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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE MICHAEL F. MURRAY. NO. 207	**VERIFIED ANSWER OF JUDGE MICHAEL F. MURRAY TO NOTICE OF FORMAL PROCEEDINGS**

The Honorable Michael F. Murray responds to the Notice of Formal Proceedings now pending before the Commission on Judicial Performance as follows:

INTRODUCTION

Around 3:00 or 4:00 a.m. on July 7, 2006, Cole Wilkins committed a felony burglary when he stole appliances and other fixtures from a residential construction site in Menifee. He loaded the stolen goods into a pick-up truck. He did not tie down, or otherwise secure the appliances. The tailgate of the truck was open. Wilkins headed for Long Beach with the unsecured, stolen appliances in the back of the truck. In the dark, at approximately 5:00 a.m., a stove fell off the truck onto the 91 Freeway. Wilkins did not stop. Within minutes, three drivers struck the stove and an off-duty Los Angeles County Sheriff's Deputy, David Piquette swerved to avoid the stove. When he swerved, Deputy Piquette struck the left side of a Mack tractor-trailer. The big rig swerved to the right, slid along the K-rail, jackknifed, and overturned onto Deputy Piquette's car. David Piquette was killed.

On July 13, 2006, Cole Wilkins was charged with murder. The prosecution pursued two theories, felony murder and murder with implied malice, because the stolen stove, which had been dropped on the freeway by Cole Wilkins, was a substantial factor in the cause of David Piquette's death.

In November 2006, after the preliminary hearing, Deputy District Attorney Michael Murray was, for the first time, assigned to the prosecution of the murder case. DDA Murray was provided with three thorough reports from the California Highway Patrol, two regarding the collisions of the first three drivers with the stove and a third report regarding the collision of David Piquette with the truck. All three reports clearly stated that the cause of the collision was "other than driver." The report on the Piquette accident stated:

> "The cause of this traffic collision is 'other than driver'. This determination is based upon the dark lighting conditions, the dark color of the object (range) in the roadway and the limited

> visibility of the object as evidenced by the numerous other drivers serving into adjacent lanes to avoid the object. At least three other vehicles actually struck this object and their damage was documented by the California Highway Patrol. The range, which had fallen from a vehicle being driven by Witness Wilkins, was left abandoned by him in the roadway. After the range had fallen, Witness Wilkins continued westbound on State Route 91 and did not stop or call to report the hazard."

Michael Murray had no reason to question the obvious fact that if the stove had not been on the freeway David Piquette would not have swerved into the truck. Voir Dire for the first trial of the Wilkins case began on April 21, 2008. On May 5, 2008, the jury returned a guilty verdict on the murder charge, based on the CALCRIM jury instructions for felony murder. Michael Murray received no information before or during the trial suggesting that the Primary Collision Factor on the reports had been changed from that originally stated by the investigating CHP officers. DDA Murray was told during the trial that there were CHP officers who did not believe it should be a murder case; however, that information did not cause any concern since a felony murder theory was unusual in traffic collision cases. A suggestion that there were officers who did not agree with the charge, certainly did not suggest that the accident reports had been revised to change the Primary Collision Factor.

After the guilty verdict, defense counsel, Joseph Vodnoy, proposed July 11, 2008, as the date for sentencing. DDA Murray had emphasized to Mr. Vodnoy, that the sentencing needed to go forward on the date chosen by Mr. Vodnoy since Deputy Piquette's widow and other family members would be scheduled to appear to provide victim impact statements. Nevertheless, Mr. Vodnoy filed a motion to continue the sentencing hearing based on the length of the sentencing report and his inability to prepare for the hearing because of his vacation. DDA Murray did not believe the motion established good cause for a continuance and objected to the continuance. There was no

allegation in Mr. Vodnoy's moving papers of any impropriety during the investigation of the accidents.

At the sentencing hearing, Mr. Vodnoy stated he wanted to add a "completely different ground" that it had been "brought to [his] attention that there were improprieties, or at least alleged improprieties" by the Highway Patrol in connection with the investigation of this case. He asked to be given time to explore allegations that there was alleged tampering of reports by CHP officers, none of whom had been witnesses in the Wilkins matter. DDA Murray responded:

> "He's just stated some reasons that are not contained in his declaration that was filed with the 1050. And he still hasn't stated any reasons that indicate that there's new evidence or a change in evidence that would affect in any way the outcome of this case.
>
> He's made some allegations that aren't his. He hasn't talked about the substance of where these allegations came from. I'm not familiar with any of this material. And he hasn't talked about how any of that affects the outcome of this case.
>
> It's notable that none of these individual, Lieutenant Worthington, Officer Rosenberg, none of them were witnesses in the trial.
>
> And he hasn't talked about how there's any relevance to an alleged internal affairs investigation, which I don't even have any confirmation. There is an investigation ongoing. How any of that would in any way impact the jurors findings in this particular case. So, I don't think there's any good legal cause stated."

Mr. Vodnoy then asserted, "There was tampering with the report in this case in terms of causal connection between the incident that occurred in this case." He again asked for a continuance to explore the allegations. The trial court denied the request for a continuance.

DDA Murray did not give the new allegations credence. He had advised Mr. Vodnoy, just before the hearing started that he would be objecting to the continuance. Mr. Vodnoy then said he would raise allegations about impropriety in the investigation of the accident, but Mr. Vodnoy could (or would) not provide any information regarding the source of the allegations. Mr. Vodnoy declined to reduce the allegations to writing. It remained obvious that Deputy Piquette had swerved to avoid the stove, making the stove a substantial factor in the collision under the felony murder instruction. Mr. Vodnoy said nothing further to DDA Murray about these allegations after the hearing.

At the time the verdict had been entered in the Wilkins case, the pretrial motions had already started in a capital murder case in which DDA Murray was the prosecutor. That trial continued until July 31, 2008. Judge Murray acknowledges that, after the sentencing hearing, he did not give any further thought to the allegations that had been made at the hearing.

A Notice of Appeal in the Wilkins case was filed on the day of the sentencing hearing. DDA Murray was not involved in the appeal. The case remained on appeal until the remittitur issued by the Supreme Court was filed on June 7, 2013. The Supreme Court reversed the affirmation of the conviction by the Court of Appeal and overturned the conviction on the ground that the trial court had refused an instruction that the felony only continued until the perpetrator had reached a place of temporary safety.

DDA Murray made three appearances after the remittitur in which the Public Defender's office was appointed and dates for future hearings were set. The last of those appearances was on September 6, 2013. In November of 2013, before the next scheduled appearance, DDA Murray had back surgery and the Wilkins case was reassigned to DDA Larry Yellin.

On October 3, 2014, a Pitchess Motion was filed on behalf of Mr. Wilkins. DDA Murray was not assigned to the Wilkins case at that point and did not see the motion. DDA Murray does recall that around that time, Deputy District Attorney Yellin, who was

the assigned DDA on the case, asked him whether he knew anything about changed reports; DDA Murray responded that he did not.

On July 10, 2015, the Public Defender's Office filed a Motion to Dismiss the case for "Outrageous Government Conduct." DDA Murray was still not assigned to the case but he was provided with the motion since it accused him of misconduct. He understood the District Attorney's Office was investigating the allegations that had been made in the motion. DDA Murray then learned, for the first time, from an interview of CHP Sergeant Joseph Morrison, conducted by OCDA Investigator Cardenas, that the Primary Collision Factor originally listed by the investigating officers in their reports had been changed. By the time DDA Michael Murray had the information that the reports had been changed, that information had long been known to Mr. Wilkins' counsel at the Public Defender's Office.

Judge Murray was sworn in as a judge of the Orange County Superior Court on January 3, 2017. He has worked hard to serve the court well and is not aware of any complaints about his conduct as a judicial officer. The commission does not allege in this proceeding that Judge Murray has engaged in any judicial misconduct. Instead, the commission seeks to censure or remove Judge Murray for allegedly violating Mr. Wilkins' *Brady* rights while Judge Murray was a Deputy District Attorney.

Judge Murray does not dispute, based on the information he has learned since July 2015, that Mr. Wilkins' *Brady* rights were violated. For purposes of the Wilkins case, the standard for determining whether there was a *Brady* violation required that the knowledge of the entire prosecution team, including members of law enforcement, be imputed to the District Attorney's Office.

However, the standard for imposing discipline on Judge Murray in these proceedings must be different than the standard applicable in the criminal case against Wilkins. The questions that must be answered in these proceedings are (1) what DDA Murray personally knew; (2) whether DDA Murray intentionally failed to investigate

when he was obligated to investigate; and (3) whether DDA Murray intentionally failed to disclose information he knew, when he was required to disclose that information. Judge Murray asks that the allegations in this matter be carefully evaluated to differentiate between the information which was known to others in the Orange County District Attorney's Office or to other members of the prosecution team and what DDA Murray *personally knew*.

Judge Murray also asks that the Masters and the commission evaluate the allegations in this matter without the benefit of hindsight. DDA Murray's actions should be viewed in the context of the facts and circumstances and the information known to him at the time of the events in question, not in the context of what is now known about the changing of the reports. Twenty-twenty hindsight should not influence the conclusions of either the Masters or the Commission on Judicial Performance.

FURTHER RESPONSE TO THE NOTICE OF FORMAL PROCEEDINGS

1. Judge Murray denies that he committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute or improper action within the meaning of article VI, section 18 of the California Constitution, providing for removal, censure, or public or private admonishment by the commission.

COUNT ONE

2. Judge Murray admits that on July 7, 2006, Cole Wilkins burglarized a house under construction in Riverside County and loaded some large household appliances onto the back of a pickup truck without securing them in any manner. The tailgate of the truck was down and none of the items in the bed of the truck were tied down. Shortly before 5:00 a.m., Mr. Wilkins was driving the pickup truck westbound on the 91 freeway, travelling approximately 60 to 65 miles per hour, heading in the direction of his home in Long Beach when a stove fell from the back of the truck onto the 91 freeway. The stove fell in either the fast lane or the lane just right of the fast lane of the four-lane freeway. After the stove fell off the truck, multiple vehicles collided with the

stove. At 5:00 a.m., off-duty Los Angeles County Sheriff's Deputy David Piquette, who was driving in the number one or two lane, suddenly swerved to the right, to avoid hitting the stove, and struck a big rig travelling in the far right lane. The truck swerved to the right, slid along the K-rail and overturned onto Deputy Piquette's car. Deputy Piquette died.

3. Judge Murray admits that the California Highway Patrol (CHP) was the investigating agency of the July 7, 2006 accident, that CHP Officer Michael Bernardin investigated the fatal collision, and CHP Officer John Heckenkemper investigated the other collisions. Based on information learned by Judge Murray in and after July 2015, and on information and belief, Judge Murray admits that Officer Bernardin wrote an accident report, which identified the primary collision factor (PCF) of the accident as the unsafe speed of Deputy Piquette; Officer Bernardin submitted his accident report to the accident investigation unit for review. Based on information learned by Judge Murray in and after July 2015, and on information and belief, Judge Murray admits that Officer Heckenkemper wrote the accident report documenting the other three collisions and that report indicated the PCF as unsafe speed of the other drivers. Officer Heckenkemper submitted those reports to the accident investigation unit for review.

4. Based on information learned by Judge Murray in and after July 2015, and on information and belief, Judge Murray admits that CHP Sergeant Joseph Morrison testified in November 2016 that he directed Officer Bernardin to change the PCF for the collision involving Deputy Piquette from "unsafe speed for the conditions" to "other than driver." Based on information learned by Judge Murray in and after July 2015, and on information and belief, Judge Murray admits that Sergeant Morrison rewrote Officer Heckenkemper's report under his own name, which changed the PCF to "other than driver" and added a recommendation for prosecution; after re-writing the report, Sergeant Morrison threw Officer Heckenkemper's original report away. Based on information learned by Judge Murray in and after July 2015, and on information and belief, Judge

Murray admits that Sergeant Morrison testified that the Orange County District Attorney's Office was provided with the final copies of the reports after they were changed. Sergeant Morrison testified in November 2016 that the reports were not final when the changes were made and that he never told the District Attorneys' Office that the reports had been changed. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015.

5. Judge Murray admits that on July 11, 2006, Cole Wilkins was arrested and on July 13, 2006, the Orange County District Attorney's Office filed a complaint against Mr. Wilkins, alleging one count of murder and one count of possession of stolen property (*People v. Wilkins*, Case No. 06NF2339).

6. Judge Murray admits that Officer Heckenkemper testified in April 2017 that Sergeant Morrison had told him that they found the person who dropped the stove and that he was going to be charged with murder. Judge Murray admits that Officer Heckenkemper testified in April 2017 that Sergeant Morrison told him Officer Bernardin's PCF was changed to "other than driver" because they didn't feel that they could obtain a murder conviction with the deputy sheriff being at fault for the crash. Judge Murray does not know whether this testimony was accurate, but Judge Murray specifically denies any insinuation that he had anything whatsoever to do with the changing of the reports. DDA Murray was not involved in the Wilkins case until after the preliminary hearing. Judge Murray further alleges, based on the discovery provided by the commission in this case (and previously unknown to him) that an Internal Affairs investigation Executive Summary stated under "Current Findings" that, "The changes to the reports were made in accordance with the Collision Investigations Manual (CIM) and were made prior to being processed or entered into SWITRS." DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015.

7. Judge Murray admits that he was assigned to prosecute the *Wilkins* case sometime in late November 2006, after the preliminary hearing. Judge Murray admits that between June 19, 2007 and January 24, 2008, Mr. Wilkin's defense counsel, Joseph Vodnoy, filed five motions to continue the trial. In his June 15, 2007 declaration, Mr. Vodnoy stated that a continuance of the trial was warranted in order to allow analysis of an "event data recorder" which was in Deputy Piquette's car. Mr. Vodnoy stated the information was crucial in establishing "what circumstances existed at the time of the accident which is otherwise not available through witness testimony or the existing discovery materials." DDA Murray did not object to the continuance, but because the case was being delayed while Mr. Vodnoy was attempting to obtain an order for the funds to pay for the analysis, DDA Murray advised Mr. Vodnoy that the District Attorneys' Office would arrange to have the analysis done. It did so and the analysis was provided to Mr. Vodnoy

8. Judge Murray admits that during his preparation before trial, CHP Investigator Theresa Pines mentioned that some officers within the CHP did not believe the case should be prosecuted as a murder. Judge Murray admits that he did not follow up on Investigator Pines' statement because he did not believe that unknown officers' personal opinions about charging decisions were relevant, and he had no reason to believe that Investigator Pines or any other CHP officer knew something about the case that he did not. Judge Murray denies that Investigator Pines' statement was potentially exculpatory information.

9. Judge Murray admits that on April 21, 2008, shortly before jury selection, the Court wanted to address a couple of issues; specifically, whether the jury would learn the occupation of the decedent, in fact, that he was a police officer. The Court inquired of DDA Murray, who explained: "Your Honor, the only way that I think that becomes relevant is in the event that the defense puts on an expert. I don't offer that information in my case-in-chief. But in the event the defense puts on an expert and attempts to argue

some sort of fault or contributory negligence on the part of the victim, I think his occupation, per se, isn't relevant. It's his education, his training, and everything that went into that occupation. The fact that he was a trained driver, that he'd been a ten-year veteran of the U.S. – in any event, if defense puts an expert on that talks about those issues--." [04/21/08 R.T. p. 1:18-27.] The Court inquired of Mr. Vodnoy, who responded: "Your Honor, in all frankness, finally someone came through on Friday for my expert, who my belief, he hasn't finished analyzing the case. Unfortunately, he had to leave on vacation. But he will be testifying, I believe. And I'm not – I don't want to lock him into something along the lines, 'It was unsafe driving by the decedent traveling at an unsafe speed.' I want to be honest with the Court and counsel not to try to sandbag anybody." [04/21/08 R.T. p. 2:1-8.] The Court stated, "Well, in that event, I basically agree with the position of Mr. Murray. I think that in terms of causation and an issue regarding the operation of those vehicles, that the fact that it's a police officer in route to his employment has relevance in evaluating the causation of factors, as well as his ability to operate a vehicle. So based upon your anticipated defense in this case, is that something that you wish to address with the jury in jury selection or – the fact that the decedent was a police officer?" [04/21/08 R.T. p. 2:9-18.] Mr. Vodnoy further explained, "I understand that, but the problem is, I'm anticipating my defense to be that he was traveling at an unsafe speed and was not driving in a safe manner." [04/21/08 R.T. p. 2:25-27.] The Court inquired whether counsel wanted to encompass the issue in the statement of the case and the following exchange occurred:

> MR. MURRAY: --I think I left it on my desk downstairs. And there was one other thing along the lines—and to go into the discussion Mr. Vodnoy is going to have to engage in, I'm going to object to expert testimony regarding contributory negligence, because I don't think that's the law. I think the law is very clear that contributory on the part of the defendant [sic] is not relevant to an analysis under the felony murder rule. It's the straight

causation analysis based on substantial test. And the defendant, if he's one percent a factor--

THE COURT: Well, I think clearly, in terms of the facts and circumstances of the accident, in terms of causation, there's going to be evidence in that regard.

MR. MURRAY: Well, the only reason why I offer it is because, when we get there—I don't even have the report, so I don't know what the expert is going to say. But in the event there's an offer dealing with contributory negligence, I'm going to object. And at that time, I guess when the issue is right, the court will take it up and evaluate it based on the authority that both sides offer, and make a decision as to what the parameters are for the expert testimony.

The only reason why I raise the issue now is because Mr. Vodnoy is trying to decide whether or not he wanted to approach that subject with the jury in anticipation that I might try to bring it in after his expert testifies.

I'm just saying, we don't know what the parameter of that expert's testimony is going to be right now. And I offer it only for –in terms of heads up.

MR. VODNOY: Well, the position that I'm taking is that this is a second degree murder charge here. Unless they're--

THE COURT: That's another issue, the People have indicated that they will be seeking instructions to applied [sic] malice, and that is an issue also. And I haven't fully established a set of jury instructions in this case, but speed may have relevance to one theory not the other.

MR. MURRAY: It may, your Honor.

10. Judge Murray admits that on April 22, 2008, he gave his opening statement to the jury in *People v. Wilkins*. Judge Murray admits that during his opening statement, he stated that the stove which fell off the back of Mr. Wilkins' truck caused the death of Mr. Piquette. Judge Murray admits that he concluded his opening statement as follows: "I'd ask that you listen to all of the evidence in this case, everything that's presented. And

when you've heard all the evidence, I ask that you do one thing, you just hold the defendant responsible. That's it. Nothing more, nothing less, just hold him responsible for his actions for what he did, for what he caused." [04/22/08 R.T. 306:15-21.] Deputy District Attorney Murray based his argument on the CALCRIM instructions and other law governing the felony murder and implied malice murder charges. Both CALCRIM 540C (Felony Murder) and CALCRIM 520 (Implied Malice) provided, as of April 2008, that "There may be more than one cause of death. An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death." DDA Murray had no doubt that if the stove had not been dropped on the freeway by Mr. Wilkins, the accident would not have happened, and Deputy Piquette would not have been killed. The stove was unquestionably a substantial factor in the cause of death.

11. Judge Murray admits that one day during the *Wilkins* trial, as he was leaving the courtroom during the noon recess, a man, who he had never met before, approached him, identified himself as a reporter from the Orange County Register, and asked what he thought about the fact that some CHP officers did not believe the case was a murder. Walking towards the elevators, DDA Murray responded that he did not believe it was relevant whether some CHP officers agreed or disagreed with the charges being pursued by the District Attorney's Office.

12. Judge Murray denies that before or during the trial, then CHP Assistant Chief Steven Beeuwsaert informed him that the CHP collision reports concerning the *Wilkins* case had been altered, the PCFs had been changed, and that the officers did not find Mr. Wilkins at fault. Judge Murray denies receiving any call from Assistant Chief Beeuwsaert or speaking with Assistant Chief Beeuwsaert regarding a change or changes to any report, or regarding the "Primary Collision Factor" in the *Wilkins* case. Judge Murray denies he responded to Assistant Chief Beeuwsaert that it did not matter because the defendant was a fleeing felon at the time the stove fell from his vehicle, or any words

to that effect because he did not speak with Assistant Chief Beeuwsaert. Judge Murray admits that he did not conduct any inquiry concerning Assistant Chief Beeuwsaert's statements because he did not speak with Assistant Chief Beeuwsaert. Since he did not speak with Assistant Chief Beeuwsaert, he did not have any information from Assistant Chief Beeuwsaert to disclose. Judge Murray admits that he learned that the CHP reports had been changed and the original report destroyed sometime after late July 2015 when he reviewed the transcript of an interview of former CHP Sergeant Joseph Morrison by Orange County District Attorney Investigator Frank Cardenas. By that point in time, DDA Murray also was informed that the Public Defender's Office had filed a Motion to Dismiss which included representations by the Public Defender's Office that Officer Bernardin and Officer Heckenkemper would testify that the Primary Collision Factors had been changed in the reports. Judge Murray admits that on September 17, 2015, Deputy Public Defender Sara Ross emailed DDA Eric Scarbrough, who was designated to handle the Motion to Dismiss, to request reports or other discovery related to interviews with defense witnesses; the audio recording of the interviews conducted by the Orange County District Attorney's Officer, including the interview of Sergeant Morrison, were sent the following day, on September 18, 2015.

13. Judge Murray admits that in his case in chief, several witnesses testified that the stove was directly involved in the first three collisions. Eyewitnesses testified during the prosecution's case in chief that it was dark when the stove fell off the truck, that they were unable to avoid hitting the stove since it happened so fast, that the stove was moving as it was hit by the cars, that they saw Deputy Piquette swerve and that the stove remained on the freeway after Deputy Piquette had swerved and hit the big rig. There was no explanation for Deputy Piquette's swerve other than his sudden perception of the stove on the freeway.

14. Judge Murray admits that Officer Bernardin's changed report stated that the cause of the accident was "other than driver." Judge Murray admits that he recited the

names of potential witnesses, including Investigator M. Bernardin, during jury selection; Judge Murray explained that "I don't expect all these people will be called. In fact, I know they will not be. I just want to go over the names to make sure you're not related to any of these people or live next door, or somehow acquainted with any of these individuals." [04/21/08 R.T. p. 13:3-7.] Judge Murray admits Officer Bernardin was subpoenaed to testify at trial but was not called as a witness at trial. Judge Murray admits that in December 2016, Inspector Pines testified that she spoke with Officer Bernardin, while sitting outside a courtroom, about reports being changed. Judge Murray denies that Inspector Pines spoke with him about her conversation with Officer Bernardin. In December 2016, Investigator Pines testified that she believed she told OCDA Investigator Robert Sayne about her conversation with Officer Bernardin and OCDA Investigator Sayne said words to the effect that the cause of the accident did not matter because the defendant was charged as a fleeing felon. In December 2016, Investigator Pines testified that she had *no recollection of ever talking to Mr. Murray about her conversation with Officer Bernardin.*

15. Judge Murray admits that in April 2017, Officer Heckenkemper testified that prior to testifying at trial, he met with OCDA Investigator Wesley Vandiver at the scene of the accident to discuss the location of the stove at the time of accident and how Officer Heckenkemper pulled the stove out of the road after the collision. Judge Murray admits that in April 2017, Officer Heckenkemper testified that during this meeting with OCDA Investigator Vandiver, he told Investigator Vandiver that "there were some things going on with this investigation that the D.A. probably should know about. And that Officer Bernardin didn't – didn't believe in the P.C.F., and if he was put on the stand that he would probably not agree with what the P.C.F. is." Judge Murray admits that in April 2017, Officer Heckenkemper testified that he also mentioned his report to Investigator Vandiver. Judge Murray admits that in December 2016, Investigator Vandiver testified that around the start of the trial, he met with Officer Heckenkemper to try to recreate the

location of the stove before Officer Heckenkemper pulled the stove out of the road. In December 2016, Investigator Vandiver testified that when he testified during the trial, he was not aware of allegations made by Officers Bernardin and Heckenkemper that their P.C.F.'s had been changed. Judge Murray alleges that since Investigator Vandiver did not know about the changed reports at the time of trial, he could not have informed DDA Murray that the reports were changed.

16. Judge Murray admits that Officer Bernardin was the investigating officer of the fatal collision, was subpoenaed to court to testify at trial, and was not called as a witness. Judge Murray admits that during the trial, and over DDA Murray's objections, Mr. Vodnoy called Donald Gritton as an expert on accident reconstruction, that Mr. Gritton testified that he was a former CHP Officer, had been practicing as a full-time accident reconstructionist for 16 years and was accredited by the Commission for Traffic Accident Reconstruction. Judge Murray admits that Mr. Gritton testified that the stove was a factor as to how the fatal accident happened and that his opinion as to why the accident happened was that Deputy Piquette was driving at an unsafe speed for the condition of the roadway. Judge Murray admits that the Court overruled his objection that the opinion lacked foundation. Judge Murray admits that Mr. Gritton testified that in his opinion, "the deputy made a lane change in which he was unable to correct, and subsequently struck the tractor trailer rig." Judge Murray admits that the Court overruled his objection to this opinion testimony. Judge Murray admits that Mr. Gritton testified that he did not see any document or anything that he examined that showed that Deputy Piquette swerved to avoid the stove. Judge Murray admits that one of the questions he asked Mr. Gritton on cross-examination was "Do you have any evidence to suggest that but for the stove in the no. 2 lane, that if that stove wasn't there that there was anything else that you've seen in the evidence or reports that would account for Mr. Piquette's actions right there in that location?" and Mr. Gritton responded, "No."

17. Judge Murray admits that Investigator Vandiver testified on rebuttal during the trial. Investigator Vandiver was chosen as the rebuttal witness because he was a highly qualified expert; in DDA Murray's opinion, Investigator Vandiver was far more qualified than Mr. Gritton, the expert who had been called by Mr.Vodnoy. Mr. Vandiver opined that the stove was a "substantial factor" in the fatal collision and that, in the absence of the stove, he did not believe "we have a swerve." Mr. Vandiver also testified in response to Mr. Vodnoy's question about a "safe speed," that "with 100 feet of visibility from low beam headlamps, an object ahead of you, and your ability to perceive, respond, and skid to a stop to avoid that is no greater than 28 miles an hour, using industry exceptive [sic, as reported] norms for perception, response, friction value, et cetera. Et cetera. That being said, going 28 miles per hour at 5:00 o'clock in the morning on the westbound in the 1 or 2 lane is not safe."

18. Judge Murray admits that Officer Heckenkemper testified in April 2017 and Investigator Vandiver testified in December 2016 that they met at the scene of the accident before the trial. Judge Murray admits that he asked Investigator Vandiver during the trial, "Did you see anything else in your review of the evidence, the witness statements, the photographs, that indicated any other cause that would have contributed to David Piquette's evasive maneuver?" and Investigator Vandiver responded, "There's nothing else." Judge Murray admits that on cross-examination, Investigator Vandiver testified that he would estimate that Deputy Piquette was travelling at the same speed of those around him right before he took the right turn in response to Mr. Vodnoy's question, "And are you saying – what speed was Officer Piquette traveling right before he took the right turn?" Judge Murray admits that Mr. Vodnoy asked Investigator Vandiver, "Do you have any evidence of that?" and Investigator Vandiver responded, "I have the lack of evidence in that I think if he was going extremely fast, we would probably hear about it." Mr. Vodnoy followed up, "You're basing it on the fact that nobody said how fast he was going? That's evidence for you?" and Investigator Vandiver

responded, “Kind of. I’m basing it on the fact that when people go extremely fast, others tend to notice versus when we go similar speeds with those around us, we blend in, and people don’t notice. So, when statements are taken, that type of stuff generally comes out in my experience with most officers.” Judge Murray admits that Investigator Vandiver testified during the trial that it did not appear that Deputy Piquette was traveling at an unsafe speed. Judge Murray admits that on redirect examination of Investigator Vandiver, one of the questions he asked was “And is there anything else in the evidence – anything in witness statements, photographs, or anything that you had become aware of, other than the stove, that would explain that set of circumstances depicted on the diagram?” and Investigator Vandiver responded, “No.”

19. Judge Murray admits that during closing argument, DDA Murray argued, in part:

> The defense puts up an expert. The accident isn’t even really particularly relevant because accident and felony murder go hand in hand. I mean that is the law and you’re going to get the jury instruction. I’ll tell you this. Don’t believe anything out of my mouth. Don’t take anything I say for granted. Be skeptical about everything you hear. I’m certainly not going to be offended. I have a very thick skin. Be very skeptical you’re going to get the jury instructions. Look at them.
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> Felony murder says accident. If the death is result of an accident, if it’s unforeseen, unintended, it doesn’t matter.
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> So, why is the defense try [sic] and put on an expert and say, I’ve looked at everything and I think the [sic] David Piquette made an unsafe turning movement? What’s with that whole system of smoke and mirrors? To try and make David Piquette, are you kidding me, to try and blame it on the victim. That takes some audacity.
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> You’re going to get a jury instruction that says, even if it were there, okay, even if David Piquette did something completely wrong. If the stove was a substantial factor, and then David Piquette made did make a negligent turning movement, let’s

> just say it was not just unsafe, it was totally negligent, it doesn't matter. Negligence on the part of the victim is irrelevant. This is not a civil case where you start looking at who's at what percent at fault. It is irrelevant.
>
> All you look at is, did the stove, was there a causal connection between the stove being on the road and what happened? That's it. And they try and put an expert onto quote, reconstruct the accident and just blow smoke and hope that somebody gets confused.
>
> What happened is pretty simple. I didn't go to it in great detail because it didn't matter. What happened is pretty simple. There's a stove in the road. David Piquette swerved to avoid the stove, just like the drivers before him. Some hit it; some didn't. and he clips a big rig. He gets caught underneath it. And the big rig goes out on of control on a K-rail and unfortunately comes over on top of him. There's not a lot of mystery there. But it's not an issue of fault period.
>
> You heard testimony about what happened to David Piquette and what happened to his car. And again, it's not a matter of whether anybody could foresee the specific mechanism. The specific change of events that caused somebody to die here. In fact, for felony murder, it doesn't have to be foreseeable at all. That's the distinction between the felony murder here and the implied malice second degree murder. For implied malice second degree murder, there's got to be some foreseeability. For felony murder, because you're involved in the felony. The law doesn't require any foreseeability. [05/01/08 R.T. pp. 921:14-923:4.]

20. Judge Murray admits that DDA Murray argued two theories of murder to the jury—first-degree felony murder and second-degree implied malice murder. Judge Murray admits that Judge Richard Toohey instructed the jury on both theories. The CALCRIM jury instructions for felony murder and implied malice both stated, "There may be more than one cause of death. An act causes death only if it is a substantial factor causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes death."

21. Judge Murray admits that on May 5, 2008, the jury convicted Mr. Wilkins of first-degree murder. Judge Murray admits that the Court scheduled the sentencing for July 11, 2008. Sometime after the guilty verdict, DDA Murray told Mr. Vodnoy that the date set for sentencing should be far enough in the future so that there would be no need for a continuance given the impact on the family of having to come to court for the victim impact statements. The July 11, 2008 date had thereafter been chosen by Mr. Vodnoy. Judge Murray denies that on June 8, 2008, he had a telephone call with reporter Jon Cassidy. Judge Murray denies that Mr. Cassidy told him that he had received a tip that the CHP had altered an accident report as to the finding of fault in order to place the blame for the accident on Mr. Wilkins. Since he did not receive the call from Mr. Cassidy, Judge Murray denies that he responded to Mr. Cassidy that he had not heard of a report being altered, and that it would not have any bearing on a criminal case and would only affect civil liability or words to that effect. DDA Murray did not conduct any inquiry concerning the statement allegedly made by Mr. Cassidy and did not tell the defense about the alleged statement because he did not have a telephone call with Mr. Cassidy. In his December 5, 2015 declaration, Mr. Cassidy stated that he received a telephone call from "the prosecutor on the *Wilkins* case," but was not 100% certain that he spoke with Mr. Murray. Thereafter Mr. Cassidy identified the call as having occurred on June 8, 2008. According to the discovery recently produced by the commission, the phone number identified as being the number Cassidy was called from, belonged to the Alternate Public Defender's Office. Moreover, June 8, 2008 was a Sunday and Judge Murray assures the Masters and the commission that he would not have spoken with a reporter, who was not known to him, on a Sunday in June of 2008. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015.

22. Judge Murray admits that he appeared in court on July 11, 2008 for the sentencing in the *Wilkins* case. Judge Murray admits that at the start of the hearing, the

Court stated, "There was filed with the Court on July the 8th a motion to continue this matter. And the Court did review that declaration." Judge Murray admits that the Court asked Mr. Vodnoy, "Is there anything you want to add?" Judge Murray admits that Mr. Vodnoy responded, "Yes, Your Honor. A completely different ground. In addition, it was brought to my attention that there were improprieties, or at least alleged improprieties." Judge Murray admits that the following colloquy occurred:

MR. VODNOY: There [sic] alleged improprieties by the Highway Patrol in connection with the investigation of this case. It is my understanding, and these are allegations that I would like to explore in terms of having people being witnesses.
First of all, with respect to the Lieutenant Mark Worthington of the Highway Patrol, there is allegations that he's been fired for tampering with the report in our case. There was allegation that he tampered with another report in another case involving the same CHP officer. That was one of the investigators in our case.
In addition to that, there was allegation that Internal Affairs seized the computer signed to accident review Officer Scott Taylor. My understanding that he's one of the officers, he is one of the officers in our case.
In addition to that and his, both was Worthington and Worthingon's superior, Ken Rosenberg was additionally demoted from Captain to Lieutenant over this and some other matters, and he lost the command over this investigation.
I would like to explore that in a motion for new trial and move to continue the case so that I may subpoena these officers into court.

THE COURT: Mr. Murray.

MR. MURRAY: With the regard to the grounds stated in Mr. Vodnoy's 1050, there were no legal grounds whatsoever stated in his 1050. He said he'd been on vacation. He said that

the probation report was long and he wanted more time.

Those are not legal grounds. This is a date for sentencing that Mr. Vodnoy picked. He picked it at that time that the jury came back with their verdict and nothing has changed as of today in terms of good legal cause.

He's just stated some reasons that are not contained in his declaration that was filed with the 1050. And he still hasn't stated any reasons that indicate that there's new evidence or a change in evidence that would affect in any way the outcome of this case.

He's made some allegations that aren't his. He hasn't talked about the substance of where these allegations came from. I'm not familiar with any of this material. And he hasn't talked about how any of that affects the outcome of this case.

It's notable that none of these individuals, Lieutenant Worthington, Officer Rosenberg, none of them were witnesses in the trial.

And he hasn't talked about how there's any relevance to an alleged Internal Affairs investigation, which I don't even have any confirmation.[sic] There is an investigation ongoing. How any of that would in any way impact the jurors findings in this particular case.

So, I don't think there's any good legal cause stated. And the People are ready to proceed in [sic] I may briefly.

MR. VODNOY: There it was tampering with in this case in terms of casual connection between the incident that occurred in this case. It's clear that that would be crucial to the gravamen of the offense. This is not an intentional killing. This a situation of felony murder regarding an item that was on the freeway that other witnesses had managed to avoid.

If there was evidence that the deputy was traveling at an unsafe speed or something else, that certainly

should be, is relevant to the issue itself with respect to how the accident happened. So, I think it is relevant and I think that it is goes to the heart of the case itself in terms of how the accident occurred.
There's no allegation and never was a allegation that Mr. Wilkins deliberately pushed this thing off his truck or knew that the item was off his truck at the time that Deputy Piquette died.
So given the fact that that is the facts of the case, and it's not some guy goes into a liquor store and shoots the clerk behind the counter. I think that we should be allowed to explore this by subpoenaing these witnesses and having Your Honor listen to the testimony.

THE COURT: Submitted?

MR. VODNOY: Submitted.

MR. MURRAY: Submitted.

***

THE COURT: All right. The Court find no good cause to continue this matter. [07/11/08 R.T. pp. 1041:1-1044:7, 1044:22-23.]

23. Judge Murray admits that DDA Murray did not conduct an inquiry based on the information provided by Mr. Vodnoy at the sentencing hearing. At the time, DDA Murray did not give credence to Mr. Vodnoy's unwritten statements about allegations allegedly made by an unidentified source, since the statements seemed to be a ploy to obtain a continuance for which Mr. Vodnoy did not have good cause. Mr. Vodnoy's declaration, which was filed just three days before the hearing in support of the Motion to Continue, did not mention these allegations. Moreover, DDA Murray was not familiar with the individuals identified by counsel; they were not witnesses called during the trial and he did not associate their names with the *Wilkins* case. DDA Murray stated to the court: "He's just stated some reasons that are not contained in his declaration that was filed with the 1050. And he still hasn't stated any reasons that indicate that there's new evidence or a change in evidence that would affect in any way the outcome of this case.

He's made some allegations that aren't in his. He hasn't talked about the substance of where these allegations came from. I'm not familiar with any of this material. And he hasn't talked about how any of that affects the outcome of this case. It's notable that none of these individual, Lieutenant Worthington, Officer Rosenberg, none of them were witnesses in the trial. And he hasn't talked about how there's any relevant to an alleged internal affairs investigation, which I don't even have any confirmation. There is an investigation ongoing. How any of that would in any way impact the jurors findings in this particular case. So, I don't think there's any good legal cause stated." The Court found that good cause did not exist to continue the sentencing hearing based on the allegations made by Mr. Vodnoy. The Court's denial of the continuance confirmed for DDA Murray that Mr. Vodnoy's statements did not appear to be credible. Judge Murray acknowledges that, after the sentencing hearing, he did not give any further thought to the allegations that had been made at the hearing.

24. Judge Murray admits that Judge Toohey sentenced Mr. Wilkins to 26 years to life in prison. Judge Murray admits that Mr. Wilkins appealed his conviction on the ground that the trial court erred in refusing his request to instruct the jury that, for purposes of felony murder, the felony continues only until the perpetrator has reached a place of safety. The Notice of Appeal was filed on the day of the sentencing hearing. DDA Murray had no involvement with the case while it was on appeal.

25. Judge Murray admits that the Fourth District Court of Appeal found no error and affirmed Mr. Wilkins' conviction. Judge Murray admits that the California Supreme Court granted review. Judge Murray admits that on March 7, 2013, the Supreme Court issued an opinion, holding that it was error to refuse to instruct the jury on the escape rule, which required reversal of Mr. Wilkins' conviction. (*People v. Wilkins* (2013) 56 Cal.4th 333.) Judge Murray admits that the Supreme Court remanded the case for a new trial. Judge Murray admits that on June 21, 2013, DDA Murray appeared on behalf of the People before Judge Toohey after the case was remanded. Judge Murray

does not have sufficient information to specifically admit or deny that beginning in July 2013, he began providing pretrial discovery to Mr. Wilkins' new defense counsel. Judge Murray believes he would have instructed a paralegal to provide the discovery, or a paralegal would have automatically provided the existing discovery materials to the defense. Judge Murray admits that pretrial discovery was provided to Mr. Wilkins' new defense counsel after the case was remanded for a new trial; Judge Murray does not know when the OCDA began providing the discovery.

26. Judge Murray denies that between January 3, 2011 and July 2015, he failed to meet his continuing duty to inquire about potentially exculpatory evidence, including possible changed reports, a possible Internal Affairs investigation, and possible officer discipline or termination as a result of their conduct in the *Wilkins* case, to determine if that information was, in fact, exculpatory and subject to mandatory disclosure. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015. By the time DDA Murray learned that CHP reports had been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defender's Office had *already learned* that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports.

27. Judge Murray denies that prior to providing pretrial discovery to Mr. Wilkins new defense counsel beginning in July 2013, he failed to meet his continuing duty to inquire about potentially exculpatory evidence, including possible changed reports, a possible Internal Affairs investigation, and possible officer discipline or termination as a result of their conduct in the *Wilkins* case, to determine if that information was, in fact, exculpatory and subject to mandatory disclosure. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015. By the time DDA Murray learned that CHP reports had

been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defender's Office had *already learned* that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports.

28. Judge Murray admits that on March 19, 2014, defense counsel filed a motion to continue the trial date. Judge Murray admits that in her supporting declaration, defense counsel stated, "I notified by email the previously assigned district attorney Michael Murray about my need for a continuance. Mr. Murray indicated the case had been re-assigned to Larry Yellin and that he forwarded my email to Mr. Yellin. I have not yet spoken directly with Mr. Yellin but it is my hope that we can mutually agree upon a new date for this case to go to trial." Judge Murray admits that the docket in the *Wilkins* case indicates that Larry Yellin made a special appearance for District Attorney Michael Murray on March 21, 2014. Judge Murray admits that thereafter, DDA Yellin was assigned to the case, in place of DDA Murray. DDA Murray was not re-assigned to the case until sometime in September 2015.

29. Judge Murray admits that on October 3, 2014, defense counsel filed a motion for discovery of peace officer personnel records for Officer Michael Bernardin and Officer Scott Taylor. DDA Murray was not assigned to the Wilkins case at the time the *Pitchess* motion was filed and he did not see the motion. Judge Murray admits that defense counsel's request, included discovery of "Complaint(s), statements, and/or the resulting investigation report(s) in the California Highway Patrol (hereafter "CHP") Internal Affairs file(s) and/or employee personnel file(s), regardless of merit and/or disposition from prior and any current investigations concerning the current case and any prior instances of alleged misconduct." Judge Murray admits that in the accompanying declaration, defense counsel stated that she was present at an interview conducted on September 30, 2014 of Officer Bernardin and he confirmed that he concluded in his

report that the deceased driver was at fault, that he wrote in his police report that the primary collision factor or PCF was excessive speed by the deceased driver. Judge Murray admits that the defense counsel's declaration stated that Officer Bernardin said that he was aware that his original report had been changed and that the change was made after he submitted his report to the Accident Investigation Unit, that Officer Bernardin said that he spoke to Officer Heckenkemper who told him the PCF in his police report was also changed from excessive speed to "other than driver." Judge Murray admits that defense counsel's declaration also stated that Officer Bernardin said that after the jury trial, he was contacted by Internal Affairs, that there was an investigation regarding alteration of police reports, and that he told Internal Affairs that he concluded the cause of the accident was excessive speed and the report had been changed to "other than driver." Judge Murray admits that the motion and supporting declaration was received by the OCDA on October 3, 2014 but denies that DDA Murray saw the motion.

30. Judge Murray does not have sufficient information to either admit or deny that defense counsel talked with DDA Yellin and expressed concern that DDA Murray knew of the changed reports, did not disclose them, and were aware of *Brady* violations in the case.

31. Judge Murray admits that DDA Yellin asked him whether he knew about the changed reports in the *Wilkins* case, when DDA Yellin was assigned to case. Judge Murray admits that he told DDA Yellin that he did not. Judge Murray denies that after his discussion with DDA Yellin that he failed to meet his continuing duty to inquire about potentially exculpatory evidence, including possible changed reports, a possible Internal Affairs investigation, and possible officer discipline or termination as a result of their conduct in the *Wilkins* case, to determine if that information was, in fact, exculpatory and subject to mandatory disclosure. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015. By the time DDA Murray learned that the CHP reports had been changed, DDA Murray was

informed and believed that Mr. Wilkins' counsel at the Public Defender's Office had already learned that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports.

32. Judge Murray denies that between January 3, 2011 and July 2015 that he violated his obligations under *Brady v. Maryland* (1963) 373 U.S. 83. Judge Murray admits that a prosecutor's duty to disclose evidence favorable to the accused extends to evidence reflecting on the credibility of a material witness under *People v. Kasim* (1997) 56 Cal.App.4th 1360. Judge Murray denies that he violated this duty. Judge Murray admits that the scope of the prosecution's disclosure obligation extends beyond the contents of the prosecutor's case file and encompasses the duty to ascertain as well as divulge any favorable evidence known to the others acting on the government's behalf under *People v. Williams* (2013) 58 Cal.4th 197, 256 citing *In re Brown* (1998) 17 Cal.4th 873, 879. Judge Murray denies that he violated this duty. Judge Murray admits that after conviction, the prosecutor is bound by the ethics of his office to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction under *Imbler v. Pachtman* (1976) 424 U.S, 409, 427, fn. 25 and *People v. Garcia* (1993) 17 Cal.App.4th 1169, 1179. Judge Murray denies that he violated this obligation. Until late July 2015, DDA Murray did not have possession of potentially exculpatory evidence of the changes to the CHP reports nor did he know such evidence existed in the possession of the CHP. Not until he reviewed the transcript of an interview of former CHP Sergeant Joseph Morrison by Investigator Frank Cardenas in late July 2015, did DDA Murray learn that the original CHP reports had been revised to change the PCF from unsafe speed to "other than driver" and the original reports destroyed. By the time DDA Murray learned that the CHP reports had been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defenders' Office

had already learned that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports. Judge Murray denies that he violated Penal Code section 1054.1 and former rule 5-220 of the Rules of Professional Conduct.

33. Judge Murray denies that he violated the California Constitution, article VI, section 18, subdivision (d)(2) and (d)(3).

COUNT TWO

34. Judge Murray incorporates by reference his answers to the allegations set forth in Count One. Judge Murray denies that between January 3, 2011 and approximately September 17, 2015, he failed to meet his continuing duty to disclose to the defense exculpatory evidence, about which he had actual knowledge, including that relevant original traffic collision reports in the *Wilkins* case had been altered, that the PCFs had been changed, and that Officer Bernardin found that the decedent, not the defendant, caused the fatal collision. Until he read the interview of former Officer Sergeant Joseph Morrison sometime in late July 2015, DDA Murray did not have possession of potentially exculpatory evidence of the changes to the CHP reports nor did he know such evidence existed in the possession of the CHP. DDA Murray did not learn that CHP reports in the *Wilkins* case had been changed or destroyed until sometime after late July 2015. By the time DDA Murray learned that the CHP reports had been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defenders' Office had already learned that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports.

35. Judge Murray does not have sufficient information to specifically admit or deny that beginning in July 2013, he began providing pretrial discovery to Mr. Wilkins'

new defense counsel. Judge Murray believes he would have instructed a paralegal to provide the discovery, or a paralegal would have automatically provided the existing discovery materials to the defense. Judge Murray admits that pretrial discovery was provided to Mr. Wilkins' new defense counsel after the case was remanded for a new trial; Judge Murray does not know when the OCDA began providing the discovery. Judge Murray admits that new defense counsel was provided the same CHP reports provided prior to the first trial. Until sometime after late July 2015, DDA Murray did not know that the reports in the *Wilkins* case had been changed, that the PCF findings by CHP officers had been changed, and that Officer Bernardin originally identified the primary collision factor as the unsafe speed of Deputy Piquette. By the time DDA Murray learned sometime after late July 2015 that the CHP reports had been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defender's Office had *already learned* that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports. Judge Murray admits that on September 17, 2015, Deputy Public Defender Sara Ross emailed DDA Eric Scarbrough, who was designated to handle the Motion to Dismiss, to request reports or other discovery related to interviews with defense witnesses; the audio recording of the interviews conducted by the Orange County District Attorney's Office, including the interview of Mr. Morrison, were sent the following day, on September 18, 2015. Judge Murray denies that he failed to disclose exculpatory evidence to the defense.

36. Judge Murray denies that he failed to disclose exculpatory evidence about which he had actual knowledge. Judge Murray denies that he violated his duty to disclose evidence favorable to the accused that is material either to guilt or punishment, pretrial under *Brady* and post-trial pursuant to *Imbler v. Pachtman*. Until sometime after late July 2015, DDA Murray did not know that the reports in the *Wilkins* case had been changed,

that the PCF findings by CHP officers had been changed, and that Officer Bernardin originally identified the primary collision factor as the unsafe speed of Deputy Piquette. By the time DDA Murray learned that the CHP reports had been changed, DDA Murray had been informed and believed that Mr. Wilkins' counsel at the Public Defender's Office had *already learned* that the original CHP reports had been changed, that the original conclusions as to the primary collision factors had been changed from unsafe speed to "other than driver," and were aware of the circumstances surrounding the changes to the reports. Judge Murray denies that he violated Penal Code section 1054.1 and former rule 5-220 of the Rules of Professional Conduct.

37. Judge Murray denies that he violated the California Constitution, article VI, section 18, subdivision (d)(2) and (d)(3).

AFFIRMATIVE DEFENSES

1. The California Constitution Article Six, Section 18(d) limits the authority of the commission to censure or remove a judge to actions that constitute willful misconduct in office, persistent failure or inability to perform the judge's duties, habitual intemperance in the use of intoxicants, or drugs, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The conduct alleged by the commission in the Notice of Formal Proceedings does not fall within the commission's authority to censure or remove Judge Murray.

2. The California Constitution Article Six, Section 18(d) limits the authority of the commission to censure or remove a judge to actions occurring not more than 6 years prior to the commencement of the judge's current term. Judge Murray's term began on January 3, 2017.The Notice of Formal Proceedings includes allegations of actions that occurred before January 3, 2011; thus those alleged actions are outside of the jurisdiction of the commission.

3. Judge Murray cannot be disciplined for actions of others. Although the knowledge of the entire prosecution team is imputed to the District Attorney for purposes

of determining whether there has been a *Brady* violation in a criminal case, these proceedings seeking to discipline Judge Murray must determine whether DDA Murray himself violated *Brady* by intentionally failing to disclose information when he was obligated to do so.

4. The delays by the commission in the prosecution of these proceedings against Judge Murray have prejudiced Judge Murray and the commission should be barred by the equitable doctrines of latches and estoppel from the pursuit of discipline against Judge Murray.

5. The merger of the accusatory, investigatory, and adjudicatory functions in a single body has long been questioned as failing to comport with the generally accepted standards of due process, a concern raised by the course of these proceedings to date.

DATED: February 3, 2022

Respectfully submitted,

ROBIE & MATTHAI
A Professional Corporation

EDITH R. MATTHAI
GABRIELLE M. JACKSON
Counsel for Judge Michael Murray

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF ORANGE,

I, MICHAEL F. MURRAY, declare that:

I am the respondent judge in the above-entitled proceeding. I have read the foregoing Verified Answer of Judge Michael F. Murray to Notice of Formal Proceedings, and all facts alleged in the above document, not otherwise supported by citations to the record, exhibits, or other documents, are true of my own personal knowledge.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 3rd day of February 2022 at Santa Ana, California.

MICHAEL F. MURRAY
No. 207

PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 350 South Grand Avenue, Suite 3950, Los Angeles, California 90071.

On February 3, 2022, I served the foregoing document described as **VERIFIED ANSWER OF JUDGE MICHAEL F. MURRAY TO NOTICE OF FORMAL PROCEEDINGS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Melissa G. Murphy
Assistant Trial Counsel
Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
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Mark A. Lizarraga
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Emma Bradford
Legal Advisor to Commissioners
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( ) **BY PERSONAL SERVICE**: I delivered such envelope by hand to the above addressee(s).

(XX) **VIA OVERNIGHT COURIER**: I am "readily familiar" with the firm's practice of collecting and processing overnight deliveries, which includes depositing such packages in a receptacle used exclusively for overnight deliveries. The packages were deposited before the regular pickup time and marked accordingly for delivery the next business day.

(XX) **BY E-SERVICE**: I caused the aforementioned document(s) to be electronically served on all counsel of record above.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 3, 2022, at Los Angeles, California.

Kobe Moreno