

SUPERIOR COURT OF CALIFORNIA

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FILED  
Los Angeles Superior Court

COUNTY OF LOS ANGELES

MAY 02 2008

CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER

By \_\_\_\_\_, Deputy

Department 130, Judge William C. Ryan

In Re:	X	Case No. BH 003 597
DEBORAH PEAGLER,	:	MEMORANDUM OF DECISION
	:	(Motion to Disqualify
On Habeas Corpus.	:	the District Attorney)
<u>PEOPLE OF THE STATE OF CALIFORNIA</u>	:	Case No. A 386 586
	:	
versus	:	
	:	
DEBORAH PEAGLER,	:	
	:	
Defendant.	:	
	X	

Motion by Petitioner Deborah Peagler to Recuse the District Attorney. Geoffery L. Robinson, Esq., of Bingham McCutchen LLP, for Petitioner and Defendant Deborah Peagler. Deputy District Attorneys Tracy Lopez, Esq. And Laura Jane Kessner, Esq., for Respondent and Plaintiff People of the State of California. Deputy Attorney General David Matthews, Esq., for the Hon. Edmund G. "Jerry" Brown, Jr., Attorney General of the State of California. Granted.

**PROCEDURAL HISTORY**

In January 1983, petitioner Deborah Peagler and another were charged with the 1982 murder with special circumstances of her so-called "common law husband" Oliver Wilson.<sup>1</sup> The special circumstance was alleged to be murder for financial gain, which exposed Ms. Peagler to the death penalty. The District Attorney, in the person of Deputy District Attorney Curt Livesey, indicated he would actually seek the death penalty.

On October 13, 1983, after her preliminary hearing at which she was held to answer as charged, Ms. Peagler, largely to avoid the death penalty, pled guilty to first degree murder. In exchange, the district attorney dismissed the special circumstance, which eliminated exposure to the death penalty. On November 15, 1983, Ms. Peagler was sentenced to an indeterminate term of 25 years to life. No appeal was taken from her conviction. Ms. Peagler is presently in the custody of the Director of the Department of Corrections and Rehabilitation, confined to the Central California Women's Facility at Chowchilla, California.

On September 1, 2005, Ms. Peagler petitioned this court for a writ of habeas corpus, which was summarily denied on December 13, 2005 (Wesley, J.). A subsequent motion to set aside the order denying the writ was also denied on April 24, 2006.

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<sup>1</sup> There is no common-law marriage in California.

(Wesley, J.). A supplemental petition for writ of habeas corpus was not considered because of a failure to obtain leave of court to file it.

On July 5, 2007, Ms. Peagler filed a petition for a writ of habeas corpus in the Court of Appeal of California, Second Appellate District (Case No. B 200 237). On November 2, 2007, Division Eight of that court (Cooper, Rubin and Flier, JJ.) issued an order to show cause why the relief prayed for in the petition should not be granted, returnable in this court for an evidentiary hearing and disposition. After one judge was disqualified pursuant to Code of Civil Procedure, section 170.6, and another recused herself, the matter was assigned to the undersigned.

#### CLAIMS IN THIS PETITION

In Ms. Peagler's petition, as amended and supplemented, she essentially makes three claims:

First, that prior to the murder, she suffered from Intimate Partner Battering (née Battered Woman's Syndrome) at the hands of Oliver Wilson. Had evidence of that been allowed in 1983 at trial, she would not have pled guilty. Instead, she would have gone to trial and would likely have been acquitted or, at most, been convicted of a lesser crime.

Second, that the testimony of the prosecution's principal witness at the preliminary hearing, Anthony Reedberg,

was untruthful, that he was a paid informant who received a benefit for his testimony, and that the district attorney knew his testimony was untruthful prior to Ms. Peagler being sentenced, and that they had an insufficient basis to seek the death penalty. Ms. Peagler further claims that the district attorney intentionally failed to disclose to her trial counsel the concerns about Mr. Reedberg's veracity, using the threat of an unobtainable death penalty as a negotiating point to extract a guilty plea to first degree murder. Ms. Peagler further claims that had she known about Reedberg's lack of veracity and informant status and the likelihood that the death penalty would not be sought, she never would have pled guilty to first degree murder.

Third, that the district attorney breached a plea agreement made in July 2005 that would have freed Ms. Peagler. She alleges that on July 26, 2005, prior the filing the initial petition in this court that was summarily denied in late 2005 by Judge Wesley, Ms. Peagler's attorneys met with District Attorney Steve Cooley, his Chief Deputy, Curt Livesey, and Mr. Livesey's Special Assistant, Karla Kerlin, regarding Ms. Peagler's case. During the meeting, both Mr. Cooley and Mr. Livesey allegedly agreed that Ms. Peagler was not guilty of murder, that the appropriate charge was likely voluntary manslaughter, and that they would write her attorneys to recommend the next step.

On July 28, 2005, after reflection, Chief Deputy Livesey wrote Ms. Peagler's attorneys to recommend filing a petition for a writ of habeas corpus pursuant to Penal Code, section 1473.5. The Chief Deputy allegedly went on to write that:

"Once the matter has been returned to the jurisdiction of the Los Angeles Superior Court, this office would be willing to offer a plea to one count of voluntary manslaughter, in violation of Penal Code § 192(a), with credit for the years of imprisonment served thus far. This disposition satisfies our office policy of requiring a plea to the charge that most accurately describes the defendant's criminal conduct. In context, it also serves the interests of justice."

The maximum punishment in California for voluntary manslaughter alone, with no enhancements, is a determinate sentence of eleven years in any State Prison. Because Ms. Peagler had been confined at that point approximately 22 years, this disposition would have resulted in her immediate release into the community.

On August 29, 2006, Ms. Peagler's attorneys learned from Assistant District Attorney John Spillaine that there were concerns within the District Attorney's office regarding the manner in which the plea offer was made by Mr. Livesey. In the midst of this, on September 1, 2005, Ms. Peagler filed her petition for writ of habeas corpus, pursuant to Penal Code,

section 1475.5.

On September 12, 2005, Mr. Spillaine allegedly telephoned Ms. Peagler's attorneys to advise that the District Attorney had decided to withdraw the plea offer made by Mr. Livesey. The same day, a letter signed by Assistant District Attorney Curtis Hazell, who was Acting Chief Deputy while Mr. Livesey was on vacation out of the country, was sent to Ms. Peagler's attorneys advising that the plea offer was withdrawn, and purporting to explain why it had been withdrawn.

Later, Ms. Peagler's attorneys learned that there was a great deal of internal controversy in the District Attorneys Office -- described by one observer as a "firestorm" -- regarding the plea offer. On October 22, 2005, Ms. Peagler's attorneys allegedly spoke to both Mr. Spillaine and Head Deputy District Attorney Lael Rubin, who was in charge of the Appellate Division, including the Habeas Corpus Litigation Team ("HabLit Team"), regarding the plea agreement. Both of them purportedly told Ms. Peagler's attorneys that the internal controversy was regarding how the plea agreement was reached and the lack of review by the HabLit Team, and that it did not relate to the merits of Ms. Peagler's case or the offered disposition. Two months later, on December 13, 2005, Judge Wesley summarily denied Ms. Peagler's petition.

Ms. Peagler moved to reconsider the order summarily

denying the petition, but that motion was denied by Judge Wesley in April 2006. A supplemental petition was filed but never ruled upon. Sometime in 2007 but prior to the instant petition being filed in the Court of Appeal, Mr. Livesey allegedly contacted Judge Wesley *ex parte* in chambers to urge him reconsider denial of the 2005 petition, and to grant the writ. This petition followed.

#### DISCUSSION

Petitioner Deborah Peagler has moved to disqualify the district attorney's office pursuant to Penal Code, section 1424(a)(1). She contends that a conflict of interest exists such that she will not receive a fair hearing on her petition. The conflicts alleged are essentially the things that give rise to her three claims in the petition, as well as the spectre of possible civil liability for several past and present employees of the district attorney's office.

The standard for disqualifying a district attorney is two part: (1) Is there a conflict of interest, and, if so, (2) is it so severe as to render it unlikely that the defendant [here, petitioner] will receive fair treatment during all portions of the proceeding. *E.g. People v. Choi* (2000) 80 Cal. App. 4<sup>th</sup> 476, 480-81, citing *People v. Connor* (1983) 34 Cal. 3<sup>rd</sup> 141. A conflict exists whenever the circumstances of the case evidence a reasonable possibility that the district attorney's office may

not exercise its discretionary functions in an evenhanded manner. Connor, *supra*, at 148 (emphasis added). In determining whether a conflict exists, no one factor will compel disqualification. Rather, the entire complex of facts must be considered by the court to determine whether it is unlikely that a defendant will receive fair and impartial treatment. *Hambarian v. Superior Court* (2002) 27 Cal. 4<sup>th</sup> 826, 834; *People v. Eubanks* (1996) 14 Cal. 4<sup>th</sup> 580, 599.

At the outset, the district attorney at oral argument argued in opposition that the misconduct alleged in the petition for a writ of habeas corpus is not factually true, especially as to the third claim, and therefore no conflict exists. But that begs the question, and the district attorney essentially asks me to find that the allegations of the second and third claims are untrue, before hearing the evidence, in order to deny the motion. Yet in the district attorney's written opposition to the motion, the district attorney also argued that to grant the motion, the court would have to first have to find the allegations in petition to be true, before hearing the evidence, in which case the writ should issue, and the motion be denied.<sup>2</sup>

Both of these arguments miss the mark. The Court of Appeal has already determined that a *prima facie* showing has been made. That compels this court to assume, for purposes of the

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<sup>2</sup> First the sentence then the verdict? Cf. Carroll, *Alice's Adventures in Wonderland*, chap. 12 (1865).

motion to disqualify only, that the allegations of the petition are true, and rule accordingly.

The district attorney and the attorney general both argue that there is no actual conflict that would justify recusing the district attorney. With respect, I disagree. Ms. Peagler's second and third claims, if true, directly implicate the practices, conduct, and integrity of the district attorney's office, especially its senior management both in 1983 and in 2005. Current and past high-level members of that office will undoubtedly be called to testify by Ms. Peagler at the evidentiary hearing to support some of her factual contentions and to authenticate documents that, *inter alia*, claim to show a failure to disclose exculpatory evidence prior to Ms. Peagler pleading.

Consequently, subordinate attorneys in the district attorney's office will be placed in the awkward position of having to cross-examine vigorously - or perhaps not so vigorously or at all - Mr. Cooley, Mr. Livesey, Mr. Hazell, Ms. Rubin, Mr. Spillaine, and other past and present senior members of that office. Indeed, at the earlier oral argument on this motion, the attorney general, in response to the court's question about having the cross-examine Attorney General Brown, candidly admitted that he would not be comfortable doing so and that he would prefer that someone else do so. That, of course, was the

full-credit answer and demonstrates the reality and depth of the conflict. Junior deputy district attorney's cross-examining senior management deputy district attorney's is not really the adversarial setting contemplated in this situation and is not designed to quickly and efficiently get at the truth.<sup>3</sup> The probability is that these deputy district attorneys will not be able to disregard the fact that the witnesses are their own superiors. The conflict is palpable and self-evident.

Another conflict arises from the second claim that the district attorney obtained a guilty plea from petitioner by (1) the use of known perjured testimony at her preliminary hearing, (2) from an informant who received a benefit for testifying against her, and (3) even though there was evidence that the special circumstance could not be proved beyond a reasonable doubt. Ms. Peagler claims that the prosecution then failed to disclose those facts to her attorney, even though those circumstances appear to have been known to the district attorney prior to Ms. Peagler being sentenced on November 1983. See Exhibit "F" to the Declaration of Geoffrey L. Robinson in support of Amendment and Supplement to Habeas Petition (Memorandum to Curt Livesey from Peter S. Berman, dated October 26, 1983).

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<sup>3</sup> Wigmore's aphorism still holds true today. Cross-examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367 (Chadbourn rev. 1976).

Ordinarily, a bare claim of misconduct by a line deputy in the ordinary course of a case would not be enough to disqualify the district attorney. But here, when the entire complex of facts and allegations, supported by declarations and documents, are considered, it appears that there may be an understandable tendency to over-defend and seek to prevail whatever the consequence as to what happened in 1983, especially because Mr. Livesey appears to have been involved. This is also evidenced by the unusual circumstances of the 2005 plea offer, its retraction, and Mr. Livesey's subsequent *ex parte* meeting with Judge Wesley in an attempt to have him grant the petition, even though there was apparently substantial internal conflict as to the proper course. Caught in this crossfire of internal conflict and faced with a "circle the wagons" attitude against professional criticism, is Ms. Peagler. It seems more than reasonably probable that Ms. Peagler will not be able to receive the fair and impartial treatment to which by law she is entitled.

The district attorney has also argued that either the doctrine of separation of powers, or some form of a deliberative privilege, or both, applies to this case, which would bar inquiry into why the district attorney made and then withdrew the plea agreement in 2005. Without deciding at this juncture whether either would preclude a detailed and searching inquiry, it is likely that some inquiry would be allowed at least as to the

public facts as claimed by Ms. Peagler, which would probably result in at least Mr. Cooley, Mr. Livesey, Mr. Hazell and Mr. Spillaine being called to testify.

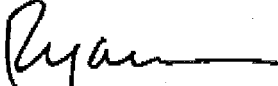
The district attorney also has argued that the third claim was not cognizable by habeas corpus, and, therefore, there is no need to call or cross-examine past and present senior members of the district attorney's office. Again, with respect, I disagree. Anyone claiming to be unlawfully restrained of his or her liberty "under any pretense whatsoever," may prosecute a writ petition. Penal Code, section 1473(a). The enumeration of specific grounds for a writ in that section is not to be construed as a limitation. *Id.*, subsection (d). The claim is that but for the district attorney's breach of the plea agreement back in 2005, Ms. Peagler would be out of custody today, and that she is therefore unlawfully restrained of her liberty. Ms. Peagler's third claim is therefore cognizable via habeas corpus.

#### DECISION

A motion to disqualify should not be granted for trivial reasons but should be granted where the conflict is grave. In my opinion such is the case here. Accordingly, petitioner's motion to disqualify the district attorney is GRANTED.

Clerk to give notice to all parties.

Dated: May 2, 2008  
Los Angeles, California

  
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William C. Ryan  
Judge of the Superior Court