After careful consideration of the facts, the briefs and arguments of counsel, and the pertinent authorities, and good cause appearing therefore, the Court hereby confirms its March 30, 2023, tentative ruling as follows:

On November 4, 2022, Petitioner Joseph H. Nuccio ("Petitioner") filed an amended petition for writ of habeas corpus alleging both wrongful conviction and of factual innocence. In support of these claims, Petitioner offers four volumes of evidence and cites new DNA evidence, the purported failure of the prosecution to disclose exculpatory evidence under Brady, Trombetta, and Youngblood (citations omitted), and the possible presentation of false testimony at the trial in violation of Brady and Napue (citation omitted). The record shows that this petition is based upon years of post-conviction discovery, which ultimately resulted in the April 26, 2022 "Order for Discovery" and in a formal evidence log filed in this action on May 24, 2022.

The Motion to Recuse

On February 8, 2023, Petitioner filed this motion to recuse the San Joaquin County District Attorney's Office. As in the underlying habeas petition, Petitioner asserts that the District Attorney's Office suppressed, lost, or destroyed evidence in Petitioner's case and even claims that the "State was aware of Petitioner's innocence prior to arrest and prosecution". (Motion at p. 3.)

On March 6, 2023 the Office of the Attorney General for the State of California filed an opposition. On March 7, 2023, the San Joaquin County District Attorney's Office filed its opposition and an accompanying declaration from Deputy District Attorney Robert Himelblau, the district attorney presently assigned to this case.

On March 10, 2023, Petitioner filed a 46-page reply. The reply stated "a much larger issue that has come to light . . . which dramatically changes the nature of the motion and the substance of the Attorney General's Opposition". (Reply filed Mar. 10, 2023, at p. 1.) On March 8, 2023, the District Attorney's Office had turned over additional, new discovery.

On March 13, 2023, the matter came on for hearing. Deputy Attorney General Sean McCoy appeared for the Office of the Attorney General. Deputy District Attorney Robert Himelblau appeared for the Office of District Attorney. Jennifer Sheetz, Esq. appeared for Petitioner Joseph Nuccio, who was not present but in custody serving his sentence. At the hearing on the matter the Court ordered the following briefing schedule: Petitioner to file an amended reply/ supplemental reply on March 17, 2023; the district attorney and attorney general to file supplemental responses on March 24, 2023. Further hearing on the matter was set for April 3, 2023.

Thereafter, on March 20, 2023, Petitioner filed his amended reply. On March 24, 2023, the Office of the District Attorney filed its supplemental opposition and accompanying declaration of Robert Himelblau. On March 27, 2023, the attorney general filed its supplemental response.

The parties appeared and argued the motion on April 3, 2023, and on April 10, 2023.

After careful consideration of the facts, the briefs and arguments of counsel, oral argument of the parties, and the pertinent authorities, and good cause appearing therefore, the Court rules as follows:

1. Penal Code section 1424.

As a preliminary matter,

Section 1424(a) governs motions seeking to disqualify a district attorney "from performing an authorized duty." Although motions to recuse or disqualify a district attorney are most typically made in the context of a criminal prosecution, the broad language of section 1424(a) does not limit its application to criminal cases.

(People v. AWI Builders, Inc. (2022) 80 Cal.App.5th 248, 266–267.) The parties and the court agree—Penal Code section 1424(a) provides guidance as to when recusal is appropriate, even in habeas cases. (See People v. Vasquez (2006) 39 Cal.4th 47, 56 (stating, "Although the statute refers to a "fair trial," we have recognized that many of the prosecutor's critical discretionary choices are made before or after trial and have hence interpreted section 1424 as requiring recusal on a showing of a conflict of interest " 'so grave as to render it unlikely that defendant will receive fair treatment during all portions of the criminal proceedings.' " (Eubanks, at p. 593, 59 Cal.Rptr.2d 200, 927 P.2d 310, quoting People v. Conner, supra, 34 Cal.3d at p. 148, 193 Cal.Rptr. 148, 666 P.2d 5.".) (emphasis in original).) As such, the court looks to Penal Code section 1424 and its progeny for guidance.

2. The Section 1424 Test.

In section 1424, the Legislature established a substantive test for a motion to disqualify the district attorney: "The motion may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial." The statute demands a showing of a real, not merely apparent, potential for unfair treatment, and further requires that that potential "rise to the level of a likelihood of unfairness." (Eubanks, supra, 14 Cal.4th at p. 592, 59 Cal.Rptr.2d 200, 927 P.2d 310.)
(People v. Vasquez (2006) 39 Cal.4th 47, 56 (emphasis in original).)

In People v. Bryant, Smith and Wheeler (2014) 60 Cal.4th 335, 374, the California Supreme Court rejected an argument that past conduct of the prosecution controls Section 1424 analysis—"[t]hat is not the proper inquiry." (People v. AWI Builders, Inc. (2022) 80 Cal.App.5th 248, 275.) "[R]ecusal is not a mechanism to punish past prosecutorial misconduct. Instead, it is employed if necessary to ensure that future proceedings will be fair. '[Penal Code] [s]ection 1424 does not exist as a free-form vehicle through which to express judicial condemnation of distasteful, or even improper, prosecutorial actions.' " (People v. Bryant, Smith and Wheeler (2014) 60 Cal.4th 335, 375, 178 Cal.Rptr.3d 185, 334 P.3d 573.)" (People v. AWI Builders, Inc. (2022) 80 Cal.App.5th 248, 275 (emphasis added).)

Therefore, when considering a motion for recusal, it is the moving party's "burden to allege facts which, if credited, establish: (1) a 'conflict of interest,' and (2) that the conflict is 'so grave as to make a "fair trial" [or proceeding] unlikely.'" (Melcher v. Superior Court (2017) 10 Cal.App.5th

160, 166.) "[T]he first half of the inquiry asks only whether a "reasonable possibility" of less than impartial treatment exists, while the second half of the inquiry asks whether any such possibility is so great that it is more likely than not the defendant will be treated unfairly during some portion of the criminal proceedings." (Melcher v. Superior Court (2017) 10 Cal.App.5th 160, 166–167.)

3. This Case.

"A conflict under section 1424 "exists whenever the circumstances of a case evidence a reasonable possibility that the DA's office may not exercise its discretionary function in an evenhanded manner. Thus, there is no need to determine whether a conflict is 'actual,' or only gives an 'appearance' of conflict." However, for recusal to be granted, defendant must demonstrate that fair treatment by the office is unlikely."
(People v. Cannedy (2009) 176 Cal.App.4th 1474, 1480.) Stated otherwise,

"Although the statute fails to "specify whether the disqualifying conflict must be 'actual' or need only generate the 'appearance of conflict,' " the Supreme Court defines a conflict allowing recusal as one "of such gravity as to render it unlikely that defendant will receive a fair trial unless recusal is ordered" (People v. Conner (1983) 34 Cal.3d 141, 147, 193 Cal.Rptr. 148, 666 P.2d 5 ("Conner "), italics added) and construes the statute as prohibiting recusal solely on the ground of the appearance of impropriety: "Conner establishes that, whether the prosecutor's conflict is characterized as actual or only apparent, the potential for prejudice to the defendant—the likelihood that the defendant will not receive a fair trial—must be real, not merely apparent, and must rise to the level of a likelihood of unfairness." (People v. Eubanks (1996) 14 Cal.4th 580, 592, 59 Cal.Rptr.2d 200, 927 P.2d 310 ("Eubanks"), original italics.)"

(People v. Jenan (2006) 140 Cal.App.4th 782, 791–792; see also People v. Vasquez (2006) 39 Cal.4th 47, 55.)

In this habeas matter, the record shows that on April 26, 2022, the Court issued an "Order for Discovery" wherein the prosecution team was ordered to turn over nearly everything in its possession. (See Order filed April 26, 2022.) The order also required the parties to meet and confer and file a formal Evidence Log in this action. (Id.) This was done on May 24, 2022. (See Evidence Log filed May 24, 2022.) In large part, the purpose of the Evidence Log was to assist in the location of evidence and establishment of the chain of custody of evidence alleged to have been misplaced, lost, or destroyed going as far back as 2001. At the May 24, 2022, hearing regarding the Evidence Log, Deputy District Attorney Himelblau represented to the counsel and to the court that all discovery has been put onto a CD Rom and was ready for Attorney Sheetz. (Minute Order, dated May 24, 2022.)

On June 17, 2022, the parties through their counsel appeared for a further status conference. The Court ordered Deputy District Attorney Himeblau and Attorney Sheetz to meet regarding the photo negatives that were noted in police records as being taken next to the victim's body in order that the photos could be developed and turned over to the Petitioner. (Minute Order date, June 17, 2022.)

On July 22, 2022, the parties appeared yet again for a status conference. At that conference, the parties discussed a Pitchess issue that arouse during the post-conviction discovery proceedings. The Court ordered Petitioner to file his amended habeas petition by October 28, 2022, and set a Pitchess Motion for September 16, 2022.

On September 16, 2022, the Court conducted in camera review of the Pitchess material. (Minute Order, dated Sept. 16, 2022.)

On September 27, 2022, the parties appeared again. The Court granted Petitioner's request to unseal additional confidential material and again ordered that the amended petition for writ of habeas corpus be filed on or before October 28, 2022. (Minute Order, dated Sept. 27, 2022.)

On November 4, 2022, Petitioner filed his amended petition under the guise of having been provided all the requested and ordered post-conviction discovery in the possession of the prosecution team that had not been lost, destroyed, and/or misplaced.

Yet, four months later, on March 7, 2023, in response to the instant motion, District Attorney Himelblau provided a declaration under penalty of perjury stating:

28. After Petitioner's counsel examined evidence located at the Stockton Police Department on April 26, 2022, I requested the latent print cards be retrieved and compared to the prints of Jody Zunino, Terry Sprinkle and Petitioner.

29. On or about October 4, 2022, I received a report from the California Department of Justice. The report indicated (1) Print Card #1 did not yield sufficient details for comparison; (2) Print Card #2 excluded Jody Zunino, Terry Sprinkle or Petitioner; and (3) Print Card #3 identified Elaine Marie Barnes.
29a. This California Department of Justice has not been discovered to Petitioner's counsel at time of this declaration but will be prior to the March 13, 2023, hearing.

30. On October 4, 2022 Investigator Rodriquez determined that Elaine Marie Barnes had convictions for prostitution; four convictions for Penal Code section 647(b) from 1989 to 1993.) In addition, he located a 1994 Stockton Police report (SPD CR# 94-42225) listing an Elaine Mullholland as a reporting party. Elaine Mullholland is also known as Elaine Marie Barnes.

30a. A reading of the report reveals, in brief, Mullholland and Sprinkle argued while in a motel room. Mullholland said he raised a knife during the argument. She grabbed the knife and cut herself. Sprinkle said he caught Mullholland stealing money and they argued and she raised a pair of pliers. He pushed her into the shower where she cut her hand on a broken shower handle. A broken shower handle, a knife, and a pair of pliers were all found in the room.

30b. No charges were ever filed.

30c. I reviewed Sprinkle's CLETS printout printed on or about August 29, 2007 and provided to the trial court. I also reviewed Sprinkle's CLETS printout printed on or about July 28, 2022. The incident referred to in SPD CR# 94 42225 does not appear on either print out.

30d. Report SPD CR# 94-42225 has not been discovered to Petitioner's counsel at time of this declaration but will be prior to the March 13, 2023, hearing.

31. The latent prints lifted by Technician Nasello have not been lost or suppressed.

(Decl. Himelblau, filed March 7, 2023 (emphasis added).)

Petitioner's initial reply offered in support of this motion filed on March 10, 2023, confirms that Attorney Sheetz did not receive the above-noted new discovery from the Office of the District Attorney until March 8, 2023. (Supp. Decl. of Sheetz, filed March 10, 2023, ¶ 4.)

Pursuant to Rules of Professional Conduct, Rule 3.8, the Office of the District Attorney has an ongoing duty to turn over new, credible and material evidence creating a likelihood that a convicted defendant did not commit an offense of which the defendant was convicted. (CA ST RPC Rule 3.8.) The District Attorney also has a duty to "undertake further investigation, or make reasonable* efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit" if the prosecution occurred in the prosecutor's jurisdiction. (CA ST RPC Rule 3.8.) (See also, In re Jenkins (2023) 14 Cal.5th 493 (discussing duties post-conviction).)

In addition, pursuant to this Court's order issued on April 26, 2022, the District Attorney (inclusive of the prosecution team) has been ordered to turn over to Petitioner's counsel all the discovery identified therein. This includes materials discoverable under Penal Code section 1054.9. Rather alarming, at no point during any of the almost monthly status conferences between April 2022 and October 2022 did Deputy District Attorney Himelblau disclose to Petitioner's counsel or to the court that the missing latent finger print evidence had be located after Attorney Sheetz' April 26, 2022, visit to the Stockton Police Department, (Decl. Himelblau filed March 7, 2023, ¶ 28), and that the fingerprint evidence was "tested" or run through the DOJ system at some point prior to October 4, 2022, (Decl. Himelblau filed March 7, 2023, ¶¶ 28-29a.). Instead, Deputy District Attorney Himelblau disclosed that material and a related police report detailing an altercation involving a knife between another prostitute and Terry Sprinkle for the first time on or about March 8, 2023—approximately 10 months after the latent fingerprint evidence was initially found in April 2022 and nearly four months after Petitioner's amended habeas petition was filed. (Decl. Himelblau filed March 7, 2023, ¶ 30d.) This is troublesome as this "delay" prohibited Petitioner from addressing this new evidence in the amended habeas petition.

The Court notes that these March 2023 disclosures are not the only pieces of evidence that appear to have been lost, misplaced, destroyed, and/or untimely produced during these post-conviction proceedings. For example, the March 7, 2023, Declaration of District Attorney Himelblau notes that Investigator Eduardo Rodriguez's chain of custody report for Terry Sprinkle's blood vial was not provided prior to the filing of the amended habeas petition, (Decl. Himelblau filed March 7, 2023). Until recently, the prosecution had represented to Petitioner's

counsel and to the court that the vial had been lost. (See Decl. Himelblau filed March 7, 2023, ¶ 51.) And in July of 2021, the Office of the District Attorney only provided Petitioner's counsel with "Side A" of a cassette tape containing an interview with Terry Sprinkle, although arguably a mistake. (See Decl. Himelblau filed March 7, 2023, ¶ 70-70b.)

The operative habeas petition—and the motion to recuse—allege, in essence, a "systematic" breakdown of the handling of the evidence in this case beginning in 2001 (shortly after the murder) and continuing up to the present. It appears that members of the prosecution team (which includes attorneys, investigators, office staff, and local law enforcement personnel) may need to be called as witnesses at a future evidentiary hearing on the merits of the Petitioner's wrongful conviction and actual innocence claims. True, "[t]he fact that an employee of the district attorney's office might be a witness . . . and credibility of that witness may have to be argued by the prosecuting attorney," is not enough reason alone to recuse an entire prosecutorial office. (People v. Cannedy (2009) 176 Cal.App.4th 1474, 1482.) However, given the evidence before this court, the prosecution's recent "delays" in production in this proceeding and seeming disregard of this Court's discovery orders in combination with the many allegations of prosecutorial misconduct in the pending habeas petition (including, Brady, Trombetta, Youngblood, and more), it is foreseeable that the "office as a whole, would likely be influenced by the personal interest of the district attorney" and that of the involved employees and agents as opposed to the interests of justice. (Melcher v. Superior Court (2017) 10 Cal.App.5th 160, 167.) Stated otherwise, it is foreseeable that there could be a conflict between prosecution's desire to defend the reputation of the office and the prosecution's duty to evenhandedly assist in the determination of the validity of Petitioner's conviction. The court emphasizes, "recusal motions are not disciplinary proceedings against the prosecutor". (Hollywood v. Superior Court (2008) 43 Cal.4th 721, 731.) "The ultimate focus of the section 1424 inquiry is on protection of the defendant's rights, not whether recusal may be just or unjust for the prosecutor." (Hollywood v. Superior Court (2008) 43 Cal.4th 721, 731.) "The public prosecutor's proper interest is not that it shall win a case, but that justice shall be done." (People v. Vasquez (2006) 39 Cal. 4th 47, 55 (internal quotation marks and citation omitted).) The court finds Petitioner met his prima facie burden in showing a reasonable possibility that Petitioner will be treated unfairly in future proceedings before this court.

4. Evidentiary Hearing.

A judge has discretion to determine whether to hold a hearing on a motion to recuse. When there are factual disputes and credibility findings that must be made to decide the motion, an evidentiary hearing is appropriate. (Penal Code, § 1424.) As such, based upon the foregoing, the court orders an evidentiary hearing be set at a time agreeable to the parties and to the court. This hearing will be for the purpose of determining whether a conflict exists that renders it unlikely that Petitioner will receive fair treatment during future proceedings, and if necessary, that no alternative short of recusal of the Office of District Attorney exists. At the April 10, 2023, hearing on the matter, District Attorney Himelblau represented to the court that explanations for the above noted conduct—both his own and that of others—exist, and as such, evidence to that effect as well as evidence of any measures in place to avoid future discovery and evidentiary disclosure/ handling issues in this proceeding shall be presented at the hearing.

Linda L. Lofthus
Judge of the Superior Court