STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE MICHAEL F. MURRAY, **No. 207**	**MODIFIED DECISION AND ORDER OF DISMISSAL***

I. INTRODUCTION

This disciplinary matter concerns Orange County Superior Court Judge Michael F. Murray. The Commission on Judicial Performance commenced this inquiry with the filing of its notice of formal proceedings on January 5, 2022.

Judge Murray is charged with two counts of misconduct. The charges pertain only to conduct that occurred before Judge Murray took the bench in 2017. The charges alleged that, between January 2011 and September 2015, while serving as an Orange County deputy district attorney (DDA), Judge Murray failed to conduct any inquiry into potentially exculpatory information concerning a murder prosecution (*People v. Cole Allen Wilkins* (*Wilkins*)) in which he was the prosecutor (Count One), and failed to meet his continuing duty to disclose to the defense exculpatory evidence about which he had actual knowledge (Count Two), in violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), Penal Code section 1054.1, and former rule 5-220 of the Rules of Professional Conduct. The notice alleged Judge Murray's conduct constituted conduct prejudicial to the administration of justice that brings the judicial office into disrepute and improper action within the meaning of article VI, section 18 of the California Constitution.

* The commission's decision and order entered December 6, 2022, was modified by order entered January 19, 2023. The modification did not have an effect on the commission's decision and order and did not change the finality date of the decision and order.

The California Supreme Court appointed Hon. Judith M. Ashmann-Gerst, Associate Justice of the Court of Appeal, Second Appellate District; Hon. Patricia D. Benke (Ret.), Associate Justice of the Court of Appeal, Fourth Appellate District; and Hon. George J. Abdallah, Jr., Judge of the San Joaquin County Superior Court, as special masters to conduct an evidentiary hearing.

The seven-day hearing took place between April 25, 2022, and May 18, 2022. The masters filed a report containing their findings of fact and conclusions of law on July 14, 2022. The commission heard oral argument on October 19, 2022.

The masters found that the examiner did not prove by clear and convincing evidence a number of the factual allegations contained in Counts One and Two. The masters found that, to the extent that some of the factual allegations were proven by clear and convincing evidence, those facts did not support a finding that Judge Murray engaged in either prejudicial misconduct or improper action while serving as the prosecutor in the *Wilkins* matter.

We conclude, based on our independent review of the record, that the masters' factual findings are supported by clear and convincing evidence, and we adopt them in their entirety. In this decision, we summarize the factual findings.

We also adopt the masters' legal conclusions with one exception. The masters noted that this was a complicated matter, raising an issue of first impression relating solely to a judge's alleged pre-bench prosecutorial misconduct, for which the commission has never previously issued public discipline. With this statement, we agree. The masters further concluded that no legal authority exists to sanction an individual prosecutor for a *Brady* violation in a proceeding outside the underlying criminal action. With this conclusion, we respectfully disagree and reach our own conclusion.

After an attorney becomes a judge, the State Bar loses jurisdiction to investigate alleged misconduct or issue discipline. Evaluation of any alleged misconduct that occurred while the judge was an attorney then falls within the

jurisdiction of the commission. The commission may censure or remove a judge for pre-bench misconduct that took place within six years of the commencement of the judge's current term. (Cal. Const., art. VI, § 18, subd. (d)(2); see also, *Inquiry Concerning Couwenberg* (2001) 48 Cal.4th CJP Supp. 205, 221, 225; *Public Censure of Judge Paul D. Seeman* (2013).)

When an attorney is found to have committed ethical violations prior to becoming a judge, it negatively affects the public's confidence in, and perception of, the judiciary. The purpose of a commission disciplinary proceeding is the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. As such, it is the commission's responsibility and mandate to investigate and discipline judges for pre-bench misconduct, including pre-bench prosecutorial misconduct, where appropriate. We conclude that in order to fulfill the commission's mandate, under certain circumstances, it may be necessary and proper for the commission to discipline a judge who committed a *Brady* violation while serving as a prosecutor. Those circumstances are not presented here.

Judge Murray is represented by Edith R. Matthai, Esq.; Gabrielle M. Jackson, Esq.; and Leigh P. Robie, Esq., of Robie & Matthai in Los Angeles, California. The examiners for the commission are commission trial counsel Mark A. Lizarraga, Esq., and commission assistant trial counsel, Melissa G. Murphy, Esq.

II. LEGAL STANDARDS

A. Three Levels of Judicial Misconduct

There are three types of judicial misconduct: willful misconduct, prejudicial misconduct, and improper action.

Willful misconduct is the most serious type of misconduct. Its elements are (1) unjudicial conduct, (2) committed in bad faith, (3) by a judge acting in a judicial

capacity. (*Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1091 (*Broadman*).)

The second most serious type of misconduct is "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," also referred to as "prejudicial misconduct." (Cal. Const., art. VI, § 18, subd. (d).) Prejudicial misconduct "may be committed by a judge either while acting in a judicial capacity, or in other than a judicial capacity." (*Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, 878 (*Adams II*).) Prejudicial misconduct while acting in a judicial capacity does not require bad faith; rather, it is conduct that a judge undertakes in good faith, but that nevertheless would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office. (*Geiler v. Commission on Judicial Qualifications* (1973) 10 Cal.3d 270, 284 (*Geiler*).) Prejudicial misconduct may also be found when a judge commits " 'willful misconduct out of office, i.e., unjudicial conduct committed in bad faith.' " (*Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 312 (*Doan*), quoting *Geiler*, *supra*, 10 Cal.3d at p. 284, fn.11.) "In this context, bad faith means a culpable mental state beyond mere negligence and consisting of either knowing or not caring that the conduct being undertaken is unjudicial and prejudicial to public esteem." (*Broadman, supra,* 18 Cal.4th at p. 1093.)

Improper action occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute. (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89 (*Ross*), citing *Adams II*, *supra*, 10 Cal.4th at pp. 897-899.) Improper action may be the basis for a public or private admonishment, but not censure or removal. (Cal. Const., art. VI, § 18, subd. (d).)

Only prejudicial misconduct and improper action are relevant in this matter because Judge Murray is not charged with willful misconduct.

B. Burden of Proof

The examiner has the burden of proving the charges by clear and convincing evidence. (*Broadman, supra,* 18 Cal.4th at p. 1090.) "Evidence of a charge is clear and convincing so long as there is a 'high probability' that the charge is true. [Citations.]" (*Ibid.*) Clear and convincing evidence is so clear as to leave no substantial doubt. It is sufficiently strong to command the unhesitating assent of every reasonable mind. (*Ibid*.) Any reasonable doubts should be resolved in favor of the accused judge. (*Geiler*, *supra*, 10 Cal.3d at p. 275 (citing *Moore v. State Bar* (1964) 62 Cal.2d 74, 79).)

C. Standard of Deference to Findings and Conclusions of Masters

The California Supreme Court has held that the factual findings of the masters are entitled to special weight because the masters are in a position to observe and assess the demeanor of the witnesses. (*Broadman, supra,* 18 Cal.4th at p. 1090.) The legal conclusions of the masters are entitled to less deference because the commission has expertise with respect to the law concerning judicial ethics. (See *Adams II, supra,* 10 Cal.4th at p. 880, citing *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 832.) The commission may determine, however, that it is appropriate to disregard the factual findings and the legal conclusions of the special masters and make its own determinations based on its own independent review of the record. (See *Inquiry Concerning Clarke* (2016) 1 Cal.5th CJP Supp. 1, 7.)

III. FINDINGS OF FACT

A. Background

The notice alleged that, while serving as a DDA, Murray[1] was assigned to prosecute *Wilkins*, a homicide case involving a traffic collision which was

[1] For purposes of clarity, and with no disrespect, we refer to Judge Murray as "Murray" when we describe the actions he took as a DDA, and as "Judge Murray" when referring to his testimony before the masters.

investigated by the California Highway Patrol (CHP). The notice alleged that Murray violated his *Brady* obligations by failing to disclose exculpatory evidence to Wilkins's defense attorney and failing to further inquire into potentially exculpatory evidence that he became aware of while prosecuting the *Wilkins* case.

Specifically, the notice alleged that, before and during the trial, Murray was informed of exculpatory information by a CHP officer and a news reporter, namely that the CHP reports in the case had allegedly been altered. Murray was also put on notice during conversations with a news reporter and a CHP investigator of potentially exculpatory information, namely that certain CHP officers did not agree with the murder charges. The notice also alleged that, after Wilkins was convicted, but before his sentencing, Wilkins's defense attorney alleged in open court that there were improprieties in the CHP investigation, and that certain CHP officers had lost their jobs, thus triggering Murray's duty to inquire. The notice further alleged that, after the *Wilkins* case had been reversed on appeal and was in pre-trial litigation for a second trial, despite being questioned by his colleague about altered reports, Murray still failed to disclose his knowledge of altered reports and improprieties in the CHP investigation.

The following facts are adopted from the masters' factual findings, which we have determined are supported by clear and convincing evidence based on our own independent review of the record. Where appropriate, we have also included certain facts that we have determined are supported by clear and convincing evidence based on our own independent review of the record. Where there were disputes in the testimony, we have adopted the credibility determinations of the masters.

B. <u>The Decision to Charge Wilkins with Murder</u>

On July 7, 2006, Cole Wilkins stole appliances from a home under construction and, without properly securing them, loaded the appliances onto his truck. Shortly before 5:00 a.m., as Wilkins was driving, a stove fell off the back of the truck onto the freeway. After the stove fell off the truck, multiple collisions

occurred. In one of those collisions, off-duty Los Angeles Deputy Sheriff David Piquette suddenly swerved and struck a big rig, which jackknifed and fell onto Piquette's car, killing him.

CHP Officer Michael Bernardin investigated the fatal collision, and CHP Officer John Heckenkemper investigated two other related nonfatal collisions occurring just before the fatality. Bernardin identified the Primary Collision Factor (PCF) in his report as Piquette's unsafe speed for the conditions. Similarly, Heckenkemper's report identified the PCF of the crashes that he investigated as the unsafe speed for the conditions of one of the drivers who hit the stove.

CHP Sergeant Joseph Morrison was assigned to review Bernardin's report. Morrison directed Bernardin to change the PCF for the collision involving Piquette to "other than driver." Additionally, because he also did not agree with Heckenkemper's conclusion regarding the PCF in the nonfatal collisions, while Heckenkemper was on vacation, Morrison rewrote Heckenkemper's report under his own name and changed the PCF to "other than driver." Heckenkemper's original report was then destroyed and the final CHP reports identified the PCF as "other than driver." All the final reports were signed off by CHP accident review officer Scott Taylor and provided by the CHP to the Orange County District Attorney's Office (OCDA).

Then-DDA Lawrence Yellin, now Judge Yellin,[2] was assigned to the *Wilkins* matter. Judge Yellin testified that he met with District Attorney Tony Rackauckas twice to discuss what charges to bring against Wilkins. At the first meeting, Rackauckas told Yellin that the case sounded like felony murder. Yellin replied that he was not sure. Judge Yellin testified that he left the meeting and conducted some legal research. At some point that same day, someone advised Yellin that Rackauckas had been the sentencing judge in a prior violent juvenile

[2] For purposes of clarity, and with no disrespect, we refer to Judge Yellin as "Yellin" when we describe the actions he took as a DDA, and as "Judge Yellin" when referring to his testimony before the masters.

matter involving Wilkins. Judge Yellin testified that he told Rackauckas that Rackauckas had been the sentencing judge in Wilkins's prior case, and Rackauckas responded that he "did not remember that." Morrison testified that he was present during at least one meeting with the OCDA, at which Yellin was also present.

Yellin ultimately charged Wilkins with murder and receiving stolen property. The prosecution pursued two murder theories: felony murder and murder with implied malice, namely that the stolen stove, which had been dropped on the freeway by Wilkins, was a substantial factor in causing Piquette's death.

Before the masters, Morrison testified that he did not alter the reports to help the prosecution secure a murder conviction, but he also testified that he "guess[ed]" that, during a 2016 hearing in the *Wilkins* case, he had previously testified that he changed the CHP reports and destroyed Heckenkemper's report because he thought it would help secure a murder conviction against Wilkins. Judge Yellin testified that no one from the OCDA suggested changing the report to support a murder conviction.

At some point after the preliminary hearing, Murray was assigned to prosecute Wilkins.

1. Murray's knowledge of Morrison's alleged collusion with the OCDA in changing the report

While not specifically alleged in the notice, before the masters and in their briefs to the commission, the examiner argued that the circumstances under which Morrison changed the reports should be considered as "contextual evidence relevant to evaluating both Murray's and Morrison's motivations and conduct."

The special masters found that no evidence was presented that Morrison colluded with members of the OCDA to improperly change the reports and obtain a murder conviction. The examiner objects, arguing that the evidence presented

reflected that Morrison improperly changed the report, in violation of CHP policy, to assist with a murder prosecution, after meeting with members of the OCDA.

During the hearing, there was a great deal of testimony elicited from CHP officers about whether a reviewing officer can change a report, the circumstances under which they may do it, and the appropriate protocol for doing so. The masters' report contains some references to this testimony, without making any explicit findings.

The resolution of this issue is not necessary to our decision in this matter, because, whether or not the report was properly or improperly changed, the question before us is what evidence was presented showing that Murray was aware that the reports had been changed. Judge Murray testified that he was unaware that it was Morrison who had changed a report, or that a report had been changed, until 2015 when he read a transcript of an interview with Morrison in which Morrison stated that he changed the report. The examiner presented no evidence that Murray was involved with, or had any knowledge of, the alleged collusion between Morrison and other members of the OCDA to improperly change the reports.

2. Murray's knowledge of Rackauckas's involvement

Also, while not specifically alleged in the notice, before the masters and in their briefs to the commission, the examiner argued that the evidence introduced before the masters showed that Murray "may" have known of Rackauckas's involvement in Wilkins's prior juvenile matter and in the decision to charge Wilkins with murder. According to the examiner, Murray's knowledge of these facts should be evaluated as circumstantial evidence of Murray's state of mind during the *Wilkins* prosecution, in that he had an enhanced motive to win the *Wilkins* case because his boss, Rackauckas, was personally invested in the outcome.

The masters found that the examiner did not introduce any evidence in support of their allegation that Murray knew about Yellin's conversations with Rackauckas regarding charging Wilkins with murder, or that Murray knew of

Rackauckas's involvement in Wilkins's prior juvenile matter. As such, the masters concluded that there was no evidence that Murray's prosecution decisions and conduct were influenced by Rackauckas's involvement in the case.

The examiner asks us to reject the masters' findings. According to the examiner, Rackauckas's name appears multiple times in Wilkins's juvenile court records, and it is implausible that Murray did not notice it. The examiner also contends that neither Judge Yellin nor Judge Murray was credible when they testified that they did not discuss Rackauckas's involvement in charging Wilkins because: Murray and Yellin had a long-standing friendship and professional relationship; Rackauckas's involvement in the discussions regarding charging Wilkins was unusual; and, years later, Yellin mentioned Rackauckas's involvement to a deputy public defender representing Wilkins in his second trial.

Judge Murray testified he was not aware that Rackauckas had sentenced Wilkins in one of the numerous prior juvenile matters relating to Wilkins that he reviewed, and that he did not remember ever noting that Rackauckas was the sentencing judge in the juvenile court records relating to that matter. The examiner presented no evidence to the contrary, and the masters found that Judge Murray's testimony was credible.

Judge Yellin testified that, while he did not usually meet with Rackauckas to discuss the filing of murder charges, he left his meeting with Rackauckas, conducted appropriate research, and concluded that a murder charge could be filed. He insisted he was not intimidated by Rackauckas and that Rackauckas did not intimidate him into filing a murder charge. Judge Yellin further testified that he never talked with Murray about his conversations with Rackauckas, that he never made a notation in the *Wilkins* file regarding his conversations with Rackauckas, and that Murray was not in the homicide unit at the time the charging decisions in *Wilkins* were made. Judge Yellin also stated that he never sat down and discussed the *Wilkins* case with Murray: Murray was simply assigned Yellin's case load when Yellin was reassigned to another unit. The

examiner presented no evidence to the contrary and offered no theory as to why Judge Yellin would testify less than truthfully on this issue.

Judge Murray testified that, during the relevant period, he had no knowledge about any charging discussions between Rackauckas and Yellin, and that he never discussed the *Wilkins* prosecution with Rackauckas.

Based on our independent review of the record, and particularly in light of the special weight we afford to the masters' factual findings due to their ability to observe the demeanor of witnesses, and assess their credibility, we find that the masters' factual finding on this issue is clearly supported by the evidence, and we adopt the masters' factual finding on this issue.

C. The *Wilkins* Prosecution

1. Pines's comment to Murray

After Murray was assigned to prosecute Wilkins, he was provided with the CHP reports that identified the cause of the collisions as "other than driver." CHP investigator Theresa Pines was assigned to the case. The notice alleged that sometime prior to the *Wilkins* case going to jury trial, Pines informed Murray that certain CHP officers did not believe that Wilkins should be prosecuted for murder. Pines testified that she did not remember ever making this comment to Murray.

Judge Murray, however, testified that, sometime prior to the trial, which occurred in 2008, Pines made the alleged comment to him. Judge Murray testified that he did not ask Pines for any further information, and he did not follow up on her comments. He testified that people regularly disagreed with charges and theories pursued by the OCDA's office and that it was not uncommon for police officers, lawyers, or members of the public to question charges. Judge Murray also testified that he did not generally ask law enforcement officers what they thought of charges, and that he was not the prosecutor who had charged Wilkins – that was Yellin.

Neither party objects to these factual findings and we adopt them. The import of Pines's comment and Murray's response to it are discussed in the Conclusions of Law, *post*.

2. Heckenkemper's comment to Vandiver

OCDA investigator Wesley Vandiver testified that he met with Heckenkemper at the accident site during trial preparation. The notice alleged that during this meeting Heckenkemper told 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 believe in the PCF, and if he was put on the stand that he would probably not agree with what the PCF is.' "

Vandiver testified before the masters that Heckenkemper did not make that statement to him. He admitted that Heckenkemper did make a different statement, to the effect that Heckenkemper did not agree with the murder filing against Wilkins. This statement was not alleged in the notice. Vandiver said that he passed along Heckenkemper's comment to Murray. Judge Murray testified that he did not remember Vandiver telling him this, but that, if Vandiver said he did, then he must have. Heckenkemper did not testify before the masters.

The masters found that the examiners did not present any evidence at the hearing that Heckenkemper made the statement to Vandiver alleged in the notice. The examiner objects to the masters' findings and argues there is clear and convincing evidence that Heckenkemper made the statement to Vandiver because, in his answer to the notice, Judge Murray admitted that Heckenkemper testified in a separate proceeding in 2017 that he made the statement alleged in the notice.

The examiner asks the commission to use the judge's admission that certain testimony occurred to find by clear and convincing evidence that the testimony was factually true – i.e. – that Heckenkemper made the statement alleged in the notice to Vandiver. We decline to do so. Judge Murray's answer to the notice admits that Heckenkemper previously gave certain testimony in a

separate proceeding. An admission that certain testimony was previously given is not an admission to the truth of that testimony. Heckenkemper did not testify before the masters, the examiner presented no other evidence of this statement, and Vandiver testified that Heckenkemper did not make the statement to him. We therefore adopt the factual finding of the masters.

Regarding Vandiver's testimony before the masters that Heckenkemper did not agree with the murder filing, the notice does not allege that Heckenkemper made this statement to Vandiver, nor does it allege that Vandiver ever relayed it to Murray. The masters did not make an explicit finding of fact on this issue, although they did note it in their report. The masters do not, however, appear to have considered this statement in their legal analysis of whether Murray engaged in misconduct by failing to conduct any further inquiry based on the statement.

This statement was not alleged in the notice and we therefore decline to consider it in determining whether Murray engaged in misconduct. (See, *Inquiry Concerning Saucedo* (2015) 62 Cal.4th CJP Supp. 1, 49 [commission declined to adopt masters' finding of misconduct with respect to incidents not charged in the notice, citing rule 128(a) that examiner may make a motion to amend the notice to conform to proof]; *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 695-696 [although evidence was presented at the hearing of certain facts, they were not included in the charged misconduct, and therefore not considered for purposes of discipline].)

3. Reporter's question to Murray

The *Wilkins* case proceeded to jury trial, and, during trial, the following events occurred. Shortly before jury selection, Wilkins's attorney, Joseph Vodnoy, told the trial court that he anticipated his defense to be that Piquette was at fault for the fatality because he was traveling at an unsafe speed for the conditions. He also said that he expected to call a reconstruction expert who

would testify that Piquette was at fault due to his unsafe speed. The trial began on April 17, 2008.

One day during trial, as Murray was leaving the courtroom, a news reporter asked him what he thought about the fact that some CHP officers did not believe that Wilkins should have been charged with murder. Judge Murray testified that he responded that their opinions were irrelevant to charges being pursued by the district attorney's office.

While the masters did not make an explicit finding on this allegation, their report references the fact that the parties included this fact in their stipulated timeline. Neither party objects, and we conclude that there is clear and convincing evidence that the conversation between the news reporter and Murray occurred. The import of this conversation is discussed in the Conclusions of Law, *post*.

4. The Internal Affairs investigation and Beeuwsaert's telephone call to Murray

Meanwhile, in the context of a completely separate investigation, CHP Assistant Chief Steven Beeuwsaert learned about allegations that the accident reports in the *Wilkins* matter had been altered. Beeuwsaert testified before the masters that, on or about April 30, 2008, while the *Wilkins* trial was ongoing, he met with Heckenkemper regarding Heckenkemper's concerns about changes to reports in the *Wilkins* case and in other matters. Beeuwsaert interviewed other CHP officers, and, given everything he had learned, he reached out to Internal Affairs (IA) on May 1, 2008. By May 20, 2008, IA took over the investigation. According to Beeuwsaert's testimony, during his call with IA, a superior officer suggested that he call the DDA prosecuting Wilkins to notify him about the allegations of changed reports.

Beeuwsaert testified that, soon after the May 1, 2008 call, he obtained a telephone number from the court officer or the public affairs office and called a person who he believed was the DDA prosecuting the *Wilkins* case. Beeuwsaert

explained that he did not remember exactly what he said and he did not remember exactly what the person responded, but he told the person about alleged changed accident reports, and the person may have responded that it did not matter because Wilkins was being prosecuted under a theory of felony murder. Beeuwsaert testified he could not independently recall the name of the person he spoke to, but that the individual never said he was not the DDA prosecuting Wilkins.

The examiner presented other evidence to support the allegation that the person Beeuwsaert spoke to was Murray. In 2009, CHP Lieutenant Paul Golonski filed two whistleblower complaints against the CHP. The whistleblower complaints included allegations specifically related to Beeuwsaert, including that Beeuwsaert had violated *Brady* in the *Wilkins* case. Beeuwsaert intended to respond to the complaints by declaration. Deputy Attorney General Chris A. Knudsen helped Beeuwsaert prepare his declaration and drafts of the document were e-mailed back and forth between Knudsen and Beeuwsaert. In an unsigned, draft declaration, Beeuwsaert identified the prosecutor with whom he spoke in the *Wilkins* case as "Mike Murray."

A signed declaration similar to the unsigned draft was also admitted into evidence during the hearing before the masters. This declaration did not contain many names; instead, it referred to some individuals by their initials and in other instances, no names were mentioned. Beeuwsaert testified that he was uncertain as to whether this declaration was actually filed in response to the whistleblower complaints, because he did not think he would have filed a declaration with initials. This signed declaration does not contain Murray's name or the initials "MM." Instead, it just refers to an unnamed DDA. Beeuwsaert testified that he did not know why the signed declaration omitted Murray's name.

Beeuwsaert testified before the masters that he had no recollection of talking to Murray. In response to questioning by the examiner, however, Beeuwsaert acknowledged that, in April 2017, in connection with a motion in the

Wilkins case, he had testified that he was " '100 percent' " sure he spoke to Murray.

Judge Murray testified that he never received a call from Beeuwsaert. He testified he was certain that Beeuwsaert never called him because a call from an assistant chief about changes to accident reports in a murder case was not something he would have forgotten.

The question of whether Beeuwsaert made this call or, if he made the call, that he made it to Murray is the main factual issue in dispute in this case. The masters concluded that the examiner did not prove by clear and convincing evidence that Beeuwsaert had a telephone conversation with Murray in which Beeuwsaert informed him that the reports concerning the *Wilkins* case had been altered. The masters noted the amount of time that had lapsed presented a problem for the examiner to prove their case, because, over time, "memories [had] faded, evidence disappeared, and events lost their perspective." According to the masters, the fact that Beeuwsaert had testified differently or more confidently in April 2017 did not alter their conclusion that the examiner had not proven this fact by clear and convincing evidence in the hearing before them.

The masters made clear they did not conclude that Beeuwsaert was lying or making false claims to cover up his own misconduct, but they noted it was undisputed that the signed version of Beeuwsaert's declaration omitted Murray's name and did not contain Murray's initials. They observed that Beeuwsaert offered no explanation for this difference between the signed and unsigned documents, and noted that it was possible Murray's name was deleted because Beeuwsaert could not recall the name of the DDA with whom he spoke and did not want to sign a declaration under penalty of perjury if he was not certain. Based on the evidence presented to them, including that "to this day, [Beeuwsaert] still cannot recall the name of the person he spoke to," the masters concluded: "We cannot make the leap that the examiners would like us to make,

namely that Beeuwsaert must have spoken to Murray because that is the only DDA name on any document."

The examiner asks the commission to reject the masters' findings for the following reasons. Beeuwsaert testified that his superior officer suggested he call the DDA prosecuting Wilkins; he called the person he believed was the DDA; the person he spoke to appeared familiar with the case and responded in a manner consistent with the prosecution team's theory that causation was irrelevant; Murray's name was included in an unsigned declaration related to the whistleblower case that Beeuwsaert was involved in; and Beeuwsaert's prior testimony that he was "100 percent" sure he spoke with Murray. The examiner also argues that Beeuwsaert had no motive to lie and was a senior CHP officer with a distinguished career.

Based on our independent review of the evidence, we have determined that the masters properly evaluated the evidence. We adopt the masters' credibility determinations and address our factual findings on this main factual issue in dispute.

The testimony before the masters reflects that Beeuwsaert's memory was very imperfect and appears to have evolved and changed over time. Before the masters, Beeuwsaert testified that he had no recollection of talking to Murray. He testified that he spoke to someone at the OCDA but "to this day" cannot independently recall the name of the person he spoke to and that, other than having found Murray's name on a draft declaration, he had no independent recollection of talking to Murray.

In fact, Beeuwsaert's memory and statements about his alleged call changed multiple times. Beeuwsaert admitted under questioning that when an investigator from the Orange County Public Defender's Office (OCPD) first interviewed him in 2015 regarding his actions in the *Wilkins* case, he did not mention making a call to the OCDA's office, or to Murray. Beeuwsaert later told the OCPD investigator that he did not remember the call at all, "other than what I

have on paper," and "And so I don't know if my boss asked me to call the DA's office … itself, or what. I don't remember. I don't remember any of that."

Additionally, Beeuwsaert admitted on cross-examination that his notes of his investigation in the *Wilkins* case did not mention speaking with anyone at the OCDA's office, or mention Murray. Similarly, the notes Beeuwsaert made in preparation to defend against the whistleblower case are conspicuous for the absence of information regarding the alleged phone call to Murray. Beeuwsaert testified that he took the whistleblower allegations very seriously and prepared a detailed document to rebut the claims made against him. He testified that he wrote comprehensive statements identifying the date, time, and content of communications related to the *Brady* allegations being made against him. In contrast to his meticulous written descriptions of the communications rebutting other allegations of *Brady* violations, Beeuwsaert admitted that he did not similarly describe calling Murray or anyone else regarding the *Wilkins* case, or recount any order by a supervisor to do so.

Beeuwsaert's testimony regarding the multiple declarations in the whistleblower case also creates serious doubts about their reliability. As the masters noted, while the unsigned draft declaration contains Murray's name, the signed version omits his name. The inconsistencies in Beeuwsaert's two declarations remain unexplained, despite the examiner's attempts to elicit an explanation from Beeuwsaert.

The declarations in the whistleblower case are also ambiguous. The unsigned declaration that specifically identified Murray does not state that Beeuwsaert called Murray, rather it states: "The Orange County DA handing [*sic*] the case, DDA Mike Murray, was well aware of the circumstances involving the accident and the differences of opinion as to who was at fault." The signed version stated that the prosecutor "was informed" – not that Beeuwsaert himself informed Murray or made any phone call. And, suffice to say, the document that

Beeuwsaert signed under penalty of perjury does not state that Beeuwsaert made the call to Murray.

The examiner argues that Beeuwsaert did not have a motive to lie, and the masters indicated they did not believe that Beeuwsaert was lying at any point or making false claims in order to cover up his own alleged misconduct. We accept the masters' credibility determination on this issue. But while Beeuwsaert may not have had a motive to lie, per se, he did have a motive, at the time he was working on the declarations in 2009, to present facts in a light most favorable to himself. Beeuwsaert was a defendant in a whistleblower suit that made serious allegations Beeuwsaert had personally engaged in a pattern of *Brady* violations. And Beeuwsaert was working with Knudsen to defend himself against those allegations. Further, the draft declarations were prepared and e-mailed back and forth between Knudsen and Beeuwsaert. As such, it is not clear from the evidence presented before the masters how the draft declarations were created – whether Beeuwsaert drafted them, Knudsen drafted them based on conversations with Beeuwsaert, or a combination of both. Beeuwsaert testified before the masters that he had no independent recollection of calling Murray, other than the fact that there was a reference to Murray being informed of the issues in the *Wilkins* case in the draft declaration. While it is human nature to rely on a written record when an individual does not have an independent memory of what occurred, here the written record appears unreliable.

In contrast to Beeuwsaert's inconsistent accounts of whether and with whom he spoke, Judge Murray testified (consistent with his responses to the commission) that he never received a call from Beeuwsaert, and that he would have remembered a call from an assistant chief of the CHP telling him that reports had been changed in a murder case he was working on. The masters found Judge Murray's testimony credible.

In light of the inconsistencies and unanswered questions, we cannot conclude that Beeuwsaert's testimony meets the clear and convincing evidence

standard required in these proceedings, particularly in light of the special weight we afford to the masters' factual findings due to their ability to observe the demeanor of witnesses, and the mandate that any reasonable doubts should be resolved in favor of the accused judge (*Geiler*, *supra*, 10 Cal.3d at 275).

5. Bernardin's statement to Pines

Separately from the IA investigation, the trial against Wilkins was progressing, and as part of his trial preparation Murray issued a subpoena to Bernardin. The notice alleged that Bernardin appeared at the courthouse pursuant to the subpoena, and while outside the courtroom he told Pines that his report had been changed. The notice further alleged that Pines told either Murray or OCDA Investigator Robert Sayne about Bernardin's statement and that either Murray or Sayne responded with words to the effect that the cause of the accident did not matter because the defendant was charged as a fleeing felon. The notice further alleged that, despite the fact that Bernardin was the investigating officer, had found that the stove caused the fatal collision, and appeared in court to testify, Murray did not call him as a witness, the implication being that Murray did not call Bernardin because either Pines or Sayne had told him about Bernardin's statement and Murray knew Bernardin was going to offer testimony contrary to what was in his report.

Pines testified regarding the conversation she had with Bernardin outside a courtroom. According to Pines, that conversation may have occurred when Bernardin appeared at the courthouse pursuant to Murray's witness subpoena for the jury trial. Pines was not sure, however, and testified that she and Bernardin may have met at a different courthouse at a different time. Nevertheless, she related that during the conversation outside the courtroom, Bernardin told her that his report had been changed. Pines stated that she had initially recalled in an August 2015 interview with an OCDA investigator that she told Murray about Bernardin's statements, but that later in the same interview, she remembered that it was in fact Sayne whom she had told. Pines testified before the masters

that it was Sayne, not Murray, to whom she relayed Bernardin's statements. According to Pines, Sayne told her that the cause of the accident did not matter because Wilkins had been charged as a fleeing felon. Sayne testified before the masters that Pines never told him about this conversation with Bernardin.

Judge Murray testified that, in preparation for trial, he would create a universal witness list with the names of all persons who might potentially testify. All of those individuals would be subpoenaed, even if ultimately their testimony was not needed. Judge Murray explained that he did not call Bernardin as a witness at the *Wilkins* trial because traffic accident reports are not admissible evidence and he never intended to introduce them (or the PCFs) as evidence and thus did not need Bernardin to testify. In other words, Judge Murray denies the implication in the notice that he did not call Bernardin because Pines or Sayne told him that Bernardin was going to offer testimony contrary to what was in his report.

The masters found the examiner failed to prove the allegation that Pines or Sayne relayed to Murray Bernardin's statement that his report had been altered. They emphasized Pines's testimony that she only spoke with Sayne about Bernardin's statements. No testimony was elicited that Sayne told Murray about the changed reports; in fact, Sayne testified that, while he worked on the *Wilkins* case, he did not hear that the accident reports were altered and denied having any discussion with Pines about the cause of the accident and the charges in the case. The masters noted that, while Sayne denied having a discussion with Pines, this did not allow them to leap to the conclusion that Pines must have spoken to Murray. Both Judge Murray and Pines testified that this did not occur.

Neither the examiner nor the respondent objects to the masters' findings, and we adopt them.

6. Cassidy's telephone call to Murray

On May 5, 2008, Wilkins was convicted of first-degree murder, and the parties were required to set a sentencing date. Judge Murray testified that

sentencing hearings are often continued, and in order to be sensitive to Piquette's family, Murray did not want to continue any sentencing hearing; he wanted to pick a settled date. Judge Murray explained that he and Vodnoy had a conversation regarding the sentencing hearing and Murray's concerns, and sentencing was set for July 11, 2008.

Former Orange County Register Reporter John Cassidy testified before the masters that, around this time, he received a tip from a former CHP officer that the accident reports in the *Wilkins* case had been altered. The informant urged Cassidy to call the "handling" prosecutor, but did not identify who that was. Cassidy testified that he looked up the case online to get docket details and identified Murray as the DDA. He then called Murray and left him a voicemail message; Murray supposedly returned the call on Sunday, June 8, 2008. Cassidy testified that he told Murray about the tip related to altered accident reports. Murray allegedly responded that he had not heard of a report being altered, and, regardless, it would not have any bearing on a criminal case. Before the masters, Cassidy also testified about several other concerns he had about the *Wilkins* case, including that he found the response by law enforcement to the alleged burglary "concerning," that he had the impression that the victims of the burglary may have been involved in an insurance scam, that he thought it was strange that no seat belt analysis for Piquette was conducted, and that no skid mark analysis was performed. Cassidy further explained that, prior to the sentencing hearing, he spoke to Vodnoy and told him about the tip he had received.

Judge Murray testified that he never spoke to Cassidy; he would not have returned a call from a reporter he did not know; and that, at around this time, Murray's mother-in-law was fighting leukemia and Sundays were spent with family. Phone records for Cassidy's phone were introduced into evidence which reflected that, on June 8, 2008, Cassidy received three incoming calls; none from any numbers associated with Murray.

The masters found that the examiners did not prove by clear and convincing evidence that Cassidy had a telephone call with Murray. The masters specifically found that Cassidy was not a credible witness, based upon the manner in which he testified, and that Cassidy's testimony overall led them to conclude that he may have been "looking for a grander, more widespread and coordinated scheme than what was there." The masters also credited Judge Murray's testimony that he never received a phone call from Cassidy, that he did not return phone calls from reporters he did not know, and that he did not know Cassidy.

Neither party objects to the factual findings, and we adopt them, along with the masters' credibility determination.

7. Vodnoy's statements at Wilkins's sentencing

Days prior to the scheduled sentencing, Vodnoy filed a motion, pursuant to Penal Code section 1050, to continue Wilkins's sentencing on the grounds that he was unprepared for the hearing; he had been on vacation and needed more time. The motion did not mention the tip from Cassidy, nor allege that reports in the *Wilkins* case had been altered.

Judge Murray testified that at the sentencing hearing, prior to going on the record, Vodnoy asked Murray if he had an issue with continuing the hearing. Judge Murray testified that he previously told Vodnoy he did object because Piquette's family was present and Vodnoy had agreed to the settled date. At that point, according to Judge Murray, Vodnoy said "there's something going on at the CHP or there's an investigation." Murray asked Vodnoy for a written affidavit regarding the new grounds for the request to continue, pursuant to Penal Code section 1050, so that the issue could be litigated. Judge Murray testified that blank 1050 forms were available for that purpose in every courtroom. Vodnoy did not file one.

The parties then went on the record and Vodnoy made the following statement:

> There [are] 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 these people being witnesses. [¶] First of all, with respect to . . . Lieutenant Mark Worthington of the Highway Patrol, there [are] allegations that he's been fired for tampering with the report in our case. There was an 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 [an] allegation that Internal Affairs seized the computer [assigned] to Accident Review Officer[] Scott Taylor. My understanding [is] that he's one of the officers, he is one of the officers in our case. [¶] In addition to that . . . Worthington'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 for a motion for new trial and move to continue[ ] the hearing.

The transcript reflects that Murray responded by arguing that Vodnoy had not provided any reasons to indicate that there was new evidence or a change in evidence that would have affected the outcome in this case. The transcript then reflects the following exchange:

> MURRAY: [Defense counsel] 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 . . . Lieutenant Worthington [and] Officer Rosenberg [were not] witnesses in the trial. [¶] And [defense counsel] 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.
>
> VODNOY: There . . . was tampering with the report in this case in terms of the causal 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 [is] 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 [Deputy Piquette] 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 . . . goes to the heart of the case itself in terms of how the accident occurred.

The trial court denied Vodnoy's request for a continuance and sentenced Wilkins to 26 years to life in prison.

It is undisputed that Vodnoy and Murray made the statements as reflected in the transcript of Wilkins's sentencing hearing. Neither party objects to these findings and we adopt them. Judge Murray's testimony regarding his response to the comments and the import of the comments are discussed in the Conclusions of Law, *post*.

D. The *Wilkins* Retrial

In March 2013, the California Supreme Court reversed Wilkins's conviction (on grounds not at issue here) and remanded the case for a new trial. Murray was assigned to the retrial.

1. Yellin's question to Murray regarding changed reports

Judge Murray testified that, upon receiving the case, he told his paralegal to prepare discovery and turn it over to the OCPD, who were now representing Wilkins. That discovery included the identical accident reports that had been provided to the defense in the first *Wilkins* trial, including the altered reports, because that was all the OCDA had.

Murray was then out on medical leave for an extended period and the case was transferred back to Yellin while Murray was on leave. While Yellin was

assigned to the case, then-deputy public defender (DPD) Isabel Apkarian,[3] now Judge Apkarian, was assigned to Wilkins's retrial, read the sentencing transcript, spoke to Vodnoy,[4] and asked him for any CHP reports other than the ones in the file. Judge Apkarian testified before the masters that Vodnoy told her he did not have any other CHP reports. Judge Apkarian testified that, during this pretrial litigation period, Yellin told her about his initial conversation with Rackauckus regarding what crimes Wilkins should be charged with. Judge Apkarian testified that she also spoke to Cassidy, whom Vodnoy had identified as the source of his information. Cassidy told her that he had alerted the "*Wilkins* prosecutor" to alterations to the CHP reports. Apkarian also interviewed Bernardin, who told her that the PCF in his report had been changed.

Further litigation ensued and Judge Yellin testified that, at some point, he understood that there was an allegation of changed or inconsistent CHP reports. He examined the *Wilkins* file and found no inconsistent CHP reports. He then called Murray and asked him if he knew about a changed report. Judge Yellin testified that Murray replied that he did not have any such information; and that everything was in the "box," which, Judge Yellin testified, meant the file he had already looked through. Judge Murray testified that Yellin called him looking for an additional set of reports. Specifically, Judge Murray testified that Yellin asked him whether he saw anything to indicate that there was a second set of traffic reports, and Murray told him, " 'No. I didn't discover the case. You did. If you didn't see them, I didn't see them.' "

The masters concluded that in or around 2014 and 2015, Yellin asked Murray if he knew anything about altered reports, and Murray responded that he

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[3] For purposes of clarity, and with no disrespect, we refer to Judge Apkarian as "Apkarian" when we describe the actions she took as a DPD, and as "Judge Apkarian" when referring to her testimony before the masters.

[4] Vodnoy subsequently passed away in 2014.

did not. Neither party objects to these factual findings, and we adopt them. The import of Yellin's question and Murray's response are discussed in the Conclusions of Law, *post*.

2. Murray reads the transcript of Morrison's interview

A new DPD took over the *Wilkins* case and Judge Yellin testified that she told him she intended to file motions that would implicate Murray in misconduct, she thought she had "things" that were going to make Murray look bad, and she wanted a deal – namely a lower penalty for Wilkins. According to Judge Yellin, the conversation prompted a second conversation between Yellin and Murray, during which Murray dropped "an F bomb" and told Yellin to let the OCPD file whatever motion they wanted.

The OCPD then filed a motion to dismiss the case based on "outrageous government misconduct" (the OGC motion), and subsequently also a motion to recuse the OCDA. Those motions made a number of serious allegations against the OCDA, Murray, and law enforcement, including that Morrison had changed Heckenkemper and Bernardin's reports. Judge Murray testified that he was not involved in responding to the motions and that another DDA, Eric Scarbrough, was assigned to handle them. Judge Murray stated that Scarbrough told Murray there were specific allegations against Murray, but that Murray was very quickly "walled off" because his supervisor did not want him involved. Scarbrough testified that, in order to respond to the motions, the OCDA interviewed the individuals identified in the OGC motion, including Morrison.

Judge Murray testified that, in late July 2015, he read the transcript of the OCDA's interview of Morrison, in which Morrison acknowledged changing the PCFs. According to Judge Murray, he specifically asked to review the transcript because Scarbrough told Murray that Morrison admitted to changing the reports. Judge Murray explained, "[T]hat's the first time anybody associated with the D.A.'s Office, CHP had given a statement or an interview to us saying yeah, this

happened." (*Sic*.) He said he did not review the transcripts of the interviews of Beeuwsaert or Bernardin.

The OCDA filed its opposition to the OCPD's OGC motion, and the next day, September 15, 2015, the OCPD called and requested the transcripts of the OCDA interviews. The request for the transcripts went to Yellin and Scarbrough.

Although the timing is unclear, Judge Murray testified that, after the OCPD's request for the transcripts was made, Dan Wagner, Murray's supervisor, and Scarbrough were engaged in a conversation in the hallway outside of Wagner's and Murray's offices regarding what they should discover to the OCPD. Judge Murray testified that he overheard the conversation and told them they should "discover it all."

Judge Murray further testified that he did not turn over the transcript of Morrison's interview at the time he read it in July 2015 because he was instructed not to be involved in the case while the motions were pending; he was essentially "walled off" and not supposed to do anything that could impact the motion.

The masters concluded that Murray read the transcript of Morrison's interview in July 2015 and the transcript was provided to the OCPD in September 2015. Neither party objects to this finding and we adopt it. Whether Murray should have turned over the transcript before September 2015 is discussed in the Conclusions of Law, *post*.

After being elected on June 7, 2016, Murray was sworn in as a judge of the Orange County Superior Court on January 3, 2017. In 2017, Wilkins was retried and found guilty of second-degree murder.

IV. CONCLUSIONS OF LAW

In order to evaluate the conduct at issue here, we first set forth the law applicable to prosecutors in criminal cases.

A. *Brady v. Maryland*

"Prosecutors have a special obligation to promote justice and the ascertainment of truth." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378 (*Kasim*).) It is well-settled that the prosecution has a "broad obligation to disclose exculpatory evidence." (*Strickler v. Greene* (1999) 527 U.S. 263, 281.) This duty "extends even to evidence known only to police investigators and not to the prosecutor." (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042 (*Salazar*) [citing, *Kyles v. Whitley* (1995) 514 U.S. 419, 438].) Therefore, to comply with *Brady*, " 'the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police.' " (*Salazar*, *supra*, 35 Cal.4th at p. 1042.)

Brady duty attaches " 'to evidence the prosecutor, or the prosecution team, knowingly possesses or has the right to possess. The prosecution team includes both investigative and prosecutorial agencies and personnel. [Citations.] The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it. [Citations omitted.]' " (*People v. Superior Court* (*Meraz*) (2008) 163 Cal.App.4th 28, 47; see also *Kasim*, *supra*, 56 Cal.App.4th at p. 1380 ["The scope of the prosecutorial duty to disclose encompasses not just exculpatory evidence in the prosecutor's possession but such evidence possessed by investigative agencies to which the prosecutor has reasonable access"].) A prosecutor's disclosure obligations are continuing and do not end when the trial is over. (*Imbler v. Pachtman* (1976) 424 U.S. 409.)

In assessing whether *Brady* error has occurred, the operative question is whether evidence was suppressed, not whether the prosecution's burden to disclose was triggered. (*Salazar*, *supra*, 35 Cal.4th at p. 1042 [one of the three components of a true *Brady* violation is that the evidence must have been suppressed].) Thus, the *Brady* cases are clear that even "inadvertent" suppression of exculpatory/impeachment evidence constitutes a *Brady* violation.

(*Salazar*, *supra*, at p. 1042.) In other words, even if the prosecution inadvertently failed to disclose exculpatory evidence, it could be held accountable for a *Brady* violation. The prosecutor's good or bad faith does not matter for purposes of assessing whether a *Brady* violation occurred. (*Brady*, *supra*, 373 U.S. at p. 87 [due process violation occurs when evidence is suppressed "irrespective of the good faith or bad faith of the prosecution"].)

B. *Brady* Violations in the Context of Commission Proceedings

The masters concluded, and Judge Murray concedes, that the prosecution team committed a *Brady* violation in that evidence was suppressed from Wilkins. In the criminal context the prosecution team as a whole may be found to have violated *Brady*, without individual assignment of blame. The issue in these proceedings, however, is to what extent, if any, Judge Murray himself was personally aware of exculpatory evidence, but failed to disclose it, or of potentially exculpatory information, but failed to further inquire into it. And, unlike criminal proceedings, in the context of commission proceedings the determination of whether Judge Murray acted with bad faith is material to the determination of whether he committed prejudicial misconduct.

We address here an argument made by the examiner during oral argument. Throughout these proceedings, and in both their pre-hearing and post-hearing briefs, the examiner acknowledged that "[w]ith respect to the conduct charged in these proceedings, prejudicial misconduct involves " 'willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity' " (citing *Doan*, *supra*, 11 Cal. 4th at p. 312 quoting *Geiler*, *supra*, 10 Cal.3d at p. 284, fn.11). This is different than the standard for prejudicial misconduct when a judge is acting in a judicial capacity. In that context, prejudicial misconduct does not require bad faith; rather, it is conduct which a judge undertakes in good faith, but which nevertheless would appear to an objective observer to be not only unjudicial but prejudicial to public esteem for the judicial office ("the objective observer standard"). (*Geiler*, *supra*,

10 Cal.3d at p. 284.) In a post-hearing brief to the masters, the examiner asserted that "[n]either the commission nor the California Supreme Court has addressed whether a judge may commit prejudicial pre-bench misconduct without proof of bad faith," and specifically asserted that it was "unnecessary to decide that question here" because Judge Murray's conduct in failing to further inquire or to disclose was "intentional and in bad faith."

In their report, the masters noted that prejudicial misconduct falls into the two categories, but that the only relevant category here was willful misconduct out of office, i.e., unjudicial conduct committed in bad faith by a judge not then acting in a judicial capacity. The masters, in concluding in their report that Judge Murray did not commit prejudicial misconduct, found specifically that he did not act in bad faith. In their opening brief to the commission, the examiner did not contend that the masters were incorrect when they concluded that the examiners were required to prove bad faith. Rather, the examiner argued that the commission should find that there was clear and convincing evidence that Judge Murray's failure to inquire was done in bad faith and thus constituted prejudicial misconduct.

For the first time during oral argument before the commission, the examiner argued that our prior decision in *Inquiry Concerning Kreep* (2017) 3 Cal.5th Supp. 1 provides authority for the proposition that we need not find that Judge Murray acted in bad faith and that the commission could find, even though Judge Murray is charged solely with conduct while not acting in a judicial capacity, that he committed prejudicial misconduct under the objective observer standard.

The examiner proffered no theory as to why the objective observer standard should apply to these proceedings, despite the fact that Judge Murray was not a judge at the time of the alleged misconduct and therefore not acting in a judicial capacity. Nor did the examiner argue why, under the objective

observer standard, the commission should find that Judge Murray committed prejudicial misconduct.

Throughout these proceedings the examiner has asserted that Judge Murray's conduct constituted prejudicial misconduct because it was intentional and made in bad faith, and Judge Murray's defense responded accordingly. We therefore decline to address the question here of whether a judge's pre-bench misconduct could constitute prejudicial misconduct under the objective observer standard.

C. Count One: Failure to Inquire

Count One of the notice alleged that Murray failed to meet his continuing duty to inquire about potentially exculpatory evidence. Based on our factual findings, the potentially exculpatory evidence at issue consists of the statements by Pines and an unnamed reporter that some CHP officers did not believe Wilkins should be prosecuted for murder, Vodnoy's statements at Wilkins's sentencing that there were allegations of improprieties in the CHP investigation and that an officer had tampered with a report, and a question by Murray's colleague, Yellin, asking about changed reports or another set of reports.

At the outset of our analysis, it is important to note the additional constraints that the statute of limitations brings to this matter. The commission can censure or remove a judge for conduct occurring within six years of the start of the judge's current term. (Cal. Const., art. IV, § 18, subd. (d).) Judge Murray's current term began in January 2017. Conduct that occurred before January 2011 is, therefore, barred by the statute of limitations. Judge Murray is not charged with committing misconduct by failing to inquire in 2008 when the comments were made to him by Pines and the unnamed reporter, or when Vodnoy made the statements at sentencing. Rather, the notice charged Judge Murray with violating his continuing duty to inquire during the time period January 2011 to September 2015, long after the first *Wilkins* trial, and during the period when the conviction was reversed on

appeal and remanded for a second trial in 2013 and the subsequent period of pretrial litigation in 2014 and 2015 before the second trial.

1. Murray did not act in bad faith when he failed to inquire further into the comments made to him by Pines and a reporter that some CHP officers thought that Wilkins should not be charged with murder

The masters concluded that Murray did not act in bad faith when he failed to conduct any further inquiry in response to Pines's statement that some CHP officers thought Wilkins should not be charged with murder. In coming to their conclusion, the masters credited Judge Murray's explanation that he did not consider the information from Pines to be potentially exculpatory, triggering his duty to further inquire, because "the fact that certain officers did not think that Wilkins should be charged with murder does not mean that they did not think the stove caused the fatal collision." The masters also credited Judge Murray's explanation that criticisms of the OCDA's office were common, opinions of CHP officers did not affect his litigation strategies or decisions, and he was not involved in the decision to charge Wilkins with murder.

The examiner objects and argues that any experienced prosecutor acting in good faith would have known that he or she was obligated to inquire when "even just one person relayed information that officers did not think a defendant charged with killing a police officer, should be prosecuted for murder." The examiner also argues that Murray received similar information from three independent sources (Pines, the unnamed reporter, and Vandiver), but that the masters failed to address the cumulative effect of such potentially exculpatory information on Murray's duty to inquire. The examiner asks the commission to find that "Murray's failure to inquire – despite receiving the same potentially exculpatory evidence from three separate sources – establishes by clear and convincing evidence that his lack of inquiry was intentional and done in bad faith."

We agree with the examiner that the cumulative effect of similar information received by Murray from the unnamed reporter should be considered,

and not just the effect of Pines's comment. As discussed, *ante*, however, we decline to consider the similar statement conveyed to Murray by Vandiver, because it was not alleged in the notice.

Considering both statements together, however, we still cannot make the leap advanced by the examiner. The examiner equates being informed of the alleged opinion of a CHP officer disagreeing with a charging decision with knowledge of "problems with [the] case." The examiner, however, does not make a connection between why such a statement would alert Murray to "problems with his case," or what kind of problems Murray should have been alerted to. The fact that some officers did not agree with the charges does not suggest that the officers did not think that the stove was the cause of the accident, or logically lead to a question of whether there had been any changes to the reports; or, more fundamentally, to the existence of potentially exculpatory evidence that would require further inquiry.

Further, Judge Murray testified: "[Yellin] charged the case what I thought was appropriately and frequently people question our filing decisions. It's not something I would follow up on unless somebody told me something specific and then I would follow up on it." We find persuasive Judge Murray's testimony that he did not view unnamed law enforcement officers' disagreement with a charging decision as potentially exculpatory evidence. We agree with the masters that, between January 2011 and September 2015, Murray did not act in bad faith and conclude that he did not commit prejudicial misconduct by failing to conduct further inquiry into the information he received in 2008 that some officers disagreed with the charges in the *Wilkins* matter.

2. Murray did not act in bad faith when he failed to inquire further into Vodnoy's statements at Wilkins's sentencing hearing

The masters also concluded that Murray did not commit prejudicial misconduct when he did not conduct any further inquiry into Vodnoy's comments at Wilkins's sentencing. In support of their conclusion, they noted that Vodnoy

had submitted a written motion days ahead of trial which said nothing about Vodnoy's allegations, and that Vodnoy did not call Murray prior to the sentencing to tell him about the allegations. The masters further noted Judge Murray's explanation that, in court on the day of the scheduled sentencing, he asked Vodnoy to put his concerns in writing so that the matter could be litigated. The masters found this fact reflected that, as much as Murray did not want to continue the sentencing hearing, he was open to having the question of a continuance adjudicated. And, despite Murray's request for a written declaration, Vodnoy never provided one.

Judge Murray admitted he did not conduct any inquiry into Vodnoy's allegations. He indicated that, based upon what he now knows, Vodnoy's allegations "should have piqued his curiosity to inquire about the allegations." He testified, however, that at the time he did not give credence to Vodnoy's statements because they seemed to be a ploy to obtain a continuance for which he otherwise did not have good cause, and Murray could not figure out how the allegations against the individuals referenced at sentencing had anything to do with the *Wilkins* case. None of the officers whom Vodnoy mentioned had testified in the *Wilkins* trial. The masters accepted as credible Judge Murray's explanation that, amid a hearing based on oral argument only, he did not recall that the name of one of the officers identified by Vodnoy – Taylor – was on one of the CHP accident reports. Under these circumstances, the masters concluded, Murray reasonably believed that Vodnoy's comments were unsubstantiated and a ploy to continue the sentencing hearing. The masters also noted the fact that there was no evidence that Vodnoy himself ever followed up on the concerns he raised at the sentencing hearing. The masters concluded that, while Vodnoy was under no *Brady* obligation to do so, and his failure to investigate did not alleviate any responsibility that the prosecution owed to Wilkins, his failure to do so supported their finding that Murray did not act in bad faith.

The examiner asks the commission to reject the masters' conclusions and find that Murray acted in bad faith when he failed to conduct further inquiry into Vodnoy's comments and, as such, committed prejudicial misconduct. The examiner argues that Murray's failure to inquire further into Vodnoy's statements at sentencing was intentional – that he "processed" the allegations and "decided not to investigate." In support of their assertions, the examiner makes the following arguments. Vodnoy's remarks were sufficiently specific to trigger a *Brady* duty because he identified three individuals allegedly involved in CHP improprieties – including Taylor, who had signed off on Bernardin's report – and Vodnoy identified specific improprieties. The examiner maintains we should find Judge Murray's testimony that he "never connected the dots" is therefore not credible. The examiner further argues that the fact that Murray did not believe Vodnoy did not negate his duty to inquire.

The examiner also emphasizes that, in his written responses to the commission, Judge Murray did not describe the off-the-record conversation that he testified he had with Vodnoy regarding putting the allegations in writing, and thus the commission should disbelieve Judge Murray's testimony that Vodnoy's refusal to put the allegations in writing contributed to Murray's belief that the allegations were a ploy for a continuance. The examiner also takes issue with the masters' apparent failure to consider the fact that then-DPD Apkarian was troubled by Vodnoy's statements at sentencing, according to her testimony. The examiner argues that Apkarian's testimony regarding her concern after her review of the transcript demonstrates the error in the masters' conclusion that Murray's failure to further inquire into Vodnoy's allegations "was reasonable and acceptable."

We acknowledge that Vodnoy's statements at sentencing are the strongest evidence in support of the allegation that Murray failed in his duty to inquire into potentially exculpatory information. Judge Murray himself testified that, based upon what he now knows, Vodnoy's allegations "should have piqued his curiosity to inquire about the allegations." Because we do not believe, however, that the

evidence clearly and convincingly demonstrates that Murray's failure to further inquire into Vodnoy's allegations between January 2011 and September 2015 reflects bad faith, we agree with the masters' conclusion that he did not commit prejudicial misconduct.

Judge Murray testified that he has reviewed tens of thousands of police reports in his career. As such, the fact that, at the sentencing hearing, Murray did not recall that Taylor's name was on a CHP accident report when he did not use the accident report in the trial, and when Taylor did not testify in the trial, does not strain credulity. And the fact that none of the individuals whom Vodnoy mentioned had testified in the *Wilkins* trial lends support to Judge Murray's testimony that he could not figure out how the allegations against the individuals referenced had anything to do with the *Wilkins* case.

Further, we cannot conclude that the evidence compels a finding that Judge Murray was not credible when he testified about the off-the-record conversation that he had with Vodnoy regarding putting the allegations in writing. First, the masters found Judge Murray's testimony credible. And, in two of his responses to the commission, albeit in significantly less detail than in his testimony, Judge Murray noted that Vodnoy's refusal or inability to put the allegations in writing contributed to his belief that Vodnoy's allegations were a "ploy" to get a continuance.

Even if Murray's conclusion that Vodnoy's comments were a ploy to continue the sentencing was questionable, and in hindsight erroneous, the question here is whether his failure to further inquire was done in bad faith, not whether his failure to further inquire was mistaken or negligent. As the masters noted: "Murray's disbelief and resulting disregard of [Vodnoy's] statements may have been negligent but it was not a willful failure to ignore the possibility that *Brady* evidence existed." In this context, prejudicial misconduct requires "a culpable mental state beyond mere negligence." (*Broadman*, *supra,* 18 Cal.4th at p. 1093.)

Significant to our finding that Murray's failure to further inquire does not reflect bad faith is the time period charged in the notice. Judge Murray is not charged with misconduct for failing to further inquire in 2008, when Vodnoy made the statements at the sentencing. Judge Murray is only charged with failing in his continuing duty to inquire beginning in 2011. While a prosecutor has a continuing duty to inquire, the examiner presented no evidence that Murray remembered Vodnoy's 2008 comments in 2011, when the charging period began, or more materially when, in 2013, the case was remanded for a second trial, and, in bad faith, failed to conduct further inquiry.

For these reasons we cannot conclude that Murray acted in bad faith when he failed to further inquire into Vodnoy's comments between 2011 and 2015, and thus conclude that he did not commit prejudicial misconduct.

3. Murray did not act in bad faith when he failed to inquire further into Yellin's question regarding changed or missing reports

The masters concluded that the examiner did not present any evidence that Murray acted in bad faith in responding to Yellin's question regarding changed or altered reports. The examiner objects to the masters' conclusion and argues that Yellin's question about changed reports should have triggered Murray's duty to inquire, but that Murray, in bad faith, failed to do so.

We agree with and adopt the masters' conclusion for the following reasons. Judge Yellin testified that when he became aware of the allegations that the reports had been changed, he examined the file to look for inconsistent reports. When he asked Murray whether he had any information on altered reports, Murray told him he did not and that "everything I have is in the box." Judge Yellin testified that "the box" was the file he had already looked through. Judge Murray testified that Yellin called him "looking for an additional set of reports. He said, did you see anything to indicate that there was a second set of traffic reports? And I said, 'No. I didn't discover the case. You did. If you didn't see them, I didn't see them.' " (*Sic*.)

The testimony of both Judge Yellin and Judge Murray strongly indicate that both were under the impression that the allegation involved *physical* reports in the possession of the OCDA that had never been discovered to the OCPD. And Murray truthfully responded to Yellin that everything that had been discovered was in the file. Yellin's and Murray's assumptions about the changed or missing reports physically existing somewhere in the *Wilkins* file are also supported by Judge Apkarian's testimony that, when she was trying to investigate the allegations of changed reports, she called Vodnoy and asked him whether he was in possession of any reports other than the ones in the file.

While all the parties now know in hindsight that no such physical files existed, Murray's response does not reflect bad faith and we thus conclude that he did not commit prejudicial misconduct.

D. <u>Count Two: Failure to Disclose</u>

Count Two of the notice alleged that Murray failed to disclose exculpatory evidence, about which he had actual knowledge, namely that the reports in *Wilkins* had been altered, the PCFs changed, and that Bernardin found that Wilkins did not cause the fatal collision. In light of our factual findings that the examiner did not prove by clear and convincing evidence the allegation that Murray had actual knowledge (i.e., either his telephone call with Beeuwsaert or with Cassidy, or the statement by Heckenkemper to Vandiver), we agree with the masters' conclusion that there was no evidence that Murray had actual knowledge of the alleged *Brady* material before July 2015, when "as Murray credibly testified," he read the transcript of Morrison's interview and learned that the CHP reports had been altered and that that information should have been conveyed to the defense.

With regard to the two-month period between July 15, 2015 – when Murray read the transcript of Morrison's interview by the OCDA investigator – and September 17, 2015 – when the transcript was discovered to the OCPD – the masters concluded that Murray did not act in bad faith by failing to immediately

turn over the transcript to the defense and thus did not commit prejudicial misconduct. The masters credited Judge Murray's explanation that he was "walled off" from the OGC motion and was not supposed to do anything that would impact the litigation of that motion. The masters concluded: "Reading a transcript is one thing; taking it upon himself to turn discovery over while being instructed to stay away from the case and while another DDA was handling the OGC motion and related discovery is another."

The examiner objects and argues that, as to the time period between July 15 and September 17, 2015, "the evidence establishes that Murray acted in bad faith by failing to immediately disclose to the defense the transcript of [Morrison's] interviews," and, as such, the commission should reject the masters' conclusion that he did not commit prejudicial misconduct. The examiner asserts that Murray was not truly "walled off," from the *Wilkins* case, that he was still the assigned trial prosecutor, that the Morrison transcript clearly showed that a *Brady* violation had occurred, and if Murray was acting in good faith he would have immediately disclosed the transcript to the defense.

We adopt the masters' conclusion that the evidence does not establish that Murray acted in bad faith between July 15, and September 17, 2015, for the following reasons. The evidence presented during the hearing reflects that Scarbrough was assigned to respond to the OGC motion and, after the OCPD refused to provide discovery relating to the OGC motion, he decided to contact the individuals named in the motion. Murray was not involved in the investigation; Scarbrough supervised the OCDA investigator conducting the interviews. Judge Murray testified that "I was [ ] very quickly walled off from the case by my supervisor. He didn't want me involved in the case. He didn't want me talking to investigators or witnesses involved in the case.

Scarbrough testified that the day after he filed his opposition to the OGC motion, the OCPD requested copies of the interviews. Notably, that request did not go to Murray, but to Yellin and Scarbrough. Upon learning that the OCDA

interviews conducted in response to the OCPD's OGC motion had not yet been discovered, Murray told Scarbrough to "discover them all."

It appears clear, therefore, that, while Murray was still the assigned prosecutor on *Wilkins*, he was the subject (in part) of the OGC motion and a witness in the proceedings, and was walled off from the case. Scarbrough was assigned to respond to the OGC motion and was the prosecutor directing the investigator and responding to the motion based on the investigator's interviews of witnesses. The examiner presented no evidence that Murray knew during two-month time period that Scarbrough had not yet discovered the interviews to the OCPD, and that Murray, in bad faith, failed to disclose them to the defense. Rather, the evidence presented indicated that, as soon as Murray became aware that Scarbrough had not yet discovered the interviews to the OCPD, he told Scarbrough that he should disclose them. We therefore conclude that Murray did not act in bad faith and commit prejudicial misconduct between July 15, and September 17, 2015.

E. <u>Murray Did Not Commit Improper Action</u>

The masters separately addressed the issue of whether Judge Murray's conduct constituted improper action. The masters stated:

> For the same reasons, we also conclude as a matter of law that Judge Murray did not engage in improper action. Improper action "consists of conduct that violates the California Code of Judicial Ethics." (*Inquiry Concerning Ross* (2005) 49 Cal.4th CJP Supp. 79, 89; see also *Inquiry Concerning Laettner* (2019) 8 Cal.5th CJP Supp. 1, 9 ["[i]mproper action occurs when the judge's conduct violates the canons, but the circumstances do not rise to the level of prejudicial misconduct and do not bring the judiciary into disrepute"].) "Improper conduct includes conduct that an objective observer aware of the circumstances would not deem to have an adverse effect on the reputation of the judiciary." (*Inquiry Concerning Ross*, *supra*, at p. 89.) [¶] The Examiners here have not directed us to a single judicial canon that would apply to these

> proceedings. Given that Judge Murray is accused of misconduct solely when he was a DDA years ago, and the evidence regarding his behavior as a judge was consistently stellar, we do not believe that a "reasonable observer" would find that his conduct, even if deemed a *Brady* violation, would "tarnish public esteem for the judiciary." (*Inquiry Concerning Johnson* (2020) 9 Cal.5th CJP Supp. 1, 43.)

The examiner objects to the masters' conclusion that Judge Murray did not commit improper action. The examiner argues only that the violation of a statutory duty constitutes improper action at a minimum, citing *Adams II, supra,* 10 Cal.4th at pages 905-906. The examiner does not advance any separate argument as to why the commission should find Judge Murray committed improper action, even if we do not find that he committed prejudicial misconduct.

Here, the notice does not allege the violation of any canon, and the examiner does not identify any canon that Judge Murray allegedly violated. The California Supreme Court has repeatedly defined improper action as conduct that "violates the California Code of Judicial Ethics" and conduct that "violates the canons." (See, e.g., *Ross, supra,* 49 Cal.4th CJP Supp. at p. 89; *Inquiry Concerning Laettner* (2019) 8 Cal.5th CJP Supp. 1, 9.) Considering the lack of any specific canon violation alleged in the notice, we cannot conclude that Judge Murray committed improper action.

F. The Commission's Authority to Sanction a Judge for Pre-Bench Misconduct Constituting a *Brady* Violation

In concluding that Murray did not commit misconduct, the masters further concluded that there exists no legal authority to sanction an individual prosecutor for a "*Brady* violation in a proceeding outside the underlying criminal action."

The masters stated:

> Independently of the foregoing analysis, we note that the Examiners have directed us to no legal authority in support of their assertion that an individual prosecutor can be held personally accountable for a *Brady* violation

> in a proceeding outside the underlying criminal action. By asking that we find that Murray committed conduct prejudicial to the administration of justice that brings the judicial office into disrepute and improper action within the meaning of article VI, section 18 of the California Constitution, that is at least part of what the Examiners are asking us to do.

The masters noted that *Brady* is not designed to punish an individual prosecutor, rather, the purpose of *Brady* is to avoid an unfair trial for a criminal defendant. The masters concluded that the fact that *Brady* can result in unfairness to individual prosecutors, i.e., due process violations occur when evidence is suppressed irrespective of the good faith or bad faith of the prosecution, makes it an inapt vehicle for imposing punishment in a proceeding concerning a judge. The masters concluded that using *Brady* to justify punishing an individual prosecutor, now judge, for alleged misconduct is "not what *Brady* is designed to do."

We disagree with the masters' contention that the commission seeks to use *Brady* to justify punishing an individual prosecutor. The purpose of a commission disciplinary proceeding is not punishment, but rather the protection of the public, the enforcement of rigorous standards of judicial conduct, and the maintenance of public confidence in the integrity and independence of the judicial system. When an individual is found to have committed ethical violations prior to becoming a judge, it negatively affects the public's perceptions of the judiciary, and the individuals who have become judges. As such, it is the commission's responsibility and mandate to investigate pre-bench misconduct, including *Brady* violations by former prosecutors, and to discipline judges where appropriate.

We have concluded here that the examiner did not prove, by clear and convincing evidence, that Judge Murray personally committed a *Brady* violation, intentionally and in bad faith, before becoming a judge. While we agree with the masters that the requirements and purpose of *Brady* may sometimes make it an

"inapt vehicle" for judicial discipline, there are occasions when a *Brady* violation may also constitute pre-bench misconduct when the individual prosecutor personally committed a *Brady* violation in bad faith, prior to taking the bench. (*Doan*, *supra*, Cal.4th at p. 312.) In those circumstances, we would not hesitate to impose discipline in order to fulfill our mandate to protect the public, enforce rigorous standards of judicial conduct, and maintain public confidence in the integrity and independence of the judicial system.

V. CONCLUSION

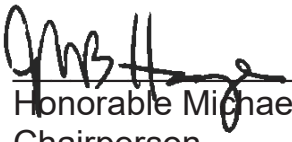
For the foregoing reasons, the commission orders the proceedings in this matter dismissed.

ORDER

Commission members Hon. Michael B. Harper; Dr. Michael A. Moodian; Hon. William S. Dato; Mr. Eduardo De La Riva; Rickey Ivie, Esq.; Ms. Kay Cooperman Jue; Ms. Sarah Kruer Jager; Hon. Lisa B. Lench; Mr. Richard Simpson; and Ms. Beatriz E. Tapia voted to order that this matter be dismissed. One attorney member position was vacant.

Date: January 19, 2023

On behalf of the
Commission on Judicial Performance,



Honorable Michael B. Harper
Chairperson