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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING FORMER JUSTICE WILLIAM J. MURRAY, JR. No. 211	VERIFIED ANSWER OF FORMER JUSTICE WILLIAM J. MURRAY TO NOTICE OF FORMAL PROCEEDINGS

COMES NOW the Honorable William J. Murray, Jr. (Ret.) responds to the Notice of Formal Proceedings ("Formal Notice") now pending before the Commission on Judicial Performance pursuant to rule 119(c) of the Rules of the Commission on Judicial Performance ("Commission Rules"), by admitting, denying, and alleging as follows:

I. TO THE OVERALL FORMAL NOTICE

Justice Murray answers and admits that he is a former justice of the Court of Appeal, Third Appellate District ("Third District"), from December 10, 2010, to January 27, 2022.

Justice Murray accepts responsibility for his conduct. He offers explanations of the facts and circumstances surrounding the decisional

delay and mitigating evidence. He cannot and does not accept responsibility for allegations that are false. Nor does he accept responsibility for allegedly failing to adhere to time standards not mandated by law.

Justice Murray retired more than three years ago, no longer sits as a justice, and has no interest, desire, or intention of sitting on assignment, providing alternative dispute resolution services, or practicing law. Accordingly, there is no chance that any decisional delay will reoccur.

Justice Murray denies that his conduct constitutes willful misconduct in office, persistent failure or inability to perform his duties, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, improper action, and dereliction of duty within the meaning of article VI, section 18(d) of the California Constitution, providing for removal, censure, or public or private admonishment of a judge or former judge, to wit.

Justice Murray devoted over 40 years of his life to public service, with immense sacrifice to his family, private life, and personal health. Over 26 years of that 40 years was devoted to the California Judiciary, including work as a bench officer, on Judicial Branch administration and education, and enhancing the public's opinion of California's courts. Emblematic of his commitment, over his time on the Court of Appeal, Justice Murray worked exceedingly long hours, including weekends crafting and revising opinions, all to ensure faultless accuracy of fact and law. And he continued to make significant and unique contributions to the administration of justice in California.

Public service is in Justice Murray's family DNA, and he has always tried to answer that call. But Justice Murray acknowledges and accepts responsibility for striving to do more than he was capable of due to unforeseeable circumstances that evolved during his time at the Court of

Appeal. He acknowledges that his work ethic of devoting significant time to personally researching the record and the law, in an effort to ensure that cases he authored arrived at the right result for the right reasons, contributed to the delay in authorship of his opinions. Justice Murray believed that he would figure out a way to get it all done, because he had always done so in the past. He acknowledges that in the end, he was unable to move some cases as quickly as others. But, as more fully discussed below, it was not for lack of trying or habitual neglect.

As set forth below, there were many contributors to the length of time to finalize the Court's work, including the authoring justices' drafting processes, circulation to the other justices on the panel, time to schedule oral arguments and cite check the opinions, in addition to unforeseen changes in the law, record construction, and, at times, staff/personnel changes or challenges. All played significant roles, and at times dominant, in the Justice Murray's flow of work. Some are addressed below, and others addressed at the hearing. The Formal Notice acknowledges ***none of this***, instead opportunistically opting to lay responsibility for the entirety of the timelines at Justice Murray's feet.

Justice Murray responds specifically here to the Commission's allegations:

COUNT ONE

Justice Murray denies that he engaged in a neglect of duty and a pattern of chronic delay in deciding a significant number of appellate cases from April 2012 to January 2022.

Justice Murray admits that during the relevant time period, a panel of three Court of Appeal justices was assigned to each appeal, with one of the three justices assigned as the author-justice.

Justice Murray admits that the author-justice was responsible for preparing, along with assistance from their chambers or the central staff

attorneys, a draft opinion that would be circulated to the other two panel justices for their consideration, comment, concurrence, or dissent. No individual justice is alone responsible for "deciding" an appeal. Each appeal is decided by the three-justice panel, with at least two agreeing as to the disposition.

Justice Murray denies that all of the cases described in the Formal Notice or Exhibit 1 were ones that were originally assigned to him as author-justice.

Justice Murray denies that he failed to promptly decide or dismiss 355 cases in Exhibit 1 within at least one year after a case was either assigned to him or was fully briefed, whichever date is later.

Justice Murray denies that the "one-year time period" referenced in the Formal Notice was a "standard" required by any California rule or statute, or even any formal or informal practice during his time at the Third District. No such rule has ever been the subject of training or otherwise documented, communicated, or made apparent to Justice Murray and others during Justice Murray's time at the Third District. With the exception of the litigants specified below, the litigants in the Formal Notice and the cases listed in Exhibit 1 were not prejudiced by the delay.

Justice Murray further denies that Exhibit 1 to the Formal Notice is an accurate recounting of the cases assigned to him as the author-justice. Additionally, much of the information in Exhibit 1 is inaccurate, incomplete or misleading. Justice Murray denies that all of the listed cases were properly rated. Periods of time during which there was supplemental briefing are not identified.[1] The last column labeled "NOA to Opinion

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[1] The Supreme Court's Appellate Caseflow Workgroup stated that "the processing of many appeals is properly extended for valid reasons," and cited as an example, "[s]upplemental briefs have been ordered to consider the effect of newly enacted legislation or for other legitimate reasons."

(Days)" is irrelevant and misleading because it includes the delay associated with record preparation and extensions requested by, and granted to, litigants for the filing of briefs after the notice of appeal is filed and before the appeal was assigned to Justice Murray. Also, Exhibit 1 does not account for the time associated with scheduling oral argument, which was done at the convenience of the parties and consistent with the schedule of the court; nor does it account for requests to reschedule oral argument made by the parties, which were often granted by the court. And Exhibit 1 does not list the disposition of the appeals. If the judgments were affirmed, those appeals were meritless and no outcome related prejudice occurred because of the alleged decisional delay.

Additionally, Justice Murray lacks sufficient information and knowledge to admit or deny all of the information in Exhibit 1 because, as far as he knows, the underlying raw data appears to be data stored on the Third District's case management system, ACCMS. Also, the data may have been compiled in another court database unknown to Justice Murray. Justice Murray does not have access to ACCMS or any other court data base. Additionally, Exhibit 1 was created by an unknown person and Justice Murray does not know what raw data that person relied upon to create the exhibit or the identity of the person who created it.

Finally, pursuant to Commission Rules, rule 104(e), Justice Murray exercises his right to refuse to respond to each and every other allegation based thereon contained in Exhibit 1 of Count One.

Justice Murray admits that two of his assigned cases, including one juvenile matter, had aged between eight and nine years before a decision was issued. Justice Murray admits that two of his cases, including one

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(Appellate Caseflow Workgroup Report to the Chief Justice (December 6, 2022, p. 11, 31.)

juvenile matter, were delayed between seven and eight years. Not having access to the court's ACCMS, Justice Murray lacks sufficient information to admit or deny and, on that basis, denies that: five cases were delayed between six and seven years, 15 cases were delayed between five and six years; 47 cases were delayed between four and five years, 59 cases, including one juvenile matter, were delayed between three and four years; 88 cases were delayed between two and three years; and 137 cases, including three juvenile matters, were delayed between one and two years.

Justice Murray admits that he did not prioritize the resolution of older cases before doing work on newer ones. He attempted to prioritize reversals, cases that required remand for further proceedings, cases set forth in prioritization lists given to him by Administrative Presiding Justice (APJ) Vance Raye, more difficult/serious/consequential older cases over less difficult/serious/consequential older cases, and cases where publication would benefit California courts and litigants statewide. Cases that would obviously be affirmed, especially those where a criminal defendant had been sentenced to long prison sentences, or cases where the sentences imposed on criminal defendants had been served before or shortly after Justice Murray was assigned authorship were given lower priority in working down the backlog; no actual prejudice resulted from any delay in those cases.

Justice Murray admits that his backlog included cases assigned to him as early as 2011. Justice Murray admits that he was aware of his growing backlog of cases. Justice Murray admits that he received monthly reports identifying his assigned cases and the date of each assignment. Justice Murray admits that he knew that the issue of backlog was a court-wide concern during the relevant time period, that he was present at bench meetings held at various times between 2012 through 2018, when the topic of delay and the court's growing backlog of appeals was discussed. Other

justices also had backlogs during this time period. The backlog of specific justices was not the topic of conversation during these meetings.

Justice Murray admits that reducing assignments and reassigning cases to other justices' chambers failed to completely resolve his backlog during the relevant time period. Further, the extra hours beyond the high number of hours he already customarily worked throughout his tenure on the court, also failed to resolve the backlog.

Justice Murray denies that the table included on page three of the Formal Notice is accurate. He also denies that all of the cases referenced therein were properly rated. Additionally, he lacks sufficient knowledge to admit or deny all of the information contained therein because the underlying raw data is stored on the Third District's ACCMS system, a third-party server, to which Justice Murray does not have access. Additionally, the table was created by an unknown person, and it is not known what raw data that person relied upon to create the table or the identity of that person.

Pursuant to Commission Rules, rule 104(e), Justice Murray exercises his right to refuse to respond to each and every other allegation based thereon contained in the chart on page three of the Formal Notice.

Justice Murray admits that the court's managing attorney screens all appeals and numerically ranks each chambers case according to complexity, generally from 1 to 5, with higher numbers assigned to more complex cases. The number is based on the number of weeks the managing attorney predicts it would take a chambers attorney to research and produce a draft opinion. For example, a "1" is predicted to take one week; a "5" is predicted to take five weeks. The managing attorney also assigns cases to a staff of attorneys known as "central staff" to write draft opinions on cases

dubbed Routine Disposition Appeals (RDAs and rdaas).[2] Justice Murray admits that RDAs are defined as cases with one to three issues presented. Justice Murray denies that RDAs never involve novel, close, or complicated issues. Justice Murray denies that RDAs are always the least complex – in fact, many of Justice Murray's RDA rated cases contained novel, close, and/or complicated issues. If the definition of RDA alleged in the Formal Notice is correct, then Justice Murray had many cases rated as RDAs that were underrated.

During Justice Murray's tenure on the Third District, there were three managing attorneys who served at various times. Although they used the same numerical rating, their ratings of cases, which is subjective, were not uniform. Sometimes research of the record and the law by research attorneys and/or the author justices revealed that the original rating did not accurately reflect the complexity of the appeal. However, Justice Murray never requested that the rating be changed on his cases. Also, the original rating did not take into account changes in the law that occurred during the pendency of the appeal or other issues reflected in supplemental briefing.

Contrary to the allegations in the Formal Notice, RDAs can involve complex, novel or close issues. During his tenure on the court, Justice Murray had a number of difficult RDAs and at least 34 RDAs he authored were published and subsequently cited in other cases at least ten times.[3]

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[2] An "RDA" connotes cases assigned to chambers for a chambers attorney to produce a draft opinion. An "rdaa" indicates the case was assigned to a central staff attorney to produce a draft opinion. In this answer, "RDA" covers both varieties of this rating, unless specifically stated otherwise.

[3] One factor demonstrating that an RDA involved novel, close or complex issues is whether it was published. Another measure, although imperfect, is the number of appellate cases that subsequently cited those published opinions. The following published cases authored by Justice Murray, and originally rated as RDAs, have been cited in 10 or more cases: *People v.*

Some RDAs that are specific referenced in the Formal Notice, and that were not published, are discussed below. Justice Murray put significant effort into the opinions on those cases. And when he devoted extra time to these RDAs, that time could not be devoted to other cases in his caseload.

Author-justices must rely on chambers and central staff attorneys to produce competent and quality draft opinions that can be quickly put into circulation to the other two justices on the panel. During Justice Murray's tenure on the Third District, each justice was staffed with two chambers attorneys. Justice Murray admits that he was assigned more RDAs than higher-rated cases. But this was, in part, because there were times when

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Scarano (2022) 74 Cal.App.5th 993, disapproved *People v. Prudholme* (2023) 14 Cal.5th 961 (12 cases); *People v. Pillsbury* (2021) 69 Cal.App.5th 776 (38 cases); *People v. Brewer* (2021) 65 Cal.App.5th 199 (24 cases); *People v. Bermudez* (2020) 45 Cal.App.5th 358 (32 cases); *People v. Hull* (2019) 31 Cal.App.5th 1003 (16 cases); *People v. Saelee* (2018) 28 Cal.App.5th 744 (20 cases); *People v. Rogers* (2016) 245 Cal.App.4th 1353 (46 cases); *People v. Silva* (2016) 247 Cal.App.4th 578 (25 cases); *People v. Fruits* (2016) 247 Cal.App.4th 188 (115 cases); *People v. Phoenix* (2014) 231 Cal.App.4th 1119 (37 cases); *People v. Elder* (2014) 227 Cal.App.4th 411 (56 cases); *People v. Carroll* (2014) 222 Cal.App.4th 1406 (37 cases); *People v. Hendrix* (2013) 214 Cal.App.4th 216 (221 cases); *People v. Snow* (2012) 205 Cal.App.4th 932 (27 cases); *People v. Vasquez* (2012) 205 Cal.App.4th 609 (11 cases); *People v. Holford* (2012) 203 Cal.App.4th 155 (224 cases); *People v. Clark* (2011) 201 Cal.App.4th 235 (117 cases); *In re Z.W.* (2011) 194 Cal.App.4th 54 (28 cases); *Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366 (98 cases). A further measure of complexity is if the California Supreme Court takes up the case on review and clarifies an issue. One such case is *People v. Schuller* (2021) 72 Cal.App.5th 221, reversed, *People v. Schuller* (2023) 15 Cal.5th 237 [clarifying harmless error analysis when the trial court fails to give an instruction on imperfect self-defense in murder cases, an issue that had not previously been resolved]; See also *People v. McCullough* (2011) 193 Cal.App.4th 864 (cited 93 times), affirmed *People v. McCullough* (2013) 56 Cal.4th 589 [failure to object in the trial court forfeits claim of insufficient evidence of inability to pay jail booking fee].)

Justice Murray had only one chambers attorney due to budgetary considerations. Thus, he was assigned fewer complex chambers cases and instead assigned more RDA cases where the draft of the opinion was written by central staff attorneys. Many of these RDAs assigned to Justice Murray were more complex than the run-of-the-mill RDAs.

Justice Murray admits that his chambers was assigned fewer higher rated cases later in his time at the Third District. Justice Murray admits that as his backlog continued, the number of rdaa and RDA assignments declined.

Justice Murray admits that during his tenure at the Third District, all justices could designate one assignment-free month per year. Justice Murray has insufficient information and knowledge, and on that basis denies that he was assigned no new chambers cases for eight months in 2017, five months in 2018, seven months in 2019, six months in 2020, and at least three months in 2021. Also, during some of these time periods, some cases were reassigned to him from other chambers.

Justice Murray denies that from 2017 to 2020, at least 32 of his delayed cases were reassigned to other justices to complete, due to his failure to dispose of the matters in a timely manner. Reassignments were made in 2016, 2018 and 2019. All reassigned cases were cases that had been assigned to one of his chambers attorneys, CA-3, who failed to produce draft opinions.[4] Justice Murray admits only that these cases were

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[4] Justice Murray had five chambers attorneys during his time on the Third District. They will be referred to in this answer as CA-1, CA-2, CA-3, CA-4 and CA-5, with the number indicating the order in which they worked in his chambers, to protect their privacy rights. Similarly, the Commission referred to CA-1 and CA-3 without naming them in the Formal Notice. The Commission is aware of the names of all of these persons, but a list will be provided upon request.

reassigned to other justices due to his failure to effectively supervise and ensure that his assigned chambers attorney, CA-3, provided draft opinions in those cases. During the accumulation of CA-3's backlog, Justice Murray focused on personally researching the record and law in other cases where drafts had been submitted by CA-3, his other chambers attorneys and central staff, in addition to reviewing and considering and making comments on drafts circulated to his chambers from other author justices.

Justice Murray admits that some authoring justices inserted the following sentence into written opinions after these cases were reassigned to them: "The panel as presently constituted was assigned this matter in [Month Year]." (See, e.g., *People v. Shepardson*, No. C081157, fn 4 ["This matter was assigned to the panel as presently constituted in January 2019."].) The assignment of some of CA-3's backlogged cases was not changed; rather Justice Murray was permitted to retain these cases and assign other chambers attorneys, one of whom joined Justice Murray's chambers after CA-3 was fired from his chambers in January 2019 for her failure to perform.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies, that there were eight cases in which another justice sought to be reassigned from a panel because of concern about Justice Murray's alleged decisional delay.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies, that from 2016 to 2020, except for assignments to the newest justice, the court assigned Justice Murray less than half the number of appeals assigned to any other Third District justice. Justice Murray admits that between 2016 and 2020, he was assigned fewer appeals than the other Third District justices.

Justice Murray denies that his neglect of duty and decisional delay resulted in additional supplemental briefing in any of the matters described

above and in Exhibit 1. Justice Murray further denies that he caused a greater workload on research attorneys and other panel justices, who were allegedly required to conduct additional research and analysis, some of which was necessary as a result of his delay in deciding the cases. The Formal Notice references no specific cases where such extra work was allegedly done by others. Justice Murray admits that during periods of decisional delay, supplemental briefing was required in some of the cases in Exhibit 1 to address unforeseeable changes in the law that would not have been an issue had the appeals been decided prior to those changes. However, Justice Murray has insufficient knowledge and information at this point as to how many, or which cases this circumstance may apply, or which cases on which he personally did the additional work, since no specific cases have been identified. Justice Murray also admits that supplemental briefing in some cases addressed new theories of trial court error or new arguments asserted by appellate counsel, as well as issues he or the other justices on the panels requested be briefed.

One draft authored by Justice Murray requiring multiple rounds of supplemental briefing languished in the chambers of the acting presiding judge on the panel for lengthy time periods when several monumental changes in the law took place, requiring supplemental briefing to address these changes in the law.[5]

Justice Murray admits that many litigants and attorneys inquired about the status of their appeals.

Justice Murray admits that one attorney wrote a poem about the delay in one of his cases. Justice Murray thought the submission of the poem was unprofessional. The defendant in that case had been sentenced to

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[5] *People v. Garcia and Ballesteros* Nos. C066714, C066716, discussed in more detail below.

195 years, four months for multiple sex crime convictions. Based on Justice Murray's review of the briefing shortly after receiving the assignment and the later submission of the draft opinion by CA-1, it was clear the judgment would be affirmed.[6] However, Justice Murray felt revisions to the draft opinion were warranted and set the opinion aside for occasions when he could block-off time to make the revisions. In the meantime, Justice Murray worked on more pressing matters in his caseload and circulating cases from the other justices. As Justice Murray predicted, the judgment was affirmed by the panel and the defendant sustained no actual prejudice.

Justice Murray admits that protracted decisional delay may damage the public's esteem for the judiciary.

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Justice Murray admits that his conduct resulted in actual prejudice to the litigants or victims in seven of the following cases specifically referenced in the Formal Notice. He denies that his conduct resulted in actual prejudice in the rest of the following cases and the other cases listed in Exhibit 1.

1. *People v. Kent*, No. C062332 (Rating: 2).

This white-collar prosecution involved a series of consumer fraud and theft-related felonies committed over a period of time by appellant, a travel agent. Among other things, appellant contended that insufficient evidence supported the convictions. The case was complex, involving an ongoing, but disorganized set of schemes and the examination of the

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[6] *People v.Schenberger*, No. C069146. The opinion authored by Justice Murray can be found on the California Court's website at < C069146A.PDF > . Petition for review was denied by the California Supreme Court on April 12, 2017.

applicable elements of arcane legal theories of larceny as they related to appellant's substantial evidence claims. Appellant also alleged judicial misconduct, claiming that the trial court punished her at sentencing for going to trial instead of accepting a plea bargain offer.

Justice Murray admits that the matter was fully briefed on August 29, 2011 and assigned to him on August 31, 2011.[7] Justice Murray admits the case was decided by the panel on March 28, 2018. Justice Murray admits that the trial court had sentenced appellant, on June 18, 2009, to five years and four months in state prison.

Justice Murray admits that on October 4, 2017, appellant filed a motion to place the matter on calendar. Justice Murray admits that motion was denied as moot on November 2, 2017. This denial was the result of setting the matter on the oral argument calendar, which was scheduled consistent with the court's calendar on February 21, 2018.

Justice Murray admits that when the decision was issued in March 2018, the panel reversed and dismissed Count 5.[8] In addition, the panel

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[7] Justice Murray understands the assignment dates alleged in the Formal Notice is the assignment date reflected in ACCMS. Justice Murray and other justices were not informed of assignments on the ACCMS date. They were informed of assignments when the monthly draw was published around the first of the month following the assignment date reflected in ACCMS. Thus, inclusion of the date of assignment and any calculations based thereon does not accurately reflect when a justice received notice of the assignment. Typically, there was only a lapse of a few days between the ACCMS date and publication of the monthly draw. Accordingly, Justice Murray will admit to the ACCMS date, assuming the ACCMS date in the Formal Notice is correct.

[8] Execution of the sentence on Count 5 had been stayed by the trial court pursuant to Penal Code section 654, so the reversal had no practical impact on appellant's aggregate sentence.

stayed the execution of the eight month consecutive sentence on Count 4, pursuant to Penal Code section 654.

Justice Murray denies that due to his decisional delay, appellant served all of her original sentence and lost all benefit of an eight-month reduction in her prison term on Count 4. The loss of the eight-month sentence reduction was not the result of excessive delay by Justice Murray. More than two years elapsed before record preparation and briefing was completed and the case assigned to Justice Murray. With good-time/work-time credits, appellant would have been paroled on her original sentence shortly after Justice Murray was assigned to the case and long before any delay in completing the opinion became excessive. Thus, the loss of the benefit of the eight-month reduction was not "due to Justice Murray's delay."

Cognizable prejudice can only occur during the period after the delay became excessive. Yet, in this case, the loss of the benefit of the eight-month reduction took place long before the delay allegedly became excessive.

Justice Murray did not prioritize this case because he knew he would need to put significant work into revising the draft opinion submitted by CA-1, and that appellant would not be prejudiced by that delay. Justice Murray believed appellant was likely "time served" based upon a note CA-1 had written on the chambers tracking sheet when she submitted her draft. This meant appellant was likely paroled around the time he was assigned the case or sometime before the draft had been produced by CA-1, sometime in the latter half of 2011. Consequently, he believed appellant would not have sustained actual prejudice by him postponing the significant time and effort he would need to devote to researching and revising the draft he had been provided.

In Justice Murray's opinion, the case was erroneously rated by the managing attorney as a "2," meaning the managing attorney predicted a chambers attorney could complete and submit a draft to the justice within two weeks. This white-collar theft case involved a confusing set of facts and the applicable elements of arcane legal theories as they related to defendant's substantial evidence claims. It also involved documentary evidence admitted at trial as prosecution and defense exhibits. The prosecution's trial presentation was disorganized, and the appellate briefing was not helpful. The Attorney General's brief, with one exception, largely tried to track the prosecution's disorganized presentation. Appellant's briefing was misleading in some areas and downright accusatory as to the trial court's sentencing.

The draft submitted by the assigned chambers attorney, CA-1, was problematic in that there were numerous factual errors, the facts underlying the counts were not set forth in coherent manner, significant facts pertinent to the applicable theories of theft had been omitted, and the legal analysis was wrong. CA-1's legal analysis included a theory not advanced by the parties and later determined by Justice Murray to be unsupported in the law. Had that draft been filed, it would have been obvious to the parties that the panel's decision was not based on a familiarity of the facts, an understanding of the law or correct application thereof.

Justice Murray could not, in good conscience, circulate CA-1's draft "as is." Significant revisions were required, and Justice Murray believed he needed to personally make those revisions, including reviewing the documentary exhibits.[9] He did not trust CA-1 to do the work, especially

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[9] There were pertinent documents introduced at trial, and Justice Murray believed he needed to review them to fill in gaps in the factual background pertinent to the theft theories. When Justice Murray began more detailed work on the draft, he asked his judicial assistant to obtain the box of

since the case had been rated a ”2,” and he knew more than two more weeks was required to adequately address the issues. Justice Murray believed he would need to block off a significant amount of time to adequately research the record and law to produce an opinion. In the meantime, Justice Murray worked on more pressing matters in his caseload and circulating cases from the other justices. Ultimately, Justice Murray devoted much of two months to researching and redrafting the opinion. While he focused on that, he was unable to give attention to other cases in his backlogged caseload.[10] The significant revisions Justice Murray made to the opinion before circulation are documented by Microsoft Track changes on his drafts.

Appellant’s petition for review was denied by the California Supreme Court. The complexity of the case is reflected by the fact that one

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documentary exhibits from the file room. The box was still sealed, indicating CA-1 never looked at the pertinent documentary evidence in this white-collar theft prosecution before producing the draft she submitted to Justice Murray.

10 The opinion Justice Murray redrafted can be found on the California Courts website at < C062332.PDF >. Justice Murray believed that it was essential to layout the facts of the various schemes in a coherent manner and to connect the relevant facts to the elements of the arcane theories of theft the prosecution was based upon. He also thought it important to ensure that the background portion of the opinion set out facts revealed at trial showing the aggravated nature of defendant’s conduct and upon which the trial court apparently relied in sentencing to address the claim that the trial court punished appellant for not accepting the plea bargain. Justice Murray admits that components of the factual presentation in his opinion of the defense evidence at trial and prosecution’s rebuttal evidence may not have been necessary to the analysis, but he included them since he had researched the record for pertinent information, and he thought inclusion of them in the opinion would show appellant, appellate counsel and the California Supreme Court that the panel was thoroughly familiar with her defense.

justice of the Supreme Court thought the petition for review should have been granted.

The Commission has not produced any evidence refuting Justice Murray's calculation as to when appellant was released from prison. Whether appellant actually "lost all of the benefit of an eight-month reduction in her prison term" can only be established by documentation from the California Department of Corrections and Rehabilitation (CDCR) showing she was released at some point after the delay became excessive.

2. ***People v. Naylor,*** No. C072239 (Rating: rdaa – Central Staff).

This matter involved a pro per petition for conditional release and unconditional discharge by a person who had been adjudicated a sexually violent predator (SVP). The claim appellant made on appeal was novel under the then current statutory scheme. He contended he was entitled to the appointment of counsel and an expert before a trial court could summarily deny his petition as frivolous.

The panel affirmed the judgment.[11] And review was denied by the California Supreme Court. Appellant sustained no prejudice resulting from any decisional delay.

Justice Murray had no notice of any standard defining "meaningful" or "meaningless" appeals in California. Justice Murray denies knowing what the Formal Notice means by the allegation that the delay rendered appellant's right to appeal "meaningless," in that as far as Justice Murray knows, that term is not used in the California Code of Judicial Ethics or any statute, rule or published case in California.

Justice Murray admits that appellant had been confined to the State Department of Health Services since 1997 on the SVP commitment. Six

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[11] The opinion authored by Justice Murray can be found on the California Courts website at < C072239.PDF >.

months before appellant filed his pro per petition for release, the Department of State Hospitals (DHS) submitted an annual report to the trial court. The DHS report stated that appellant should not be granted unconditional or conditional release. Among the reasons cited was that appellant had not completed sexual offender treatment. The issue on appeal involved whether appellant was entitled to the appointment of counsel to assist him in filing a non-frivolous petition, as well as the appointment of an expert.

Justice Murray admits that this matter was fully briefed on April 26, 2013, and assigned to him on May 15, 2013. Justice Murray admits the decision was filed on July 31, 2019.

Justice Murray admits that on May 20, 2013, five days after assignment, a central staff attorney prepared a draft opinion for his review, concluding that counsel and an expert should have been appointed and the case should be reversed. However, Justice Murray's judicial assistant did not create an electronic folder for the case, which was a mechanism Justice Murray used to keep track of when drafts had been submitted to his chambers by central staff attorneys. Justice Murray admits he first realized the draft had been submitted after appellant's brother called the court to inquire about the status of the case on November 5, 2014. An email documents this sequence of events. Justice Murray admits that he then reviewed the draft. Justice Murray did additional record and legal research and made substantial revisions to the draft. The revisions Justice Murray made are documented by Microsoft Track Changes on the draft.

Justice Murray admits that he circulated the redrafted opinion to the panel on November 14, 2014, which held that appellant should have been provided counsel, but not an expert.

Justice Murray admits that the draft came back to him from circulation on January 16, 2015, but the other justices on the panel

disagreed that appellant was entitled to counsel. One of the justices wrote a formal memo discussing his reasoning. Justice Murray reviewed the memo, and after further research and consideration, determined that that reasoning was erroneous. However, Justice Murray thought the outcome the other justices suggested might be correct. Additionally, the SVP law changed effective January 1, 2015, making it clear that petitioners like appellant were not entitled to counsel before a trial court summarily denies a petition. Justice Murray determined he needed to do additional work on the opinion and set it aside to block-off time to do so. In the meantime, Justice Murray worked on more pressing matters in his caseload and circulating cases from the other justices.

Justice Murray admits that on May 15, 2019, appellant filed a motion for calendar preference.

Justice Murray admits that during the interim time period, the superior court had denied appellant's 2015 petition for writ of habeas corpus. Justice Murray was not aware that petition was pending in the superior court. It was not called to his attention by appellate counsel before the motion for calendar preference was filed. As more fully explained below Justice Murray denies that the trial court's summary denial of the petition was "in part," because this appeal was still pending.

Justice Murray admits that the motion for calendar preference was denied as moot on July 9, 2019, when an oral argument waiver notice was sent to appellant's counsel. Oral argument was not requested. Justice Murray admits that the decision was filed on July 31, 2019. Petition for review by the California Supreme Court was thereafter denied.

Justice Murray denies that his decisional delay rendered appellant's right to appeal meaningless and negatively impacted his ability to obtain alternate relief.

Any decisional delay in deciding the appeal in no way delayed appellant's release or his ability to seek release. Under the SVP law during the relevant time periods, there were two ways a committed person could obtain release.

First, even without the recommendation or concurrence of the DHS, a committed person was statutorily entitled to petition the court for unconditional or conditional release. (Welf. & Inst. Code §6608, subd. (a).) That is what appellant had done in this case. However, a subsequent petition could be made one year after a previous denial. (Welf. & Inst. Code §6608 (j) (former subdivision (h).) Thus, the pendency of the appeal on the underlying petition did not prohibit appellant from making a new petition to the trial court at any time beginning one year after the trial court's denial.

Second, DHS was required to examine the committed person's mental condition at least once a year and file with the court and prosecuting agency an annual report addressing whether "the committed person currently meets the definition of a sexually violent predator and whether conditional release to a less restrictive alternative…or an unconditional discharge…is in the best interest of the person and conditions can be imposed that would adequately protect the community." (Welf. & Inst. Code §§ 6604.9, subd. (b)-(c).) Based on that determination, DHS could authorize the committed person to petition the court for release. (Welf. & Inst. Code §§ 6604.9, subd. (d).)

Justice Murray was fully aware of those methods by which appellant could have obtained release, and was further aware that appellant would not be released until he completed sexual offender treatment, which he had not completed despite having been committed in 1997. Justice Murray therefore saw no prejudice in setting the draft opinion aside until he could block-off time to redraft the opinion.

If appellant remained committed during the pendency of the appeal, it is because DHS in their annual reviews determined he did not qualify for release and would not authorize a petition or because he did not file a successful petition without the concurrence of DHS as he was statutorily entitled to do. Thus, the delay in deciding his appeal on the issue presented did not result in an unjust commitment. Indeed, even if the panel had reversed the judgment and ordered the trial court to appoint counsel, the reversal would not have resulted in his release. He still would have had to independently establish he qualified for release, a showing he could not make without completing sexual offender treatment.

Regarding appellant's petition for habeas corpus, it did not involve issues related to the appeal. The trial court's order summarily denying the petition is dated May 19, 2015, so the appeal had been pending a little more than two years when the writ was denied. The trial court gave two alternative reasons for denying the petition. The first reason was: "The petition fails to state with particularity the facts upon which relief should be granted, *People v. Duvall* (1995) 9 Cal.4th 464, 474." In other words, the petition was wholly meritless as appellant failed to even make a prima facie showing for relief.[12] The second reason was that the appeal was still pending at that time. The first reason is common in habeas matters and was reason enough to deny the writ petition; thus, any decisional delay in deciding the appeal did not prejudice appellant's writ because he did not make the required showing. The second reason was both unnecessary and wrong. The trial court had jurisdiction to decide a habeas corpus petition

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12 In the petition for habeas corpus, appellant alleged that "a State Auditor's report determined that evaluator's annual reports are 'not up to legal standards.' " In its order, the trial court stated: "He fails to link the state auditor's report with any particular problem with his case."

grounded on a different contention than the one pending resolution on appeal.[13]

Appellant's appeal was not simple. It was an issue of first impression for which the answer was not obvious at the time.[14] The central staff attorney wrote a draft opinion agreeing with appellant. Justice Murray initially circulated a revised opinion, agreeing with appellant that he was entitled to appointment of counsel, but not an expert. One of the justices on the panel wrote a formal memo disagreeing with that conclusion and the other justice agreed. A recent case, *People v. Smith* (2013) 216 Cal.App.4th 947 (*Smith*), had suggested in dicta that a petitioner would be entitled to counsel to assist in the filing of a petition.[15] So, contrary to the

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[13] The trial court cited *People v. Mayfield* (1993) 5 Cal.4th 220 as support for its alternative reason for its denial. That case was inapposite. In *Mayfield*, the writ petition asserted the same ground raised in his pending appeal. See *In re Baker* (1988) 206 Cal.App.3d 493, 500 [the trial court was free to determine the ineffective assistance of counsel claim in petition for habeas corpus irrespective of the pendency of the appeal because neither proceeding would interfere with the other]; *People v. Scarbrough* (2015) 240 Cal.App.4th 916, 927 ["where a writ of habeas corpus relies on evidence outside the record, it may be considered by the superior court despite a pending appeal"]; See also *Robinson v. Lewis* (2020) 9 Cal.5th 883, 901–902 ["Petitioners challenging a state court judgment by means of a petition for a writ of habeas corpus that is not related to a pending direct appeal should first file the petition in the superior court that rendered the judgment"].)

[14] Appellant had previously prevailed on appeal, making a similar claim under a prior statutory framework. (See *People v. Naylor* 2002 WL 22353)

[15] *Smith, supra,* 216 Cal.App.4th 947, was decided about two weeks after the original briefing on the petitioner's appeal was closed. The central staff attorney missed this case, and Justice Murray missed it as well in his rush to get a draft into circulation. At no point did appellate counsel call *Smith* to the court's attention or ask for supplemental briefing to discuss that case.

definition of RDAs advanced by the commission, this RDA was novel, close, and presented a complex issue.

When Justice Murray set this opinion aside to do the additional research later, he knew appellant would not be prejudiced by any decisional delay. The other two justices were not going to reverse, so appellant was not going to get the assistance of counsel or an expert he sought in his appeal. In the meantime, appellant had the statutory ability to file another petition a year after the one the trial court had denied, but he apparently did not do so or was not successful in any effort he may have made in that regard.

The delay in this appeal had no impact on appellant obtaining court appointed counsel to assist in filing subsequent petitions. The January 1, 2015, amendment to a relevant statute made it clear that he was not entitled to court appointed counsel to assist him in filing a petition for release. Moreover, it was clear that DHS was never going to recommend release until appellant completed sexual offender treatment, whether he was represented or not.

The bottom line is that if appellant qualified for release, there were statutory mechanisms in place by which he could obtain his release that were not affected by the appeal. The fact that he was not released during the pendency of the appeal indicates he did not qualify to be released because he remained "a danger to the health and safety of others in that it is likely that he…will engage in sexually violent criminal behavior due to his …diagnosed mental disorder." (Welf. & Inst. Code § 6608, subdivision (g) (former subdivision (e).) Thus, there was no unjust confinement. Regardless of when the opinion had been issued, it would not have affected appellant's release date. Appellant was not prejudiced by alleged decisional delay.

3. *People v. Harris,* No. C071383 (Rating: RDA - Chambers).

In this case, appellant was convicted of multiple sex crimes involving the molestation of his girlfriend's daughter. Nearly two months after the trial, private counsel sought court appointment at his customary hourly rate to represent appellant in post-conviction proceedings in the trial court. That request was denied by the trial court. Eventually, appellant hired that counsel to represent him, but the trial court denied counsel's request for a continuance prior to sentencing. Appellant was sentenced to five years, four months. The judgment was affirmed and review denied by the California Supreme Court.[16] Appellant was not prejudiced by any decisional delay.

Justice Murray admits that this matter was originally fully briefed on March 26, 2013, and assigned to him on March 28, 2013. Justice Murray admits the case was decided on October 14, 2017.

Justice Murray admits that the opening brief raised a single issue – whether the trial court abused its discretion by denying a motion to continue a sentencing hearing to allow newly retained counsel to review the record and file a motion for a new trial. However, the opinion also addressed a second issue. After reviewing the briefing, Justice Murray recommended to the panel that they request supplemental briefing on a Penal Code section 654 issue. Supplemental briefing was completed on June 5, 2013.

Justice Murray lacks sufficient information and knowledge to admit or deny, and on that basis denies, that appellant's attorney inquired about the status of the appeal multiple times, contacted the court by telephone in June 2015 and the early part of 2016, and by correspondence on July 24,

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16 The opinion authored by Justice Murray can be found on the California Courts website at < C071383.PDF >.

2016, or what the attorney's letter stated. Justice Murray admits that on April 5, 2017, appellant filed a motion for calendar preference. Justice Murray has insufficient information to admit or deny, and on that basis denies assertions set forth in the motion. Justice Murray admits that the decision affirming the conviction was filed more than four and a half years after assignment.

Based on Justice Murray's review of the briefs shortly after the appeal was assigned to him, the draft submitted by CA-1 and Justice Murray's early research on the case, he knew that the panel would be affirming the trial court's ruling. However, he felt he should further review the record, fill-in procedural and background facts related to the allegations not mentioned in the draft, and make revisions to improve the legal analysis. He set the case aside to do so. In the meantime, Justice Murray worked on more pressing matters in his caseload and circulating cases from the other justices. The revisions Justice Murray made to the draft opinion are documented by Microsoft Track Changes.

Notably and laudably, Justice Murray voluntarily participated in the August 28, 2017, oral argument by telephone while at home convalescing from his strokes. And he worked to get the finalized opinion filed on October 14, 2017, only two months after he had suffered the strokes.

Justice Murray denies that appellant suffered any prejudice. He was not entitled to the relief he sought. His convictions and sentencing were affirmed, so he would have had to serve his prison sentence and register as a sex offender regardless of when the appeal was decided. That he had to "suffer the effects of conviction while waiting for a decision" is not

cognizable prejudice. An appellant is not prejudiced by decisional delay when his claims on appeal are meritless.[17]

4. ***Myers et al. v. Raley's*** (2019) 32 Cal.App.5th 1239; No. C075125 (Rating: 3).

Justice Murray admits that this matter, a class action wage-and-hour appeal, was fully briefed on October 16, 2014, and assigned to him on October 30, 2014. CA-3, Justice Murray's chambers attorney, did not provide Justice Murray with a draft opinion. As a consequence, authorship was reassigned to APJ Raye and his chambers on June 29, 2018. Justice Murray remained on the panel. The appeal was decided on February 13, 2019.

Justice Murray admits that the judgment was reversed and remanded to the trial court to articulate a statement of reasons for denying or approving class certification. Justice Murray has insufficient information to admit or deny, and on that basis denies that following the panel's decision, the trial court granted class certification on October 18, 2019.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that while the appeal was assigned to him, the clerk's office notified him on multiple occasions that appellant's attorney had inquired about the status of the appeal.

However, Justice Murray admits that the litigants were prejudiced by the decisional delay. And he regrets that they were prejudiced and apologizes for it.

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17 See *Harris v. Champion* (10th Cir. 1994) 15 F.3d 1538, 1565 ["A petitioner has no reason to be anxious or concerned about the time it takes to adjudicate an appeal that is without merit"].

5. ***Sharp Image Gaming, Inc. v. Shingle Springs Band of Miwok Indians*** (2017) 15 Cal.App.5th 391; No. C070512 (Rating: 5)

Justice Murray admits that this case was "complex" and involved the Indian Gaming Regulatory Act ("IGRA"), federal preemption, interpretation of federal regulations and an analysis of the gaming contracts at issue in this litigation. The unique complexity of these issues is reflected in the published opinion.[18]

Justice Murray denies that this matter was fully briefed on February 19, 2013. While the parties had completed their briefing on that day, the United States later requested leave to file an amicus brief, which the panel granted. After the United States filed their amicus brief, the parties filed their responses on August, 9, 2013. Thus, briefing was not completed until August 9, 2013. Ultimately, the amicus briefing helped focus the research and analysis by Justice Murray and CA-3, although it was not as helpful as Justice Murray had hoped.

Justice Murray admits that this matter was assigned to him on February 28, 2013. Justice Murray admits the case was decided on September 15, 2017. Justice Murray admits that Sharp Image Gaming, Inc. prevailed at trial and obtained a jury verdict in excess of $30 million based on a contract dispute.

Justice Murray admits that on July 7, 2016, the respondent's attorney inquired about the status of the appeal. After this inquiry, Justice Murray instructed CA-3, who he had been assigned to produce a draft opinion on March 5, 2013, to give this case immediate priority. APJ Raye had talked to Justice Murray about the case and a letter the court received from appellate counsel, and when Justice Murray spoke to CA-3, he told her

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18 The opinion Justice Murray authored can be found on the California Courts website at < C070512.PDF >.

about the letter and that APJ Raye wanted priority to be given to this case. She did not produce a draft until January 17, 2017.[19] Justice Murray spent approximately a month almost exclusively focused on this case, making revisions to the draft CA-3 had submitted before he put it into circulation on February 10, 2017. During that period of time, he was unable to work on other cases in his backlogged caseload. The revisions Justice Murray made are documented by Microsoft Track Changes on the draft opinion.

Justice Murray's redrafted opinion came back from circulation on May 3, 2017. Oral argument was calendared at the convenience of the parties and consistent with the court's calendar on June 23, 2017. After oral argument, Justice Murray revised the draft and worked with CA-3 and his judicial assistant to finalize the opinion. After working at home on the opinion while he was convalescing from strokes he suffered in early August 2017, he recirculated the draft on September 11, 2017.

Justice Murray admits that on September 15, 2017, the decision was filed. The panel reversed the jury award and dismissed the case for lack of jurisdiction.

Justice Murray believes that this appeal was underrated at a "5." Justice Murray denies that any delay was excessive, given the specific facts and circumstances of this case. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that the delay created extended uncertainly and anxiety for parties awaiting the decision.

Justice Murray denies that plaintiff suffered prejudice because the panel reversed the judgment. Plaintiff's petition for review was denied by the California Supreme Court and his petition for writ of certiorari was

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[19] During this six month time period while CA-3 was working on this extraordinarily complex case, she did not produce drafts on any other cases.

denied by the United States Supreme Court. Simply, plaintiff was not entitled to the $30 million award he obtained at trial.

6. ***People v. Mullins***, No. C079303 (Rating: rdaa – Central Staff).

This appeal involved a resentencing after remand after a prior appeal. Appellant had been convicted of corporal injury on a cohabitant, making criminal threats, and disobeying a court order. One of appellant's two prior serious felony enhancements remained viable after the earlier appeal. On remand, the trial court resentenced appellant to an aggregate term of 14 years, four months.

In this appeal, appellant contended that the trial court should have either imposed concurrent sentences or stayed execution of the criminal threats sentence pursuant to Penal Code section 654. He also argued that the trial court had erroneously calculated his presentence custody credits. The panel affirmed the judgment, and review was denied by the California Supreme Court.[20]

Justice Murray admits that this matter was originally fully briefed on December 23, 2015, and assigned to him on January 5, 2016. Justice Murray admits the appeal was decided on March 4, 2020.

Justice Murray admits that while the appeal was pending, Senate Bill No. 1393 (S.B. No. 1393) was enacted, giving trial courts new authority to dismiss prior serious felony enhancements in furtherance of justice.[21] Justice Murray admits that appellant filed supplemental briefing regarding

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[20] The opinion Justice Murray authored can be found on the California Courts website at < C079303.PDF >.

[21] Effective January 1, 2019, S.B. No. 1393 (S.B. No. 1393) authorized trial courts to dismiss the Penal Code section 667, subdivision (a) five-year serious felony conviction enhancement pursuant to Penal Code section 1385 *in the furtherance of justice*.

this change in law in October 2018. Justice Murray admits that the People did not oppose remanding the matter to the trial court to recalculate custody credits and to consider striking the enhancement.

Justice Murray admits that on March 11, 2019, appellant filed a motion for calendar preference and expedited review. Justice Murray denies that the motion stated: "that calendar preference is appropriate where the parties agree that remand is required." The motion actually stated: "Calendar preference as provided for in California Rules of Court, rule 8.240, is appropriate in this case because *the appeal can be resolved on an issue where the parties are in agreement* that remand is required." (Italics added.)

However, remand concerning potential resentencing on the prior serious felony enhancement would not have resolved the consecutive or Penal Code section 654 sentencing issue. And, as more fully discussed below, Justice Murray knew the trial court was not going to dismiss the remaining prior serious felony enhancement in any event.

Justice Murray admits that the panel denied the motion for calendar preference as moot on February 18, 2020. This dismissal followed after an oral argument waiver letter was sent to appellate counsel on February 14, 2020. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that appellant had been released on parole by that time.

For reasons discussed in more detail below, Justice Murray denies that due to his alleged decisional delay, appellant lost some of the benefit of a judgment remanding the case to recalculate presentence custody credits and to consider whether to strike a five-year sentence enhancement.

This appeal was the second of two involving appellant. Justice Murray authored both opinions. After a jury convicted appellant of corporal injury on a cohabitant and criminal threats, and the trial court found two New Jersey felony convictions qualified as serious felony/strike

convictions under California's Three Strike Law, appellant was sentenced to 50 years to life as a "third striker" plus 10 years for the two prior serious felony conviction enhancements under Penal Code § 667, subdivision (a).[22]

In the first appeal, the panel reversed the sentence because the prosecution had introduced insufficient evidence to support the trial court's finding that one of the two New Jersey convictions qualified as a serious felony conviction under California law. The panel remanded to allow the prosecution to attempt to introduce sufficient evidence.[23] Upon remand, the prosecution was not able to marshal the evidence needed to prove that the prior conviction qualified as a serious felony conviction and a strike under California law. Because that left only one remaining serious felony/strike conviction, appellant could no longer be sentenced to life terms. At the resentencing on remand, the trial court sentenced appellant as a second striker to 14 years, four months, the maximum sentence it could impose.[24]

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[22] The jury deadlocked on a count charging attempted murder with a great bodily injury enhancement.

[23] *See People v. Mullins,* C066082. The opinion that Justice Murray authored in this first appeal can be found on the California Courts website at < C066082.doc >.

[24] The 14 year four month sentence was calculated as follows: Corporal injury of a cohabitant – the upper term of four years doubled because of the remaining strike conviction to eight years; criminal threats – 8 months doubled because of the remaining strike conviction to 16 months to be served consecutively; and five years consecutive for the remaining valid prior serious felony conviction, a New Jersey conviction for aggravated assault with a weapon. The trial court chose the upper term for the corporal injury of a cohabitant count "because the priors are increasing in danger and evidence saying [sic] cruelty and callousness." The trial court ran the criminal threats sentence consecutive "because those threats against [the

In the second appeal, the panel remanded directing the trial court to perform an essentially ministerial act it had erred in failing to perform at resentencing upon the first remand. In calculating the actual presentence custody credits, the trial court should have added to the time appellant spent in local jail custody prior to the original sentencing the time he later spent in prison between the original sentencing and the resentencing. *See People v. Buckhalter* (2001) 26 Cal.4th 20, 29 (*Buckhalter*) ["when a prison term already in progress is modified as the result of an appellate sentence remand, the sentencing court must recalculate and credit against the modified sentence all *actual time* the defendant has already served, whether in jail or prison, and whether before or since he was originally committed and delivered to prison custody"].

However, appellant lost no "benefit" from any delay in remanding for the trial court to state this ministerial recalculation on the record. He would not have been released to parole any sooner had the trial court recalculated his actual custody time sooner rather than later. CDCR obviously knew appellant had been in its custody after the original sentencing and would have factored that actual custody time into the determination of his release date.**25**

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victim] were separate and had separate intent than the actions that caused her traumatic injury." Additionally, the trial court imposed 160 days consecutive on a misdemeanor count of violating a court order. The trial court noted that the misdemeanor sentence "eats up some of your custody time." (3/23/15 RT 25)

25 After the panel filed the opinion in the second appeal, appellant filed a motion to recall the remittitur based on the erroneous theory that he was entitled to 50% conduct credit for the time he spent in prison between the first sentencing and the resentencing on remand after the first appeal. Appellant was not entitled to presentence conduct credits for the time he spent in prison custody after the original sentencing at the 50% rate afforded for local presentence custody credits. Instead, he was eligible for

After appellant filed supplemental briefing in the second appeal on December 2018 asserting that S.B. No. 1393, which would take effect on January 1, 2019, applied to him, Justice Murray did not push his case ahead of other cases in his backlogged caseload because he knew the trial court was never going to dismiss or strike the remaining Penal Code section 667, subdivision (a) five-year serious felony conviction enhancement in furtherance of justice. Moreover, Justice Murray knew doing so would have been an abuse of discretion because of appellant's criminal record and the circumstances of the case – there was no mitigation justifying striking or dismissing the enhancement in furtherance of justice under Penal Code section 1385. Justice Murray's judgment on this was based upon appellant's record of convictions, the trial evidence, the trial court's comments at the resentencing hearing after the first appeal, and Justice Murray's background, training and experience. Accordingly, in triaging his caseload, Justice Murray determined an immediate remand for that purpose was not necessary. Indeed, as discussed below, it was not even required under the circumstances.

The trial court's comments at the resentencing hearing after the first appeal demonstrate it would never have stricken or dismissed the serious

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the 20% rate for good-time/work-time credits earned in prison. (See Pen. §§ 667, subd. (c)(5), 1170.12, subd. (a)(5).) As the California Supreme Court previously made clear, "a convicted felon who has once been sentenced, committed, and delivered to prison, who received all credits for confinement prior to the original sentencing, and who remains behind bars pending an appellate remand solely for correction of sentencing errors, is not eligible to earn additional credits for good behavior as a presentence detainee." (*Buckhalter*, supra, 26 Cal.4th at p. 29.) Accordingly, the remand in the second appeal directed the court to recalculate his *presentence custody* credits, not the local presentence *conduct* credits as appellate counsel erroneously contended in the motion to recall the remittitur.

felony enhancement. The trial court stated: "When I think that of woman [sic] in that bathtub full of water being pushed down until she gave up, I was proud, I don't know, proud, I don't know what the right word is, but I was, *I really felt I was doing my job when I gave the guy the rest of his life in state prison*. Because if he had had his way on that day, he would have killed her, and I have no optimism about what's going to happen to anybody he ties up when he gets out." (3/23/15 RT 23, italics added.) The trial court went on to express disappointment in the prosecution's efforts to obtain the proof necessary to prove the serious felony conviction enhancement that had been reversed that had qualified appellant for life sentences under the Three Strikes Law. (3/23/15 RT 21-23) "I will tell you, I am disappointed in the government efforts in this case to ensure *a proper consequence for Mr. Mullins' conduct in regards to this case and for his record*. We moved from 60 years to life to 14 years and change." (3/23/15 RT 23, italics added.)

In light of these extraordinary comments by the trial court, appellant's criminal record, the fact that the trial court exercised its discretion to sentence appellant to the maximum sentence at resentencing by giving him an upper term base term sentence and running the subordinate term and a misdemeanor consecutively instead of concurrently and the absence of any mitigation, Justice Murray felt there was no way the trial court would or could validly strike or dismiss the remaining serious felony enhancement in the furtherance of justice under Penal Code section 1385.

In fact, given the trial court's statements at resentencing, the panel actually did not have to remand the case back to the trial court for consideration of whether to strike the enhancement, despite the Attorney General's remand concession. The relevant case law at the time provided that appellate courts "are not required to remand when 'the record shows

that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the] ... enhancement' even if it had the discretion." (*People v. Jones* (2019) 32 Cal.App.5th 267, 273, quoting *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; accord, *People v. Franks* (2019) 35 Cal.App.5th 883, 892; See also *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [no purpose would be served in remanding for resentencing based on newly authorized discretion to dismiss a strike conviction allegation where the trial court indicated it would not have done so even if it had the discretion to do so].) The trial court need not have specifically stated at resentencing it would not strike the enhancement if it had the discretion to do so. Rather, appellate courts "review the trial court's statements and sentencing decisions to infer what its intent would have been." (*Jones*, at p. 273, citing *People v. McVey* (2018) 24 Cal.App.5th 405, 419.

Here, the trial court's extraordinary statements at the resentencing hearing and its discretionary sentencing choice to sentence appellant to the maximum sentence it could impose clearly indicated that it would not have stricken the remaining enhancement in furtherance of justice even if it had the authority to do so at the resentencing hearing. The only reason the panel remanded that issue was because remand was necessary to perform the ministerial act of recalculating the custody credits. Were it not for that, the panel need not have remanded the matter at all. The panel indicated as much in the opinion.

As Justice Murray predicted, on remand the trial court declined to exercise its newly authorized discretion to dismiss or strike the remaining serious felony conviction enhancement. In fact, trial counsel did not even argue that the trial court should consider doing so. When asked by the trial court if he would like to be heard on that issue, trial counsel replied: "No, Your Honor, I don't think there's anything I could add that I haven't stated

either in 2010 or 2015." (7/30/20 RT 6)

The prosecutor, for his part, noted that the opinion Justice Murray authored in the second appeal "suggest[ed] there is evidence in the record that remand would have been futile on this issue…, but I guess since the Attorney General did not file any sort of opposition, they went ahead and sent the case back down on both the credit issue and this issue." The prosecutor added: "There isn't a whole lot I can add either [sic] factually other than to say this was an extraordinarily aggravated event on top of an already aggravated record. So I think there would be absolutely no reason whatsoever for the Court to exercise any discretion to strike the five-year prior that is in play in this case." (7/30/20 RT 7)

After both counsel submitted the serious felony enhancement issue, the trial court stated the following: "*I will reiterate that it was my intention to give Mr. Mullins every hour of every day of every month available for him to serve in custody* because of the facts and circumstances of this case and because of his prior convictions. [¶] Now I should make it more clear, given that we are often getting cases remanded for clarification on exercise of discretion, that to the extent Mr. Mullins' sentence was limited by any rule of law or interpretation of a court procedure, *it was my intention to give him every day that I could*. *And if I had the discretion to overcome any of those limitations, I would exercise it in favor of giving* Mr. Mullins *more time in custod*y. [¶]…[T]hat was not only my position at that time, but I've reviewed Mr. Mullins' probation report. The facts of this case are still a dark spot in my mind, and I will confirm that that is my intention upon that review as well. [¶] So just so that we are all clear, I am aware I have the discretion to strike the [serious felony conviction enhancement] and *I decline to exercise that…discretion in light of the horrible violence in this case* far beyond what is required to satisfy the crimes of which Mr. Mullins was convicted." (7/30/20 RT 7-8, italics added.)

Thus, as for the prospect of striking or dismissing the serious felony conviction enhancement, appellant was not prejudiced by any delay – the trial court's clear comments regarding how it viewed the heinousness of appellant' crimes at the first resentencing hearing clearly showed the trial court's intent to sentence appellant to the maximum sentence permitted, irrespective of the trial court's discretion to strike or dismiss the remaining serious felony conviction enhancement. And that is exactly what the trial court did after remand.

Accordingly, appellant did not suffer any prejudice from any purported decisional delay.[26] He lost no "benefit" from an earlier consideration. If the panel had remanded for purposes of allowing the trial court to exercise S.B. No. 1393 discretion sooner, the end result would have been the same – the trial court would not have stricken or dismissed the remaining serious felony conviction enhancement.

As for the delay in completing the opinion in the second appeal, it was the result of a disagreement in the disposition of the substantive sentencing issue and the reasoning behind it. During the circulation of the draft opinion in the second appeal, one of the other justices on the panel contended that the criminal threats sentence was subject to Penal Code section 654. She provided Justice Murray with a memo she thought supported her position that the domestic violence and criminal threats

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[26] Any delay between January 3, 2016, when Justice Murray was assigned, and January 1, 2019, when S.B. No. 1393 became effective, is irrelevant to the alleged prejudice stemming from consideration of striking or dismissing the serious felony enhancement because trial courts were statutorily prohibited from doing so prior to the effective date of S.B. No. 1393. Indeed, had the decision been filed within the one-year period referenced in the Formal Notice, appellant would never have been eligible for S.B. No. 1393 relief, and there would be no claim of prejudice concerning that new statute.

counts were committed pursuant to one intent or criminal objective. She referenced the existence of "100+" unpublished cases addressing the issue in various ways and provided Justice Murray with a short list of unpublished cases she believed were inconsistent with Justice Murray's draft. After 15 years as a trial court judge presiding over numerous domestic violence cases, nearly 14 years as a prosecutor, including personally prosecuting three domestic violence murders, four years of supervising the San Joaquin County District Attorney's homicide and domestic violence units and understanding the dynamic of battering relationships, Justice Murray thought the other justice's reasoning was flawed. Domestic violence batterers often have two intents – to injure and to psychologically terrorize their victims. Yet, the issue of consecutive sentences for criminal threat convictions in this RDA, had not been squarely addressed in the published case law.

Justice Murray thought any opinion the panel would issue warranted publication. Justice Murray wanted to take the time to provide a fulsome response to the other justice's memo and the list of cases she provided. After considering the other justice's memo and cases she cited, he set the matter aside to block-off time to do so, knowing the delay would not prejudice appellant.

In March of 2017, Division 2 of the Fourth District decided *People v. Mejia* (2017) 9 Cal.App.5th 1036 (*Mejia*), which held, consistent with Justice Murray's draft opinion, that the sentence for the criminal threats conviction in that case could be imposed consecutively. The *Mejia* court held that mentally or emotionally terrorizing a domestic violence victim by means of threats is an objective separate from the intent to cause extreme

physical pain and therefore can be separately punished. (*Id*. at p. 1047.)[27] This is what Justice Murray had said in the draft he had circulated earlier to the panel.

Justice Murray was preoccupied with other matters that he thought should be given priority, so he did not immediately return to the *Mullins* opinion after the 2017 decision in *Mejia* had been published. Then he had two strokes later that year.

Applying *Mejia* and other analogous cases to the Mullins case, Justice Murray circulated a revised opinion on February 4, 2020, that said the trial court had validly concluded that the criminal threats in this case were in furtherance of a separate criminal objective. Accordingly, Penal Code section 654 did not prohibit consecutive sentences.

Since *Mejia* had already addressed the issue Justice Murray thought was publication worthy, and publication in this case was not worth the fight, he withdrew his recommendation to publish the Mullins opinion. He also provided the other justice with an email/memo stating why the cases she had sent him were inapposite. Ultimately, the other justice agreed with his opinion and fully concurred. The extra time Justice Murray put into addressing the other justice's disagreement with the decision took time away from the other cases in his backlogged case load.

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27 See also *In re Raymundo M.* (2020) 52 Cal. App. 5th 78, 95, citing *Mejia*, *supra*, 9 Cal.App.5th 1036 ["the court could reasonably have found that [the minor] committed the assault with the objective of inflicting *physical* harm on [the victim] whereas [the minor] criminally threatened [the victim] with the separate objective of inflicting *mental or emotional* harm" (Italics added)]. Understanding the cycle of violence and the dynamic of battering relationships, this seemed like a simple concept to Justice Murray.

7. *People v. Wrobel,* No. C081210 (Rating: RDA - Chambers).

This RDA involved the question of whether appellant was disqualified from Proposition 47 relief because of a prior juvenile sex offense adjudication, an issue that had not been addressed in the case law before appellant filed his appeal.[28]

Justice Murray admits that appellant's two appeals were consolidated, and the first appeal (C081210) was dismissed as moot when the panel issued its decision. It was dismissed as moot, not because of delay, but because the trial court vacated the order that was the subject of the first appeal.[29]

Justice Murray denies that this matter was fully briefed on June 8, 2016. The briefing for the first appeal had been completed on that day. But the briefing on the second and *operative* appeal was not completed until December 29, 2016.

Justice Murray admits that this matter was originally assigned to him on July 29, 2016, and he remained assigned to it after the second and operative appeal was filed.

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28 The opinion Justice Murray authored can be found on the California Courts website at < C080296.PDF >.

29 The panel granted the consolidation request before it learned of the following. Judge "A" heard the original case and sentenced appellant, but thereafter accepted a Civil Code of Procedure section 170.6 challenge. Years later, after Proposition 47 was passed, appellant filed a motion to recall his sentence on that case and have his conviction reduced to a misdemeanor. The motion was assigned to Judge A. Forgetting the earlier disqualification, Judge A. ruled on the motion and denied it. Appellant appealed that denial. While the first appeal was pending, Judge A. remembered the disqualification and vacated the order denying appellant's Proposition 47 motion. Thereafter appellant's motion was heard by Judge "B", who also denied it. Appellant appealed Judge B's denial. That is the second and operative appeal.

Justice Murray admits that appellant had originally been sentenced to three years and eight months for two counts of felony burglary in 2014. Justice Murray admits that appellant appealed the trial court's later denial of a Proposition 47 petition to reduce the charges to misdemeanors. Justice Murray admits that the panel reversed the judgment and remanded the matter to the trial court more than four years after assignment. As more fully discussed below, Justice Murray admits that by the time this matter was decided, appellant had served his sentence. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that appellant was subject to parole conditions on this case at the time the decision was issued.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that on August 25, 2021, following the remittitur to the trial court from this appeal, appellant's convictions were reduced to misdemeanors. Justice Murray lacks sufficient information to admit or deny what occurred in the trial court after remand, and on that basis denies that appellant received the relief he sought after waiting more than four years. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that in the meantime, appellant was subject to the consequences of felony convictions and conditions of parole on this case. Justice Murray believes that appellant had at least one other case on which he may have been serving a sentence that was not part of the record in this case.

The issue presented in this RDA involved complex statutory interpretation involving whether a juvenile adjudication disqualified appellant from Proposition 47 relief. The issue had not been addressed by a published opinion prior to the close of briefing on the second appeal on December 29, 2016. It was not until the following month, when Division 3 of the Fourth District published *People v. Sledge* (2017) 7 Cal.App.5th

1089 (*Sledge*), that a court addressed the pertinent statutes. If the panel had followed that opinion and immediately issued an opinion based on that case, the trial court's denial of appellant's Proposition 47 motion would have been affirmed. Four months later, however, the Fifth District in *People v. Fernandez* (2017) 11 Cal.App.5th 926 (*Fernandez*), generally agreed with *Sledge*. However, *Fernandez's* reasoning shed new light on how the panel should consider the specific facts in this case.

Justice Murray and CA-4 thought a request for supplemental briefing on *Sledge* and/or *Fernandez* would be forthcoming, but neither party made the request. Supplemental briefing was filed on August 14, 2017, concerning the dismissal of the first appeal as moot. On that same day, CA-4 submitted a draft to Justice Murray without supplemental input from the parties discussing *Sledge* and *Fernandez*. **30** This was four days after Justice Murray's second stroke. Justice Murray was in email communication with CA-4 about this case during this time period while he was convalescing from the strokes and undergoing physical and occupational therapy.**31**

In this case, there was a factual question related to appellant's age at the time he committed the potentially disqualifying juvenile sex offense. How old was he at the time? If he committed the offense before age 16, or

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30 The parties finally submitted letters asking the court to consider *Fernandez* and *Sledge* in February 2019, appellant relying on *Fernandez* and the Attorney General relying on *Sledge*.

31 Justice Murray's judicial assistant wrote the following in an August 11, 2017, email to Justice Murray concerning him working on this case at that time: "I really feel that you should stop working for a few days and just get some much needed rest without all this workload chaos, Judge! I'm really worried about this added stress on your plate!" Justice Murray wrote back that same day: "Thanks. [¶] I want to keep my brain working. Working is better than crossword puzzles."

there was no proof in the record regarding his age when the offense was committed, then the juvenile adjudication would not have disqualified him from Proposition 47 relief. Justice Murray thought it necessary to personally make a thorough review of the record regarding this issue to confirm there was indeed no evidence establishing appellant's age when he committed the offense. After blocking-off time to conduct that review, Justice Murray confirmed that there was no evidence of appellant's age at the time he committed the juvenile sexual offense crime. Therefore, the juvenile adjudication did not disqualify appellant, and the matter should be remanded for further proceedings in accordance with Proposition 47.

Any decisional delay did not cause appellant to serve additional time in prison. He had been arrested on January 2, 2013. He later pleaded no contest to two counts of second degree burglary. On April 3, 2014, he was sentenced to probation, with 60 days county jail. He later violated his probation and was sentenced to prison on September 18, 2014, for a term of 3 years 8 months.

Thereafter, appellant filed his motion in the trial court for Proposition 47 relief in late 2014. The prosecution opposed the motions, asserting appellant was excluded because of the juvenile sex offender adjudication. The trial court concluded that the juvenile adjudication disqualified appellant from Proposition 47 relief.

By that time, appellant had served approximately a year and a half in state prison, plus the 60 days local time (less local good-time/work-time) he had served on the original grant of probation. Thus, by the time Justice Murray was assigned the first appeal in late July 2016, appellant had served nearly two years. With 50% good-time/work-time credit on his 3 year 8 month sentence, he would have likely been released from prison before the first appeal came to Justice Murray. If appellant had not been released from prison before Justice Murray was assigned the first appeal, he should

have been released before December 29, 2016, when briefing was completed in his second appeal – the operative briefing completion date here. Additionally, because appellant was originally arrested on a warrant, he was likely detained from the date of his arrest and he would have had both actual and presentence local jail conduct credit, which would have resulted in an even earlier release to parole.

Because it appeared to Justice Murray that appellant was released to parole before the appeal was assigned to him or shortly thereafter, and that his parole period would likely be short given the nature of the underlying conviction, he believed appellant would not be prejudiced if he set aside review of the record on the age issue and the completion of the opinion until he could block-off time to ensure the panel would come to the right result for the right reasons. For the same reasons, Justice Murray denies that appellant suffered any prejudice from any purported decisional delay, including unjust incarceration prejudice.

8. ***People v. Koenig*** (2020) 58 Cal.App.5th 771, No. C074411, (Rating: 6).

This was a criminal securities fraud case. Securities fraud prosecutions are fairly rare in California. This appeal was one of the most complicated cases assigned to Justice Murray's chambers during his time on the Court of Appeal. The trial court record was voluminous, including 50 bankers boxes, a fact the managing attorney could not have known when the case was rated. The briefing of the parties was not very helpful. And the prosecution in the trial court was hard to follow. Multiple issues were raised on appeal. There were 33 counts involving 31 investor victims. Appellant had been sentenced to an aggregate term of 42 years and eight months. The case rating of "6" significantly underestimated the amount of work required for this case. Ultimately, Justice Murray authored a published opinion addressing appellant's various claims, finding

instructional error on one of his claims, but concluding that the error was harmless.[32]

The notice of appeal was filed on August 5, 2013. Record preparation and briefing were not completed until December 7, 2016, more than three years after the notice of appeal was filed. Justice Murray admits the appeal was fully briefed on December 7, 2016, and assigned to him on January 3, 2017.

CA-3 was assigned to produce a draft shortly after Justice Murray's assignment. Having read the briefs, Justice Murray knew it was a difficult case and did not expect a draft anytime soon. During the period of time after his initial review of the briefing this case, he was occupied by other appeals on his caseload as well as opinions circulating from other chambers. And, unknown to him at the time, he was on way to suffering two strokes in August 2017.

Justice Murray admits that between January 22, 2018, and August 3, 2020, the Court of Appeal received letters from people requesting that the matter be fast-tracked. Justice Murray admits that he was aware that there were 31 investor victims and that many had contacted the court. Justice Murray admits that Linda Feutz, an 81-year-old victim, had been defrauded by appellant and stated she could not obtain restitution during the pendency of the appeal. Justice Murray admits that she stated that every 90 days, she was required to renew her eligibility with the California Secretary of State's Victims of Corporate Fraud Compensation Fund. Justice Murray admits that on February 2, 2018, Feutz wrote to the Court of Appeal to request a hearing. Justice Murray admits that she stated that most of the claimants were near retirement age when the appeal was filed (2013); and, in 2018,

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32 The published opinion Justice Murray authored can be found on the California Courts website at < C074411.PDF >.

were in their late 70s and late 80s—many with health issues. Justice Murray admits that she wrote that obtaining restitution "would substantially increase the quality of my remaining life, and probably for many other claimants…Please review this case and see if it can somehow be placed on a fast track for conclusion. The action is now almost 10 years old. I know I would personally like to see this resolved in my lifetime, and I am sure most of the other claimants share this same desire." Justice Murray admits that in about 2019, while the appeal was pending, victim Linda Trapanese died, which prevented her from obtaining restitution. Justice Murray admits that on June 24, 2020, John Pardella, an 85-year-old victim, called the Court of Appeal to inquire about the case. Justice Murray admits that on July 9, 2020, counsel wrote to the Court, "Given the unusual length of time the cases have been pending, and at the suggestion of the Central California Appellate Program, I am writing in an excess of caution simply to ensure that [the] case has [not] somehow fallen between the cracks."

In February 2018, when the court first began receiving communications from the investor victims, CA-3 was on maternity leave. As those communications came in, copies were provided to CA-3 by Justice Murray's judicial assistant.

Justice Murray thought about reassigning the case to his other chambers attorney, CA-4, while CA-3 was on maternity leave.[33] But given what it would have taken for CA-4 to get up to speed on the case and the fact that he and Justice Murray had other matters they were working on, Justice Murray did not think it made sense to divert CA-4's attention away from those other cases. As a practical matter, CA-4 would not have had much of a head start on CA-3 before she came back from maternity leave,

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33 CA-4 replaced CA-1 in March 2015.

especially since Justice Murray was unsure what progress CA-3 had already made on the draft.

When CA-3 came back from maternity leave, Justice Murray orally reminded her about the letters and directed her to work on this case until she finished the draft.[34] CA-3 did not produce a draft until November 8, 2018.[35]

The draft produced by CA-3 was disappointing. It essentially regurgitated the Attorney General's briefing and was problematic in several respects. After reviewing her draft and giving it some thought, it seemed to Justice Murray that her disposition of one of the instructional error claims was wrong. If Justice Murray was correct in that early assessment, then a reversal would have been required unless the error was harmless. Justice Murray believed he needed to do additional research and give additional thought to the legal analysis on the various claims in addition to reviewing the trial testimony. His initial thought was that harmless error would require fact intensive record research.

Justice Murray believed he needed to try to block-off time to focus primarily on the numerous issues in this case. A hastily prepared opinion reversing because of instructional error and an insufficient harmless error analysis would not help the investor victims. Nor would it help the defendant, who would have to go through another trial and undoubtedly be convicted again. Moreover, a second trial would have come at great expense to the state, and it would have been a substantial drain on the trial court's resources. Due to these considerations, Justice Murray wanted to

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[34] Justice Murray lacks sufficient information at this time to specify the date when CA-3 came back from maternity leave.

[35] During the interim while CA-3 was working on this complex case, she did not produce a draft on any other case that had been assigned to her.

make sure that whatever the panel's decision, it was correct and well-reasoned. If the panel reversed, then at least everyone would understand the panel conducted a thorough analysis. And if there was a reversal, Justice Murray thought a thorough opinion would aid the pre-trial negotiating posture of the parties on remand and provide guidance for the presentation of evidence and instructions at a second trial.

Justice Murray recalls attempting to address the issues in this case at various times, but could not focus on it until September through December of 2019. For the most part, he set aside other cases assigned to him during this period. Justice Murray made substantial revisions to the draft relating to the legal analysis on a number of appellant's claims. The revisions Justice Murray made are documented by Microsoft Track Changes.[36]

Additionally, Justice Murray concluded that because the trial court had erred by failing to give a mistake of law instruction, a fact intensive harmless error analysis was required. Justice Murray took it upon himself to try to research the record and write the harmless error analysis on his own instead of asking for assistance from one of his two chambers attorneys. CA-4 had his own caseload. CA-5 was relatively new to Justice Murray's chambers, but was doing a great job and Justice Murray did not want to disrupt his momentum on other cases.[37] Justice Murray admits that the decision to try to do this himself proved to be a mistake. It required review of multiple volumes of transcript. Although he tried to break away

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[36] Justice Murray personally made significant revisions to the following issues: The prosecution's conspiracy and aiding and abetting theories; the criminal negligence instruction; the Legislative intent concerning a related security fraud statute; and appellant's mistake of law instructional error claim.

[37] CA-5 replaced CA-3 in February 2019, after CA-3 was fired from Justice Murray's chambers in January 2019.

from other matters to do this review during the next several months, he was never able to immerse himself in the case. And when he did so, it diverted his time away from other cases in his backlogged caseload.

Justice Murray admits that he asked APJ Raye not to assign cases to his chambers in June and July 2020, hoping to focus primarily on this case and others in his backlog. Justice Murray admits that he got sidetracked helping the Judicial Council provide technical advice to the Legislature on Assembly Bill No. 3070 (A.B. No. 3070), *Batson-Wheeler* reform.[38]

At the time, Justice Murray was serving on the California Judicial Council's Criminal Law Advisory Committee. Among other things, Judicial Council advisory committees provide technical advice on pending legislation that is communicated by the Judicial Council to the Legislature. During the summer of 2020, in the middle of the pandemic and in the wake of the murder of George Floyd, the Legislature was pushing A.B. No. 3070 (a bill addressing the use of preemptory challenges to remove a prospective juror on the basis of the prospective juror's race, ethnicity, gender, gender identity, sexual orientation, national origin, or religious affiliation, or the perceived membership of the prospective juror in any of those groups), through the legislative process.

Justice Murray is a recognized statewide expert on *Batson-Wheeler* law and other jury law issues. He had been writing materials for the Judicial Council's education division (CJER) and presenting Judicial Branch education to judges on these subjects since the early 2000s.[39] And

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38 *Batson v. Kentucky* (1986) 476 U.S. 79; *People v. Wheeler* (1978) 22 Cal.3d 258.

39 See *People v. Heard* (2003) 31 Cal.4th 946, 967, fn 9, where the California Supreme Court recommended *Selected Jury Selection and*

he had been following the development of *Batson-Wheeler* case law in California since the early 1990s.

Justice Murray was asked to chair the Criminal Law Advisory Committee's subcommittee that would provide technical advice on A.B. No. 3070. He agreed. He felt an obligation to do so, believing that there was nobody else better qualified on the Criminal Law Advisory Committee or in the Judicial Branch to lead this important effort in a compressed period of time. The proposed legislation as then written was extremely problematic. If enacted in its then current iteration, it would have caused significant problems for trial courts selecting juries in criminal cases statewide and resulted in unnecessary appellate litigation.

Justice Murray chaired subcommittee meetings and helped organize comments from the subcommittee members. Bringing to bear his extensive study of *Batson-Wheeler* decisional law, Justice Murray drafted a memo that was used by the Judicial Council in their discussions with the Legislature suggesting revisions to A.B. No. 3070. Many of changes proposed by Justice Murray's subcommittee were adopted by the Legislature in the compressed time period during this unique legislative session.

After the subcommittee's work on A.B. No. 3070 was completed, the Legislature decided to push Assembly Bill No. 2542, the Racial Justice Act (A.B. No. 2542), through the legislative process. Justice Murray was asked to chair a subcommittee on that legislation. Because of his background, training and professional and personal experiences, he felt he was uniquely qualified for that task as well. Because of that, he felt obligated to chair the committee. Ultimately, because of the compressed

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Management Issues in Criminal Cases, authored by Justice Murray, among other materials judges should read concerning voir dire and jury selection.

time period, he and the chair of the Criminal Law Committee provided most of the input to the Judicial Council instead of the subcommittee.

During this period, Justice Murray attempted to work on the Koenig appeal. But the task required attention to detail he was unable to give. Moreover, by this time it was clear to Justice Murray that he had hit a mental roadblock and needed a fresh set of eyes to assist him. Because CA-5 was doing such a good job on other cases, Justice Murray asked him to take over addressing the harmless error analysis, among other issues in the case.

Justice Murray had focused on review of the trial transcript and had not yet reviewed the documentary evidence in this white-collar prosecution before he assigned CA-5 to assist. Justice Murray assumed the court had the exhibits because CA-3 cited them in the draft opinion she provided Justice Murray. However, despite citing to the exhibits in her draft, CA-3 never looked at them because the court did not have them. Her citations apparently came from the Attorney General's briefing. Justice Murray needed certain exhibits reviewed to present an accurate and clear factual background in the opinion and for a harmless error evaluation.

Getting the exhibits proved difficult. Justice Murray was told that the trial court had 50 bankers boxes of exhibits in storage that could not be housed at the Third District's courthouse. The Attorney General claimed there was no electronic copy. Appellate counsel had an electronic copy, but it had become corrupted. CA-5 suggested the Attorney General be ordered to produce an electronic copy of specific exhibits. Upon Justice Murray's request, the court issued the order. That process took approximately three months.

Ultimately, CA-5 provided Justice Murray a revised draft on September 11, 2020. Thereafter, Justice Murray and CA-5 worked on the draft until November 9, 2020, when it was put into circulation. After the

opinion was filed on December 10, 2020, the California Supreme Court denied review.

Justice Murray admits that the investor victims in this case were prejudiced by the delay. For this, he regrets that he was unable to get this appeal done sooner and apologizes to the investor victims. However, had Justice Murray rushed the appeal (which was underrated as a "6') by not doing the work and necessary analysis development, the result and/or reasoning might have been wrong, also prejudicing the investor victims. Ultimately, the time to ensure the opinion was done correctly diverted time away from other cases in his caseload. Had this case not involved such unique and complex legal and factual issues or had it never been assigned to him, Justice Murray would have been able to devote time to authoring other opinions.

9. *Lundquist v. Lundquist,* No. C078000 (Rating: 3)

This case involved a trust established by a parent and a dispute between that parent's adult children. It was the most complicated probate case Justice Murray authored during his time at the Third District. The record was extensive and the appeal involved statutory interpretation not previously directly addressed in the case law. The rating of "3" was inaccurate.

Justice Murray admits that this matter was fully briefed on September 6, 2016, and assigned to him on September 30, 2016.

Justice Murray lacks sufficient knowledge to admit or deny that appellant inquired about the status of the appeal multiple times. Justice Murray lacks sufficient knowledge to admit or deny that on March 1, 2018, appellant's attorney inquired about the status of the appeal through correspondence. Justice Murray lacks sufficient knowledge to admit or deny that appellant's counsel wrote to the clerk of the court, "I understand and appreciate the volume of cases before the court, but have never had a

case fully briefed for quite so long with no further activity. My client is interested in reaching resolution, and would appreciate any information as to when we might expect to receive a notice the case is ready for oral argument." Justice Murray lacks sufficient knowledge to admit or deny that on September 6, 2019, appellant's attorney inquired of the clerk's office about the status of the appeal by telephone and that she was told that "it was on the justice's desk." Justice Murray admits that on January 24, 2020, the attorney inquired by correspondence, writing, "My client is understandably deeply frustrated about the length of time that has passed without a decision. I can offer him no explanation for the delay, as I have never had a case sit fully briefed without a decision for so long."

Justice Murray admits that the panel decided the case on June 24, 2020, more than three and one-half years after authorship was assigned to him. Justice Murray admits that the panel affirmed the judgment, but reversed two aspects of the trial court's post-judgment order related to the trial court's approval of reimbursement of fees for the trustee's prejudgment work and attorney's fees resulting from the litigation on the siblings' petitions.

CA-4 submitted a draft to Justice Murray on February 17, 2017. Justice Murray reviewed the draft and believed the suggested reversal of the trial court's post-judgment order was incorrect. He was occupied with other matters at the time and set the opinion aside to do work on it. Based on his preliminary research, Justice Murray believed a deep dive into the trial court record was required. Justice Murray preferred to have CA-4 continue working on his other assigned cases and do the research himself. Unknown to Justice Murray, he was on his way to suffering two strokes in August 2017.

Justice Murray made significant revisions to the draft. Those revisions are documented by Microsoft Track Changes. As it turned out,

Justice Murray was partially correct. The entirety of the post-judgment order need not have been reversed – only two aspects of it were reversed by the panel.[40]

Justice Murray admits the litigants were prejudiced by the delay. He admits he mistakenly thought of this case as one where remand would not be required when he set it aside to block-off time to work on it. He regrets he did not research the record and revise the draft sooner and apologizes for his mistake in failing to do so.

10. *Mitchell v. Smith et al.*, No. C078089 (Rating: 2).

In this appeal, appellant made various challenges to the administration of a trust by the trustees. The panel rejected her claims, primarily because she had signed a settlement agreement barring those claims, and further concluded that even if not barred by the settlement agreement, there was substantial evidence supporting the trial court's orders. The panel thus affirmed the trial court's orders.[41]

Justice Murray admits that matter was fully briefed on August 17, 2015 and assigned to him on August 31, 2015. Justice Murray admits the appeal was decided on March 13, 2019. Justice Murray admits that on April 30, 2018, appellant filed a motion for calendar preference. Justice Murray admits that calendar preference was granted on May 2, 2018. An oral argument waiver notice was sent on December 6, 2018, and appellant requested oral argument on December 20, 2018. Oral argument was scheduled at the convenience of the parties and consistent with the court's calendar on February 19, 2019.

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[40] The opinion authored by Justice Murray can be found on the California Courts website at < C078000.PDF >.

[41] The opinion authored by Justice Murray can be found on the California Courts website at < C078089.PDF >.

Justice Murray made revisions to the draft he had been provided before circulating it. Those revisions are documented by Microsoft Track Changes. Justice Murray admits the appeal was decided on March 13, 2019.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies the facts asserted by appellant in the motion for calendar preference. Justice Murray denies that his decisional delay was excessive. Justice Murray denies that appellant was prejudiced. The panel affirmed. Appellant was not entitled to the relief that she requested.

It is not clear why appellant did not sell the house during the pendency of the appeal. It was undisputed that it would be sold and the proceeds deposited into the trust. Based on the petition for calendar preference, it appeared to Justice Murray that any problem related to the timing of the sale had nothing to do with the delay in deciding the issues on appeal. In the petition for calendar preference appellant stated there were title issues that had been resolved independently of her appeal.[42] Appellant could have been reimbursed from the trust for *legitimate* expenses related to the house until the appeal was decided. Thus, any purported economic hardship that she suffered was not related to any delay of the appeal or in the sale of the house, but her own failure to seek reimbursement for *legitimate* expenses. If the expenses were not legitimate, then she was not entitled to reimbursement no matter when the appeal was decided.

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42 In the petition for calendar preference, appellant wrote: "Five years after the trial, the property still has not been sold *because the trustees failed to properly convey the manufactured home to the trust*. *Now the title issues have been resolved and the property needs to be sold.* Appellant needs to be reimbursed the funds she expended over the last three years to protect and preserve the property." (Italics added.)

11. *Whitaker v. Wells Fargo, N.A.,* No. C081559 (Rating: 2).

Justice Murray admits that this matter was fully briefed on November 16, 2016, and assigned to him on November 30, 2016. Justice Murray's chambers attorney, CA-3, to whom Justice Murray assigned the case to produce a draft opinion, never did so. As a consequence, the matter was reassigned to APJ Raye on February 1, 2019. It was thereafter decided on March 26, 2020.

Appellant, a foreclosed homeowner who challenged his lender's refusal to modify his loan, appealed the trial court's order granting summary judgment in favor or Wells Fargo. The panel reversed.

Justice Murray admits that the delay in addressing the summary judgment ruling and remanding the matter for further proceedings prejudiced appellant. Justice Murray regrets the prejudice caused by this delay and apologizes for it.

12. *Barker v. Barker*, No. C079864 (Rating: RDA - Chambers).

This case involved a pro per appellant who appealed the judgment on division of property following marital dissolution, making nine claims of error. The panel affirmed the judgment in this judgment roll appeal.[43]

Justice Murray admits that this matter was fully briefed on April 25, 2016, and assigned to him on April 29, 2016.

Justice Murray admits that on May 10 and June 9, 2016, appellant filed motions for calendar preference.

Justice Murray assigned CA-3 to provide a draft opinion on this case shortly after authorship was assigned to him. However, she did not provide Justice Murray with a draft opinion until February 14, 2019. Shortly thereafter, Justice Murray made revisions to the draft and put it into

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43 The opinion Justice Murray authored can be found on the California Courts website at < C079864.PDF >.

circulation. The revisions Justice Murray made are documented by Microsoft Track Changes.

An oral argument waiver letter was sent on March 15, 2019. Oral argument was scheduled at the convenience of the parties and consistent with the court's calendar on June 18, 2019. The opinion was filed on June 18, 2019, affirming the judgment.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that appellant was over 70 years old and suffered from progressively worsening diabetes. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that on three occasions, Mr. Barker inquired about the status of the appeal.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that in a letter filed on April 23, 2018, appellant wrote, "By tardy, unresponsive conduct, the Appellate Court has not only failed it's [*sic*] iron clad duty to protect the Public Interest, it disturbingly indicates an ivory tower laissez-faire disinterest for addressing, and rooting out, judicial corruption."

Justice Murray admits that in a letter filed on October 4, 2018, appellant wrote, "Now, some 880 days after the filing of the Reply Brief, a decision has still not been made. Therefore, Appellant again reasonably complains. Undeniably, 880 days is more than sufficient time for this court to take this Appeal in hand and make a decision. This is especially true, and critically important, because the Appeal provides compelling proof that [a judge] is corrupt." Justice Murray lacks sufficient information to admit or deny, and on that basis denies that in a letter filed on November 9, 2018, appellant wrote, "[The delay] not only unreasonably casts a pall of doubt, suspicion, and mistrust, it undermines Public Confidence in our entire legal system. A two and a half year delay is indefensible. This Court is

inexcusably violating it's [*sic*] duty to protect, and serve, the Public Interest."

Justice Murray admits that appellant's wife was prejudiced by the decisional delay in this case, regrets that this occurred, and apologizes for it.

13. *Sacramento Municipal Utility District v. Kwan* (No. C080474, rating: 2).

Justice Murray admits that this matter, a civil action for power theft and conversion, was fully briefed on September 22, 2016, and assigned to Justice Murray on September 30, 2016.

Justice Murray's chambers attorney, CA-3, to whom Justice Murray assigned the case to produce a draft opinion, never did so. As a consequence, the appeal was reassigned to APJ Raye on or about January 1, 2019, and decided on May 15, 2019. Justice Murray admits that the judgment granting a new trial was affirmed.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that on or about March 1, 2018, counsel for one of the parties complained to the court that she had never had a case fully briefed for quite so long with no further activity, and that her client was interested in reaching resolution.

Justice Murray admits that the litigants were prejudiced by the delay, regrets that this occurred, and apologizes for it.

14. *Kalani v. Castle Village, LLC*, No. C079905 (Rating: 2).

Justice Murray admits that this matter, a premises liability and personal injury appeal, was fully briefed on July 26, 2016, and assigned to him on July 29, 2016.

Justice Murray admits that authorship was reassigned to Justice Renner on or about November 1, 2018, because Justice Murray's chambers attorney, CA-3, to whom Justice Murray assigned the case to produce a

draft opinion, never did so. Justice Murray admits the appeal was decided on February 28, 2019.

Justice Murray admits that on January 10, 2017, five months after his assignment, the original appellant, Robert Kalani, died. Justice Murray admits that on June 2, 2017, the court granted a motion substituting his wife, Rosemary Kalani, as appellant.

Justice Murray admits that the case was reassigned 27 months after his original assignment and decided in less than four months. Justice Murray admits that the panel reversed the trial court's order granting summary judgment.

Justice Murray admits that the litigants were prejudiced by this delay, regrets that this occurred, and apologizes for it.

15. *People v. Sutker*, No. C076356 (Rating: RDA - Chambers).

After a traffic stop, four pounds of marijuana was found in the car appellant was driving. Although originally charged with both possession for sale and transportation, appellant ultimately accepted a plea agreement and pleaded guilty to transportation of marijuana. (Health & Saf. Code, § 11360, subd. (a)).

Justice Murray admits that this matter was fully briefed on May 11, 2016 and assigned to him on May 31, 2016.

Justice Murray admits that appellant had been placed on probation for a term of 36 months for a felony conviction of transporting marijuana. Justice Murray lacks sufficient information to admit or deny, and on that basis denies that appellant completed probation on March 27, 2017. However, Justice Murray admits that appellant's probation was likely completed around that time assuming he had no probation violations.

Justice Murray admits that appellant's attorney filed a request for calendar preference and to expedite the appeal on August 1, 2018. Justice Murray admits that the request claimed appellant was unable to seek

Proposition 64 relief to reduce the conviction offense to a misdemeanor while the appeal was pending. However, as discussed in more detail below, this was wrong.

Justice Murray denies that his decisional delay resulted in appellant abandoning his appeal on November 7, 2018, so that appellant could seek relief in the trial court by petitioning for redesignation of his felony conviction to a misdemeanor pursuant to Proposition 64. Justice Murray admits that appellant abandoned his appeal on that date and pursuant to his request, the appeal was dismissed on December 13, 2018. But, as discussed below, he need not have abandoned his appeal to seek Proposition 64 relief.

The central issue in this appeal was an equal protection claim. Appellant contended that because the Legislature had enacted a sentencing reform requiring proof that the transportation of other drugs be "for purposes of sale," his equal protection right was violated because a similar reform requiring proof of purpose for sale had not at that time been enacted for transportation of marijuana. In other words, according to appellant, transportation of marijuana should have been treated just like transportation of other drugs, and the Legislature's failure to require a purpose of sale element for transportation of marijuana violated equal protection. This issue was anything but simple and straightforward at the time.[44]

In any event, decisional delay did not prevent appellant from seeking Proposition 64 relief to reduce the drug offense to a misdemeanor pursuant to Proposition 64. He had multiple vehicles and opportunities to seek relief from a felony conviction.

First, the transportation of marijuana statute was amended by Assembly Bill No. 730 in November 2015, effective January 1, 2016, to

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[44] Appellant also raised search and seizure claims.

add the "purpose of sale" language to make the offense a felony. Despite the fact that briefing had not been completed when the new law was enacted and became operative, no argument was ever made in appellant's appeal (either in the original briefing or in supplemental briefing) asserting the retroactive application of the new law based on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

Second, as for Proposition 64, it became effective January 1, 2017, seven months after briefing in this case was completed. Yet, its retroactive application was not argued in the appeal either. Some appellate counsel in other cases pending appeal filed supplemental briefing on these sentencing reform measures relying on the retroactivity rule in *Estrada*, but appellate counsel in this case never even asked for supplemental briefing.

Third, and perhaps most expeditiously, appellant could have asked the Third District to order a limited remand to seek Proposition 64 relief in the trial court pending the appeal. Relying on *People v. Awad* (2015) 238 Cal.App.4th 215 (*Awad*), some appellate counsel requested limited remands to the trial court for the sole and express purpose of determining whether to grant Proposition 64 relief and similar relief under other sentencing reforms. As explained in *Awad*, a case decided before briefing in this case was completed, appellate courts have discretion to order such limited remands. All an appellant needs to do is to ask. In such a case, the Court of Appeal retains jurisdiction over all remaining issues – so there is no need to abandon the appeal.[45]

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45 In his motion for calendar preference, appellate counsel stated the law was unclear whether appellant could seek relief in the trial court while the appeal was pending. This was wrong. *Awad, supra,* 238 Cal.App.4th 215, provided a vehicle to obtain the sought after relief. Appellate counsel mistakenly cited *People v. Scarbrough* (2015) 240 Cal.App.4th 916, where the defendant filed a motion in the trial court for Proposition 47 relief while his appeal was pending. But Scarbrough *did not ask the Court of Appeal*

As for appellant's probationary sentence, more than a third of his three-year informal probation term was eaten up by his appellate counsel's numerous delays in briefing.[46] Justice Murray was assigned this case as part of the June 2016 draw. CA-4 provided a revised draft opinion to Justice Murray on May 26, 2017. By then, appellant had served his entire probationary term. This case had low priority for Justice Murray at that point, especially since he believed appellant would seek Proposition 64 relief using one of the three methods discussed above. *Awad* was particularly suited for this circumstance.

On August 1, 2018, counsel filed a request to expedite the appeal because he wanted to seek Proposition 64 relief in the trial court. Despite the fact that appellant could have employed alternative means to achieve that goal, Justice Murray pushed his appeal ahead of other cases he had been working on.

Justice Murray made revisions and provided a revised draft to CA-4 for his review on August 20, 2018. Justice Murray's revisions are documented by Microsoft Track Changes. CA-4 returned the draft to Justice Murray with additional edits and comments the following day and asked whether they should ask for supplemental briefing on Proposition 64.[47] Justice Murray replied that he did not think the panel should request supplemental briefing because he believed that it would be waste of time when the opinion had already been drafted and supplemental briefing

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for permission or obtain an order for limited remand. On appeal, Scarbrough simply argued that Proposition 47 gave the trial court limited concurrent jurisdiction. The Court of Appeal held that the trial court did not have concurrent jurisdiction to address the motion.

46 A notice of appeal was filed on April 30, 2014.

47 In doing so, CA-4 wrote among other things: "Obviously, we are not in the practice of addressing claims not raised by the parties."

would delay the Proposition 64 relief appellant could obtain in the trial court.

Expediting the appeal as counsel for appellant had requested, Justice Murray circulated the revised draft on August 23, 2018. It came back from circulation on August 27, 2018. On August 27, 2018, the clerk sent an oral argument waiver letter out, with a response due on September 6, 2018. Thereafter, oral argument was waived by appellate counsel's failure to request oral argument. The opinion went into Justice Murray's judicial assistant's cite checking queue, and she returned it to him on November 26, 2018. In the opinion, the panel rejected appellants claims and affirmed the conviction. Based on his early consideration of the law and the facts, Justice Murray always viewed this case as an affirmance.

On November 27, 2018, the day after Justice Murray's judicial assistant finished cite checking, Justice Murray received a motion from appellate counsel seeking to abandon the appeal. The reason for the request was not stated. Because an oral argument waiver letter had been sent on August 27, 2018, appellate counsel knew three months before the abandonment that the appeal had been expedited and an opinion was soon forthcoming. Instead, he abandoned appellant's appeal. Justice Murray and his staff had wasted time and resources expediting appellant's appeal as appellate counsel had requested, instead of using that time to work on other matters.

In any event, decisional delay did not stop appellant from seeking Proposition 64 relief. He could have done it long before the November 27, 2018, motion to abandon the appeal. Justice Murray reasonably had expected he would have done so. Appellant did not have to abandon his

appeal to seek Proposition 64 relief. Thus, any purported decisional delay did not prejudice appellant.[48]

16. *People v. Shepardson,* No. C081157 (Rating: RDA – Chambers)

Justice Murray admits that this matter was fully briefed on September 13, 2016, and assigned to him on September 30, 2016. Authorship was reassigned to Justice Robie and his chambers on January 1, 2019, because CA-3, Justice Murray's chambers attorney, had not provided Justice Murray with a draft opinion. Justice Murray admits the appeal was decided on March 25, 2019.

Justice Murray admits while this appeal was pending, Senate Bill No. 180 (S.B. No. 180) was enacted, effective January 1, 2018. S.B. No. 180 eliminated the prior drug trafficking conviction enhancements that applied to appellant's 12-year prison sentence, imposed on January 20, 2016. Justice Murray admits that the parties provided supplemental briefing on the S.B. No. 180 issue on February 16, 2018. Justice Murray admits that after reassignment, the opinion (issued in less than three months) struck nine years in enhancements from appellant's sentence based on the change in law.

Justice Murray admits that only the base three-year prison term on the underlying offense remained. Justice Murray also admits that the judgment was conditionally reversed and the matter remanded for ruling on a new *Pitchess* hearing.

Justice Murray lacks sufficient knowledge or information to admit or deny, and on that basis denies that the trial court conducted a *Pitchess* hearing, but found no new discoverable information.

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48 Conspicuously absent from the Formal Notice is any allegation that the trial court granted appellant's petition for Proposition 64 relief.

Justice Murray lacks sufficient knowledge or information to admit or deny, and on that basis denies that the trial court resentenced appellant pursuant to the order of the Court of Appeal on September 6, 2019. Justice Murray denies that appellant lost the full benefit of a judgment striking nine years from his 12-year sentence because of alleged decisional delay.

This appeal initially involved two issues: a search and seizure claim and a claim that appellant was entitled to a *Pitchess* hearing for discovery of police officer personnel files reflecting misconduct that may have been pertinent to the search and seizure motion. A third issue was presented after the enactment of S.B. No. 180, which amended the prior drug trafficking enhancement statute. Appellant asked for supplemental briefing on the retroactive application of that criminal justice reform.

The only time period relevant to the alleged prejudice from decisional delay is the time period between February 16, 2018, when the supplemental briefing on S.B. No. 180 had been filed, and March 25, 2019, when the decision was filed. If the panel had decided the appeal within a year and before S.B. No. 180 was enacted on October 11, 2017, appellant would not have been entitled to the benefit of the amendment to the prior drug trafficking conviction enhancement, and he would have had to serve the nine years for his enhancements. (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 [the *Estrada* retroactivity rule does not apply to judgments that are final].) In other words, any purported decisional delay did not prejudice appellant. Instead, any purported decisional delay actually benefited him by eliminating nine years from his sentence.

The decision could not be immediately filed after the completion of supplemental briefing. The Attorney General did not concede application of S.B. No. 180 – he argued that appellant was not entitled to the benefit of that enactment because his sentence was the product of a plea agreement, a legal issue that was the subject of appellate litigation statewide at the time.

Thus, in determining the relevant period for any purported prejudicial delay, the following must be factored into the analysis: some reasonable period for researching and drafting the discussion portion of the opinion on this then emerging issue after the date supplemental briefing was completed, plus the time it would have taken to circulate to the other two justices on the panel, plus the time it would take to process the appeal post-circulation, including scheduling and conducting oral argument or obtaining a waiver thereof, post-circulation cite checking and filing. And likely one or both of the parties would have requested oral argument when the issue was still percolating, which would have been scheduled at the convenience of the parties consistent with the court's calendar. This time period would have been significantly longer than the three months taken by the reassigned author and panel a year later, after the case law had evolved and oral argument was waived.[49] When these events are factored into the analysis, the period of decisional delay between the completion of supplemental briefing on February 16, 2018, and March 25, 2019, was not unreasonable. Moreover, a disposition within a year of completion of the

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49 The panel (which did not include Justice Murray) ultimately disagreed with the Attorney General and held that the *Estrada* retroactivity rule applies even when the sentence was a product of the plea agreement. But application of *Estrada* for such sentences was not a slam dunk issue that could be easily decided at the point in time when supplemental briefing was filed. A split of authority developed on the issue of the application of the *Estrada* retroactivity rule when a sentence was the product of a plea bargain. (See the cases discussed in *People v. Scarano* (2022) 74 Cal.App.5th 993, disapproved *People v. Prudholme* (2023) 14 Cal.5th 961.) Ultimately, the Legislature addressed the issue by enacting legislation making the drug trafficking enhancements imposed prior to January 1, 2018, with one narrow exception, legally invalid. (Pen. Code § 1172.7, subd. (a).)

original briefing would have meant appellant was not entitled to any relief under S.B. No. 180.

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Justice Murray denies that he neglected his duty by participating in non-core judicial activities, including work on judicial branch and other committees, and in judicial and legal education programs, court outreach activities, and community work between 2011 and 2021. Justice Murray denies that he did not curtail his participation in judicial and legal education programs, court outreach and community work as circumstances evolved. Justice Murray reduced the time he spent on all of these activities in order to prioritize addressing his backlog.

Justice Murray denies that he did not minimize the impact of delay by effectively prioritizing the delayed matters and taking into account the effect of delay on the parties in some cases.

Except to the extent admitted above, Justice Murray denies that his conduct prejudiced litigants. Justice Murray denies that he neglected his duty. Justice Murray admits that there was decisional delay, but denies that it was unreasonable or excessive, except to the extent as admitted to above. However, in light of the quality and thorough nature of the opinions he authored, Justice Murray denies that his conduct created the appearance that appropriate appellate review was impeded or denied, except to the extent as admitted to above. Justice Murray denies that his conduct violated the Code of Judicial Ethics, canons 1, 2A, 3B(8), 3C(1), and 3C(2).

COUNT TWO

Justice Murray denies that he failed to accord calendar preference to six juvenile cases. Justice Murray admits that he failed to accord calendar preference to *People v. J.T.* (No. C069844), *People v. J.R.* (No. C071466), *People v. B.H.* (No. C078073), *In re: A.R., et al., a Minor* (No. C084564),

and *In re Kenneth D., et al., Minors* (No. C069972). Justice Murray denies that he failed to accord calendar preference to *In re V.E.* (No. C064723).

***In re: V.E.* also referred to as *Butte County Department of Employment and Social Services v. C.E. et al.*, No. C064723, rating: rdaa).**

Once the central staff attorney provided Justice Murray with a draft opinion, he gave this case priority and put a tremendous amount of work into making significant revisions to the draft opinion in this RDA, to the exclusion of working on other matters.[50]

The briefing on this case was completed on March 31, 2011. Justice Murray was assigned as author, according to ACCMS, on May 19, 2011. A central staff attorney was assigned to draft the opinion, but Justice Murray lacks sufficient information to admit or deny, and on that basis denies that the assignment to the central staff attorney was made on May 19, 2011.

The central staff attorney was one of two attorneys who worked exclusively on dependency appeals. For them, all of the appeals they handle have the same priority. In other words, all of the other cases assigned to her and the justices for whom she was writing had ***equal*** priority. Central staff attorneys are supervised by the court's managing attorney, not individual justices. The managing attorney rated this extraordinarily complex juvenile dependency matter as an RDA.

Justice Murray had heard a story about this particular central staff attorney's work that influenced his approach when drafts were delayed in central staff. Around the time Justice Murray joined the court, one of the justices told him this attorney had taken more than a year to produce a draft opinion that justice was assigned as author-justice. The justice told Justice Murray that he waited the whole year before sending a reminder to the

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50 The opinion Justice Murray authored can be found on the California Courts website at < C064723.doc >.

attorney about the case. Based on this, and Justice Murray's understanding that the central staff attorneys are supervised by the managing attorney who monitored the timeliness of their drafts, Justice Murray believed monitoring these cases before they were sent to the assigned author-justice was not his responsibility.

The central staff attorney did not provide Justice Murray with a draft until January 25, 2012 – approximately 10 months after Justice Murray was assigned authorship. Upon reviewing the draft, Justice Murray understood the reason for the delay– this case was not the typical dependency case. It involved issues that required more time to research and write, and it was significantly underrated as an RDA. Justice Murray also knew that the central staff attorney had other cases on her caseload that had equal priority, also rated as RDAs. If she worked exclusively on this case for a period of time, other opinions on other dependency cases assigned to other author-justices would have been delayed. Consequently, Justice Murray did not complain about how long it took her to provide a draft.

The central issue in this case was the trial court's denial of the mother's motion to relieve court appointed counsel. She also made an ineffective assistance of counsel claim. The motion to relieve counsel was based on case law related to the seminal criminal case involving relieving court appointed counsel in criminal cases, *People v. Marsden* (1970) 2 Cal.3d 118. Such motions are referred to as *Marsden* motions.

It was apparent from the draft that the central staff attorney, who was quite versed in dependency law, had little experience with *Marsden* motions. Up until that time, *Marsden* motions in dependency cases were rare. In criminal cases, such motions are frequently made by disgruntled defendants, and Justice Murray presided over a countless number of them during the fifteen years he served as a superior court judge. He was well

aware of the rules concerning such motions, what evidence was important for the opinion, and how to analyze that evidence.

After reading the briefing and draft, Justice Murray read the pertinent parts of the voluminous record and took notes related to evidence not in the original draft, including specific aspects of the multiple in camera *Marsden* hearings conducted by the dependency court. Justice Murray also researched and reviewed the applicable case law. Justice Murray recalls beginning this work in February 2012.

As reflected by Microsoft Track changes, the revisions Justice Murray made concerning the evidence, proceedings and analysis were extensive. Justice Murray consulted with the central staff attorney during the revision process and incorporated her suggested edits.

On April 30, 2012, Justice Murray sent the central staff attorney his revised draft. She responded with her revisions on May 1, 2012. Later that day, Justice Murray made additional changes and gave the opinion to his judicial assistant to proofread before circulation.[51] On May 16, 2012, his judicial assistant returned the draft to him with suggested edits, and Justice Murray put the draft into circulation.

An oral argument waiver letter was mailed on June 15, 2011, after the draft came back from circulation. Appellant requested oral argument, which was scheduled at the convenience of the parties and consistent with the court's calendar on July 17, 2012.

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51 When Justice Murray was first assigned to the Third District, his first judicial assistant suggested that all opinions should at least be proofread by her before putting them in circulation. This element of his chambers' processes was not something done in other chambers and added time to the process that proved unnecessary. Sometime after she retired for medical reasons, Justice Murray discontinued this part of his chambers process.

On July 20, 2012, Justice Murray made revisions and submitted the opinion to his judicial assistant for cite checking.[52] She returned the draft to him on July 30, 2012, and Justice Murray turned it around with additional edits the same day. On July 31, 2012, after doing additional cite checking, Justice Murray's judicial assistant sent the draft back to him with a concern about one of the citations, and he responded the following day. That same day the final opinion was put into circulation for signatures and thereafter filed on August 8, 2012.

As the above chronology demonstrates, Justice Murray gave this appeal a high priority and did significant work beginning shortly after he was provided with a draft. Justice Murray's prioritization and commitment to this case is reflected in the Microsoft Track Changes in the drafts and emails between him, the central staff attorney, and his staff after the central staff attorney provided him with a draft opinion.

While Justice Murray dedicated time to this case, time was not devoted to other cases. This case is illustrative of the Hobson's choice Justice Murray felt he faced when trying to get opinions right by doing additional legal and record research and making significant and substantive revisions: If significant time and energy is devoted to getting one opinion right, that time and energy is not devoted to multiple other cases and as a result the backlog snowball increases.

Further, Justice Murray bears no responsibility for not ensuring he got a draft from the central staff attorney sooner – she was under pressure to expeditiously get done all of the dependency cases she had assigned to her monthly. Most, if not all of those cases were rated as RDAs, but likely

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[52] The following day, Justice Murray's judicial assistant sent him an email concerning her ongoing health issue and stating she would make up work by coming in on the weekend.

none of them were as complex and time consuming as this one. Justice Murray was not her supervisor and felt he had no ability to request that she finish his work first when all of her cases for other justices had the same priority.

Justice Murray denies that he failed to accord calendar preference to *In re C.E.* He denies that his conduct above violated Welfare and Institutions Code sections 395, subdivision (a)(1), and 800, subdivision (a) Justice Murray denies that his conduct created the appearance that appropriate appellate review was impeded or denied. To the contrary, the review Justice Murray gave to the case and the quality of the opinion and his analysis is reflected in the request by C.E.'s counsel to publish the opinion.[53]

Justice Murray admits that he did not accord calendar preference to the below five juvenile cases.

1. *People v. J.T.,* No. C069844 (Rating: rdaa)

Justice Murray admits that this juvenile delinquency appeal was fully briefed on November 14, 2012, assigned to him on December 14, 2012, and decided on September 15, 2021, more than eight and one-half years after being assigned to him. The delay was attributable to Justice Murray's mistake.

This case involved a restitution order for the cost of graffiti abatement. Justice Murray received the draft from the central staff attorney on September 4, 2013. That draft did not make sense. The central staff attorney wrote the opinion up as an affirmance and justified the restitution

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[53] Justice Murray declined to recommend publication given the fact-specific nature of the case, but in retrospect thinks publication may have been useful to dependency judges and dependency law attorneys involved in deciding and litigating *Marsden* motions.

order based on the notion that the City of Sacramento had a qualifying Graffiti Removal Program in place. As far as Justice Murray could tell from the briefing, the parties never mentioned that. That issue and other aspects of the draft warranted Justice Murray's review of the record of proceedings in the juvenile court.

Justice Murray believes he set this case aside, thinking he needed a block off time to review the record. Also, there was appellate litigation pending on the issue of restitution for graffiti abatement. The Court of Appeal had published *In re Luis M.* (2012) 210 Cal.App.4th 982 (*Luis M.*), while the central staff attorney still had the matter in his office, six months before he submitted the draft to Justice Murray. By the time the draft had been submitted to Justice Murray, review had been granted, and the case was pending before the California Supreme Court.

Early in his time on the Third District, Justice Murray began keeping his working files on a thumb drive. Sometime, around 2014, after returning home from working in chambers on a Saturday, he left the thumb drive in the pair of pants he had been wearing when those pants went through the washing machine. He did not have the thumb drive completely backed up. Thereafter, he loaded another thumb drive with what he had on his work and home computers, but somehow this case did not get back into his working files.

In the Fall of 2018, Justice Raye sent Justice Murray and other chambers lists of backlogged cases and asked for monthly status reports on those cases. Justice Murray worked on those cases. This appeal was not on that list.[54]

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[54] Justice Murray is not blaming APJ Raye in any way for his failure to not have addressed this case sooner. Justice Murray mentions this only as a

After Justice Murray noticed his oversight, he noted the California Supreme Court's opinion in *Luis M.* had been published in 2014 and that there were subsequent published cases discussing *Luis M.* (See In re JT-1) At no time did the court receive a request for supplemental briefing concerning either the Court of Appeal or the Supreme Court's decisions in *Luis M*. or any of the cases that followed.

Justice Murray reviewed the record to look for evidence that Sacramento had a Graffiti Removal Program in place as well as evidence that was pertinent based on the subsequent case law. After reviewing the record twice, he determined there was no evidence that Sacramento had such a program at the time. Thereafter, he made major revisions to the draft and wrote up the opinion to reduce the restitution award. The revisions Justice Murray made are documented by Microsoft Track Changes.

Based on this research and the evolution of the law, Justice Murray determined that the restitution award should be reduced to $600 from the $5,595 it would have been had he and the other panelists simply signed off on the affirmance in the draft that was presented to Justice Murray from the central staff attorney.[55]

Justice Murray deeply regrets the delay he caused in this appeal and apologizes for it.

2. *People v. J.R.*, No. C071466 (Rating: RDA)

Appellant was placed on juvenile probation for a robbery. Thereafter, the juvenile court found that he violated his probation. The

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further explanation for his oversight, as his focus at that time was on the list of cases APJ Raye asked him to address during that time period.

55 The opinion Justice Murray authored can be found on the California Court's website at < C069844.PDF >.

juvenile court revoked appellant's probation, reinstated his probation and ordered him to a Level B placement. Appellant appealed the order finding that he had violated his probation.

The notice of appeal was filed on June 12, 2012. Justice Murray admits that the matter was fully briefed on May 10, 2013.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies, that the appeal was assigned to him on April 30, 2013. Author-justice assignments were typically made only after briefing was completed. In the rare circumstance that earlier assignments were made, assigned research attorneys typically would not begin work on the case until briefing was completed. Justice Murray believes he was notified of the assignment in the June 2013 draw. CA-1 was assigned to draft an opinion on the appeal.

Justice Murray admits that CA-1 provided him with a draft opinion on October 31, 2013. Justice Murray reviewed the draft submitted by CA-1 and was comfortable with the affirmance, but determined revisions to the facts and legal analysis should be made. But he did not give the appeal priority because it was going to be an affirmance, and it appeared that appellant's probation was completed before briefing was completed or shortly thereafter. Justice Murray focused on other matters. Justice Murray worked on the draft at various times, but believes he was distracted away from completion by other matters he thought more pressing at the time. Justice Murray admits the appeal was decided this case on May 14, 2020. The revisions Justice Murray made are documented by Microsoft Track Changes.

In hindsight, Justice Murray realizes he probably could have simply signed off on CA-1's draft, it probably would have returned from circulation without comment and nobody would have cared about the deficiencies he saw in that draft.

In any event, the judgment was affirmed and appellant was not prejudiced by the delay. Nevertheless, Justice Murray regrets the delay and apologizes for it.

3. *People v. B.H.*, No. C078073 (Rating: RDA)

After appellant's motion to suppress was denied in the juvenile court, appellant admitted illegal possession of a firearm recovered from him outside a high school football game. On December 14, 2014, the juvenile court suspended the sentence of 60 days in juvenile hall and placed appellant on probation.

The notice of appeal in this juvenile matter was filed on December 19, 2014. Justice Murray admits the appeal was fully briefed on January 11, 2016. This was more than two years after the notice of appeal had been filed. Justice Murray believed appellant had completed his juvenile probation before briefing was completed and before the case was assigned to him.

Justice Murray lacks sufficient information to admit or deny, and on that basis denies that the appeal was assigned to him on October 30, 2015. Author-justice assignments were typically made only after briefing was completed. In the rare circumstance that earlier assignments were made, assigned research attorneys typically would not begin work on the case until briefing was completed. Justice Murray believes he was notified of the assignment in the February 2016 draw.

Justice Murray assigned CA-3 to prepare a draft opinion shortly after the draw. Justice Murray admits she did not produce a draft. Justice Murray denies that he did not follow up with her about the case for more than three years after she was assigned the case. Justice Murray admits that he emailed her about the work she had done on the case in December 2018, but he denies that he had not communicated with her about the opinion before that.

After CA-3 was fired from Justice Murray's chambers in early 2019, the case was reassigned to her replacement, CA-5. He began working in Justice Murray's chambers on February 8, 2019. CA-5 submitted a draft to Justice Murray on March 11, 2019. Justice Murray reviewed the draft, made revisions and returned the draft to CA-5 for his review that same day. CA-5 returned the draft to Justice Murray with edits on March 12, 2019. Justice Murray made revisions and put the draft into circulation on or about March 13, 2019. The revisions Justice Murray made are documented by Microsoft Track Changes.

After the draft came back from circulation, Justice Murray reviewed the circulation comments and finalized the opinion for an oral argument waiver letter on March 18, 2019. Justice Murray's judicial assistant finished cite checking the draft on June 17, 2019. The opinion was filed June 19, 2019, affirming the judgment.

Appellant was not prejudiced by the delay. Nevertheless, Justice Murray regrets the delay and apologizes for it.

4. *In re: A.R., et al.*, *a Minor*, also referred to as *Sacramento County Department of Health and Human Services v. S.R.*, No. C083564 (Rating: rdaa).

In this case, the mother of the minors appealed the juvenile court's supervised visitation order.

Justice Murray admits that this juvenile dependency appeal was fully briefed on June 21, 2017. However, Justice Murray lacks sufficient information to admit or deny, and on that basis denies that the appeal was assigned to him on June 1, 2017. Author-justice assignments were typically made only after briefing was completed. The draft was submitted to Justice Murray's chambers by central staff on August 15, 2017, while Justice Murray was convalescing from his strokes. Justice Murray believes

he missed this in the process of triaging his case load after he came back to work in chambers.

The case was ultimately decided more than one and one-half years after the assignment, on January 15, 2019.[56] Revisions Justice Murray made are documented by Microsoft Track Changes.

Like all allegations in the Formal Notice, the allegations regarding this case do not specify the length of time during which the opinion circulated to the participating panelists, or the amount of time it took to cite check the opinion after it came back from circulation, or the time period during which the final opinion circulated for signatures by the participating panelists before it was filed – time periods that are not directly within the authoring justice's control.

The mother was not prejudiced because the panel affirmed the juvenile court's supervised visitation order, and the juvenile court had jurisdiction to amend that order at any time while the appeal was pending. Justice Murray, nevertheless, regrets the delay.

5. *In re: Kenneth D., et al., Minors,* also referred to as *Human Services v. L.B.,* No. C069972 (Rating: rdaa).

Justice Murray admits that this juvenile dependency appeal was fully briefed on July 25, 2012 and assigned to Justice Murray on July 26, 2012. Justice Murray admits that on July 31, 2013, the order decreasing visitation was affirmed, but the Indian Child Welfare Act finding reversed was reversed.[57] Revisions Justice Murray made are documented by Microsoft Track Changes.

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[56] The opinion Justice Murray authored can be found on the California Courts website at < C083564.PDF>.

[57] The opinion Justice Murray authored can be found on the California Courts website at < C069972.doc >.

Justice Murray circulated a draft in this case on or about March 6, 2013. The draft came back from circulation on or about March 27, 2013. Justice Murray's judicial assistant cite checked the draft and returned it to Justice Murray on July 24, 2013. During this time period, Justice Murray's judicial assistant was experiencing health challenges which later resulted in her retirement.

Justice Murray denies that his failure to accord calendar preference to the juvenile cases described above was mandated by Welfare and Institutions Code sections 395, subdivision (a)(1), and 800, subdivision (a), or created the appearance that appropriate appellate review was impeded or denied. As the Appellate Caseflow Workgroup noted when discussing statutory priorities: "In California, many types of appeals are required by statute to be given priority…In addition, dozens of other statutes and rules indirectly suggest that other types of appeals should be prioritized. Prioritizing some appeals means that the appeals not prioritized necessarily take longer to resolve. [¶] How best to prioritize cases requires a consideration of multiple factors in addition to the statutory directives, which can compete or be unclear. No guidelines explain how justices should apply these factors and directives, *but they are best assessed by the assigned justice in the exercise of the justice's discretion and in consideration of the justice's entire docket*. [¶]…[¶] Prioritizing appeals in a way to best advance the interests of the parties and the public is complicated and requires justices to consider statutory directives, the individual circumstances of particular appeals, and the other cases on their dockets."**58** The Workgroup further observed: "As our Supreme Court

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58 Appellate Caseflow Workgroup Report to the Chief Justice (December 6, 2022, pp. 12-13.

recognized recently, while the Legislature may impose reasonable rules and regulations governing how the courts are to conduct their business, the courts retain the right to control their own dockets, including the right to determine the order in which cases are decided. [Citation] If the rule were otherwise, serious constitutional questions would arise under the separation of powers doctrine. [Citation]"[59]

Justice Murray denies that his conduct in failing to accord calendar preference to the above cases violated Code of Judicial Ethics, canons 1, 2A, 3B(8), 3C(1), and 3C(2).

COUNT THREE

Justice Murray admits that he was aware of his backlog for many years. Justice Murray denies that he repeatedly discussed the issue of delay with his colleagues on the court, but admits that he was present at bench meetings where the issue of decisional delay was discussed.

Justice Murray denies that he did not diligently discharge his administrative responsibilities to supervise his research attorneys to ensure the prompt disposition of his assigned cases. Justice Murray admits that he was dissatisfied with the work of two of his chambers attorneys, CA-1 and CA-3. He, like other justices, was also dissatisfied with some central staff attorneys. But he felt powerless and unequipped to do anything more than demonstrate diligence in getting opinions right and encourage thoroughness and timeliness. He acknowledges that he prioritized getting opinions right over getting them done quickly.

Justice Murray denies that he did not take any corrective action regarding CA-3 when she failed to provide timely draft opinions on a regular basis. When she started working in Justice Murray's chambers,

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[59] Appellate Caseflow Workgroup Report to the Chief Justice (December 6, 2022, p. 12. fn. 24.

CA-3's productivity and timeliness was fine. But, she had an injury that required what was described to Justice Murray as major surgery. Later, she became pregnant. In the months preceding each, her productivity declined, and it never returned. After she returned to work, Justice Murray provided CA-3 with space and time he believed she would need to recover from these medical issues and later that she would need to adjust to being a new parent. Justice Murray admits that he did not "pressure" CA-3 to do the required work. Justice Murray was concerned that if he did so, she would hastily submit drafts which would require more work on his part, taking away time he could devote to other assigned and circulating cases.

Justice Murray admits that despite CA-3's repeated failure to timely produce draft opinions, he did not terminate her or take any adverse employment action against her. Justice Murray admits that he has said he did not do so, in part, because he felt at fault for not managing her better. But there were other, more significant factors. Justice Murray did not terminate her or take any adverse employment action against her because of her health issues and because he was concerned about a discrimination claim. Also, in addition to the health challenges, she had a young family, she was a nice person and Justice Murray decided to try to carry her instead of firing her or taking adverse action against her.

Justice Murray admits there was an allegation made to him that CA-3 was not working at home when she was supposed to be telecommuting. But the allegation was double hearsay involving people outside of the court, and Justice Murray felt he had no resources to substantiate it; nor did he think it would be a productive use of time to attempt to do so. And if the allegation turned out to be false, it might have irreparably damaged Justice Murray's working relationship with CA-3.

All of the appeals transferred from Justice Murray's chambers had been assigned to CA-3. She had not produced drafts in those cases. Some

cases were reassigned to Justice Murray's other chambers attorney and then to CA-3's replacement when he joined Justice Murray's chambers. Justice Murray would have preferred to continue authorship of the other cases if other chambers attorneys produced the draft. But the decision was made to reassign authorship to the other justices' chambers. Justice Murray's understanding was that the reassignments were made in lieu of new cases in the usual monthly draw.

Justice Murray admits that he could not rely on the work of another research attorney, CA-1. She worked in Justice Murray's chambers from approximately February 2011 to July 31, 2014. Multiple unsolicited emails from CA-1 apologizing for substandard work coupled with the revisions Justice Murray made to her drafts documented in Microsoft Track Changes prove why he did not have a comfort level with circulating her drafts "as is."

Justice Murray denies that he did not take any action to address the alleged performance deficiencies of CA-1. He worked with CA-1, but she seemed concerned about her reputation on the court and the appearance that her drafts were not accepted for circulation "as is."

On the last case CA-1 worked on with Justice Murray, a particularly difficult CEQA case, she essentially gave up on writing the draft. She told Justice Murray the case was physically giving her a headache.[60] Justice Murray spent significant time rewriting the draft, and in doing so, it appeared to him that the case gave CA-1 a headache because she had a predetermined result in mind and could not develop a legal path to that

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60 See *California Clean Energy Committee v. County of Placer*, C072680. The opinion Justice Murray authored on this case can be found on the California Courts website at < C072680.PDF >.

result. When CA-1 left Justice Murray's chambers she told him, "I guess you can't teach an old dog new tricks."

Before Justice Murray joined the court and thereafter, people emphasized that the Third District was like a family. The way he handled his personnel challenges was, in part, because of that. He wanted to avoid doing anything that might be perceived as rocking the family boat.

Moreover, firing and hiring new attorneys was no easy matter. During the earlier years of Justice Murray's tenure on the Third District, the court and the California Judicial Branch operated under budgetary restrictions. As a result and the perceived need to achieve salary savings, Justice Murray went without a second chambers attorney for significant time periods during significant points of time.[61]

The Central Staff attorneys who were on board during these times would not have been a good fit for chambers. Also, even if there had been money available to fill these positions sooner, recruitment and hiring of new attorneys would have taken time away from Justice Murray's attention to his case load and would have required the expenditure of court resources to facilitate. And Justice Murray was unsure of the quality of persons who would make themselves available for the job, especially during the years when the Judicial Branch budgetary challenges were well known. Also, unless a new recruit had prior experience working in a similar job, there

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61 Justice Murray went without a second chambers attorney for eleven months (October 2011 to September 2012) and eight months (August 2014 to March 2015). Among other things, not having a second chambers attorney hampered Justice Murray's ability to provide suggestions to draft opinions from other chambers and provide timely memos on circulating cases and separate opinions. He was required to personally do the research because he was unable to assign the research to a chambers attorney.

likely would have been a significant adjustment period to get them up to speed on being a chambers attorney.[62]

Justice Murray denies that his conduct violated the Code of Judicial Ethics, canons 1, 2A, 3C(1), and 3C(2) as alleged in the Formal Notice.

II. AFFIRMATIVE DEFENSES

A. Time Standards and Commission Authority

There is no law or rule that sets a specific limit on the time an appellate court takes to decide a matter pre-submission and, in particular, nothing that directly addresses pre-submission delay.

The California Constitution, Article Six, Section 18(d) sets forth the authority of the Commission. Neither the California Constitution, nor any other provision in law gives the Commission the authority to set time standards for appellate decision making. Nor can the Commission base discipline on time standards not established by the California Supreme Court or the California Judicial Branch.

B. Due Process - Notice

Justice Murray had no notice of any time standards that did not exist in California law at the time of the alleged conduct. Consequently, the Commission cannot impose discipline ex post facto for violating non-existent time standards.

C. Due Process – Speedy Hearing

Justice Murray has been prejudiced by the Commission's delay in filing the Notice of Formal Proceedings. Over 20 months elapsed between

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[62] CA-3 had previously externed for one of the other Third District justices and clerked for a Federal Circuit Court judge. CA-4 had been working as a chambers attorney for an intermediate appellate court justice in another state. CA-5 had been in the Third District central staff pool for approximately two years before joining Justice Murray's chambers and distinguished himself.

the last pre-filing communication Justice Murray's counsel had with the Commission in October of 2023. In that time period, memories about detail, events and the drafting and circulation processes of specific cases that will be the subject of the hearing have, no doubt, faded. And unless the Commission asked the Third District to preserve documents, such as emails and electronic case files, they may no longer be available and Justice Murray's defense will be hampered.

There also appears to be no reason for the 20-month delay. During those months, the Commission has had time to obtain the availability schedules of their witnesses and otherwise prepare for the hearing. Justice Murray's counsel, on the other hand, could not retain experts, issue subpoenas and marshal witnesses – especially since they could not know if the funds necessary to do so would be wasted if it turned out the Commission decided not to proceed.

The Commission's unexplainable delay violated due process.

D. Conduct of Others

Justice Murray cannot be disciplined for the actions of others. The Commission must determine, by clear and convincing evidence, that Justice Murray's actions, and his actions alone, support the finding of misconduct sufficient to support discipline.

E. Legal Error

Pursuant to Rule 111.4, Justice Murray cannot be disciplined for mere legal error. If the Commission finds that Justice Murray's erroneously believed his actions were legally permitted, the Commission must, in addition, prove by clear and convincing evidence that Justice Murray's error, "clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty."

F. Work Ethic and Opinion Writing Philosophy

1. Author-Justice Cases

In 1995, at age 38, and before the consolidation of the municipal and superior courts, Justice Murray was appointed to the San Joaquin County Superior Court. He served the Court with distinction for 15 years. Two prior administrative presiding justices and other associate justices of the Third District recruited Justice Murray to submit his name for nomination to the court. When evaluated by the Judicial Nominations Evaluation Commission for appointment to the Court of Appeal, Justice Murray was rated "Exceptionally Well Qualified." He had a stellar reputation, and that rating was in large measure due to his work ethic.

Before coming to the Court of Appeal, Justice Murray worked hard and long hours, a practice that intensified after being appointed to serve as a Court of Appeal Associate Justice. Throughout his time on the Court of Appeal, he generally worked nine to ten hour days in chambers during most days of the business week, often longer. And he often worked at home after those long days. Bringing a brown bag, he worked through lunch on almost all business days. He worked on most weekends — many weekends on both Saturday and Sunday. And he even worked while on vacation, circulating opinions circulated to him from other chambers when he could. During the pandemic, Justice Murray worked even longer hours at home.

Justice Murray believes that most of his colleagues developed a high level of confidence in their attorneys and, given the press of business, generally made few substantive changes to drafts, and instead circulated opinions "as is." And justices hardly ever look at the trial court record. One justice described the job as being a "copy editor."

Similarly, Justice Murray believes that, generally, other justices spent very little time on RDAs drafted by the central staff attorneys. Justice Murray recalls a conversation with one of the other justices early in their

careers where the other justice said she spent only 10 minutes reviewing RDAs. Justice Murray did not understand that because there was no way the briefs and drafts on his RDAs could be read and digested in 10 minutes. But some justices found ways to cut corners.

Justice Murray personally performed additional work on his chambers and RDA cases. In doing the extra legal and record research and making revisions on his opinions, it was his goal to ensure that his opinions came to the right decision, for the right reasons. The following explanation of this aspect of his work ethic explains Justice Murray's approach.

While working as a prosecutor in the San Joaquin County District Attorney's Office, Justice Murray handled two cases that left an impression and shaped Justice Murray's approach to opinion writing.

In the approximately the late 1980s, while working in the San Joaquin County District Attorney's Office, Justice Murray handled a resentencing on remand on *People v. Billy Joe Champion*. The Third District had concluded there was insufficient evidence to establish that Champion killed his two parents with deliberation and premeditation and reduced the first degree murder convictions to second degree murder. Judge Frank Grande, who presided over the trial and resentenced Champion, was livid at resentencing. He complained that the justices on the panel must not have read the trial transcript because the murders were clearly committed with deliberation and premeditation. Judge Grande was right; there was more than sufficient evidence to support the first degree murder verdict. And he was right about reading trial transcripts; justices do not ordinarily spend time reading transcripts or other parts of the trial court record. Because of the press of business, they are forced to rely on their attorneys to do that. But to do that, a justice must have a level of comfort that the attorney will get it right in the draft presented to the justice. Whomever drafted the *Champion* opinion clearly got it wrong.

Later, while still a prosecutor in the San Joaquin County District Attorney's Office, Justice Murray prosecuted the case of *People v. William Harris* – a robbery, burglary, kidnapping, and murder case. The Third District reversed the convictions. The shallow reasoning and disposition made no sense. There was instructional error, but the error was clearly harmless. Justice Murray asked the supervisor of the Attorney General's criminal division for an explanation. He investigated and told Justice Murray his personnel did not do a very good job on the briefing.

Ultimately, review was granted by the California Supreme Court, and the court reversed the Third District's decision, in *People v. Harris* (1994) 9 Cal.4th 407. The court concluded that the instructional error was harmless. From that experience, Justice Murray learned that appellate decisions can turn on how well the parties brief the case, and that justices might need to look beyond how the appellate advocates present the case to them. During his time at the Third District, Justice Murray took the time to do that when the instincts he developed from 15 years as a trial judge and 13 years as a prosecutor told him he should.

A third case is relevant to Justice Murray's mental state regarding his conduct. While a superior court judge, Justice Murray denied a suppression motion in *People v. Gomez*. Shortly after his ruling, the Third District published *People v. Spence* (2003) 132 Cal.Rptr.3d 621. Thereafter, the defense moved for reconsideration based on *Spence*. Justice Murray disagreed with the Third District opinion in *Spence*, which suggested the officer's subjective intent was relevant. Justice Murray knew this was inconsistent with the United States Supreme Court's decision in *Whren v. United States* (1996) 517 U.S. 806, but was compelled by *Spence* to reverse his denial and grant the suppression motion. The People appealed. *Spence* was subsequently depublished. Thereafter, in *People v. Gomez* (2005) 130 Cal.App.4th 1008, the Third District acknowledged that

Justice Murray had originally been right, *Spence* was wrongly decided, and reversed Justice Murray's ruling which had been based on *Spence*. In doing so, the Third District essentially adopted Justice Murray's reasoning from his original ruling. To Justice Murray, the issue had been well-settled long before *Spence*, but somebody at the Third District had apparently missed *Whren's* well-settled principal. *Whren* was not even mentioned in *Spence*. This episode motivated Justice Murray to never to make a similar mistake.

In addition to the above cases, Justice Murray approach to decision writing resulted from complaints he sometimes heard from trial court judges about the Third District opinions, both while on the superior court bench and after joining the Third District. There were only a few such complaints, but they resonated with Justice Murray. The complaints were never about speed; they were about the quality of the opinions, a misunderstanding about the facts or the law, or that it was obvious the author never worked on a trial court bench.

Justice Murray wanted to make sure none of his opinions received the same complaints from the trial court bench or the parties or contained similar mistakes to those in the three cases referenced above. It was his goal to come to the right decision, for the right reasons, even if it meant he had to do extra work. In his mind, Justice Murray made changes to drafts when he thought it was factually or legally necessary and/or to make for a stronger opinion. That approach proved to be time consuming, and the time devoted to that effort on any one case was time not devoted to other cases.

Justice Murray found it necessary to block-off periods of time to focus almost exclusively on many of the complex cases, cases presenting novel issues, and those that were publication worthy. He thought he needed do this to achieve a full understanding of the law, facts and issues in the case and to produce a quality opinion. It proved difficult to block out

periods of time because of the press of business related to the flow of cases day to day. The delay in many of Justice Murray's cases was attributable to his putting off working on them too long in hopes of finding the time to focus primarily on them. And when Justice Murray did focus on a case for a period of time, he got backlogged on other matters.

Justice Murray's extensive work on his opinions is documented by Microsoft Track Changes in the drafts of the opinions he authored.[63] This documentation shows diligence, not dereliction or neglect.

Excessive diligence or attention to detail is not a matter for discipline, even if the judicial officer's approach has been unrealistic or unjustified.[64]

2. Participating Cases

Throughout his time on the Third District bench, Justice Murray made contributions to opinions circulated from other chambers – particularly in the area of criminal law – sometimes making extensive margin notes and requiring his own legal and record research to support the comments. He sometimes did more extensive work on circulating cases from other justices, researching and writing many formal memos and numerous emails to his colleagues.

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[63] Microsoft Track Changes documents the date, time and person who makes changes to a draft.

[64] See *McCartney v. Commission* (1974) 12 Cal. 3d 512, 536-537 [judge's conduct and resulting inefficiency "stem[med] from an effort to attain a degree of diligence and studiousness in the application of the law which was unrealistic and frequently unjustified"; judge displayed "undue caution and excessive attention to detail in all matters before him, even those of minor importance"; this conduct was not a matter for discipline]; See also Rothman, David, California Judicial Conduct Handbook, 3rd Ed. 2007, §6.20, pp. 271-272.)

Because of memos he wrote, authorship was reassigned to Justice Murray by the Acting Presiding Judge of the panel on six cases, five of which resulted in published opinions. One criminal case transferred to him that was originally rated a "5," proved to be an albatross that diverted Justice Murray's attention from other matters as his draft did not move out of the chambers of the acting presiding judge on the panel during its circulation, and Justice Murray had to react to numerous changes in the law in the interim.[65] The changes in the law converted this case from a "5" to something that was off the charts and distracted Justice Murray and CA-4 from other matters each time supplemental briefing was required. The drafting history of this case is documented in numerous emails and Microsoft Track changes on the drafts.[66]

During a push by Justice Murray to clear his backlog, another justice asked him to rewrite a section of that justice's opinion involving heat of passion and voluntary manslaughter – an area of the law the other justice was not familiar with, but with which Justice Murray had extensive experience.[67] Despite the timing of the request and the need to address his backlog, Justice Murray personally spent the better part of a month researching the record and rewriting that section of the opinion and pertinent background facts for his colleague.

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[65] *People v. Garcia and Ballesteros* Nos. C066714, C066716.

[66] In one of the emails the acting presiding justice, in whose chambers circulation of the opinion had been stalled, wrote: "At long last, I forward this case to [the third justice on the panel]. My sincerest apologies for the delay in getting this matter moved out of my chambers."

[67] *People v. Holmes*, No. C086438. The opinion on this matter can be found on the California Courts website at < C086438M.PDF >.

Not having a second chambers attorney for significant periods resulted in Justice Murray becoming accustomed to performing these participating panelist duties on his own. Whereas other chambers sometimes assigned these duties to one of their chambers attorneys, Justice Murray wrote these memos and separate opinions on his own.

3. Supreme Court Pro Tem Assignments

Justice Murray agreed to sit *pro tem* on the California Supreme Court each time he was asked, with the exception of the last occasion sometime in 2020 or 2021, when he was focused on reducing his backlog. Justice Murray felt obligated to assist the Supreme Court when asked to do so. These assignments took time away from his assigned cases.[68] And one of the cases involved an esoteric issue related to Multistate Tax Compact and was a significant distraction that took a substantial amount of personal work for Justice Murray to try to get up to speed.

F. Contributions to the Judicial Branch

Justice Murray made significant contributions to the administration of justice in California over the course of his 26-year career on the California bench. During this time, Justice Murray engaged in numerous activities to enhance public confidence in the justice system and the administration of justice beyond his black-robe duties on the bench out of a sense of obligation and duty. He continued this practice after his appointment to the Court of Appeal.[69] Most of that time was during lunch hours, after business hours and during the weekends.

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[68] *In re C.B.* (2018) 6 Cal.5th 118; *People v. Chatman* (2018) 4 Cal.5th 277; *The Gillette Company v. Franchise Tax Board* (2015) 62 Cal.4th 468.

[69] Justice Murray's biography can be found on the California Courts website at William J. Murray, Jr. | Third Appellate District | District Courts

1. Judicial Branch Committee Work

While on the Court of Appeal, Justice Murray was appointed by the Chief Justice to serve on multiple committees, including: the Judicial Council Criminal Law Advisory Committee (1/2018 – 9/2021), the Judicial Council Providing Access and Fairness Advisory Committee (10/2013 – 9/2021), the Judicial Branch Ethics, Access and Fairness Curriculum Committee (1/2016 - 12/2021), the State Bar Legal Services Trust Fund Commission (1/2013 - 12/2021),[70] the Supreme Court Jury Selection Work Group (8/2020 –7/2022). He also serves on the California Judges Association Elimination of Bias and Inequality Task Force (2020 – Present).

2. Judicial Branch and Attorney Education

In 2019, the California Judges Association awarded Justice Murray the Bernard S. Jefferson Award for Distinguished Service in Education for his contributions to judicial education. This award was in recognition for Justice Murray's judicial branch education work since 2002.

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of Appeal. A detailed list of his judicial education contributions is attached to this answer as Exhibit 1.

[70] The Legal Services Trust Fund Commission makes recommendations to the State Bar and Judicial Council concerning funding of legal services providers. Among other things, Justice Murray directly participated in the evaluation of grant proposals for Partnership Grants involving collaboration between legal service providers and superior courts. Justice Murray reluctantly allowed for his appointment as an advisory member to this body because the previous Court of Appeal advisory member asked him to do so. Thereafter, Justice Murray came to understand that the Justice who asked him to participate was correct; his background as a prior Judicial Council member and prior trial court presiding judge was needed on the commission.

While a member of the Third District, Justice Murray was asked to and provided 23 education programs for the Judicial Council's Education Division (CJER), the California Judges Association (CJA), bar associations and a law school during his time on the Court of Appeal. See Exhibit 1 to this answer.

Justice Murray has also written education materials for judges[71] and served as a consultant for the CJER Jury Management Bench Handbook, 2011 and 2014 editions.[72] He continues to update materials on A.B. No. 3070 that are posted on the CJER Education website for judges. He has contributed materials to the CJA website as well.

Justice Murray was the team leader and discussion moderator for two San Joaquin County American Inns of Court programs which were awarded national awards for Outstanding Program (honorable mention award) 2012-2013 and 2011-2012. He participated in this organization after business hours and did so out of a sense of obligation to support the San Joaquin County legal community.

Justice Murray also helped plan and served as a panelist in CJER Continuing the Dialogue video web programs in 2013, 2014, 2018, and 2021, the last of which addressed wrongful convictions. He also served as a panelist on programs for the State Bar Litigation Section, Committee on Appellate Courts in 2011 and 2012 and the State Bar/Judicial Council Diversity Summits in 2011 and 2016.

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71 A.B. 3070/CCP §231.7 Procedure Compendium; A.B. 3070/CCP §231.7 Checklist; and *Wheeler*/*Batson* at a Glance.

72 While a judge on the Superior Court, Justice Murray authored materials on jury law cited by the California Supreme Court as one of several resources for California judicial officers. (See *People v. Heard* (2003) 31 Cal.4th 946, 967, fn. 9.)

Justice Murray also voluntarily provided externship opportunities for eight law students during his time on the Third District bench, spending extra time to work with those future attorneys and revise their drafts along with his chambers attorneys.

3. Post-Retirement

Since he retired, Justice Murray has presented 11 webinars and one live program for CJER, CJA and lawyers groups. With the exception of two programs he did for the San Joaquin County Bar Association, program organizers reached out to him to ask that he be the presenter on these programs. Because he was asked to instruct on areas of the law in which he has unique expertise, Justice Murray felt obligated to honor their requests.

Additionally, Justice Murray has continued to serve on the CJA Eliminating Bias and Inequality Committee since his retirement.

G. Third District Outreach Programming

In 2012 APJ Raye set up court committees and explained that each justice would be required to participate. He appointed Justice Murray to chair the Outreach Committee. Justice Murray did not ask for this appointment. Justice Murray served as Outreach Committee chair between 2012 and 2016. During this time, Justice Murray worked on two major projects for the court.[73]

1. California State Fair Program

In 2006, the Third District put on a program at the California State Fair. Justices invited Justice Murray to participate while he was on the San

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[73] Judicial outreach to the community is considered "an official judicial function to promote public understanding of and confidence in the administration of justice." (California Standards of Judicial Administration, Standard 10.5.)

Joaquin County Superior Court. Justice Murray was the only superior court judge to join the justices.

In 2012, Third District justices expressed a desire to do another program at the State Fair. Justice Murray, as chair of the court's Outreach Committee, was tasked with spearheading this effort. In 2013, the Third District held a program at the State Fair commemorating the 150-year anniversary of the Emancipation Proclamation and the 50-year anniversary of the Dr. Martin Luther King's "I Have a Dream" speech. Dubbed *Let Freedom Ring*, the program was a success. Because the first administrative presiding justice of the Third District had been an abolitionist, civil war general and at President Lincoln's side at Gettysburg, there was a connection to the Third District. The program, including a conversation with Abe Lincoln and a meet-the-justices session, generated a lot of good will for the court and served to enhance the public's awareness of and confidence in the court.

Justice Murray conceived of and coordinated the programing. He had never done anything like that before, so admittedly, he was less organized at it than someone with experience. He put in many hours, both during the business day and after hours doing so. Having been appointed to chair the Outreach Committee, he felt obligated to put his best foot forward for the court, and his colleagues saw how hard he worked on this successful project. For at least two months, the program was a significant distraction from his caseload. His efforts took time and energy away from that part of the job.

2. Oral Arguments in High Schools

Before Justice Murray came to the Third District, the court had a program of holding oral argument in high schools involving real cases from the district. The Third District had won an award from the Judicial Council

for this program.[74] It had been some time since the court was last in a school. APJ Raye asked Justice Murray to reinvigorate the program. He also asked Justice Murray to work on a new component for the program – having local attorneys go to the high schools before the day set for oral argument and talk to the students about the cases, what they would see and the role of the third branch of government. Again, feeling obligated, Justice Murray put his best foot forward and worked hard to make the program better than it had been before.

Justice Murray recruited local attorneys to give orientations to government classes prior to the oral arguments, created training materials and a training program for those attorneys, and conducted that training. He then coordinated the attorney assignment to classrooms with the teachers.

Justice Murray chaired two programs, one in 2014 for the Elk Grove Unified School District (the 5th largest school district in California) which involved the government students from twelve high schools and the other in 2015 at a Roseville Joint Union High School District high school in Placer County, which involved the government students from four high schools.

Partially for his efforts in the Placer County program, the Placer County Bar Association honored Justice Murray in 2016 with an award they labeled the Access to Justice Award.

Again, the other justices saw the effort that Justice Murray gave to make these programs successful for the Third District. But his efforts took time and energy away from his case load.

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[74] The Ralph N. Kleps Award, awarded by the Judicial Council to courts for innovative programs.

H. Youth Programming Related to the Administration of Justice

Justice Murray admits that he also participated in youth related community programing outside of the court. In 2011 and 2012, at the urging of the former APJ of the Third District, he participated on the planning committee for the Sacramento Friends Care annual youth program. Meetings were held after business hours for a Saturday program focused on the children of incarcerated parents. Justice Murray also served as a panelist for two of the annual programs. He thought it was important for the youth to see someone who looks like them who had become successful and to do what he could keep them from repeating the mistakes of their parents. Also, because the first impressions many of the youth and people from their communities had about the courts was negative, he thought it important to provide a positive perspective about the courts to enhance their understanding of and confidence in the justice system.

While on the San Joaquin County Superior Court, Justice Murray participated in the Beyond Incarceration programs in Stockton. Among other things, this program also focused on youth of incarcerated parents and youth who where otherwise at risk. After joining the Third District, he served on the planning committee for two youth programs which met after business hours. He also served as the master of ceremonies for one program that took place during business hours.

Justice Murray has continued his nearly career-long participation in the San Joaquin County High School Mock Trial tournaments, even after his retirement. These programs were held after business hours and on a Saturday. In 2018, he was made the first inductee to the San Joaquin County Office of Education Mock Trial Hall of Fame.

For several years, Justice Murray participated in the Wiley Manuel Bar Association's Contracts for Success program, a program he conceived

and designed to motivate youth to achieve success in life and encourage them to consider justice system careers. On several occasions, he visited schools and the Sacramento Juvenile Hall to talk to the students along with local attorneys. For his efforts, the Wiley Manuel Bar awarded him with their Judge of the Year Award in 2013.

Justice Murray also participated in other youth related programs during his time on the Third District, including the Sacramento Bar's Operation Protect and Defend program held on business week days and the Stockton NAACP's annual youth conferences, which were held on Saturdays.

Justice Murray admits that the business day, after business hours meetings and Saturday programs took time he could have devoted to his case load. But, because of his background and professional and personal experiences, he felt obligated to participate.

I. Health Challenges

Justice Murray experienced two significant health challenges during his time on the Third District.

1. Obstructive Sleep Apnea

In 2013, Justice Murray was diagnosed with Obstructive Sleep Apnea. This disorder caused daily fatigue, drowsiness, and sometimes headaches affecting his ability to concentrate during the first three years of his time on the Third District bench. He was prescribed a CPAP machine for this disorder. The symptoms returned in 2015, and his CPAP machine was adjusted.

Leading up to the diagnosis for the first three years Justice Murray was on the court, he had thought he was simply fatigued from commuting to and from Sacramento and the hours he was putting in. It was not until he began to experience headaches which got progressively worse over a couple of months that he sought medical advice and was diagnosed.

More than anything this untreated condition severely affected Justice Murray's ability to do his job in the earlier years of his time on the Third District bench. There were occasions when Justice Murray read pages in drafts or briefs and then realized he could not remember what he had just read.[75] Were it not for this condition, Justice Murray would not have fallen as far behind early in his tenure at the Third District.

2. Ischemic Strokes

In August 2017, while working in chambers after business hours, Justice Murray suffered an ischemic stroke. The symptoms had gone away by the time he went to the hospital. At the emergency room, he was misdiagnosed,[76] sent home and told to return in the morning for an MRI.[77] It was not until the following morning, after the MRI, that the event that occurred the previous evening was diagnosed as an ischemic stroke. Justice Murray, who had gone back to work in chambers, returned to the hospital as directed, where he suffered the second ischemic stroke. The strokes

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[75] As described by Dr. Sanjay Gupta in his book *Keep Sharp; Build a Better Brain at Any Age*. (*Stay Sharp*), obstructive sleep apnea "occurs when tissues in the back of the throat collapse, blocking the airway…For ten seconds or more, a person with sleep apnea stops breathing, which lowers blood-oxygen levels and strains the heart. These micro-awakenings can go on hundreds of times a night, fragmenting sleep and preventing a person from experiencing all cycles of sleep that include the most restorative one: deep sleep." (*Stay Sharp*, p. 134.) The importance of quality sleep is also discussed by Dr. Gupta: "More than just affecting memory, a sleep deficit prevents you from processing information in general. So not only do you lack the ability to remember, you cannot even interpret information – to bring it in and think about it." (*Stay Sharp*, p. 137.)

[76] The ER doctor thought Justice Murray may have suffered a transient ischemic attack (TIA).

[77] When Justice Murray went home, he continued to work on the email he had been writing when he had what turned out to be his first stroke.

caused numbness on the left side of his face, left arm and some fingers on his left hand and extreme weakness in his left leg. After his discharge from the hospital, he underwent physical and occupational therapy for several weeks and has been prescribed medications he will take for the rest of his life.

While convalescing and rehabilitating at home after the strokes, Justice Murray continued to work on his caseload, including three very difficult and complex matters. His work and the timing of that work is documented by Microsoft Track Changes on his draft opinions and emails. He volunteered to participate in two oral arguments by telephone.[78] Instead of using his medical condition as an excuse to take an extended leave and have his cases reassigned, Justice Murray returned to work in chambers three weeks after the strokes.

Justice Murray was told the strokes were caused by a narrowing artery in the thalamus that shut down completely for two periods of time. The doctors were unable to say why the artery was narrow or why it shut down. They said obstructive sleep apnea is a risk factor for stroke, but could not say it was the cause of his strokes. There was no clot. They ruled out atrial fibrillation or other heart condition. Plaque in the artery was a possibility, but Justice Murray's cholesterol numbers had always been good. One explanation that could not be ruled out was stress. They said the narrow artery is a genetic defect and Justice Murray could very well experience more strokes in the future.

After the strokes, Justice Murray discontinued most of his community and youth work, which he had already started to curtail, as well as his participation in the San Joaquin County Inn of Court. But he

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78 *People v. Valdivia* (2017) 16 Cal.App.5th 1130, review granted and vacated in light of *In re Ricardo P.* (2019) 7 Cal.5th 1113.

continued to contribute to the Judicial Branch beyond his bench duties by his participation on the committees listed above and by providing instruction as a judicial educator when asked. His judicial education activities included three programs held less than three months after his strokes in which he served as: a chambers presenter and as a moderator at sessions of the Third District's October 2017 district-wide conference held for judges and attorneys; the solo instructor for a three-hour session at the October 2017 CJER Criminal Law Institute; and a panelist for a program at the Bar Association of San Francisco in November 2017. And he continued doing his own legal and record research on his opinions, making substantive revisions to drafts and contributing to opinions circulating from other chambers.

Justice Murray was not debilitated or disabled. Nobody who interacted with him, watched him work or who saw him teach any of the 27 programs he taught after the strokes would think that he was.[79] However, he admits he was not the same after the strokes and in hindsight, he tried to do too much judicial branch and justice system related work beyond his bench duties.

J. Unforeseeable Circumstances

Nobody, including Justice Murray could foresee the changes that took place in the law during the period between 2012 and 2021 referenced in the Formal Notice. In addition to the significant statutory reforms and case law changes to criminal law, there were also changes to the law governing home foreclosures and redevelopment agencies.

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[79] Reports that Justice Murray was debilitated, qualified for disability retirement, perpetrated a fraud on the public by not seeking disability retirement, and should have been charged with a crime for that alleged fraud were not true and defamatory.

Nor could Justice Murray predict the two significant health challenges he had. He is of the belief that had he not suffered from those two conditions his backlog would not have been nearly what it turned out to be.

Also, Justice Murray did not seek appointment to serve as the Third District's Outreach Committee Chair. Nor could he predict in advance the amount of time it would take away from his bench duties.

As for those bench duties, Justice Murray could not predict how long it would take to make revisions to the drafts he set aside. Nor could he predict what would come to his chambers in the interim period or how long it would take to address those matters. All he could predict is that he would do a thorough review of those matters and write a draft that came to the right result for the right reasons.

Perhaps he should have foreseen that his personnel challenges would not improve, but he simply did not.

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All of these circumstances, and Justice Murray's work ethic and philosophy concerning opinion writing combined to exacerbate his backlog. His backlog was not the result of willful misconduct, lack of diligence or negligence. If anything, Justice Murray can only be faulted for trying to do too much under the circumstances.

Respectfully submitted

Dated: July 21, 2025

MILLER WAXLER LLP

By: 

Randall A. Miller, Esq.
Andrew J. Waxler, Esq.
Jeanette Chu, Esq.

Counsel for Hon. William J. Murray (Ret.)

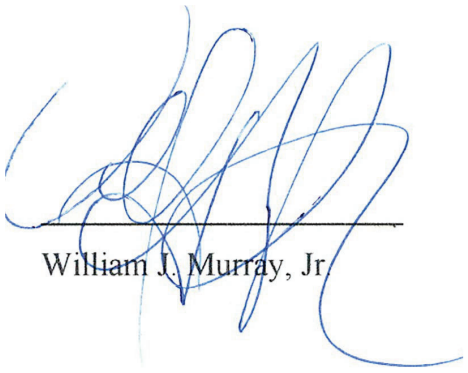
VERIFICATION

I, William J. Murray, Jr. am the respondent in the above-referenced proceeding.

I have read the VERIFIED ANSWER OF JUSTICE WILLIAM J. MURRAY, JR. (RET.) TO NOTICE OF FORMAL PROCEEDINGS and know its contents. The matters stated therein are true of my own knowledge except as to those matters which are stated on information and belief and, as to those matters, I believe them to be true.

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

Executed this 21st day of July, 2025 at Sacramento County, California.



William J. Murray, Jr.

EXHIBIT 1

Hon. William J. Murray, Jr. (Ret.)

Curriculum Vitae

July 21, 2025

Judicial Branch / Legal Education Programming / Criminal Law & Procedure / Racial Justice / Jury

Judicial Branch

- Associate Justice, Court of Appeal, Third Appellate District: 2010-2022; Outreach Committee Chair 2012-2016.
- Judge, Superior Court, San Joaquin County: 1995-2010; Presiding Judge: 2008-2010; Chair, Community Focused Court Planning Team 1999-2010; Chair, Jury Service Committee: 2000-2005, 2008-2010; Co-Creator 2001 California Judicial Council Kleps Award winning Court-Community Leadership & Liaison Program; Co-Creator 2000 California Judicial Council Kleps Award winning Jury Service Compliance and Education Program.
- California Supreme Court Jury Selection Working Group: 2020-2022.
- California Judges Association Eliminating Bias and Inequality Committee: 2020-present.
- Judicial Council Criminal Law Advisory Committee: 2017-2021; 2003-2006 (Judicial Council Liaison); 2002-2003.
- Judicial Council Providing Access & Fairness Advisory Committee: 2013-2021; 2007-2011.
- Judicial Council Joint Presiding Judge & Court Executive Officer Working Group on Jury Administration and Management: Co-Chair 2007-2010.
- Judicial Council Member: 2003-2006; Chair Litigation Management Committee, 6/2006-9/2006; Vice-Chair Executive and Planning Committee, 2005-2006; Vice-Chair Rules & Projects Committee, 2004-2005; Judicial Council Liaison to Criminal Law Advisory Committee, 2003-2006.
- Judicial Council Task Force on Jury System Improvements: 2002-2003.

Education Programming Activities and Publications

Awards for Legal Education Programming

- California Judges Association Bernard S. Jefferson Award for Distinguished Service in Judicial Education: 2019.
- Placer County Bar Association Access to Justice Award: 2016.
- American Inns of Court, National Award for Outstanding Program, *12 Angry Yoots Kill a Mockingbird* – Team Leader: 2012-2013.
- American Inns of Court, National Award for Outstanding Program*, Eastside Story* – Team Leader: 2011-2012.

Program Planning and Moderating

- Hon. William J. Murray, Jr. Unity Bar Section, San Joaquin County Bar Association, Executive Committee: 2021-present.
- Center for Judicial Education & Research (CJER) Access, Ethics and Fairness Education Committee: 2016-2021.
- CJER Continuing the Dialogue video programs planner/presenter/moderator; 2013, 2014, 2018, 2021.
- Court of Appeal, Third District, *Let Freedom Ring* Program at the California State Fair – Chair, Coordinator, and Moderator: July 2013.
- Chair, Oversight Committee for the first statewide conference jointly held by the California Judicial Council, the California Judges Association, and the California State Bar: September 2005.
- CJER Criminal Law Education Committee: 2002-2003.

Instructor, Panelist

- **2025**
  - Solo presenter for two-part webinar for the California Judges Association – A.B. 2542, the Racial Justice Act (January).
- **2024**
  - Solo presenter for webinar for Monterey County Bar Association – A.B. 2542, the Racial Justice Act (August).
  - Panelist, California Black Lawyers Association – A.B. 2542 Racial Justice Act and A.B. No. 3070 Jury Selection Reform (April).
  - Solo presenter live program for CJER Trial Court Judicial Attorneys Institute – A.B. 2542, the Racial Justice Act (March).
- **2023**
  - Solo presenter live program for California Lawyers Association – A.B. 3070, Jury Selection Reform (April).
  - Solo presenter live program for the Stanislaus County Inn of Court – Implicit Bias in Jury Decision Making (February).
  - Solo presenter for the California Judicial Council Black History Month program webinar series – A.B. 2542, the Racial Justice Act and Other Criminal Justice Reforms (February).
  - Solo presenter for the San Joaquin County Bar Association Masters Series webinars – Implicit Bias in Jury Decision Making (January).
  - Coordinator and co-presenter for the San Joaquin County Bar Association Masters Series webinars – Historical Housing Discrimination and its Continuing Influence on Society (January).
- **2022**
  - Solo presenter for Fresno County Superior Court webinar – A.B. 3070, Jury Selection Reform (April).
  - Solo presenter for California Judges Association webinar – A.B. 3070, Jury Selection Reform (April).
  - Solo presenter for San Joaquin County Bar Association webinar – A.B. 3070, Jury Selection Reform (February).

- **2021**
  - Solo presenter for Orange County Inn of Court webinar – A.B. 3070, Jury Section Reform (November).
  - Co-presenter for the CJER Appellate Justices Institute webinar – the Racial Justice Act (October).
  - Solo presenter for CJER Appellate Justices Institute webinar – A.B. 3070, Jury Selection Reform (October).
  - Solo presenter for CJER webinar – A.B. 3070, Jury Selection Reform (October).
  - Solo presenter for CJER Criminal Law Institute webinar – A.B. 3070, Jury Selection Reform (May).
  - Solo presenter for California Association of African-American Judges two-part webinar – *Batson*/*Wheeler* issues (February).
  - Co-presenter for two California Judicial Council Criminal Services webinars – A.B. 2542, the Racial Justice Act (January).
  - Planning committee and panelist for CJER Continuing the Dialogue webinar – Wrongful Convictions (February).
- **2019**
  - Solo presenter for CJER B.E. Witkin Judicial College live program – *Batson*/*Wheeler* Issues (August).
- **2018**
  - Coordinator and moderator, California Judges Association Midyear Conference live panel discussion by academic constitutional experts on the *Masterpiece Cakeshop* sexual orientation discrimination case (March).
  - Planning Committee and panelist for CJER Continuing the Dialogue webinar – Redlining, Restrictive Covenants and the Fair Housing Act (November).
  - Solo presenter for CJER four-part podcast on *Batson-Wheeler* issues (March).
  - Solo presenter for San Joaquin County Bar Association live program – Jury Misconduct (January).
- **2017**
  - Panelist for Bar Association of San Francisco live program – Jury Diversity Issues (November).
  - Solo presenter for CJER Criminal Law Institute live program – Selecting and Managing Your Juries (October).
  - Solo presenter for the Solano County Bar Association live program – *Batson*/*Wheeler* Issues (February).
  - Solo presenter for the San Joaquin County Bar Association live program – *Batson*/*Wheeler* Issues (January).
- **2016**
  - Co-presenter for California Judges Association (CJA) live program – *Batson*/*Wheeler* Issues (September).
  - Panelist for California Judicial Council & California State Bar Diversity Summit live program – Judicial Diversity (September).
  - Adjunct professor, Drivon School of Law, Humphreys University – Appellate Advocacy (Summer semester).

- **2015**
  - Adjunct professor, Drivon School of Law, Humphreys University – Appellate Advocacy (Summer semester).
  - Solo presenter for Placer County Bar Association live program – *Batson*/*Wheeler* Issues (April).
- **2014**
  - Solo presenter for CJA live program – Jury Misconduct (September).
  - Panel moderator and presenter for CJER Appellate Attorneys Institute live program – *Batson*/*Wheeler* Issues (March).
  - Co-presenter for CJER Continuing the Dialogue webinar – *The Lives of Booker T. Washington and Frederick Douglass; Lessons for Today* (February).
- **2013**
  - Co-panelist for CJER Continuing the Dialogue webinar – *A Conversation with Abraham Lincoln: The Third District at the State Fair* (July).
- **2012**
  - Panelist for California Bar Association live program – Protecting the Appellate Record in the Trial Court (April).
- **2011**
  - Panelist for California Bar Association live program – Appellate Practice (April).
  - Panelist for Nevada County Bar Association live program – Appellate Practice (March).
- **2010**
  - Co-presenter CJER Presiding Judges and Court Executive Officer Conference – Court Administration Issues (November).
  - Co-presenter for CJER B.E. Witkin Judicial College live program – Court Community Outreach (August).
- **2009**
  - Adjunct professor, Drivon School of Law, Humphreys University – Evidence I & II (September-April).
  - Co-presenter for Judicial Council Trial Court Presiding Judges & Court Executive Officer Advisory Committee live meeting – Jury Service Compliance (May).
  - Solo presenter San Joaquin County Superior Court live program – Jury Management (May).
- **2008**
  - Adjunct professor, Drivon School of Law, Humphreys University – Evidence I & II (September-April).
  - Solo presenter State-Federal Judicial Council live program – Jury Service Compliance (November).
  - Solo presenter CJER Continuing Judicial Studies live program – Jury Issues (August).
  - Solo presenter San Joaquin County Superior Court live program – Search Warrants (August).
- **2007**
  - Adjunct professor, Drivon School of Law, Humphreys University – Evidence I & II (September-April).

- Solo presenter for CJER Criminal Law Institute live program – Jury Issues (October).
- Solo presenter for CJA live program – Jury Issues (March).
- Co-Presenter for joint CJER/CJA/State Bar Conference live program – Criminal trials and Jury Issues (September).
- Solo presenter for CJA live program – Jury Misconduct and *Batson/Wheeler* update (May).
- Solo presenter for William J. Rae-ABOTA Inn of Court (Los Angeles) live program – *Batson/Wheeler* issues (February).
- Oversight Committee Chair for CJER/CJA/State Bar Conference (January-September).

- **2006**
  - Adjunct professor, Drivon School of Law, Humphreys University – Evidence I & II (September-April).
  - Solo presenter for Conference of State Court Administrators – Court Community Outreach (October).
  - Co-presenter for CJER Criminal Law and Procedure Institute – Innovative Jury Practices and *Batson/Wheeler* issues (March).
  - Solo presenter for CJER Continuing Judicial Studies live program – Jury Misconduct (January).
  - Solo presenter for CJER Continuing Judicial Studies live program – *Batson-Wheeler* Issues (January).
- **2005**
  - Co-Presenter live program at the California Judicial Administration Conference – Court Outreach.
  - Solo presenter for CJER Continuing Judicial Studies live program – Juror Misconduct (October).
  - Solo presenter for Judicial Council/CJA/State Bar Conference live program – Juror Misconduct (September).
  - Solo presenter for CJER live program – Court Community Outreach (September).
  - Solo presenter for CJA live program – Court Community Outreach (September).
  - Solo presenter for CJER live program – Juror Misconduct (September).
  - Co-presenter for CJER Race & Ethnic Bias Issues in the Courts live program – Court Community Outreach (May).
- **2004**
  - Solo presenter for CJER Criminal Law Institute live program – Jury Misconduct (October).
  - Solo presenter for CJER Criminal Law Regional Institute live program – Jury Misconduct (August).
  - Solo presenter for CJER Continuing Judicial Education Program live program – Jury Issues (January).
- **2003**
  - Co-Presenter for CJER Celebrating California's Juvenile Courts Conference live program – Court Community Outreach (December)
  - Co-presenter for CJA live program – Court Community Outreach (November).

    - Solo presenter for CJER Criminal Law Institute live program – Jury Issues (February).
    - Solo presenter for CJER Continuing Judicial Studies live program – Community Outreach (August).
    - Solo presenter for CJER Criminal Law and Procedure Institute live program – Jury Misconduct (2003).
    - Solo presenter for CJER Continuing Judicial Studies live program – Jury Selection, *Batson/Wheeler* Issues (January).
- **2002**
    - Solo presenter for CJER Continuing Judicial Studies live program – Jury Misconduct (August).
    - Solo presenter for 9th Circuit Judicial Conference live program – Jury Service Compliance Programming (July).
    - Solo presenter for CJER Race and Ethnic Bias in the Courts live program – Jury Diversity and *Batson/Wheeler* Issues.
- **1999**
    - Adjunct Professor, California State University Stanislaus – Criminal Procedure Fifth Amendment Issues (Fall Semester 1999).
- **1995**
    - Co-presenter for California District Attorneys Association live program – Cross-examination of Defense Experts.
- **1992-1995**
    - Solo presenter and MCLE coordinator for San Joaquin County District Attorney's Office live programs – Various topics.

Judicial Branch Publications

- Author, A.B. 3070 Compendium and Checklist: 2021, 2022, 2023, 2025.
- Jury Misconduct Checklist: 2018.
- Consultant, CJER *Jury Management Bench Handbook*: 2011, 2014.
- Author, *Wheeler/Batson* at a Glance: 2008-2022.
- Author, *Selected Jury Misconduct Issues and Cases* (last edition 2008).
- Author, *Wheeler/Batson Case Compendium and Checklist Script* (last edition 2008).
- Author, *Selected Jury Selection and Management Issues in Criminal Cases* (Cited by the California Supreme Court as a resource judges should consult in *People v. Heard* (2003) 31 Cal.4th 946, 967, fn 9.) (last edition 2004).

<u>Attorney Experience</u>

San Joaquin County District Attorney's Office 1986-1995: Assistant District Attorney (2nd in Command 1992-1995); Deputy District Attorney, Homicide Unit (1987-1992), Felony Unit (1986-1987).

Brooklyn, New York District Attorney's Office 1982-1986: Assistant District Attorney (Homicide Bureau 1985-1986; Major Offense Prosecution Bureau & Felony Bureau 1983-1985; Investigations Bureau 1983; Criminal Court Bureau 1982-1983).

Education

George Washington University Law School: J.D. 1982.

Frostburg State University: B.S. 1979.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is MILLER WAXLER LLP, 411 South Hewitt Street, Los Angeles, CA 90013. On July 21, 2025, I served the document(s) described as **VERIFIED ANSWER OF FORMER JUSTICE WILLIAM J. MURRAY TO NOTICE OF FORMAL PROCEEDINGS** on the interested parties by placing true copies thereof enclosed in a sealed envelope and served in the manner and/or manners described below to each of the parties herein and addressed as follows:

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☒ by causing such document to be transmitted by electronic mail to the office of the addressees as set forth below on this date before 5:00 p.m.

☐ by causing such document(s) to be sent overnight via Federal Express I enclosed such document(s) in an envelope/package provided by Federal Express addressed to the person(s) at the address(es) set forth below and I placed the envelope/package for collection at a drop box provided by Federal Express.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on July 21, 2025, at Los Angeles, California.

GLEN RENFREW

SERVICE LIST

Emma Bradford, Esq.
Legal Advisor to Commissioners
Commission on Judicial Performance

Office of Legal Advisor
Commission on Judicial Performance

REDACTED

cc: Tiffany Poovaiah

REDACTED

Commission on Judicial Performance Trial Counsel

Mark. Lizarraga, Esq., Trial Counsel

REDACTED

Melissa G. Murphy, Esq., Assistant Trial

REDACTED

Commission on Judicial Performance
455 Golden Gate Avenue, Suite 14400
San Francisco, CA 94102

cc: Nicole Benavidez

REDACTED