

No. 24-A-__

IN THE SUPREME COURT OF THE UNITED STATES
November term 2024

THOMAS OSTLY,

Petitioner

v.

CITY AND COUNTY OF SAN FRANCISCO; CHESA BOUDIN,

Respondent.

**Appendix in Support of Petition for Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit**

**APPENDIX IN SUPPORT OF PETITION FOR A
WRIT OF CERTIORARI**

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APPENDIX

APPENDIX	A.	Declaration of Chesa Boudin in Support of CCSF's Motion for Summary Judgment (exhibits included)
APPENDIX	B.	Declaration of Thomas Ostly in Support of Opposition to CCSF's Motion for Summary Judgment (exhibits included)
APPENDIX	C.	Motion for Summary Judgment Hearing Transcript
APPENDIX	D.	Judgment Entered by Northern District Court on June 15, 2023
APPENDIX	E.	Memorandum of Ruling on Appeal by 9 th Circuit Court of Appeals on August 28, 2024

A

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8 Attorneys for Defendants
CITY AND COUNTY OF SAN FRANCISCO,
9 CHESA BOUDIN (in his capacity as the San Francisco
District Attorney)
10

11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA

13 THOMAS OSTLY,

14 Plaintiff,

15 vs.

16 CITY AND COUNTY OF SAN
17 FRANCISCO; CHESA BOUDIN and DOES 1
through 50,
18 Defendants.

Case No. **3:21-cv-08955-EMC**

**DECLARATION OF CHESA BOUDIN IN
SUPPORT OF DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OR, IN THE
ALTERNATIVE SUMMARY ADJUDICATION**

Hearing Date: April 13, 2023
Time: 1:30 p.m.
Place: Courtroom 5 – 17th Floor

Date Action Filed: July 26, 2021
Trial Date: July 24, 2023

21
22 I, Chesa Boudin, declare:

23 1. Except where stated otherwise, I have personal knowledge of the following facts and, if
24 called to testify, could and would testify competently thereto.

25 2. I released Plaintiff Thomas Ostly from his position as an Assistant District Attorney
26 with the City and County of San Francisco on or about January 10, 2021. A true and correct copy of
27 the letter formalizing that release is attached hereto as **Exhibit A**.
28

1 6. Additionally, I do not recall being aware of the age of persons whom I hired or fired at
2 the time I took office – including Mr. Ostly – nor is that information I recall ever asking for or
3 receiving. Moreover, decisions I made to hire or release any attorney at the San Francisco District
4 Attorney's Office – including Mr. Ostly – were not based in whole or in part upon age. Similarly,
5 decisions I made to end indemnification agreements for any attorney at the San Francisco District
6 Attorney's Office – including Mr. Ostly – were also not based in whole or in part upon age.

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8 I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8,
9 2023 in San Francisco, California.

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12 Chesa Boudin
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EXHIBIT A

EXHIBIT A

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY



Chesa Boudin
District Attorney

HAND DELIVERED

January 10, 2020

Thomas Ostly
420 E 17th Street, Apt C
Oakland, CA 94606

RE: Release from Permanent Exempt Appointment

Dear Mr. Ostly,

This notice serves to inform you that you are being released from your exempt appointment as an 8177 Attorney (Civil/Criminal) with the San Francisco District Attorney's Office, effective the close of business on January 10, 2020. Exempt employees serve at the pleasure of the Appointing Officer and may be released from employment at any time. A copy of the Notice to Exempt Appointee form that you signed on January 21, 2014, is enclosed. Also enclosed, please find a separation report for the release from your position.

Per the Municipal Attorneys Association (MAA) Memorandum of Understanding (MOU), Article II.I, Severance Pay, paragraph 73, you are entitled to a payment equivalent of 30 calendar days in lieu of 30-day notice of the release.

Also, in exchange for a release signed by you and MAA, you are entitled to a severance benefit based on your years of service. See MOU paragraphs 74-81. A severance agreement is enclosed for your review. To receive severance pay, you or MAA must notify the Office that you are electing severance within thirty days of notice of the release, or by not later than February 9, 2020. Please provide that notice by sending the enclosed severance agreement, signed by you and the designated MAA representative, to Richard Ng, Principal Human Resources Analyst at richard.ng@sfgov.org.

You should contact the San Francisco Health Service System (HSS) and the San Francisco Employees' Retirement System (SFERS) promptly to determine your benefits and retirement options. You can contact a HSS benefits specialist at (415) 554-1750 or info@myhss.org. You can contact SFERS at (415) 487-7000 or sfersconnect@sfgov.org.

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY

If you have any questions or to return the severance agreement, you may contact Richard Ng, at (628) 652-4041 or richard.ng@sfgov.org and he will assist you.

Thank you for your service to the Office of the District Attorney's Office and best of luck in your future endeavors.

Sincerely,

A handwritten signature in black ink, appearing to read "Chesa Boudin".

Chesa Boudin
District Attorney

CC: Personnel File

Enclosures: Signed Notice to Exempt Employee form
Separation Report
Severance Agreement
City & County Benefit Guide 2020 pages 31-32

350 RHODE ISLAND, NORTH BUILDING, SUITE 400N • SAN FRANCISCO, CALIFORNIA 94103

RECEPTION: (628) 652-4000 • FACSIMILE: (628) 652-4001

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5 Attorneys for PLAINTIFF
THOMAS OSTLY

6
7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 THOMAS OSTLY,

10 Ostly,

11 vs.

12 CITY AND COUNTY OF SAN FRANCISCO;
13 CHESA BOUDIN; and DOES 1-50

14 Defendants.
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Case No.: 3:21-CV-08955-EMC

**PLAINTIFF THOMAS OSTLY'S
DECLARATION IN SUPPORT OF
OPPOSITION TO SUMMARY
JUDGMENT**

Judge: Hon. Edward M. Chen
Date Action Filed: July 26, 2021
Trial Date: July 24, 2023

1 I, Thomas Ostly, declare:

2 1. I am the Plaintiff in the above-captioned matter.

3 2. Except where stated otherwise, I have personal knowledge of the following facts
4 and, if called to testify, could and would testify competently thereto.

5 3. The San Francisco adult criminal courts consist of a few departments in one
6 building. At the time I was employed 18 prosecutors were assigned to general felonies. Criminal
7 attorneys employed by the City were matched up so their caseloads would be on the same days, but
8 trials, vacations and other interruptions of the regular calendar meant that the few dozen lawyers
9 interacted regularly if not daily. Similar to a small town, gossip about the people working at the
10 Hall of Justice spread quickly and it was not uncommon to hear about cases, verdicts and personal
11 interactions from multiple sources.

12 4. I began work for the City at a volunteer in April 2013. After 9 months as a full-time
13 trial lawyer I was hired to work at the San Francisco District Attorney's Office.

14 5. After being hired I was assigned to Preliminary Hearings, then General Felonies and
15 the last two years of my employment was in the Crime Strategies Unit.

16 6. As a City employee I had a few cases with Mr. Boudin. The earliest I recall is from
17 2013, *People v. David Abujaber* Court Number 2471878. It was a hand off trial assigned
18 immediately after I began as a full-time volunteer. After a three-day trial Mr. Boudin's client was
19 found guilty. There is nothing about my work in that case that would give any reasonable person a
20 basis to claim I was not adequately able to carry out the responsibilities of a criminal prosecutor. I
21 believe Mr. Boudin's client was convicted because Mr. Boudin failed to put in evidence negating
22 the elements of the offence, choosing instead to focus solely on attacking law enforcement.

23 7. I had cases with Mr. Boudin when I was assigned to the Crime Strategies Unit,
24 *People v. Kuanisha Mayers* Court Number 17013207 and 17016460. In that matter, the defendant
25 was accused of selling narcotics in the Tenderloin. At arraignment, Mr. Boudin opposed a stay
26 away order claiming the defendant needed to be in the area to care for a relative, but provided no
27 evidence in support of that claim. After the Court reduced the distance of the stay away order on
28

1 Mr. Boudin's representations, the defendant move one block over and continued to sell narcotics.

2 8. The defendant in *People v. Mayers* was then alleged to have sold narcotics to an
3 undercover officer and arrested again. Given Mr. Boudin's prior unsubstantiated claims the
4 defendant is caring for a relative in the area, I drafted a source of bail and stay away order and
5 presented it to the duty Judge, effectively overcoming the obstacle Mr. Boudin's misrepresentations
6 presented. At the arraignment on the new case Mr. Boudin stated the defendant was an addict, and
7 the large amount of individually wrapped narcotics where for personal use, therefore the case
8 should be reduced to a misdemeanor pursuant to Penal Code Section 17b. However, the defendant
9 told both the arresting officers and then the arraignment Judge she was pregnant and does not use
10 drugs. Mr. Boudin's request to reduce pursuant to 17b was denied. I later put in the preliminary
11 hearing, and it was held to answer. There is nothing about those cases that could give any
12 reasonable person a reason to question whether I could carry out my duties as a prosecutor.

13 9. When I was in General Felonies prior to joining the Crime Strategies Unit I had more
14 trials than any of the other 18 attorneys in the unit, and I still covered calendars and other tasks
15 normally reassigned while a prosecutor was in trial. There is nothing about my work in General
16 Felonies that any reasonable person could interpret as an inability to do my job as a prosecutor. I
17 have no idea what cases or facts Mr. Boudin could be referring to in his declaration.

18 10. As part of my work in the Crime Strategies Unit I was detailed to the State organized
19 retail crime task force. As a result of my work and others the office received awards from the
20 Coalition of Law Enforcement and Retail in October 2019 and from CAL-ORCA in February 2020.
21 In 2022, a month before the recall election, Mr. Boudin attempted to repackage prior work as a new
22 operation, while claiming it was a basis to vote against his recall. A true and correct copy of the
23 political mailer sent by Mr. Boudin's campaign referencing the ORCTF work is attached as
24 **Exhibit 1**. There is nothing about my work on the organized retail crime problem facing the City
25 that a reasonable person could interpret as evidence I could not adequately meet my responsibilities
26 as a prosecutor.

27 11. I was told my work for the SFDA was excellent and I was encouraged to keep
28 working as I had been. As the station ADA for Southern and Tenderloin I was detailed to numerous

1 community meetings. I was never criticized for participation at the City and community meetings.
2 On the contrary, I was specifically told feedback from my work in the community was all positive.

3 12. I am not aware of any person that could have made a legitimate complaint to Mr.
4 Boudin about me during his time campaigning. I prosecuted Mr. Muzaffar and he was convicted
5 for killing 6-year-old Sophia Liu in 2018. After the trial, public defenders Sliman Nawabi and
6 Michelle Tong violated a Court order by going to a juror's house to get a signature on a declaration
7 to support a motion for a new trial. The declaration contained information counsel knew to be false
8 because the juror said it was not true. After several hearings it was shown counsel had
9 misrepresented the facts of his interaction with the juror. A true and complete copy of the transcript
10 on the hearing addressing City employee misconduct after I reported it is attached as **Exhibit 2**.

11 13. I personally reviewed Mr. Boudin's publicly available campaign finance disclosures.
12 They confirm he accepted donations from both the criminal defendant and his lawyers while *People*
13 *v. Muzaffar* was pending and he was on the campaign trail.

14 14. As a member of the Crime Strategies Unit I was also reassigned cases from General
15 Felonies that needed additional investigation and work-up. One example of that is the case of
16 *People v. Mushtaq*. The e-mail asking that the case be reassigned specifically to me given the
17 unique needs of the case is attached as **Exhibit 3**. I put facts I learned from the subsequent
18 investigated that negated a sham NGI defense on the record in September 2019. **Exhibit 4**.

19 15. In 2017 I reported City employees Matt Sotorosen and Sangita Singha for failing to
20 communicate settlement offers to a criminal defendant. I was aware of settlement offers not being
21 communicated in other cases and suspected it in many more. My understanding was that it was
22 City policy to not communicate settlement offers to clients that might accept the offer over the
23 public defender's objection.

24 16. With the permission I notified the press about the City employee practice of
25 regularly failing to communicate settlement offers and Mr. Adachi was contacted about the
26 allegations and interviewed by the reporter.

27 17. After it was publicly known that I whistle blew against my fellow City employees, a
28 CA State Bar Complaint was filed against me by the City. I did not learn about the bar complaint

1 until it was disclosed in discovery in this case, and no facts of the complaint are known to me. I am
2 informed and believe, and thereon allege it was filed in retaliation for my reporting the systemic
3 misconduct by City employees towards their clients at the direction of Mr. Adachi, after he was
4 contacted by the reporter. A true and correct copy of the completely redacted bar complaint from
5 2018 is attached as **Exhibit 5**.

6 18. The Heather Knight article from 2018 was not published until March 7, 2019 days
7 after the death of Jeff Adachi. I immediately reported to my supervisor that I expected retaliation
8 from City employees since two of the cases referenced in the article were cases I had prosecuted. A
9 true and correct copy of the article is attached as **Exhibit 6**.

10 19. Immediately after the article about City employee misconduct was published City
11 employee Ilona Solomon began to retaliate against me. I received e-mails claiming she had not
12 received materials in violation of discovery prior to our upcoming trial, and when I attempted to
13 clarify she would refuse to respond and make different allegations.

14 20. I was particularly concerned about the behavior of Ms. Solomon because she was
15 known to file false complaints about other City employees and was also known to lie about
16 interactions with people. I also have had a trial with her previously and knew from personal
17 experience the perception of her among my colleagues was correct. Moreover, she was known to
18 make statements like she is "a Lieutenant in Jeff Adachi's army" and seemed focused on advancing
19 a political agenda through the cases of criminal defendants. Because of these things and much more
20 I made the decision to have no contact with Ms. Solomon that was not documented, and in each of
21 my e-mails to her I reminded her that I would never speak to her and if she did I would use the e-
22 mails to refute her claim.

23 21. For the next several weeks Ms. Solomon disparaged me to other City employees,
24 court staff and private defense attorneys. What I was hearing was that she was bragging that she
25 would have our upcoming trial dismissed because of prosecutorial misconduct and I would be
26 sanctioned and reported to the CA State Bar by the trial court. At least one Judge stopped me in the
27 hallway to ask if I knew what Ms. Solomon was talking about as well as countless other not
28 connected to the litigation in any way. Ms. Solomon was not making these allegations in writing

1 nor would she make them when I was present.

2 22. On Friday, March 29, 2019 I was sent to trial with Ms. Solomon. As I had been
3 hearing for weeks, she accused me of prosecutorial misconduct and asked that I be sanctioned and
4 reported to the state bar. Since Mr. Adachi had hired a City employee whose only job was to file
5 complaints, there had been a large increase in baseless CA State Bar complaints. The City changed
6 its policy regarding accusations of prosecutorial misconduct made by City employees. True and
7 correct copies of the e-mail recording the new protocol, a flowchart and the protocol itself are
8 attached to this declaration as **Exhibits 7, 8 and 9** respectively. The article regarding Peter
9 Calloway's position with the City and his illustrating his obvious bias is attached as **Exhibit 10**.

10 23. After the court denied Ms. Solomon's requests it ruled that Ms. Solomon had
11 redacted medical records inappropriately and ordered that she turn them over unredacted. I also
12 made a record of the numerous lies and misstatements of fact Ms. Solomon had made in the case.
13 As required by the new protocol I reported the allegations made and my response to the Trial
14 Integrity Unit, and notified them of the Court's ruling. **Exhibit 11**.

15 24. The next day I returned to work after Ms. Solomon's motions in limine were denied I
16 heard she sent an office wide email disparaging me and misstating facts from litigation I was in
17 prior to being a City employee. I heard about this e-mail from multiple sources and was told it was
18 sent through her work account. I was also informed, and thereon allege that since I was being
19 targeted by City managers they were not going to intervene to stop her behavior. For years I
20 attempted to obtain a copy of the email as a private citizen through public records requests and City
21 employees denied it existed and failed to produce it. Only after I filed a lawsuit and my attorney
22 identified the specific e-mail was it turned over in discovery. **Exhibit 12**. This e-mail was also sent
23 to Mr. Boudin. Mr. Boudin also shared an office with Ms. Solomon. Given the number of people I
24 heard about her ranting about me over the previous weeks it is not believable that she said nothing
25 to Mr. Boudin.

26 25. During the trial with Ms. Solomon and in the subsequent weeks her behavior
27 escalated. When listening to jail calls of a defendant Ms. Solomon no longer represented, he stated
28 that Ms. Solomon told him there was a conspiracy against him and I was behind it. I reported this

1 to my supervisors and the City began to provide security for me, but did not intervene to stop the
2 retaliatory behavior.

3 26. In May of 2019 I was informed by multiple City employees that emails had been
4 sent within the public defender department asking people to come forward and complain about me.
5 I immediately reported this to my supervisors. I then heard that the bar complaint I predicted was
6 going to be filed. In June 2019 a bar complaint was filed and copies were given to the Court under
7 seal in an attempt to have me removed from cases. With permission of the front office I moved to
8 have the complaint unsealed. A copy of the my e-mail requesting that it been unsealed so the matter
9 can be investigated is attached as **Exhibit 13**.

10 27. As soon as the bar complaint was unsealed, I received a call from local reporter
11 Michael Barba. He informed me he was doing a story about the accusations against me. I
12 explained to him that since the City employees doing this to me, Peter Calloway, Danelle Harris,
13 Kleigh Hathaway, Ilona Solomon and others, had done the same thing to my colleagues I knew that
14 after the complaint was filed they would give it to the press so I had been waiting for his call. I then
15 gave him all of the files and internal e-mails I could legally give him. This stopped the lies told by
16 the City employees from being repeated in the press. A copy of an e-mail I sent to Mr. Barba is
17 attached as **Exhibit 14**.

18 28. After the bar complaint was filed several public defender's began to accuse me of
19 misconduct in my cases. I am informed and believed this is because Peter Calloway and managers
20 employed by the City encouraged employees to make complaints about me while doing nothing to
21 verify if the accusations they were making are true. After the bar complaint was filed and
22 additional attorneys lied in declarations, I refused to speak to any public defenders without
23 witnesses present, or on the record. My supervisors agreed that to protect myself there should no
24 longer be undocumented communications with the City employees repeatedly lying about me to
25 management.

26 29. City employee Danielle Harris then attempted to get me demoted or reassigned
27 because I refused to talk to attorneys that were actively and aggressively lying about me to damage
28 my career. In response to her attempt to have me lose my position Chief of the Criminal Division

1 Marshall Khine acknowledged the accusations made against me were lies and they were targeting
2 me. **Exhibit 15.**

3 30. The retaliation continued for months until Mr. Boudin was sworn in as the elected
4 District Attorney and fired me. City employees have continued to harass and retaliate for my
5 whistleblowing, making statements to damage my credibility. For example, Mr. Boudin's former
6 officemate Ilona Solomon posted from her Twitter account that I was fired for prosecutorial
7 misconduct. The repetition of these false claims to the general public through social media and the
8 press are not harmless and anyone, including potential employers conducting a background check
9 will find these inappropriate and unlawful attacks. One of the examples of the City allowing City
10 employees to use their position with the City to harm me is a tweet she sent by Ilona Solomon in
11 July 2022. Ms. Solomon referred to me as a "pig" and "cockroach" and claims unequivocally I was
12 fired for prosecutorial misconduct, despite Mr. Boudin's assertion to the contrary. This statement
13 from Mr. Boudin's friend and officemate directly contradicts his declaration in support of summary
14 judgment. A true and correct copy of Ms. Solomon's tweet is attached as **Exhibit 16.**

15 31. After my termination I learned that Mr. Boudin had hired former public defender
16 Stephanie Lacambra and others I had cases with to work in the Independent Investigations Bureau.
17 Based on my experience with the City employees Mr. Boudin hired, I believed they would engage
18 in the same unethical conduct they committed when they were public defenders. In 2020 I sent
19 emails to targets of Mr. Boudin warning them that the people hired by Mr. Boudin may engage in
20 the same unethical behavior as prosecutors as they did as defense attorneys, including handling
21 cases based on political ideology instead of evidence. After I sent those emails a lawsuit was filed
22 naming the same attorney I and alleged she engaged in the same conduct I had witnessed.
23 Moreover, after Mr. Boudin was recalled from office the newly appointed Chief of IIB detailed the
24 misconduct being committed during Mr. Boudin's administration. I believe Mr. Boudin needed to
25 terminate me because I was a known whistleblower and would have reported the misconduct his
26 new hires were committing, and I stated this in writing in 2020. A true and correct copy of the
27 email detailing the misconduct in IIB from current DA appointment is attached as **Exhibit 17.**

28 32. Mr. Boudin terminated several other employees when he terminated my

1 employment. It is my understand that all the people he terminated were considerably older and
2 more experienced than the younger, inexperienced people he hired as replacements. I am also
3 aware that my age has been referred to when publicly disparaging me, and my physical appearance
4 was regularly referenced throughout 2019 when City employees were systematically retaliating
5 against me.

6 33. When I requested documents from the City through public record requests they were
7 done as a private citizen, not as a City employee. When I first suggested s public records request to
8 obtain the inappropriate e-mails being sent to all public defender staff I was asked not to do so by
9 Marshall Khine because it would draw additional retaliation. I was later contacted by Chief of Staff
10 Sharon Woo and told they cannot tell me not to do anything that could aid in my bar defense and I
11 was free to file anything I want regarding public records, but it must be clear it is not being
12 requested by the district attorney's office. I was then told they were working on a global
13 withdrawal of all bar complaints including the one filed against me. I opposed this and e-mailed
14 Mr. Gascon and stated my reasons for wanting to deal with the allegations on their merits, including
15 that City employees had publicly repeated the allegations outside of litigation and any settlement
16 would give the impression the allegations had merit. **Exhibit 18.**

17 34. At every point in my employment with the City I was open and transparent about the
18 work I was doing and reporting of City employee misconduct. When City employees retaliated by
19 making demonstrably false allegations I tried to obtain public documents to prove the allegations
20 were false, while publicly disclosing everything I possessed. Multiple City employees not only
21 refused to disclose the documents that existed, they falsely denied their existence.

22 35. City employees repeated their false allegations about me to the Davis Vanguard,
23 which published the allegations without fact checking them. I am aware that the same City
24 employees that were engaging in retaliation against me for whistleblowing were also using the
25 Davis Vanguard to damage my credibility, while fundraising and providing trainings for Davis
26 Vanguard interns.

27 36. This declaration does not contain all of the evidence regarding the retaliation
28 engaged in by City employees. The behavior was engaged in almost daily and committed in a

1 number of my cases after the disparaging e-mails asking to make complaints about me were sent to
2 all public defender employees. At trial I intend to testify to all of these acts, present the numerous
3 additional e-mails, news articles, social media posts, court transcripts and internal documents to
4 prove I am being truthful, and will call the witnesses that can corroborate.

5 I declare under penalty of perjury that the foregoing is true and correct. Executed on March
6 24, 2023, at San Francisco, California.



7
8 Thomas Ostly


San Francisco Chronicle

May 10, 2022

District Attorney
Chesa Boudin is
shutting down the
crime rings that
fuel break-ins.

S.F. boba shop was a front for an international car-burglary operation, D.A. Boudin says

The probe leading to Le's arrest, which is dubbed Operation Auto Pilot, included bait cars, GPS tracking devices and undercover surveillance, and led to the recovery of more than 1,000 laptops, phones, cameras and other devices from locations allegedly associated with Le, officials said.

 Man charged with running international car-burglary ring out of SF boba shop, DA says

SFGATE

San Francisco car burglary kingpin used Quickly boba shop as front, DA Boudin says

An operation led by District Attorney Chesa Boudin caught the international ringleader behind many break-ins.

VOTE NO ON PROPOSITION H

The Republican-funded recall won't make us safer.

Ad paid for by No on H, Friends of Chesa Boudin Opposing the Recall.

Committee major funding from:

1. Dignity CA SEIU Local 2015 (\$125,000)
2. Service Employees International Union Local 1021 candidate PAC (\$115,000)
3. Christian Larsen (\$115,000)

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO,
BEFORE HONORABLE, KAY TSENIN, JUDGE PRESIDING
DEPARTMENT 16

THE PEOPLE OF THE STATE
OF CALIFORNIA,

PLAINTIFF,

VS.

SYED ABID MUZAFFAR,

DEFENDANT,

No. 14031213

Reporter's Transcript of Proceedings

October 3, 2019

APPEARANCES :

For the People:

GEORGE GASCON
District Attorney
By: THOMAS OSTLY
Assistant District Attorney
350 Rhode Island Street,
North Building, Suite 400N
San Francisco, CA 94103

For the Defendant:

MANOHAR RAJU
Public Defender
By: SLIMAN NAWABI
Deputy Public Defender
555 Seventh Street
San Francisco, CA 94103

Reported by:

IRENE L. TOFFT
C.S.R. No. 12913

1 Department 16

October 3, 2019

2 P-R-O-C-E-E-D-I-N-G-S

3 THE COURT: The matter of the People of the State of
4 California versus Syed Muzaffar. I see Mr. Muzaffar is present.
5 Both counsel are present. Counsel, do you want to add anything
6 to any of the papers? Any of the exhibits? Anything like that?

7 MR. OSTLY: I have nothing more to add. Thomas Ostly for
8 the People.

9 MR. NAWABI: Sliman Nawabi for Mr. Muzaffar who is present,
10 Your Honor. I did file a response to Mr. Ostly's --

11 THE COURT: Yeah. I read it this morning.

12 MR. NAWABI: -- opposition. Just wanted to make sure the
13 Court has that. Does the Court have any questions?

14 THE COURT: Not really. All right. Mr. Ostly?

15 MR. OSTLY: Yes, Your Honor. So there is two issues I
16 believe that are before the Court. One is whether or not the
17 alleged misconduct of Ms. Xxxx (phonetic) should lead to a new
18 trial. And then also the conduct of Mr. Nawabi. Is there one
19 you want me to address first?

20 THE COURT: No. Just go to whatever you choose.

21 MR. OSTLY: So I'll start with Mr. Nawabi. He contacted a
22 juror after he was expressly ordered by Your Honor not do so.
23 When you asked him why did that happen or how did that happen
24 Mr. Nawabi became agitated and essentially said the Court was
25 somehow holding that against his client. I don't have the exact
26 wording but it's in the transcript that Mr. Nawabi said that he
27 would need to somehow investigate it to find out what happened.

28 But in reality Mr. Nawabi went out to the juror's house. He

1 did it personally. He went out with Michelle Tong. The People
2 did not find out that Michelle Tong was present until multiple
3 hearings. Notes from Ms. Tong were turned over to the People.
4 When I repeatedly requested any notes that existed, the notes of
5 Michelle Tong were turned over but not attributed to Ms. Tong.
6 Mr. Nawabi sent me an email saying, well, these are my notes but
7 they were the notes from Ms. Tong.

8 So I do not believe that the he one -- I think we played the
9 JAVS in court where you were clear to the jury that no one was
10 going to contact them without going through you. So it's clear
11 that he did violate the court order.

12 THE COURT: Sorry. Go ahead.

13 MR. OSTLY: The most disturbing part is the declaration
14 that was submitted. Ms. Xxxx's, English is not her first
15 language. He took an interview of Ms. Xxxx in English. He
16 submitted a declaration. I believe at one point Ms. Xxxx even
17 said that her mother told her not to trust attorneys and then
18 pointed to Mr. Nawabi and said this is the reason why, because
19 of what he did to her.

20 He went out. He manipulated her. He said that he would take
21 her statement and if she signed he would make the changes that
22 she was saying were needed and then that way he wouldn't have to
23 come back again but he didn't do that. He submitted a
24 declaration that she had told him that was not accurate
25 according to Ms. Xxxx. And those weren't insignificant
26 inaccuracy. There was a mischaracterization of what happened.
27 Ms. Xxxx saw an article. She glanced at it according to her
28 testimony but that is not what was in her declaration written by

1 Mr. Nawabi.

2 THE COURT: Go ahead, Mr. Ostly.

3 MR. OSTLY: The other issue is that Ms. Xxxx -- I believe
4 there were at least four different things that Ms. Xxxx had said
5 were not accurate. There were at least four different things in
6 her declaration that Ms. Xxxx said were not accurate. That is
7 very concerning. That an attorney would take a statement from
8 someone, not document it, not do it in the person's -- the
9 language they are most comfortable in. But to tell her I will
10 email you a copy to let you confirm it before I submit it to the
11 Court and in not doing that is -- well, it's beyond concerning.

12 I think something more needs to happen in order to address
13 that issue because trying to undue a verdict where a
14 six-year-old lost her life, where a mother had been waiting for
15 five years to finally get a jury verdict and then to have an
16 attorney violate Court orders and essentially tamper with a
17 juror and misrepresent her position to the Court in order to get
18 a new trial is shocking and cannot be allowed to happen in any
19 kind of case and much less one where even though it's a
20 misdemeanor the emotional toll is as much as it is.

21 And then finally, if there is any question that Mr. Nawabi
22 knew better than to do what he was doing, you don't need to look
23 further than the cross-examination of Sergeant Mahoney
24 (phonetic) in the underlying case.

25 Mr. Nawabi called Sergeant Mahoney as a witness. Sergeant
26 Mahoney interviewed Sophia's mother after Sophia was killed.
27 Mr. Nawabi called him as a witness, a defense witness and
28 essentially tried to dirty him up by saying that Mr. Mahoney or

1 Sergeant Mahoney does not like Mr. Muzaffar because Sergeant
2 Mahoney had made that statement and I disclosed it.

3 He then went through and essentially tried to insinuate that
4 Sergeant Mahoney did not do the interview the way it should be
5 done. And it came out on redirect -- I'm sorry -- on cross when
6 the People crossed Sergeant Mahoney that he did do his interview
7 exactly as he should have. He didn't leave Sophia's mother. He
8 asked her what happened even when he knew the things that she
9 was saying were inconsistent with the video specifically the
10 acceleration of the vehicle. Sophia's mother said that she
11 accelerated. That she heard her acceleration. And when I asked
12 Sergeant Mahoney did you believe that was the motorcycle and he
13 said yes. So he knew that she wasn't being accurate in her
14 statement. He didn't turn the tape off and start over again.

15 When you take a statement from somebody, you take their
16 statement. You don't put your finger on the scale, manipulate
17 them and misrepresent what they say and then submit a
18 declaration on behalf of that person when you told them you
19 would not do that.

20 First of all, none of this should have happened, because Mr.
21 Nawabi should have made an application to the Court and as Ms.
22 Xxxx said, she did not want people coming to her house. If that
23 would have gone through the Court this whole thing could have
24 been avoided. So I do think that something needs to happen
25 beyond simply scolding Mr. Nawabi for his behavior. It shows a
26 pattern and practice at least in this case that is, I can't
27 think of a better word than unreprehensible.

28 And as far as the new trial motion, the only evidence -- well,

1 none of the evidence that was in that article that was read
2 would give the Court any reason to grant a new trial. And it
3 would be different if we didn't have the article. If the
4 evidence was, whether it was an article, we don't know what it
5 said, then it could possibly be a problem. But in this case we
6 have the article. Nothing in that article other than
7 potentially there being a settlement of a civil suit has
8 anything to do with the criminal case.

9 There is also this misrepresentation of Ms. Xxxx influenced by
10 it. She -- while her declaration says that she was a not
11 guilty, read the article, became guilty. That is not what her
12 testimony was. She was always a guilty according to her
13 testimony. I think she said a soft guilty and then confirmed
14 it.

15 There also, as far as Ms. Xxxx's alleged misconduct, she
16 brought the article according to her testimony and her
17 statements to the DA's office because she had seen it and wanted
18 to know if she needed to report that she had seen it. She
19 showed it to Juror No. 2 and Juror No. 2 told her to put it
20 away. I'm sorry if I am getting the juror numbers wrong. It's
21 juror from -- I think Ms. Xxxx was No. 2. I mean it was Juror
22 No. 1. The Uber juror.

23 Told her to put it away. This is not Ms. Xxxx trying to
24 influence another juror. This is Ms. Xxxx being diligent. This
25 is Ms. Xxxx identifying what could be an issue and doing the
26 right thing.

27 Another juror told her to put it away. She did. But glancing
28 at an article that contains no significant information that was

1 different than what was contained at trial and closing arguments
2 is not enough time do a verdict.

3 And to the extent that anyone was quoted in the article, it's
4 only Mr. Nawabi. The People declined to be interviewed as the
5 People always -- well, at least myself. I never speak to the
6 press while a jury is deliberating or until a verdict has been
7 reached. So to the extent the article was run while the jury
8 was deliberating, Mr. Nawabi went out and gave quotes in an
9 interview with the press during the case. So unless the Court
10 has some other issue it would like me to address I'm prepared to
11 submit.

12 THE COURT: Okay. Mr. Nawabi.

13 MR. NAWABI: Yes, Your Honor. Thank you. I'll respond
14 with the first issue. First, with regards to me reaching out to
15 the juror. You know, Mr. Ostly states that I violated the
16 Court's orders by not seeking permission from the Court to get
17 Ms. Xxxx's information. But Mr. Ostly himself violated that
18 same order on two occasions when his own investigator went out
19 there on October 26th of 2018 -- three occasions. November 26th
20 of 2018 and December 6th of 2018. And speaking with Ms. Xxxx
21 himself without getting the Court's permission to do so.

22 So -- and with respect to me bullying or intimidating Ms.
23 Xxxx, I think that is a complete mischaracterization of what
24 happened here. Ms. Xxxx was a juror on this case and for
25 Mr. Ostly to say that she doesn't understand English or she
26 can't -- or her reviewing her own statements in English is some
27 way of me coercing her to say something she didn't say is
28 inaccurate.

1 There was a witness present when I was there at her house. I
2 told her who I was. I told her she didn't have to speak with
3 me. She chose to speak with me. Nothing was forced. We were
4 just following up on this gross misconduct that took place.

5 And with regards to her statements she told us what happened.
6 I told her I would return with a drafted declaration. When I
7 did return with that declaration she had ample time to review
8 it. I asked her if she needed more time. She did not -- she
9 reviewed it line-by-line. She read everything. She signed the
10 declaration. And there was a witness present for all of that.
11 It was not coerced.

12 Now, I do feel sorry for her in the sense that she had to come
13 to court and testify about this. And I'm sure that is upsetting
14 to her but that was just my due diligence and my advocacy on
15 behalf of my client to, you know, deal with this injustice,
16 misconduct that took place. And I understand it was
17 inconvenient for her. Not something she wanted to be a part of
18 and especially when the DA contacted her, interviewed her three
19 times.

20 Now, when Mr. Ostly himself says that the declaration was
21 inconsistent, you know, I did not accurately reflect what she
22 told me, Ms. Xxxx, every time she met with the district attorney
23 and even in her testimony something changed. And so, this was
24 not something that was planned by my part or something that I
25 manipulated her into doing. It's just that is how it is
26 sometimes with witnesses and statements over time.

27 So with regards to Sergeant Mahoney, he has nothing to do with
28 this motion. He's an officer. He has complete different -- a

1 complete different role in this case and he's irrelevant.

2 And Mr. Ostly, you know, what he's trying to do for the most
3 part is distract the Court and what the issue of the case is or
4 what this motion is about. It's about misconduct. There is no
5 question misconduct took place. Mr. Ostly himself on the record
6 at one of the hearings said that Ms. Xxxx reading an article is
7 misconduct. So the question for the Court is whether or not
8 Mr. Ostly has rebutted the presumptions of prejudice that arises
9 when jury misconduct happens.

10 There is only really three ways he can really do that for him
11 and it's his burden solely. I think the most obvious way is if
12 Mr. Ostly is able to show the Court or if the Court has
13 information that the word "settlement" has been used before.

14 I think that is why we worked so hard in getting the
15 transcripts from the trial, especially the testimony of the
16 witnesses and the arguments of both counsel. And the Court is
17 well aware after receiving the transcripts the word "settlement"
18 was never used.

19 What we do have and what the Court did allow into evidence is
20 the fact a civil lawsuit was filed. The article that Ms. Xxxx
21 read states that Mr. Muzaffar and Uber settled with the family
22 of the victim.

23 THE COURT: Did they reach a consensus?

24 MR. NAWABI: They reached a consensus which I would assume
25 reasonably means reached a settlement. And that is what Ms.
26 Xxxx took of it and she said that herself. And the article is
27 in Chinese. So I'm not the interpreter to --

28 THE COURT: The translation says consensus.

1 MR. NAWABI: Sure. But Ms. Xxxx stated that she took it as
2 a settlement and reasonably that is how it would be interpreted.

3 Now, the Court itself during the motions in limine and when I
4 brought a supplemental motion to introduce the fact that a
5 lawsuit was filed and order if it was relevant to impeach --
6 impeach the victim's mother during her testimony, the Court
7 allowed it for that purpose only. Specifically for that
8 purpose. And then the Court also allowed Mr. Ostly to
9 cross-examine on that with that same specification any defense
10 witnesses regarding the fact that a lawsuit was filed.

11 The Court excluded the mention of the word "settlement." The
12 Court did not want that and excluded it under 352 given that
13 this word was more prejudicial than probative.

14 So the fact that the article -- the fact that the jurors knew
15 about the lawsuit is very different than what was discovered by
16 Ms. Xxxx.

17 Now the settlement in and of itself has prejudices especially
18 when you take it into perspective of this case. This case was a
19 vehicular manslaughter case. Like the civil standards of
20 negligence whether or not Mr. Muzaffar was at fault, whether or
21 not he drove like a person who used -- who should have done
22 something or should not have done something.

23 So the fact that Ms. Xxxx learned of the settlement implies
24 reasonably that Mr. Muzaffar admitted to fault or Uber admitted
25 to fault which implies that he is responsible for what happened
26 in some way. As I cited in my papers in the People v. Thomas
27 case, the People v. Andrews case and the People v. Holloway, all
28 three of those cases the Court found misconduct because a juror

1 learned of extra judicial information that was excluded at trial
2 under 352. And the Andrews and Thomas case, a juror read an
3 article saying that a co-defendant had plead guilty to the
4 offense that the defendant was facing and the Court determined
5 that to be prejudicial. And in those cases the trial courts
6 excluded any mention of the defendant's criminal record,
7 criminal arrests, criminal convictions under 352. Additionally,
8 it was not admitted under 1101(b).

9 And so the Courts have ruled that when a juror -- and that is
10 important because it's similar in nature although Ms. Xxxx did
11 not learn that a co-defendant had plead here, she did learn
12 Mr. Muzaffar himself and Uber had accepted responsibility, had
13 conceded with the family or settled with the family in essence.

14 So it's similar in nature as far as what a juror would get out
15 of that, which is that he is responsible for doing something
16 wrong, because he did take responsibility in the settlement.

17 And so, there is no way that Mr. Ostly can show that a
18 settlement is the same thing of a civil lawsuit.

19 Lastly, and this is to no one's fault but one of the ways
20 prejudice could have been cured is if we knew about it during
21 the trial and nobody knew about it. Ms. Xxxx did not tell the
22 Court, Mr. Ostly or myself. The juror she did tell did not tell
23 the Court. And so there is no way the Court could have cured
24 the prejudice. This happened after she -- we discovered the
25 misconduct after the conviction happened. And that is no one's
26 fault but that is another way the prejudice could have been
27 cured which has not been done here. And the Courts have stated
28 in the Holloway case that if the misconduct was found after a

1 conviction and there is nothing we can do about it, it
2 exacerbates the prejudice. And that is exactly what is going on
3 here.

4 Lastly, I think when we look at everything circumstantially,
5 you know, Ms. Xxxx had deliberated for two days. She goes home
6 after the second day of the deliberations. She reads an
7 article. She brings the article with her to court. She tells
8 another juror about it. I mean, that is all circumstantial
9 evidence that this article was important to her and it's not for
10 the Court to even consider how this may have affected her
11 because under Evidence Code 1150, the Court is not to consider
12 the mental processes of the jurors just the outside overacts or
13 conduct around misconduct. And all the cases say that the Court
14 is to look at whatever the misconduct is and objectively
15 determine whether or not that would create prejudice.

16 And in this case knowing about the settlement is -- a
17 settlement when the Court itself excluded it, that same fact is
18 prejudicial.

19 I think if this was presented to us on the second or the third
20 day of deliberation and the Court had information that Ms. Xxxx
21 read this article outside of court and came back with the
22 article to court, I don't doubt that the Court would have
23 excused her as a juror. And I think that is the exact analysis
24 that how it could be summed up or summarized. You would not
25 have kept her, because she would have been reasonably prejudiced
26 from this article. And that is the exact analysis at this point
27 and even though we are very far removed from that, that is, you
28 know, that should be a question for the main issue or the heart

1 of this motion.

2 And this is not Mr. Ostly's fault. This is not my fault.
3 This is not the Court's fault. The Court read the instructions
4 to the juror. The Court admonished the juror from the
5 questionnaires all the way throughout the trial to the final
6 jury instructions. Ms. Xxxx, who disobeyed the Court's jury
7 instructions, the Court's orders and read an article that she --
8 that was actually deemed to be, you know, that was not part of
9 the evidence.

10 And I would like to think we all do our job in this courtroom
11 for justice, and I think every day we pick jurors and the Court
12 admonishes the jurors. And in this case we know that a juror
13 violated a court's order that was relevant, that was
14 prejudicial, and I think the integrity of the court system has
15 been affected by Ms. Xxxx's conduct, and I think that I would
16 ask the Court to grant this motion because that -- because what
17 Ms. Xxxx learned was prejudicial and that it warrants a new
18 trial motion.

19 THE COURT: Mr. Ostly.

20 MR. OSTLY: Yes, Your Honor. I'm a little bit surprised
21 and a little bit saddened. I cannot believe that Mr. Nawabi's
22 response to his alleged misconduct is to say, well, the DA did
23 it too. First of all, Ms. Xxxx approached me after -- and this
24 is all part of the record. Ms. Xxxx came to me in the hallway.
25 I then went and got DAI. DAI conducted a recorded interview
26 with Ms. Xxxx which was turned over to Mr. Nawabi. The People
27 conducted themselves with integrity and followed the Court
28 orders. And most shocking is that when we were down in

1 Department 10 when the Court inquired of Mr. Nawabi how it was
2 that he got her address and went out to her house, I was even
3 giving Mr. Nawabi the benefit of the doubt, thinking that
4 perhaps Ms. Xxxx had reached out to him, because jurors are free
5 to contact us if they want to. That is what happened after Mr.
6 Nawabi had violated the court order by contacting her. She
7 reached out to me, and I still did not speak to her. I did not
8 say a word other than hold on. I went and got Mike Shooter
9 (phonetic) who was the investigator of the day for DAI.

10 We went down to a conference room, the DA's office and not
11 until there was a recording going did we speak about anything.
12 And that was for both the recorded interview he did over the
13 phone and for the times that he sat down and each of those were
14 at Ms. Xxxx's request.

15 So instead of simply saying I messed up. I made a mistake.
16 Instead, Mr. Nawabi's response is, well, the DA did it too.
17 Well, the DA did not do it too. And to violate a court order
18 and try to undue a verdict and then not even apologize for it
19 but double-down and blame others is completely unacceptable.
20 There is no indication that this behavior won't continue unless
21 it's addressed. I mean, if there is at least an apology or
22 acknowledgement. Forget the apology. Just an acknowledgement I
23 shouldn't have done that. But no. It's just, well, the DA is
24 bad too. The DA is not bad. Not myself and no one else in my
25 office would pull something like this. And if I pulled
26 something like that and violated a court order and then didn't
27 own up to it I would expect to be fired.

28 As far as the verdict and Ms. Xxxx, the article was in

1 Chinese. She brought it here and showed it to someone. There
2 is no evidence of him speaking Chinese. The evidence is that
3 you want to take this circumstantial evidence. She was being
4 diligent. She's glanced at an article. Saw the pictures, I
5 believe the testimony was. Recognized it from this case. There
6 is nothing to show that the statement in the article about the
7 parties coming to a consensus would effect anything.

8 And the other important point is the jury knew there was other
9 litigation. Jason Freed (phonetic) was retained by Uber. I
10 believe in closing I even referred to it as an Uber defense not
11 a criminal defense. The title slide from the defense's
12 PowerPoint presentation said Lou (phonetic) versus Uber. There
13 is no hiding of the fact that there was other litigation from
14 the jury. Whether the parties reached a consensus on that when
15 you take in light the video, the testimony of both experts
16 regarding the timing, the physics involved, when the light
17 changed and when the vehicle accelerated, I think both sides
18 agreed that once the light changed and the car accelerated the
19 die was cast. There was no way that the vehicle was going to be
20 able to stop. The question was that once that happened, did the
21 crime occur and the jury said yes.

22 Nothing about that has anything to do with a potential
23 consensus made on a case that the jurors know nothing about.
24 And there is no evidence that this juror was affected by that in
25 any way other than to do her diligence.

26 And to the extent that there is confusion or misstatements
27 from Ms. Xxxx, yes, having her sign a declaration and be pulled
28 in two different directions, she is not a sophisticated person

1 when it comes to legal issues. She admitted as much. And I'll
2 close with what she said, which was this is why her mother told
3 her not to trust attorneys.

4 THE COURT: Okay. Mr. Nawabi?

5 MR. NAWABI: Your Honor, I'm just going to address the
6 misconduct. Her mother told her not to trust attorneys. Ms.
7 Xxxx violated a court order.

8 THE COURT: Okay. We're not talking about Ms. Xxxx. We're
9 talking about the fact that I gave you a very clear court order
10 saying you are not to go out and find these jurors. All right.
11 You have not once even apologized for violating that court
12 order. I agree with Mr. Ostly. They went out. They got taped
13 transcripts. You guys went out and talked to her. Went back.
14 Decided what you wanted her to write. Typed up a statement.
15 Went to her at her gate not even going in the house, because she
16 wouldn't let you in. Didn't mail it to her in advance. Brought
17 it to her doorstep and said here. Take a look at it. So she is
18 standing at the doorstep reading what you wrote down on paper.
19 We don't know. I mean, I did it as a lawyer. Every lawyer has
20 done it. If I want my client to say something I write the
21 statement. To hopefully agree with the statement. But when you
22 write it and they don't write it, it's a different statement.

23 Why didn't you let her write a statement? Why didn't you
24 record her statement? You know, if you really want an honest
25 statement from anybody you have them write it. You don't write
26 it and prepare it for them and then hand it to them at the front
27 door. Okay. That is problematic. I'm opposing that statement
28 because she testified. Okay. So I'm not even considering that

1 statement quite frankly. But I am considering the context of
2 your behavior. The DA -- to say, that, well, the DA went out
3 and did it too. It's like, mom, everybody else has done it.

4 MR. NAWABI: Your Honor, that is not what -- that is not
5 why I'm saying it, Your Honor. I do -- I did not know of the
6 court order.

7 THE COURT: You were in court.

8 MR. NAWABI: Your Honor, after my client has been convicted
9 that is probably one of that last things I was listening to and
10 what I'm saying --

11 THE COURT: And then when I played it back to you, have you
12 yet apologized?

13 MR. NAWABI: Well, I do apologize to the Court for
14 violating a court order that I was unaware of at the time. I --
15 I -- the reason why I'm saying this. Mr. Ostly himself sat down
16 with investigators and spoke to Ms. Xxxx was because I'm
17 assuming that he didn't even know about the court order until
18 the Court told both of us.

19 THE COURT: I'm sure he did.

20 MR. OSTLY: I absolutely knew about that court order. The
21 court has ordered it in every other trial I had and when the
22 Court is talking I listen. And when the Court says not to do
23 something I don't do it.

24 THE COURT: And they taped their recording. She approached
25 them according to Mr. Ostly. They have no reason not to believe
26 it. Approached them and wanted to talk to them. It's not like
27 they went out. However, you found her on Google or wherever,
28 the yellow pages. Exactly that is what I didn't want people

1 doing with these jurors. Unfortunately, we don't have any
2 legislation that prevents you from doing it. Somewhat tied to
3 my hands quite frankly. I'm sorry, Mr. Ostly. Holding you in
4 contempt which is what I would like to do.

5 MR. NAWABI: Well, I do apologize to the Court for
6 violating a court order. I sincerely apologize to the Court.
7 However, I can tell the Court I was not aware of that order.
8 And I have contacted jurors in the past and it has not been an
9 issue like this. And I have never contacted a juror without
10 them wanting to speak with us.

11 And I can tell the Court that there were jurors who didn't
12 want to speak with us and that is where it ended. And it was
13 never pressured, forced or anything like that. And we came up
14 in light of this new information that was important to this
15 case. And that is all I presented to the Court. This was not
16 me bullying or intimidating or forcing a witness to say what I
17 wanted. She testified she read the article.

18 THE COURT: You know, simply a statement by her signed I
19 read this article, right? I read this article and here it is,
20 Judge. This juror read this article. But your statement went
21 on a lot longer beyond that, you know. Made some implications,
22 which I agree, she has had several stories around this.

23 So I just find it extremely distasteful quite frankly. I
24 don't know -- don't think I can hold Mr. Nawabi in contempt.
25 I've had it actually researched which was my first sort of
26 feeling. But there may be other actions I can take which I'm
27 thinking about.

28 But let's get back to the main issue independent of this

1 Court. But in terms of this particular case and the motion for
2 a new trial in the cases that, you know, McCoy (phonetic) case
3 -- and I don't really remember them all by name. In Holloway
4 the newspaper articles said that the person was on parole for
5 having assaulted a woman with a hammer which in and of itself is
6 extremely prejudicial. I mean, like the step one of two to
7 decide whether or not something is prejudicial or a motion for a
8 new trial.

9 And so, there is misconduct here. Okay. I agree. I think we
10 all agree there is misconduct. So if misconduct involves the
11 receipt of information from extraneous sources the affect of
12 such receipt is judged by a review of the entire record and may
13 be found to be non-prejudicial.

14 The verdict is set aside only if there appears a substantial
15 likelihood of juror bias. Such bias can appear in two different
16 ways. First, this is from People v. Marshal I believe.

17 First, if extraneous material judged objectively is inherently
18 and substantially likelihood to influence the juror... the
19 defendant being on parole for assaulting a woman or a
20 co-defendant being found guilty, a finding of inherently likely
21 bias is required when that extraneous information is so
22 prejudicial in context of its erroneous introduction in the
23 trial itself would have warranted the reversal of the judgment.

24 Second, the Court must also -- if that doesn't exist --
25 second, the Court must look to the nature of the misconduct and
26 the surrounding circumstances to determine whether it is
27 substantially likely that a juror was actually bias against the
28 defendant.

1 In, in re Hitchins, 6, Cal., 4th, 97. There a juror concealed
2 knowledge that she had about the case during the guilt phase.
3 And made statements to a nonjuror indicating that she already
4 believed that the defendant was guilty. The Court found the
5 evidence showed it was reasonably probable the juror had
6 prejudged the case.

7 So I don't believe that there is evidence in this case that
8 the extraneous material judged objectively is inherently
9 substantially likely to have influenced a juror. I think simply
10 that there was a consensus reached. It doesn't really mean how
11 it was reached or what the consensus was. There is another
12 case. Let me see if I can find that one.

13 Roman versus Oklahoma. There was evidence of petitioner's
14 prior death sentence and whether or not it was going to
15 influence the jurors' decision. And the Court there said that
16 either -- it seems equally plausible that -- let me start from
17 the top. Even assuming that the jurors disregarded the trial
18 Court's instructions and allowed the evidence of petitioner's
19 prior death sentence influence its decision, it is impossible to
20 know how this evidence of the petitioner's prior death sentence
21 might have affected the jury. It seems equally plausible that
22 could have made the jurors more inclined to impose a death
23 sentence or it could have made them less inclined to do so.
24 Either conclusion necessarily rests upon one's intuition.

25 To hold on the basis of this record with that the admission of
26 evidence when they issued the sentence in the first case
27 rendered petitioner's sentencing proceeding for the second
28 murder fundamentally unfair would thus be an exercise in

1 speculation rather than reasoned judgment. And that is in Roman
2 versus Oklahoma 512, US, 1145.

3 In this case it's without a doubt everybody knew there was a
4 trial. There was litigation involved between Uber, Mr. Muzaffar
5 and the victim's family in this case. There is no evidence how
6 much this consensus was for. There is no evidence that -- I
7 mean, the consensus could have been that they decided to drop
8 the case. Consensus could have been -- and I don't know. I
9 think somebody mentioned a million dollars. None of us actually
10 knows really how much it was settled for other than maybe Mr.
11 Muzaffar and whether or not, that could have gone either way.
12 It could have gone, oh, she's gotten enough money. Why am I
13 going to find Mr. Muzaffar guilty or it could be exactly how the
14 sentence scenario.

15 I don't think that there is really any kind of evidence that
16 she was bias and I don't think this information was really quite
17 different. In fact, I didn't read your closing arguments. I'm
18 sorry, Mr. Nawabi. But if your closing argument is anything
19 like any public defender's closing argument it talks about the
20 different burdens of proof. There is a different burden of
21 proof in civil cases than criminal cases. So the jurors were
22 aware of that also if that was in your closing argument.

23 So I think based on the totality of examining the entire
24 record that there is no substantial likelihood that the
25 complaining party suffered any actual harm and the motion is
26 denied.

27 Now -- so that is it. Do you want to set sentencing at
28 another time or do it now?

1 MR. OSTLY: Yes.

2 THE COURT: Okay. I don't know when I'm going to be back.
3 I don't have a future date. Just pick a date in 22 and we will
4 work around it. I've been setting dates for the 2nd of January
5 in traffic court. January 2nd for sentencing.

6 (The matter was concluded.)

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1 STATE OF CALIFORNIA.)
2) ss.
3 COUNTY OF SAN FRANCISCO)
4

5 I, IRENE L. TOFFT, CSR, HEREBY CERTIFY: That I was the
6 duly appointed, qualified shorthand reporter of said court in
7 the above-entitled action taken on the above-entitled date; that
8 I reported the same in machine shorthand and there after had the
9 same transcribed through computer-aided transcription as herein
10 appears; and that the foregoing typewritten page contain a true
11 and correct transcript of the proceedings had in said matter at
12 said time and place to the best of my ability.

13 I further certify that I have complied with CCP 237(a)(2)
14 in that all personal juror identifying information has been
15 redacted if applicable.

16 DATED: November 13, 2019,
17

18 Irene L. Tofft

19 IRENE L. TOFFT
20 C.S.R. 12913
21
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23
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27
28

From: Allen, Linda (DAT)
Sent: Mon, 4 Dec 2017 13:39:55 -0800
To: Khine, Marshall (DAT)

You know the BMW speeding down Howard Street and kills the bicyclist case? Used to be John Ullom's, now McBrides? She just started a big trial. The dad of the 192 victim is extremely high maintenance. Defendant is going NGI and there's a lot of background investigation we should do to refute it. Tom Ostly is the perfect person to take the 192 and do all the background investigation. If Frank is ok with Tom taking the case, what do you think?

Linda Allen
Assistant District Attorney
Office of the District Attorney
Hall of Justice
(415) 553-1211
Linda.Allen@sfgov.org

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE HARRY M. DORFMAN, JUDGE PRESIDING

DEPARTMENT NUMBER 15

---oOo---

PEOPLE OF THE STATE OF CALIFORNIA,)

Plaintiff,)

vs.)

FARRUKH MUSHTAQ,)

Defendant.)

Court No. 16011638

Pages 1 - 16

Reporter's Transcript of Proceedings

Wednesday, September 4, 2019

APPEARANCES OF COUNSEL:

For the People:

George Gascón, District Attorney

City and County of San Francisco

850 Bryant Street, Suite 322

San Francisco, California 94103

BY: **THOMAS OSTLY**, Assistant District Attorney

For Defendant:

BY: **CHRIS MORALES**, Attorney at Law

Reported By: Jacqueline K. Chan, CSR No. 10276

1 SEPTEMBER 4, 2019

2 P-R-O-C-E-E-D-I-N-G-S

3 ---oOo---

4 **THE COURT:** All right. Let's call Mr. Mushtaq's case
5 at line 60, 6-0, on the mental health diversion calendar.
6 Mr. Mushtaq is here out of custody.

7 The lawyers, please.

8 **MR. MORALES:** Chris Morales appearing with Mr. Mushtaq,
9 Your Honor.

10 **MR. OSTLY:** Thomas Ostly for the People.

11 **THE COURT:** Thank you. I do see a number of people
12 here with Mr. Mushtaq. I just want to recognize you on the
13 record. Thank you for being here in support of him.

14 Okay. I've had a chance to review the papers
15 presented. I did have a chance to review your more recent
16 response to what Mr. Ostly had to write. I think we found
17 it on or about August 21st. Okay. Thank you. I was
18 here it turned out two Mondays ago. That was the day I
19 set. I apologize to everybody. If you all came here
20 waiting to see me, I was not at work that day, but here I
21 am.

22 All right. So let me start with you, Mr. Morales. You
23 don't need to repeat all the points you made in your papers
24 and your recent response, but if you want to highlight
25 something that you think would persuade me that your client
26 should be receiving mental health diversion, I'm ready to
27 listen before I finalize a decision.

28 **MR. MORALES:** Thank you, Your Honor. So I'm holding in

1 my hand my client's driver license. I have previously
2 shown this to the district attorney. So as a result of
3 this case, my client's license was suspended.

4 **THE COURT:** Well, you told me in your recent papers
5 that at some point the DMV decided to reinstate his driving
6 privilege, correct?

7 **MR. MORALES:** Correct. And I'm holding in my hand --
8 it was reinstated December 18th, 2018.

9 **THE COURT:** All right.

10 **MR. MORALES:** So as long as that's on the record and we
11 all know that.

12 **THE COURT:** Okay. What else do you want me to
13 consider?

14 **MR. MORALES:** So the Court had a chance to review three
15 doctors' reports. All three doctors confirmed that my
16 client was insane at the time -- criminally insane at the
17 time of the accident. All three doctors reviewed the
18 police reports, reviewed the medical and hospital reports.
19 My client was locked up at the psych ward for 30 days after
20 the accident. He didn't move into the jail until about 30
21 days after he was arrested because he was not stable. It's
22 clear that he was -- that he was in a psychotic episode at
23 the time of the accident, at the time that he went through
24 a red light and was speeding. So -- and this Court
25 appointed two of those doctors.

26 So it's clear at the time -- I think it's clear at the
27 time of the accident that he was having a psychotic episode
28 because the DMV has given him back his driver's license.

1 He is not a danger.

2 **THE COURT:** Well, wait a second. The fact that the DMV
3 reinstated his driving privilege nine months ago means they
4 went through their own process and they decided to
5 reinstate his driving privilege. That's what it means.

6 Go ahead.

7 **MR. MORALES:** They took his license away because he was
8 speeding and because he went through a red light, and as a
9 result of those two traffic violations he killed somebody.
10 After a period of time, after he took the written test and
11 the driving test again, they have found, in my opinion,
12 because they gave him back his license, that he is safe to
13 drive.

14 **THE COURT:** You're -- I don't think you're telling me,
15 but I'm checking.

16 **MR. MORALES:** Okay.

17 **THE COURT:** That the DMV's administrative decision does
18 not control my decision this morning for a Penal Code
19 treatment law 1001.36. I understand why you're advancing
20 that information as persuasive, but it's in my mind, but it
21 doesn't control my decision.

22 **MR. MORALES:** You control your decision.

23 **THE COURT:** You're right.

24 **MR. MORALES:** Yes. So, yes. I am giving you
25 information that I hope will persuade you to let my client
26 or to have my client enter mental health diversion and
27 counseling, which is where he belongs as opposed to the
28 criminal justice system. That is why our legislators

1 passed this law specifically for cases like this in my
2 opinion.

3 I just want to point out a couple of things that the
4 doctor said. I'm not going to go through everything.

5 But Dr. Howard, page nine:

6 "It is further my opinion that Mr. Mushtaq's delusions
7 at the time impaired his ability to understand the quality
8 of his actions. Mr. Mushtaq was experiencing delusions
9 that appear akin to the dei fic decree" D-E-I F-I-C,
10 "wherein an individual believes that they have been
11 commanded by God to do something."

12 Dr. Glick: "Patient had clearcut manic and psychotic
13 symptoms surrounding permission of the acts such that his
14 mood controlled his behavior, i.e., driving recklessly and
15 irrationally and subsequently hitting a pedestrian."

16 The third doctor who was retained by the defense, okay,
17 says that "as evidenced by the information outlined above,
18 Mr. Mushtaq was experiencing symptoms of severe manic
19 episode with psychotic features at the time of the instant
20 offense. These symptoms directly impacted his behavior
21 surrounding the offense." And he goes on.

22 So I do want to point out that --

23 **THE COURT:** Let's assume for a moment, Mr. Morales,
24 that you persuade me that at the time of the conduct, your
25 client was experiencing mental health problems related to
26 his diagnosis. Let's assume that. I'm not making a
27 finding. Okay. What else do you want me to consider?

28 **MR. MORALES:** I want you to consider this. That since

1 we have put my client -- since I have put my client's
2 mental state at issue almost a year and a half ago, maybe
3 two years ago, it is the prosecution, they have the right
4 to ask the Court to order him to submit to their own
5 psychiatrist interview and to submit to -- hire their own
6 doctor, have him submit to an interview and come up with
7 their own findings.

8 They had talked about that through several different
9 D.A.s, not just Mr. Ostly, but they haven't done that. So
10 if they have questions, if they doubt any of the findings
11 from these three doctors who are all on the court appointed
12 list, they've had the ability to do that, hire their own
13 psychiatrist. My client would readily submit yet another
14 interview with a psychiatrist. Those are my comments.

15 Thank you, Your Honor.

16 **THE COURT:** All right. Thanks.

17 Mr. Ostly, what do you think I should do today?

18 **MR. OSTLY:** I think you should deny the petition. I
19 would like to make a few comments, Your Honor.

20 **THE COURT:** Now is the time.

21 **MR. OSTLY:** One is Ms. Slattery's uncle, Charles
22 Desmond, is here and he's present in court as a
23 representative of the family.

24 **THE COURT:** Thank you, sir, for being here. I'm glad
25 you're here for these proceedings.

26 **MR. OSTLY:** There's also a representative from Stop
27 Crime SF.

28 **THE COURT:** From?

1 **MR. OSTLY:** Stop Crime SF.

2 **THE COURT:** Okay. It's a public courtroom. That
3 individual is entitled to be here also.

4 **MR. OSTLY:** And I also received an email last night. I
5 can provide a copy to counsel from Ms. Slattery's father
6 who vehemently opposes mental health diversion. He simply
7 is asking that the Court make the right decision. He
8 opposes it on the merits from the small amount of
9 information that he has about the case. So the family
10 opposes it.

11 And I've also received emails from the bike coalition.
12 They were unable to come today, but they've asked me to
13 inform them of what the Court's decision is in the matter.

14 **THE COURT:** Okay.

15 **MR. OSTLY:** But to focus on the facts of this case, the
16 thing that's missing from all of the psych reports is what
17 Mr. Mushtaq was saying at the time of the incident. We
18 have his cell phone. We have his text messages. They were
19 part of the People's opposition.

20 **THE COURT:** What's the information?

21 **MR. OSTLY:** The information is is that the night before
22 the incident, Mr. Mushtaq went to a book signing in Marin.
23 He met a gentleman. They then went out to the Marina to do
24 cocaine and to hook up with prostitutes. The next day they
25 were talking about meeting up to party more the upcoming
26 Thursday.

27 That day Mr. Mushtaq went to work at a company called
28 RockYou, which is right over off of Howard Street. He was

1 written up that afternoon. It's a performance improvement
2 plan. He had an extended meeting with human resources.
3 And an attorney by the name of Mark Woods, who's the
4 counsel for RockYou, they discussed how Mr. Mushtaq could
5 improve his work performance because he was not performing
6 satisfactorily.

7 In response to that performance review, he stated that
8 he thought he should get a raise and get a better position
9 where he would be able to work with the person he wants to
10 work with.

11 There was no indication from the interviews that we
12 took or the text messages from that meeting that he was in
13 some kind of mental health crisis.

14 At 5:00 o'clock he left work that day. He texted a
15 person by the name of Josh Grant, one of his co-workers,
16 that he was going to Gold Club, which is the strip club on
17 Howard Street.

18 Mr. Mushtaq had been at that strip club earlier in the
19 day prior to him being written up at work. He was there
20 over the lunch break. His wife sent him an email saying
21 that she knew that he was transferring \$1300 to the Gold
22 Club strip club. At the same time he's doing that, he's
23 having multiple text messages with other individuals about
24 going to Vegas, about a friend who's applying for jobs.
25 He's able to hold multiple coherent conversations
26 throughout that time.

27 At the time he leaves work and goes back to gold club,
28 the co-worker says, you know, have fun, tell everyone I

1 said hi, but does not go with him.

2 The information from Gold Club is that when Mr. Mushtaq
3 was there, he tried to disable a light in one of the rooms.
4 He was asked to leave. He then tried to re-enter the Gold
5 Club multiple times and did it by first changing his shirt
6 and coming back. And they said no, it's obviously you, go
7 away. He then pulled up in his car and asked if they had
8 valet parking, like he was showing up for the first time.

9 And, again, this isn't signs of being in a mental
10 health crisis. It's just a sign of not wanting to follow
11 the rules, not at the strip club, not at his employer, not
12 general Penal Codes regarding drug use and prostitution,
13 but now we get to the point where he's then leaving the
14 strip club.

15 He's been in communication with his wife, who has
16 called him out for transferring the \$1300 to the strip
17 club. She tells him that his daughter has the statue,
18 which is the groom from their wedding cake, and she said
19 your daughter's walking around with that while you're
20 spending money and time at a strip club.

21 When he leaves the club, his wife is there, coming
22 there with I believe another person to confront him. He
23 then goes down Howard Street at a high rate of speed over
24 80 miles an hour. He's carving through traffic. And when
25 he reaches 7th and Howard, he goes through a still red
26 light. He changes lanes abruptly to avoid a car that was
27 stopped in the No. 1 lane and he collides with and kills
28 Ms. Slattery. He does not stop his vehicle. He continues

1 from 7th all the way to 9th.

2 He gets out of the vehicle. He allows the car to roll
3 back into another parked car. He then is on his cell phone
4 or, you know, has his phone to his ear, but he does not
5 call 911. And at that point good Samaritans take
6 Mr. Mushtaq into custody over the -- over having on viewed
7 the vehicle rolling back into another stopped vehicle.

8 So at no time did Mr. Mushtaq try to get assistance for
9 Ms. Slattery. So to say that he was speeding and that
10 caused it, well, he also didn't stop at a fatal collision.
11 He had plenty of opportunity. Instead of going into the
12 gas station to call 911 to tell somebody, he did none of
13 those things. He tried to avoid responsibility.

14 All of the information that the Court's been given
15 regarding the psychiatric evaluations, especially and most
16 particularly the statements from Mr. Mushtaq that he
17 believed that he was God and driving the car with his mind
18 is completely inconsistent with the evidence that's in the
19 case, specifically his own text messages.

20 At the time of the collision he is texting. And so if
21 he's texting at 80 miles an hour -- and the evidence is is
22 that Mr. Mushtaq prior to reaching 7th Street was behind an
23 ambulance. And as that ambulance was going code three
24 through traffic, he was behind it, carving through traffic
25 behind it. That ambulance made a right-hand turn toward
26 Market Street and Mr. Mushtaq continued to drive at that
27 same rate of speed and in the same reckless manner until he
28 went through the red light at 7th Street.

1 The video surveillance footage that shows the collision
2 matches the times that Mr. Mushtaq was on the phone and
3 sending text messages and he was on the phone with his
4 wife. And at that point she's texting him to call 911. So
5 there is an ambiguity at best in what the text messages
6 show.

7 There may be a different version of well, he's having a
8 mental health crisis because he's been doing cocaine and
9 he's at the strip club and is being kicked out, but it is
10 inconsistent with what Mr. Mushtaq has reported to the
11 psychiatrist that he believed that he was God, and driving
12 the car with his mind to be able to send coherent text
13 messages, to be able to answer phone calls and drive the
14 car in a purposeful manner. Meaning that he is avoiding
15 obstacles and he is taking advantage of opportunities and
16 traffic as they arose and driving at that rate of speed.

17 **THE COURT:** I do understand your lengthy recitation as
18 it relates to the nexus issue which is part of what this
19 statute requires.

20 Is there anything else you want me to consider before I
21 make a decision?

22 **MR. OSTLY:** I believe that Mr. Mushtaq remains a
23 serious threat to public safety given the facts of this
24 case.

25 **THE COURT:** All right. Thanks. Submitted or any
26 response?

27 **MR. MORALES:** I have a brief response.

28 I did something unusual in this case. I allowed this

1 prosecutor, Mr. Ostly, and two inspectors to come to my
2 office -- and the Court recognizes I do this sometimes --
3 and interview my client's wife at length. I let them ask
4 every and any question they wanted and report it.

5 What we do as lawyers if we disagree with the opinion
6 of a psychiatrist or psychologist is we give them
7 information. You didn't have a chance to review this
8 before you came up with your opinion. I would like you to
9 review this and let me know if you change your opinion.

10 So a number of district attorneys, deputy D.A.s,
11 assigned to this case have said they were going to do that
12 in this case. Get the three doctors more information to
13 see if they would -- if the doctors in absorbing that
14 information could change their mind. That has not
15 happened. None of the D.A.s -- deputy D.A.s assigned to
16 this case have reached out, as far as I know, to any of the
17 three doctors to provide them the information that
18 Mr. Ostly just gave you. And yet, again, they have the
19 ability to hire their own psychiatrists to review
20 everything and even to sit down and interview my client.
21 Those are my comments.

22 **THE COURT:** Thanks very much. All right. Submitted?

23 **MR. MORALES:** Submitted.

24 **MR. OSTLY:** Submitted.

25 **THE COURT:** All right. Mental health diversion is
26 denied for two main reasons. First, I'm reading the papers
27 and listening carefully to the arguments today. I'm not
28 persuaded that there is a clear nexus or connection between

1 the mental health issue at the time of the incident that
2 led to the death of the victim and the driving conduct.
3 I'm not persuaded that you carried that burden,
4 Mr. Morales, which is part of the application burden that
5 you carry.

6 Secondly, I am concerned about public safety given the
7 driving conduct here. Running a light, killing an innocent
8 victim, a total stranger to him. The statute makes me ask
9 the question, is there a risk to public safety that in the
10 future there will be potentially a murder, to be as direct
11 as I can be.

12 Murder is either express malice or implied malice.
13 Candidly, I don't think that the risk here is of an express
14 malice or an intentional killing, but I am concerned given
15 the conduct here that has already led to the conduct of one
16 innocent person could lead to a death again if he drives
17 the same way.

18 The fact that he got his license back from the DMV does
19 not change my comments right now, Mr. Morales. The conduct
20 here has already caused a death. And I'm concerned that
21 similar driving conduct could lead to another death.

22 The statute makes me ask the question. I can't predict
23 the future, but I've got to ask the question. And so for
24 all those reasons, I'm denying mental health diversion.
25 The question is -- I think I should send you back to
26 Department 22. The case is at the trial stage, correct?

27 **MR. OSTLY:** Yes.

28 **THE COURT:** Okay. When do you both want to go back to

1 Department 22 to settle this case or set a trial?

2 **MR. OSTLY:** I think Thursdays are usually good for me.

3 **MR. MORALES:** I'm going to ask the Court to stay all
4 proceedings at this point. I'd like to come back to this
5 courtroom in two weeks.

6 **THE COURT:** Why come back to this courtroom? My job is
7 done.

8 **MR. MORALES:** Because you just made that ruling, and so
9 it should either follow you or come back to this courtroom.
10 That's my request.

11 **THE COURT:** Well, what I want to do is send you to
12 Department 22.

13 **MR. MORALES:** No, I understand.

14 **THE COURT:** At this point it's appropriate to move the
15 case to the trial court. Either to settle the case or set
16 a trial. If you want to pursue any other remedy based on
17 my decision today --

18 **MR. MORALES:** Right.

19 **THE COURT:** -- I'm not blocking you --

20 **MR. MORALES:** Right.

21 **THE COURT:** -- from seeking review, whether it's a writ
22 or some other authorized action, Mr. Morales. But properly
23 I should send this case to our trial court. If you seek
24 review and get a stay of proceedings -- if you're asking me
25 today to stay proceedings --

26 **MR. MORALES:** I am.

27 **THE COURT:** -- the answer is denied. I won't do that.

28 **MR. MORALES:** Thank you. All right.

1 **THE COURT:** I'll leave it to you to get a stay from
2 some other lawful means.

3 When do you want to go to 22? Would you like to go
4 Thursday, September 12th, or Thursday, September 19th?
5 I'll give you those two Thursdays.

6 **MR. MORALES:** How about the 26th? Okay. Because
7 those two Thursdays don't --

8 **THE COURT:** Mr. Ostly, he's asking for approximately
9 three weeks out.

10 **MR. OSTLY:** That's fine.

11 **THE COURT:** Okay. Mr. Mushtaq, listen carefully, sir.
12 Thursday, September 26th, at 9:00 o'clock in the morning,
13 you must be present in Department 22 in this building on
14 the third floor with your lawyer. Do you understand, sir?

15 **THE DEFENDANT:** Yes, Your Honor.

16 **THE COURT:** Okay. Thank you very much. That's the
17 order. Good luck.

18 (Whereupon, the proceedings were concluded.)

19 ---o0o---

1 State of California)

2 County of San Francisco)

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4
5 I, Jacqueline K. Chan, Official Reporter for the
6 Superior Court of California, County of San Francisco, do
7 hereby certify:

8 That I was present at the time of the above
9 proceedings;

10 That I took down in machine shorthand notes all
11 proceedings had and testimony given;

12 That I thereafter transcribed said shorthand notes
13 with the aid of a computer;

14 That the above and foregoing is a full, true, and
15 correct transcription of said shorthand notes, and a full,
16 true and correct transcript of all proceedings had and
17 testimony taken;

18 That I am not a party to the action or related to a
19 party or counsel;

20 That I have no financial or other interest in the
21 outcome of the action.

22
23
24 Dated: August 31, 2021

25
26 

27 JACQUELINE K. CHAN, CSR No. 10276
28

SAN FRANCISCO PUBLIC DEFENDER

JEFF ADACHI – PUBLIC DEFENDER
MATT GONZALEZ – CHIEF ATTORNEY



December 11, 2018

Office of Chief Trial Counsel

Intake Department

State Bar of California

845 South Figueroa Street

Los Angeles, California 90017-2515

Via U.S. Mail and State Bar Attorney Misconduct Online Complaint form.

Re: Complaint against

Redacted

Dear Chief Trial Counsel,

Redacted

1 §

Redacted

Adult Division - HOJ
555 Seventh Street
San Francisco, CA 94103
P: 415.553.1671
F: 415.553.9810
www.sfpdpublicdefender.org

Juvenile Division - YGC
375 Woodside Avenue, Rm. 118
San Francisco, CA 94127
P: 415.753.7601
F: 415.566.3030

Juvenile Division - JJC
258A Laguna Honda Blvd.
San Francisco, CA 94116
P: 415.753.8174
F: 415.753.8175

Clean Slate
P: 415.553.9337
www.sfpdpublicdefender.org/services

Community Justice Center
P: 415.202.2832
F: 415.563.8506

Bayview Magic
P: 415.558.2428
www.bayviewmagic.org

MoMagic
P: 415.567.0400
www.momagic.org



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Exhibit 1

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Exhibit 2

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Exhibit 3

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Exhibit 4

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Most Popular

She secretly recorded her abuser and helped put him in prison. Justice...

Stephen Piscotty, released by A's, thankful for trade that brought him home

Secret Service waited to tell Capitol Police of Pelosi threat until the...

Why one ordinary vineyard may threaten the future of Napa's



1 of 5

A photo of Public Defender Jeff Adachi is on display ahead of his memorial service at City Hall in San Francisco, California, on Monday, March 4, 2019.

Gabrielle Lurie / The Chronicle

In the two weeks since Public Defender Jeff Adachi's shocking death, admirers of the larger-than-life attorney have praised his aggressiveness, his brashness and his never-give-up courtroom style.

At his City Hall memorial on Monday, he was eulogized as, “Our sansei Superman... fighting for truth, justice and the American way.”

During a Board of Supervisors commemoration the week before, Supervisor Hillary Ronen said Adachi told attorneys in the public defender’s office, including her husband, “to fight with everything they’ve got for every single client — to take risks, to push boundaries.”

There’s no question that Adachi pushed enough boundaries to turn the office into the premier public defender’s unit in the country. It is funded and staffed to match, and often trounce, the district attorney’s office.

But did he ever cross those boundaries? This happened to be a matter I was looking into shortly before his death and one that was the subject of my last interview with Adachi.

More for you

SF Public Defender Jeff Adachi dies

At SF’s City Hall, politicians, friends, supporters say goodbye to Jeff Adachi

At issue were court records suggesting attorneys in the Public Defender's Office failed to tell their clients of plea deals offered by the district attorney, instead insisting the cases go to trial. Failing to convey plea offers is an offense so anathema to proper legal conduct, it could get an attorney disbarred.

Robert Joy said it happened to him.

On Jan. 29, 2016, Joy, then 21, was driving to a hospital where his pregnant wife was in labor. Joy was speeding and struck a traffic control officer, who sustained minor injuries. Joy was quickly arrested and missed the birth of his daughter.

He was charged with two felonies, later dropped to two misdemeanors and an infraction, and was represented by an attorney in Adachi's office. The case went to trial, and a jury found Joy guilty on all counts on Dec. 18, 2017. He faced up to a year in prison and hired a private attorney, Alexander Guilmartin, to appeal the conviction.

Guilmartin sought a new trial on the grounds that Joy's public defender had failed to convey a plea deal the district attorney's office offered days before the trial started. Under the deal, if Joy pleaded guilty, paid a fine, completed 80 hours of community service and took a driver's safety course, he'd be left with just a single misdemeanor vehicle code violation on his record. He'd also avoid jail time.

"Mr. Joy proceeded to trial in complete ignorance of this plea offer," Guilmartin wrote in court records.

"Mr. Joy was similarly unaware of the long-rumored policy of the San Francisco Public Defender's Office

to encourage trials in misdemeanor cases, thereby filling courtrooms and forcing favorable resolutions in felony cases.”

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The theory is that Adachi wanted his misdemeanor attorneys to go to trial to take up courtroom space and judges’ time. That would mean felony trials would take longer to schedule and that witnesses’ memories could fade, they might move or they could die, resulting in better outcomes for the public defender’s clients charged with the most serious crimes.

It’s a rumor that has circulated at the Hall of Justice and City Hall for years, and one that Adachi flatly disputed.

“That’s ridiculous,” Adachi told me several weeks before he died. “That we would try misdemeanor cases for the purposes of delaying felony cases makes absolutely no sense. The clients are completely separate.”

He did admit — proudly — that his office takes a lot of misdemeanor cases to trial, more than public defender's offices in other California counties.

"We do spend a lot of court time trying misdemeanor cases," Adachi said. "We spend a lot of time training our attorneys to go to trial, and we encourage our attorneys to go to trial."

Did late SF Public Defender Jeff Adachi keep plea deals secret from clients?

Adachi set myriad targets for his attorneys each year, including 10 trials each for misdemeanor attorneys. Failure wouldn't necessarily get an attorney fired, but "we're going to examine what you're doing," he said.

He said when he arrived at the Public Defender's Office in 1986, it was a "plea-bargaining mill," with clients encouraged to take whatever deal the district attorney's office offered. Now, he explained, most misdemeanor cases are still settled, but taking some cases to trial keeps his attorneys sharp.

But going to trial isn't only good for his attorneys, it's also good for his clients, Adachi said, because the ultimate verdict is often better for them than the original plea offer. He provided statistics showing the outcomes after trials — of misdemeanor cases and felony cases combined — were better than the plea offer 59 percent of the time last year and worse just 15 percent of the time. The rest of the time, the outcome matched the plea offer.

The District Attorney's Office does not track that data but said it was dubious the statistics were correct.

Brian Pearlman, managing attorney of the public defender's misdemeanors unit, answered more of my questions after his boss' death. He was adamant that attorneys always convey plea deals and that doing so is "a very clear standard in the office."

That said, he readily acknowledged that attorneys often try to persuade their clients to reject plea deals and go to trial instead. He said he sometimes spends up to 30 hours over many jail visits trying to persuade a client to reject a plea offer.

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He gave a hypothetical example of a mentally ill or high man dropping his pants to urinate on a sidewalk. A woman passing by might think he was masturbating, and he could be charged with indecent exposure. But pleading guilty to get out of jail quickly could mean he would have to register as a sex offender for the rest of his life.

“The system is set up as a plea mill where they want people to come in, plead guilty and go home,” Pearlman said. “We empower our attorneys, and in turn, they empower their clients to fight these cases.”

But clients can’t be talked out of accepting a plea offer they never knew about in the first place. And that’s the allegation from Joy and a few other clients.

There was the case of a man — who talked to me on the condition he not be named because he feared losing his security job — who was at a Beyoncé concert at AT&T Park in 2014 when he swiped tickets for the next night’s concert from an office desk.

The case dragged on — it required dozens of court appearances, he said — before he dumped his public defender in frustration and hired a private attorney.

Only then did he learn that the district attorney’s office had offered him “pretrial diversion.” If he had taken 12 classes designed to discourage theft, including learning impulse control, his case would have been dropped. Emails reviewed by The Chronicle show his public defender rebuffed the offer of pretrial diversion two minutes after receiving it.

The private attorney sought to have the case dismissed because of ineffective counsel by the Public Defender’s Office. At a hearing, two public defenders who’d worked on the case testified they did convey the offer and the judge did not dismiss the case.

Still, the district attorney’s office was convinced the defendant was telling the truth and moved to drop the case.

In the 2017 court hearing to end the case, Judge Kay Tsenin said to the defendant, “I have my own issues with the way public defenders handle cases in court. I have for 20 years. ... You are speaking to the choir.”

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The man said afterward that when he learned of the pretrial diversion offer, "My heart was pounding. I couldn't believe it."

Adachi had said that in the Beyoncé case and the Robert Joy case, the men simply weren't telling the truth. They had been informed of the offers and rejected them, he said.

"It's not unusual for a client to have second thoughts," Adachi said. "I'm 100 percent certain our attorneys completely complied with our office's procedure that each and every offer be conveyed."

In a third case, defendant Benjamin Chase was convicted of multiple crimes related to a home burglary. Chase requested that the court appoint a new attorney because his public defender had failed to tell the

prosecutor that he had accepted an offer to plead guilty to one count of residential burglary in exchange for two years in state prison.

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“I at no time wanted to ever go to trial,” Chase said in court, according to a transcript.

The Court of Appeal sided with Chase in May 2018 and granted him a new trial. The district attorney’s office agreed to allow Chase to take the original deal of two years in state prison.

Adachi said his attorney had been deep into another trial and immediately left for an international vacation, thinking the offer would still be on the table when she returned. But in the meantime, a different prosecutor was assigned to the case, and the offer was removed.

Court records show similar patterns in a few other cases, though Adachi had explanations for each one.

District Attorney George Gascón declined to comment for this column. His spokesman, Max Szabo, talked about the matter before Adachi’s death. He said that because prosecutors can’t talk to defendants, it’s extremely rare for these kinds of allegations to surface.

“That’s why having this many occurrences surface publicly is so concerning,” he said. “It’s impossible to know how many other defendants are out there who don’t even know an offer was conveyed.”

He added: “Attorneys are required to make the interests of their client paramount, not their own interests, and certainly not the interests of their boss. If the public defender is pushing his attorneys to go to trial, and reportedly rewarding them for it, that would seem to create an office-wide conflict.”

The reward can include a promotion to the felony unit after completing 20 misdemeanor trials. Pearlman said that number is not a hard-and-fast rule but added, “Around 20 trials is a good barometer.”

The case of Joy, the new dad who hit the traffic control officer, was before Judge Stephen Murphy in November. Joy’s private attorney asked that his convictions be vacated and that he be allowed to take the original plea deal. Murphy agreed.

I asked Joy what he planned to do now that the nearly three-year ordeal is over.

“Live my life,” he said.

“Do some community service, too,” his lawyer interjected.

“Yes, community service and take care of my children,” Joy said. “Thank God.”

San Francisco Chronicle columnist Heather Knight appears Sundays and Tuesdays.

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Top of the News

New data shows 20,000 people will be homeless in San Francisco this year

San Francisco homelessness officials now estimate a jaw-dropping 20,000 people live unhoused in the city throughout the year — and for every one person housed, another four lose their housing.

BY KEVIN FAGAN AND MALLORY MOENCH

Lightning is rare in the Bay Area, but so dangerous when it strikes

BY JACK LEE

Coastal fog has kept the Bay Area cool. What happens now that ‘Fogust’...
BY GERRY DÍAZ

Bay Area COVID vaccination rates for kids are among state’s highest, but...
BY AIDIN VAZIRI AND SUSIE NEILSON

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From: Merin, David
Sent: Monday, October 29, 2018 6:56 PM
To: SFDA-All Attorneys
Subject: Updated Prosecutorial Misconduct Protocol
Attachments: PMFlowChart (002).pdf; Prosecutorial Misconduct Protocol (002).pdf

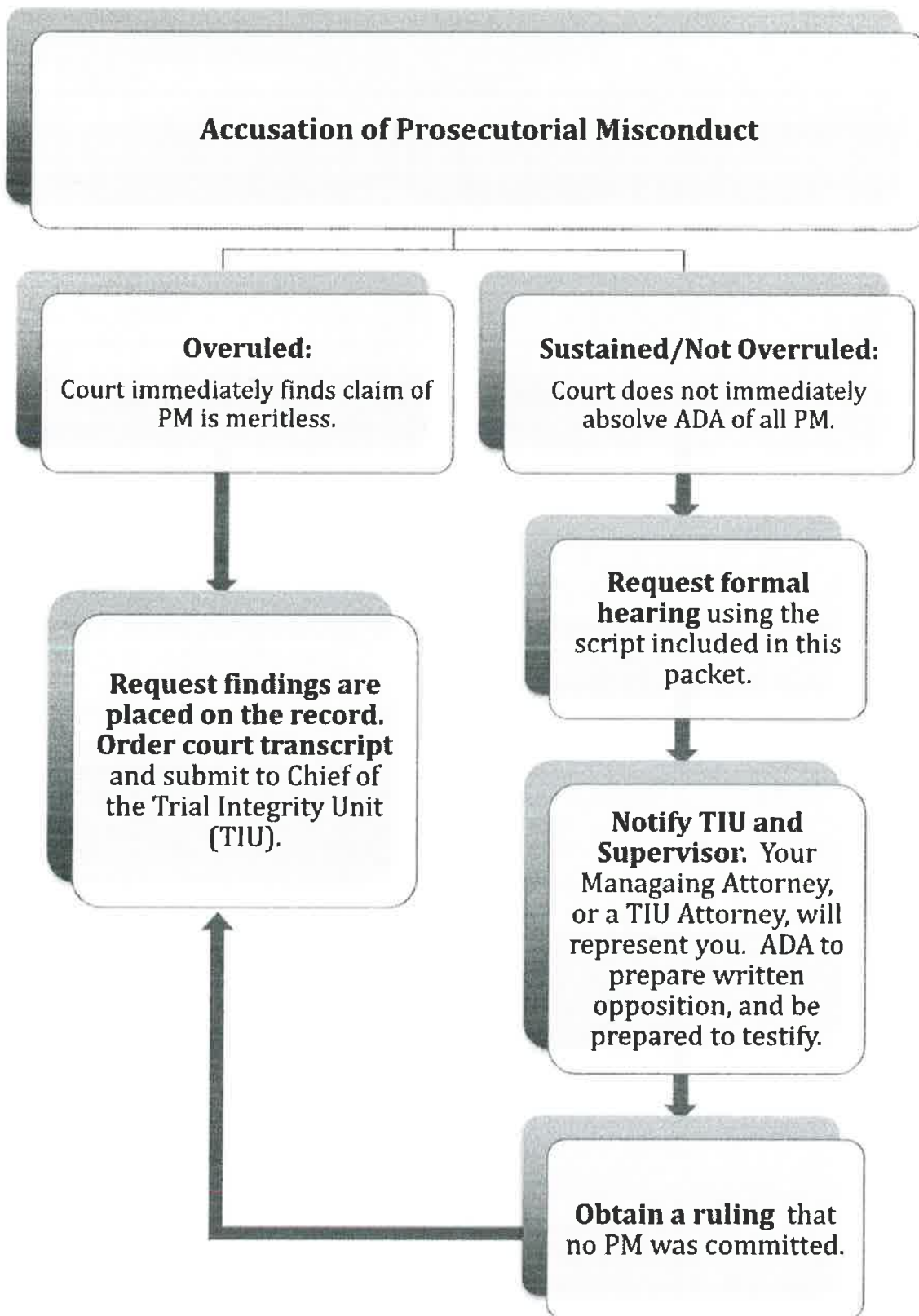
All Attorneys:

Attached is SFDA's *updated* office protocol for responding to allegations of prosecutorial misconduct (PM). Effective today, the protocol has been updated to reflect that MA's will now represent their ADA's in court when arguing against allegations of PM, instead of TIU. Additionally, while TIU, Wade Chow and Jim Thompson, will continue to be resources to you, the updated PM Protocol now provides that written oppositions to PM motions are to be entirely drafted by the ADA.

Finally, below is a SHAREPOINT link to PM opposition resources. Thanks

<https://sfgov1.sharepoint.com/sites/DAT/TIU/Misconduct%20Allegations/Forms/AllItems.aspx?viewpath=%2Fsites%2FDAT%2FTIU%2FMisconduct%20Allegations%2FForms%2FAllItems.aspx>

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CITY AND COUNTY OF SAN FRANCISCO

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***Policy Directive
Protocol for Allegations of Prosecutorial Misconduct***

Policy Directive

It is the policy of the Office of District Attorney to never allow a false accusation of Prosecutorial Misconduct ("PM") to go un-rebutted. Prosecutors should always deny false allegations on the record even if the initial accusation was made *in-camera*. Even frivolous, perfunctory, or repetitive defense claims of PM should be responded to on the record.

As always, we are guided by the United States Supreme Court's articulation of a prosecutor's professional responsibility:

"The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done...He/She may prosecute with earnestness and vigor—indeed he/she should do so. But, while he/she may strike hard blows, he/she is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." (*Berger v. United States* (1935) 295 US 78, 88.)

Definition: Prosecutorial Misconduct

"Prosecutorial misconduct" is a broad term used to describe serious incidents of professional misconduct as well as relatively insignificant, well-intentioned, or even innocent or negligent acts. While PM may be alleged in numerous contexts, the oral allegation of PM is frequently alleged during trial on the following bases:

- Comment on Defendant's refusal to testify ("Griffin error");
- Comment on Defendant's silence after *Miranda* admonishment ("Doyle error");
- Comment on Defendant's refusal to participate in police interview;
- Stating personal opinions;
- Vouching for the credibility of prosecution witnesses;
- Intentional use of false testimony;
- Reference to facts not in record;
- Eliciting, or attempting to elicit, inadmissible evidence;
- Failure to correct false testimony of prosecution witness;
- Coercion of Defense witnesses or undue interference in a defense witnesses decision to testify;
- Arguing that defense counsel had an "obligation" to present evidence;
- Misstatement of the law or evidence;
- Brady or Discovery Violation per PC 1054.1;
- Post-verdict revelation of inadmissible evidence to jurors.

This list of examples of PM is not exhaustive. (*See, California Criminal Law Procedure and Practice, 2012 § 2.45, for more complete list.*)

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY

October 29, 2018

Protocol

Oral Allegation of PM

Commonly, accusations of PM are made as short defense objections made during the People's closing argument vaguely referencing "misconduct" or "PM." Such objections may be strategic efforts calculated to interrupt the flow of argument. The Court often summarily overrules such objections and permits continued argument. In the event the Court does not immediately overrule the defense objection, use the protocol below:

1. **IF THE COURT DOES NOT IMMEDIATELY OVERRULE A PM OBJECTION, REQUEST A FINDING THAT THE ACCUSATION IS WITHOUT MERIT:** Upon the oral allegation of PM, request the Court find no PM was committed and request that such findings are recorded on the record and in the minutes.
 - a. **FINDING OF IMMEDIATE MERITLESS PM:** Upon the Court finding meritless any defense claim of PM, order the transcript and route the same to the Chief of the Trial Integrity Unit (TIU) for banking and possible ethics referral of the defense attorney.
2. **NO IMMEDIATE JUDICIAL FINDING OF WRONGFUL PM ACCUSATION:** In the absence of an immediate judicial finding absolving the ADA of all PM, request the Court to conduct a formal hearing on the record using the following script:

"Your Honor, an allegation of prosecutorial misconduct has been made against the Prosecution Team. In order to properly respond, I need to know the specific nature of the allegation and any facts supporting the alleged misconduct. Additionally, I ask for a reasonable time period in which to respond. If no basis can be given by the defense, I ask for the allegation to be stricken and that defense counsel be admonished of his/her duty of candor under California Rule of Professional Conduct 5-200(a) and (b) and Bus. and Prof. Code §6068(d) which state that a member shall employ such means only as are consistent with the truth and shall not seek to mislead the judge or jury by artifice or false statement of fact or law."
3. **NOTIFY "TIU" AND YOUR SUPERVISOR:** Your Managing Attorney, or a TIU attorney, will represent you at the hearing requested above. ADA must prepare a written opposition to the PM allegation and be prepared to testify if necessary. **DO NOT REPRESENT YOURSELF AT THE HEARING –YOUR MA OR TIU WILL REPRESENT YOU IN COURT.**
4. **OBTAIN A RULING THAT NO PM WAS COMMITTED:** At the conclusion of the hearing, request the Court find no PM committed and record the same on the court record and in the minutes. Order the transcript and route to the Chief of TIU for banking and possible further ethics referral of the defense attorney.

Written Allegation of PM

NOTIFY TIU AND YOUR SUPERVISOR: Your MA, or TIU, will represent you at the hearing. ADA must prepare a written opposition of the facts and allegations. Assist your representative in preparing an opposition and be prepared to testify if necessary. **DO NOT REPRESENT YOURSELF AT THE HEARING.**

CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE DISTRICT ATTORNEY

October 29, 2018

Legal Resource Guide

WRONGFUL OR BAD FAITH ACCUSATIONS OF PROSECUTORIAL MISCONDUCT

An accusation of misconduct must be supported by facts. In the absence of proof that an ADA violated the law, rule of professional conduct, or a court order, the defense attorney him/herself has committed misconduct by making a spurious accusation either intentionally or recklessly. (See, Bus. and Prof. Code §6068(d) and California Rule of Professional Conduct 5-200(a) and (b).) Such accusations are designed to intimidate, malign, or distract the prosecution.

When the Prosecution is presented with such tactics, whether intentional or reckless, consider "going on the offensive" by requesting the court find that the *accuser* has committed misconduct. At a minimum you may ask that the accuser be admonished as to their duty of candor¹. If the false accusation is egregious, you may invite the court to consider sanctions or even contempt proceedings. (See generally, *Vaughn v. Muni. Court* (1967) 252 Cal.App.2d 348, 358; *In re Ciraolo* (1969) 70 Cal.2d 389, 394.) While you may accuse your opponent of misconduct, contempt power belongs to the court and you may not "move" to have your opponent held in contempt. Order a transcript of any Court admonishment or findings against the defense and route to TIU for banking on the 'S' Drive. The following points and authorities may be helpful:

Duty to Never Mislead the Court

"An attorney has the unqualified duty to refrain from acts which mislead the court; representation to the court of facts known to be false is presumed intentional and a violation of an attorney's duties as an officer of the court under B&P Section 6068." (*Jackson v. State Bar* (1979) 23 Cal.3d 509, 513.)

Duty of Candor and Honesty

Consider asking the court to find that your opponent violated the duty to be candid and never mislead a judge. (Cal. Rule of Professional Conduct 5-200; B&P Code Section 6068(d).) A lawyer speaking in court is virtually under oath. (*Mosesian v. State Bar* (1972) 8 Cal.3d 60)

Duty to Respect the Court and Maintain Just Causes

Consider asking for findings that the duty to respect the court in B&P Code section 6068(f) and the duty to maintain just causes in section 6068(e) were violated.

¹ Of course, the Prosecution's own Duty of Candor mandates the concession of clear incidents of prosecutorial misconduct. (See, Bus. and Prof. Code §6068(d) and California Rule of Professional Conduct 5-200(a) and (b).) If the ADA is not sure whether he/she has committed PM, immediately advise and confer with a supervising ADA.