it employed the same tactics as the Hastert loans: i.e., the full amount of the loan origination fees (points) were taken upon close of escrow, but the loan was never fully funded as required by law and by the loan agreement. The Defendant believes that the financial relationship between Mr. Newell and Olympic Mortgage was the basis for the Nevada County District Attorneys Office refusing to recuse itself and not referring the Pellerin loan from Olympic, as well as other Olympic loans that had been complained about, to the Attorney General for investigation.

5. On the morning of April 20, 2010, Mr. Pellerin was preparing to go to the restitution hearing and testify. However, a trespasser, Mr. Benzine (the purported victim in this case), arrived at the Pellerin residence to serve some legal papers. Although Mr. Pellerin had obtained a court order preventing any further service of legal papers except by a professional process server back in June of 2009, against a Mr. John Schema (the Pellerins landlord and business associate of Olympic Mortgage³), once again Mr. Schema had driven someone (on this occasions Mr. Benzine) to the Pellerin residence in violation of the court order to serve legal papers that could have been served by mail. When Mr. Pellerin asked Mr. Benzine to identify himself and started to walk towards where he knew Mr. Schema would be hiding, Mr. Benzine repeatedly assaulted and battered Mr. Pellerin trying to prevent him from finding Mr. Schema. Mr. Pellerin had no choice but to defend himself and place Mr. Benzine under citizens arrest.

³ These facts are contained in the Incident Report. Mr. Pellerin had a court order for John Schema to stay away from his residence in effect at this time.

Mr. Pellerin called the Nevada County Sheriffs Department for assistance and to take Mr. Benzine into custody for trespassing, assault and battery, and violation of a court stay away order. However, instead of arresting Mr. Benzine, the Nevada County Sheriff, after a lengthy series of radio and cell phone calls, instead arrested Mr. Pellerin. This is the incident that Mrs. Pellerin caught on the Flip video camera, the contents of which is the subject of the “sister” petition.

6. The additional declarations of Gregory Pellerin and Melissa Kaput, see Exhibit E, establish that, *prior to Mr. Pellerin even being processed at the Wayne Brown Correctional Facility by the Nevada County Sheriffs Department on April 20, 2010, knowledge of, and laughter about his arrest was taking place on the Nevada County Courthouse steps at the lunchtime break in the Hastert restitution hearing.* See Exhibit E.

The foregoing facts establish that Clifford Newell had a huge financial relationship with Olympic Mortgage and that when complaints about Olympic loans, including the loan to the Pellerins were made, the DA’s Office refused to recuse itself and refer the complaints to the Attorney Generals office for investigation and possible prosecution. The foregoing facts further establish the appearance of, if not an actual, conflict of interest on the part of the Nevada County District Attorneys Office and any matters involving Olympic Mortgage. This case involving the arrest of Mr. Pellerin on the day that he was going to testify about the Olympic loan should have been referred to the Attorney Generals Office for review before any complaint was filed. That would have guaranteed that a neutral prosecutor had evaluated the “incident” and that, if any charges were to be filed, that they bear a reasonable relationship to the facts of the incident. However, Mr. Newell refused to recuse the DA’s Office and filed felony assault and battery with

intent to commit serious bodily injury against Mr. Pellerin.

However, the Superior Court brushed these factual circumstances aside as mere “wispy strands of groundless accusations” and denied that the Defendant had even established the “appearance” of a conflict. See Exhibit F, pg. 21, lines 4-16. In light of the evidence presented by the Defendant, the finding of the Superior Court that there was neither an appearance of nor an actual conflict of interest on the part of the District Attorneys Office was a clear abuse of discretion.

B. The Superior Court Abused Its Discretion When It Denied The Defendant’s Request For An Evidentiary Hearing For Obtaining Further Evidence About The Conflict Of Interest And Showing That Defendant Was Unable To Obtain A Fair Trial

The foregoing facts raised in Defendant’s Motion to Recuse definitely established serious questions about the conduct of the Nevada County District Attorneys Office. For example, how was Mr. Pellerin’s arrest known to anyone before he had even been processed by the Sheriff and why was the person in charge of witnesses for the restitution hearing laughing and making jokes about Mr. Pellerin at the lunchtime break? *How was it possible that these people even knew that Mr. Pellerin had been arrested unless someone from the Nevada County District Attorneys Office had called them and informed them of Mr. Pellerin’s arrest?*

Moreover, in addition to the foregoing facts, the Defendant also brought forth in his Motion to Recuse the history about the evidence tampering with the video camera and the failure to turn over the other exculpatory video in the prosecution’s possession. See Exhibit A, pg. 3, lines 9-10, pg. 5, lines 8-14.⁴ The behavior of the District Attorneys Office regarding the video

⁴ The history of the video evidence tampering and Brady violations is the subject of the “sister” petition filed concurrently herewith.

camera is clear evidence of how the prosecution has acted with bias towards Mr. Pellerin, and more importantly, intends to continue prosecuting this case against Mr. Pellerin with bias resulting from Mr. Newell's relationship with Olympic Mortgage. It is now obvious that, with this district attorney, Defendant is not going to get a fair trial.

The Defendant requested a further evidentiary hearing to determine: (a) why he was arrested when he had a court order to keep Mr. Schema (and any of his friends like Mr. Benzine) away from his residence; (b) how did the person in charge of the restitution witnesses for April 20, 2010, know that Mr. Pellerin had been arrested before Mr. Pellerin had even been processed by the Sheriff; (c) why he was charged with two felonies to commit serious bodily injury when the purported victim suffered only a minor cut on his elbow; (d) why weren't any of the complaints that the Pellerins had made against Olympic Mortgage investigated by the DA's office; and (e) why didn't the DA simply recuse himself from any matter involving Olympic Mortgage when he had millions of dollars of loans with Olympic at the time.

The Superior Court's ruling that all of these facts and circumstances were mere "wispy strands of groundless accusation" is contrary to common sense and to the evidence presented. The Defendant has the right to find out how these things came about and why the District Attorney has been tampering with the evidence and doing everything possible to deny him his constitutional rights to a fair trial. The Superior Court's ruling clearly ignores the hard facts and unanswered questions and it was a clear abuse of discretion for the Superior Court to deny the Defendant an evidentiary hearing.

VII. Conclusion

In reviewing this petition, the Court of Appeal needs to look at the totality of this case,

including the facts behind the first petition for mandamus (C067033) and the “sister” petition filed concurrently with this petition concerning the denial of the Motion to Dismiss on the grounds of evidence tampering, violations of *Brady v. Maryland*, and the deliberate prosecutorial failure to even investigate the exculpatory evidence in its possession. When this is done, it is clear that the prosecution has engaged in a repeated pattern of unconstitutional behavior from before the felony complaint was filed right up to the present day when it still has not reviewed the exculpatory video evidence in its possession.

The Defense knows that if this case had been sent to a neutral prosecutor for a fresh evaluation, the charges would have been dropped. There is simply nothing in the Incident Report to support charging Mr. Pellerin with felony assault and battery with intent to commit serious bodily injury. The behavior of the Nevada County District Attorney in this case to date demonstrates beyond any doubt that there is something going on behind the scenes and that the Defendant is being prosecuted in a manner designed to make sure that he does not have a fair trial.

The huge, secret financial relationship between Mr. Newell and Olympic Mortgage created an actual conflict of interest that should have caused the Nevada County District Attorney to refer any matter involving Olympic to the Attorney General for neutral evaluation and investigation. Instead, Mr. Newell kept his relationship with Olympic secret until it was finally exposed in the Sacramento Bee on June 5-6, 2011. The arrest of Mr. Pellerin on the morning of the day that he was going to testify about his loan with Olympic and the knowledge of his arrest at noon that day before he was even processed (let alone the fact that he was being publicly ridiculed on the court house steps), demonstrates the need for a further evidentiary

hearing.

Based upon the evidence and arguments in support of the Motion to Recuse, the Defendant respectfully requests that this Court of Appeal grant him the relief requested or such other relief as the Court of Appeal deems appropriate.

Respectfully Submitted,

August 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 VII) is approximately 4050.

Patrick H. Dwyer,
Attorney for Petitioner

Date: August 22, 2011

VIII. EXHIBITS

- A. Defendant's Motion to Recuse, filed June 23, 2011.
- B. People's Opposition (by the Attorney General) to the Motion To Recuse filed July 27, 2011.
- C. People's Opposition (by the Nevada County District Attorney) to the Motion to Recuse filed July 28, 2011.
- D. Defendant's Reply to the People's Opposition filed August 2, 2011.
- E. The Supplemental Declaration of Gregory Pellerin and the Declaration of Melissa Kaput.
- F. Transcript of the proceedings of the Hearing of August 4, 2011.

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Plaintiff'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, with Exhibits A-F, 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.

Signature

Print Name

Date: August __, 2011