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ENDORSED
FILED
Superior Court of California
County of San Francisco

JUL 11 - 6 2010

CLERK OF THE COURT
BY: BENJAMIN THOMPSON
Deputy Clerk

5 Attorneys for the Honorable Anne-Christine Massullo,
6 Judge of the Superior Court of California, County of San Francisco

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 FOR THE COUNTY OF SAN FRANCISCO

9 PEOPLE OF THE STATE OF CALIFORNIA,)
10)
11 Plaintiff,) VERIFIED ANSWER OF JUDGE ANNE-
12 v.) CHRISTINE MASSULLO TO THE
13) CHALLENGE FOR CAUSE:
14) MEMORANDUM OF POINTS AND
15) AUTHORITIES
16 TINA BARFIELD #2435077)
17 ANDRE ARCENEUX #2353819)
18 ERIC BRANDON #2440362)
19 ARMANDO CASTILLO #2411845)
20 ANTONIO GARCIA #2403587)
21 FRANCISCO GARCIA #10000854)
22 FRANCISCO HERNANDEZ #2426893)
23 MICHAEL JONES #2430163)
24 JAMES LEWIS #2436134)
25 KAREN MONTOYA #2440132)
26 AVERY NEWCOMER #2437735)
27 DARYL PORTER #2412698)
28 KENNETH REVELS #2348721)
KENNETH REVELS #2430164)
RICK SHORT #2448234)
RANDY STEED #10004673)
STEPHEN WALLACE #10000328)
JAHMAL WINSTON #2343319)
SUCHA RUNGRATTANAKASIN, #2433420)
Defendants.)

1 The Honorable Anne-Christine Massullo, Judge of the Superior Court of California,
2 County of San Francisco (Judge Massullo) hereby responds to the challenge for cause filed by
3 Kamala Harris, the District Attorney for the County of San Francisco.

4 **VERIFIED ANSWER OF THE HONORABLE ANNE-CHRISTINE MASSULLO**

5 I, Anne-Christine Massullo, do declare as follows:

6 I am a Judge of the Superior Court of California, County of San Francisco and have
7 presided over the above-entitled joined actions in Department 25 at the Hall of Justice. I make
8 each of the following statements of my own personal knowledge unless stated upon information
9 and belief and as to those statements, I believe them to be true.

10 1. The District Attorney for the County of San Francisco has filed the instant
11 challenge for cause pursuant to Code of Civil Procedure § 170.1 in all of the above referenced
12 cases. The District Attorney claims that a person aware of the facts would believe that I could
13 not be fair and impartial in these cases and that I have a financial interest in the proceedings.

14 2. I specifically deny the claims of the District Attorney. I am not biased or
15 prejudiced in favor of or against any party or attorney in any of the above referenced matters. I
16 have no financial interest in any of the proceedings. I know of no reason why I cannot be fair
17 and impartial. Indeed, I have no doubt in my mind that I am and have been fair and impartial in
18 these proceedings.

19 3. On April 9, 2010, I was assigned to hear the matter *People v. Bilboa* SCN
20 2443262 and sixty other joined motions to dismiss or in the alternative to compel discovery. All
21 of the cases involved defendants charged with various narcotics crimes that were seeking
22 dismissal of their cases or, in the alternative, discovery of documents related to the misconduct
23 of a former San Francisco Crime Lab ("Crime Lab") criminalist, Debbie Madden. As part of the
24 joined motions, I was required to review thousands of pages of documents the District Attorney
25 submitted for in camera review because of an ongoing criminal investigation about Madden.
26 During one of the first hearings on the joined cases, I informed all parties that I would issue a
27 written order after my review of the bulk of the documents was complete. I set almost weekly
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1 hearings that were done at a time when I was not in session with any other trials that were
2 ongoing in my department.

3 4. Debbie Madden is represented by Paul DeMeester. Mr. DeMeester was permitted
4 to appear in the joined cases on the limited issue of asserting Madden's privacy rights with
5 respect to items contained in her personnel file. She is not a defendant in the joined cases nor
6 does she have an ongoing criminal case in San Francisco County.

7 5. On May 17, 2010, I issued an Order and Statement of Decision based on my
8 review of the documents and the record before me. A copy of the order is attached as Exhibit A
9 to the Challenge for Cause. The factual background of Madden's criminal history, suspension
10 and admission to taking spilt cocaine from the Crime Lab is found at pages 2-5 of the Order.
11 Based on the record before me, including the District Attorney's failure to provide any evidence
12 of any procedure she had in place to obtain criminal history information of SFPD employees, I
13 made findings at pages 12-17 of the May 17, 2010 Order. The District Attorney never sought
14 appellate review of that decision.

15 6. The District Attorney did, however, challenge certain findings of my order that
16 were critical of her office (not the conclusion wherein I denied the requests for dismissal) in a
17 proceeding in Department 23 of the San Francisco Superior Court, Judge Susan Breall presiding.
18 I am not aware of any ruling by Judge Breall reversing any portion of the May 17 Order. In
19 addition, the District Attorney filed this motion which seeks, in part, to vacate only that portion
20 of the May 17, 2010 Order which made findings that were critical about her office but not the
21 part of the order denying dismissal of the joined cases for *Brady* violations.

22 7. On or about May 10, 2010, my husband, John Hemann, and I were discussing our
23 schedules to determine our availability to attend various school events for our children. My
24 husband is a partner with the law firm of Morgan, Lewis & Bockius. His practice is almost
25 exclusively in anti-trust and white collar criminal proceedings. However, he believes that
26 members of the local bar should make time to represent indigent defendants and as such, he
27 applied for and was appointed to serve on the Criminal Justice Act panel for the U.S. District
28 Court in the Northern District of California. Members of the CJA panel are available to take

1 cases when the Federal Public Defender's Office has a conflict. I am informed and believe that
2 from 2006 to 2009 my husband handled only two drug cases through the CJA panel.

3 8. During our scheduling discussion, my husband told me that he had an appearance
4 in Federal Court the next day regarding a case where he had been appointed to represent a
5 defendant, Antoinette Cowden, on charges involving the possession of narcotics for sale. The
6 case title is *United States of America v. Roberson et al.* CR-00523 WHA.

7 9. I asked my husband if the case involved conduct in San Francisco County and he
8 told me that it did. I asked him for a summary of the public facts about the case so I could
9 determine if his representation of Ms. Cowden presented a conflict for me. He informed me that:
10 (1) the drugs were tested at the SFPD Crime Lab but were not tested by Debbie Madden; (2) Ms.
11 Cowden had entered a plea to a charge in 2009; (3) the case involved a small amount of crack;
12 and (4) the U.S. Attorney's Office had a separate policy on how it was dealing with cases
13 involving narcotics that had been tested by the Crime Lab.

14 10. After reviewing the pertinent ethical standards, I did not believe that recusal was
15 required. However, there was a hearing scheduled in the joined crime lab cases which I had
16 scheduled for May 13, 2010 and in an abundance of caution, I called the California Judges
17 Association ("CJA") Ethics Hotline to obtain the name of a judge who could offer a further
18 opinion on the matter. I was given the names of three judges. All of the judges whose names I
19 was given sit on the Ethics Committee for the CJA and make themselves available to respond to
20 inquiries from judges, such as myself, who are seeking guidance about ethical issues.

21 11. On or about May 11, 2010, I contacted the Honorable Mary E. Fuller, Judge of
22 the Superior Court of California, County of San Bernardino, to obtain a further opinion on any
23 potential conflict stemming from my husband's involvement in the federal court case. I outlined
24 for Judge Fuller the public facts I had learned from my husband about the case and my
25 involvement regarding discovery issues in the state court cases. I asked both for an opinion
26 regarding a conflict and whether I would be required to disclose my husband's involvement in
27 the case.

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1 12. On May 12, 2010 at approximately 12:11 p.m., Judge Fuller left a voicemail
2 message for me responding to my two points of inquiry. Judge Fuller stated that she had
3 reviewed my set of facts with the Vice Chair of the Committee and that because my husband's
4 involvement in the federal case was "so remote" that the situation was neither a conflict nor was
5 it something that would require disclosure. Judge Fuller stated that the opinion was advisory
6 only and that it would not be final until it went before the full Ethics Committee at their next
7 meeting. I am informed and believe that the next meeting of the Committee is on July 17, 2010.

8 13. On May 12, 2010 at approximately 5:30 p.m., I participated via telephone in a
9 meeting of the Criminal Justice section of the Bar Association of San Francisco ("BASF"). On
10 the agenda for the meeting was the June CLE panel regarding ethical issues in criminal
11 discovery. On memory and belief, the section first started discussing the ethics CLE in February
12 2010 well before I was assigned the Madden/Crime Lab joined cases.

13 14. As of the May 12, 2010 meeting, two ADAs from the District Attorney's Office
14 were members of the Criminal Justice section of BASF. All members of the section, including
15 the two ADAs from Ms. Harris' office, were sent an e-mail of the May 12, 2010 agenda.

16 15. On May 13, 2010, there was a further hearing on the joined cases. Based on my
17 review of the law and the response I received from Judge Fuller, I did not disclose my husband's
18 involvement in the federal case at the hearing.

19 16. As set forth above, on May 17, 2010, I issued my Order and Statement of
20 Decision on the joined cases. A further hearing was set for May 20, 2010. On or about May 25,
21 2010, I received additional documents from the District Attorney for in camera review. Those
22 documents were produced as part of the ongoing criminal investigation.

23 17. A further hearing regarding the joined cases was scheduled for May 27, 2010.

24 18. On May 25, 2010, my husband called me after he had made another appearance in
25 the federal court case. He told me that an attorney who was also present in the same courtroom
26 had approached him after his appearance to inquire about the facts of Ms. Cowden's case. The
27 attorney who approached my husband told him that he represented Debbie Madden. My
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1 husband could not recall his name but when I asked if Paul DeMeester rang a bell, my husband
2 said that that was the person who had approached him.

3 19. At the May 27, 2010 hearing on the joined cases, after all counsel, including Mr.
4 DeMeester, had made their appearances on the record, I disclosed the contact Mr. DeMeester had
5 made with my husband. I stated then, as I do today, that nothing about that contact or the case
6 would create a conflict such that I could not be fair and impartial in these proceedings. At the
7 time of the disclosure, the District Attorney said nothing. In his response to my disclosure at the
8 beginning of the hearing, Mr. DeMeester informed me that he had just been discussing that
9 federal case with the District Attorney.

10 The Court: The Court should bring this up, Mr. DeMeester. It certainly does not
11 effect this Court's ability to continue hearing the cases, but I understand Mr.
12 DeMeester contacted my husband about a matter. And he's representing -- his
13 name is John Hemann.

14 Mr. DeMeester: Really? I didn't know the connection. That's interesting.

15 The Court: And the court needs to disclose it. My husband disclosed to me that
16 you had contacted him. It's a federal court matter, has nothing to do with this
17 case, and wouldn't affect this court's ability to continue to hear these matters. But
18 I want to state on the record, Mr. DeMeester, so that you know there is a
19 connection.

20 Mr. Demeester: Right. And your honor, this -- this contact took place yesterday
21 or the day before -- two days ago. And I was just actually apprising the
22 prosecution of that case without citing names of the individuals involved. But
23 that was indeed a matter I was just broaching with counsel. So thank you very
24 much.

25 (Transcript of May 27, 2010 Hearing, RT pp. 3-4: lines 13-1.)

26 20. The next hearing in this matter was scheduled for June 10, 2010. As I was
27 reviewing the additional documents submitted in camera for review, I issued a June 2, 2010
28 Supplemental Order for Additional Information. Part of the order included the following:

Finally, the Court orders the District Attorney's office to confirm in a written
declaration that the office has reviewed its files and e-mails and that all
Brady-Giglio information has been provided to the Court for in camera review.
This additional information will be provided to the Court by close of business on
June 3, 2010.

1 21. Instead of providing a declaration on June 3, 2010, the District Attorney asked for
2 a continuance until June 10, 2010 to clarify my June 2, 2010 order. I ordered all counsel present
3 on June 4, 2010 for a specially set hearing.

4 22. Before the June 4, 2010 hearing began, the District Attorney's Office, for the first
5 time, raised the issue of a potential conflict at a sidebar with all counsel present. ADA Paul
6 Henderson requested the sidebar. To the best of my memory, ADA Henderson said that his
7 office now had concerns about my husband's involvement in the federal court case because of a
8 newspaper article that had appeared earlier that week. Since I only receive the Daily Journal in
9 print in my chambers, I had not read the article. Mr. Henderson said his office had some
10 questions for me and read them to me in front of the other counsel present. I told Mr. Henderson
11 that if there were questions, we would need to be on the record.

12 23. At the end of the June 4, 2010 hearing, I stated the following regarding the
13 questions ADA Henderson requested that I answer at sidebar:

14 The Court: Again, I want to follow procedure and so if you provide those
15 questions to the Court, and the Court will - - it is kind of an odd situation where
16 the Court is being asked questions. And again, if your office feels that it needs to
17 make a motion, then it should make the motion and the Court will address the
18 issues accordingly.

19 * * *

20 The Court: Again, the court wants to obviously be responsive. But I also want to
21 follow the procedures. There is a procedure set out, and under civil code 170.
22 And so the Court wants to be mindful of that procedure. That is all that the Court
23 can say at this point. Why don't you provide the questions and then whatever
24 authority you may have and the Court will look at them.

25 (Transcript of June 4, 2010 Hearing attached as Exhibit G to Challenge for Cause,
26 RT pp. 18-19 lines 24-15.)

27 24. A hearing for the joined cases was next scheduled for June 10, 2010. In his
28 verified statement, ADA Paul Henderson asserts that I did not allow him to lodge the District
Attorney's questions with the Court. (Challenge for Cause and Verified Statement at p. 8: lines
21-26.) On the record, I denied the request to lodge the questions for the reasons stated in my
ruling. (Transcript of June 10, 2010 Hearing, RT at pp. 11-12: lines 20-22, Exhibit I attached.)
Nonetheless, when we were off the record and I was about to get off the bench, ADA Henderson

1 again tried to leave the questions with my clerk. Because I had issued my ruling on the record, I
2 refused to allow my clerk to accept the questions. On memory and belief, I told ADA Henderson
3 that he could not leave the questions because I would consider it an *ex parte* communication.

4 25. The District Attorney alleges that I failed to disclose a potential conflict of
5 interest "until after another attorney, [Paul] DeMeester broached the subject with the People on
6 May 27, 2010, two months into the discovery hearings and 10 days after issuing its written Order
7 finding discovery violations by the District Attorney's Office." (Challenge, p. 12, lines 21-22.)
8 The District Attorney claims that based on the Court's then disclosure, a reasonable person
9 would conclude that I discussed the discovery hearings with my husband.

10 26. I deny the District Attorney's claims. It is a matter of public knowledge that I
11 have been presiding over the joined cases involving Madden and the Crime Lab since April 9,
12 2010. Where a potential conflict may present itself, I have an ethical and legal duty to gather
13 what facts I can to determine if in fact the matter presents a conflict. That is what I did when I
14 discussed the specifics of the federal case with my husband.

15 27. I had no knowledge that Mr. DeMeester had been discussing the federal case with
16 the District Attorney's Office when I took the bench on May 27, 2010. The first that I learned
17 that Mr. DeMeester had been discussing the federal case was *after* I made my disclosure as
18 evidenced in the transcript. It was Mr. DeMeester who, on the record, told me that he had just
19 been discussing the case with the District Attorney's Office.

20 28. The District Attorney asserts that there is a "temporal connection between [my]
21 rulings and findings, which the People take issue with, and the publicity surrounding [my]
22 husband's actions." (Challenge, p. 13, lines 15-16.) The District Attorney asserts that based on
23 a June 1, 2010 article in The Recorder newspaper, my husband "was able to get a better deal in
24 federal court for his client as a result of the disclosures of the problems in the Crime Lab."
25 (Challenge, p. 13, lines 17-18.) In that same newspaper, an advertisement placed by the Bar
26 Association of San Francisco ("BASF"), listed my husband as a panelist for a CLE class
27 sponsored by the Criminal Justice section, "*Brady* Disclosures: What's Gone Wrong and How to
28 Make it Right."

1 29. I deny the District Attorney's claims regarding my husband's involvement in the
2 federal case or the CLE panel. The District Attorney has not provided any competent fact or
3 evidence to support her conclusions about my husband. There has been no declaration from any
4 member of the U.S. Attorney's Office to support the District Attorney's conclusion that Ms.
5 Cowden somehow got a better deal as the result of any rulings I made in the joined state law
6 cases. The fact of Madden's 2008 conviction and the tape recorded interview of her in mid-
7 February 2010 where she admitted to taking spilt cocaine from the Crime Lab are documents
8 placed in the public domain without any order by me. In fact, the tape of Madden's interview
9 was played over a public radio or cable station.

10 30. The United States Attorney is the Chief Law Enforcement Officer for the
11 Northern District of California. The United States Attorney's Office has not asked to join in the
12 instant cases seeking discovery about Madden or the Crime Lab. My husband recently informed
13 me that the Cowden matter was resolved based solely on the policy created by the United States
14 Attorney regarding the Madden/Crime Lab cases. He further informed me that the only
15 discovery he received in the federal case was the initial lab report.

16 31. Both my husband and I are members of the Criminal Justice section of BASF.
17 The Criminal Justice section sponsors CLE classes on issues concerning both federal and state
18 criminal proceedings. I have been a member of the Criminal Justice section since 2007. My
19 husband became a member of the section in 2010. As long as I have been a member, there has
20 been an Assistant District Attorney from the District Attorney's Office who is also a member of
21 the section. The section also includes members of the private bar, academia, the public
22 defender's offices of the Northern District of California and the County of San Francisco, the
23 United States Attorney's Office and the United States District Court.

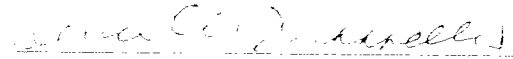
24 32. I was not present for the June 17, 2010 CLE panel. I am informed and believe
25 that the chief of the criminal division for the U.S. Attorney's office was on the panel and spoke
26 before my husband. I am informed and believe that the chief of the criminal division stated that
27 the U.S. Attorney has an "open file" discovery policy. I am informed and believe that when my
28 husband spoke next, he agreed with the discovery policy of the U.S. Attorney as a way to obviate

1 most *Brady* problems. I am informed and believe that at no time did my husband comment about
2 the Madden cases pending before me.

3 33. There are no facts or circumstances that would require my disqualification or
4 recusal in this case and I do not believe my recusal would serve the interests of justice.

5 I declare under penalty of perjury that the foregoing is true and correct.

6 Executed July 6, 2010, at San Francisco, California.

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8 Judge Anne-Christine Massullo
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The District Attorney for the County of San Francisco, has filed a challenge for cause
5 pursuant to Code of Civil Procedure § 170.1. However, the challenge is factually incomplete and
6 misleading. Indeed, the challenge appears to be an attempt by the District Attorney's Office to have
7 portions of Judge Massullo's May 17, 2010 Order overturned.

8 It is the District Attorney's position that Judge Massullo is biased or prejudiced, or that a
9 person aware of the facts would believe that the People could not receive a fair and impartial
10 hearing in the instant matter. The District Attorney fails to set forth any verified facts to support this
11 claim. The District Attorney also claims that Judge Massullo is financially interested in the
12 proceedings. The basis for the challenge is that Judge Massullo's husband is a criminal defense
13 attorney practicing law in federal court; and that he represented an indigent criminal defendant
14 prosecuted by the U.S. Attorney's Office for narcotics related offenses. Without presenting any
15 evidence, the District Attorney claims that the client of Judge Massullo's husband somehow
16 received a more favorable disposition in the federal court because of rulings made by Judge
17 Massullo in the unrelated state court cases. The District Attorney also claims that there is an
18 appearance of impropriety because Judge Massullo's husband was on a CLE panel that discussed
19 general legal principles that relate to the legal principles at issue in the instant proceedings. What
20 she fails to mention is that two Assistant District Attorney's from her office are also members of the
21 section of the bar that sponsored the CLE panel and that members of her office were at meetings
22 when the CLE presentation was discussed. In addition, the District Attorney offers no legal support
23 for her conclusion that Judge Massullo must be disqualified because her husband participated in a
24 panel discussion about the general topic of criminal discovery. In fact, the District Attorney
25 concedes that Judge Massullo's husband mentioned nothing about the Madden case or the Crime
26 Lab. Finally, the District Attorney claims that Judge Massullo was under an obligation to disclose
27 the foregoing and did not; and that raised an appearance of impropriety.

1 In addition, it is the assertion of the District Attorney that because of the appearance of bias,
2 Judge Massullo can no longer preside over any aspect of the above referenced matters. Further, the
3 District Attorney asserts that because of the appearance of bias, all of Judge Massullo's prior orders
4 are void to the extent they criticize her management of the office but, to the extent Judge Massullo
5 denied the joined defendant's motion to dismiss their criminal cases for *Brady* violations, that
6 portion of the order, and that portion alone, should stand. As set forth more fully below, the instant
7 statement of disqualification is not an avenue to challenge a judge's rulings or to obtain a reversal of
8 same. (Challenge, p. 11, lines 12-15, 22-28.)

9 For all the reasons set forth below, the District Attorney's challenge does not state grounds
10 for the disqualification of Judge Massullo and it is untimely. The instant challenge does not set
11 forth any objective facts that show bias or show that a reasonable person aware of the facts would
12 believe that Judge Massullo could not be fair and impartial in this matter or that Judge Massullo has
13 a financial interest in this matter. Therefore, the challenge filed by the District Attorney pursuant to
14 Code of Civil Procedure § 170.1 must be denied.

15 II.

16 THE CHALLENGE IS NOT TIMELY

17 "The statement shall be presented at the earliest practicable opportunity after discovery of
18 the facts constituting the ground for disqualification." Code Civ. Proc. § 170.3 (c)(1); *People v.*
19 *Sweet* (1937) 19 Cal.App.2d 392; *Krebs v. Los Angeles R. Corp.* (1936) 7 Cal.2d 549. "[I]f a
20 statement of disqualification is untimely filed or if on its face it discloses no legal grounds for
21 disqualification, the trial judge against whom it was filed may order it stricken." Code Civ. Proc.
22 §170.4(b); *Neblett v. Pacific Mutual Life Ins. Co.* (1943) 22 Cal.2d 393, 401.

23 In the instant matter, the challenge was not filed at the earliest practicable opportunity.
24 The District Attorney was aware of at least some of the facts about which she now complains, as
25 early as April 2010. Assistant District Attorneys from her office are members of the section of
26 BASF that sponsored the CLE ethics panel about which she now complains. In addition, the
27 newspaper article concerning Judge Massullo's husband and the purported better deal he got for
28 his client as a result of the Crime Lab related issues occurred on June 1, 2010. Nevertheless, the

1 District Attorney did not file the instant challenge until June 24, 2010 and in the meantime,
2 continued to submit documents for Judge Massullo's review in camera.

3 For both these reasons, the challenge is untimely and should be stricken.

4 **II.**

5 **THE STATEMENT OF DISQUALIFICATION DOES NOT SET FORTH GROUNDS**
6 **FOR THE DISQUALIFICATION**

7 Code of Civil Procedure §170.1 states:

8 (a) A judge shall be disqualified if any one or more of the following is true:

9 (1)(A) The judge has personal knowledge of disputed evidentiary facts concerning
10 the proceeding...

11 (2)(A) The judge served as a lawyer in the proceeding

12 (3)(A)The judge has a financial interest in the subject matter in a proceeding or in
13 a party to the proceeding.

14 (B)A judge shall be deemed to have a financial interest within the meaning of
15 this paragraph if:

16 (i)A spouse or minor child living in the household has a financial interest.

17 (ii)The judge or the spouse of the judge is a fiduciary who has a financial
18 interest.

19 (C)A judge has a duty to make reasonable efforts to inform himself or herself
20 about his or her personal and fiduciary interests and those of his or her spouse and
21 the personal financial interests of children living in the household.

22 (4) The judge, or the spouse of the judge, or a person within the third degree of
23 relationship to either of them, or the spouse of such a person is a party to the
24 proceeding or an officer, director, or trustee of a party.

25 (5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former
26 spouse, child, sibling, or parent of the judge or the judge's spouse or if such a
27 person is associated in the private practice of law with a lawyer in the proceeding.

28 (6)(A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be
impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge
would be able to be impartial...

(7)By reason of permanent or temporary physical impairment, the judge is unable
to properly perceive the evidence or is unable to properly conduct the proceeding.

(8)(A) The judge has a current arrangement concerning prospective employment
or other compensated service as a dispute resolution neutral....

1 The California Supreme Court has stated that unless the grounds for disqualification are
2 those enumerated in the statute, the judge will not be disqualified. *Patterson v. Police Judge's*
3 *Court* (1899) 123 Cal. 453, 455.

4 The District Attorney in the instant matter has not set forth any facts which support
5 grounds for disqualification as enumerated in the statute.

6 Code of Civil Procedure Section 170.3(c)(1) requires that the disqualification statement
7 set forth "the facts constituting the grounds" for the disqualification of the judge. Mere
8 allegations setting forth the conclusions of the declarant do not comply. *Ephraim v. Superior*
9 *Court* (1941) 42 Cal.App.2d 578, 578-579; *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d
10 415, 426. "Potential bias and prejudice must clearly be established. (Citation.) . . ." *Roitz v.*
11 *Coldwell Banker Residential Brokerage Co.* (1998) 62 Cal.App.4th 716, 724.

12 A party's belief as to a judge's bias and prejudice is irrelevant and not controlling in a
13 motion to disqualify for cause, as the test applied is an objective one. *United Farm Workers of*
14 *America v. Superior Court* (1985) 170 Cal.App.3d 97, 104; *Stanford University v. Superior*
15 *Court* (1985) 173 Cal.App.3d 403, 408 ("the litigants' necessarily partisan views do not provide
16 the applicable frame of reference.")

17 It is not sufficient in a case of this kind, to allege in the affidavit simply that the
18 defendant believes that he cannot have a fair and impartial trial, etc., but it must
19 be made to appear by the affidavit or affidavits on file that a fair and impartial
20 trial cannot be had before the judge about to try the case, by reason of the bias and
21 prejudice of such judge. (Citation.) The affidavit or affidavits must not only state
22 facts, but the facts stated must establish to the satisfaction of a reasonable mind
23 that the judge has a bias or prejudice that will in all probability prevent him from
24 dealing fairly with the defendant.

25 *People v. Ford* (1914) 25 Cal.App. 388, 395.

26 It is not sufficient that the District Attorney *claims* that Judge Massullo is biased or that
27 the People cannot receive a fair and impartial hearing in front of her. Instead, the District
28 Attorney must set forth *facts* that show to a *reasonable mind* that Judge Massullo is biased so
that the People cannot get a fair trial.

Bias or prejudice consists of a "mental attitude or disposition of the judge towards
a party to the litigation . . ." (Citation.) In order for the judge to be disqualified,

1 the prejudice must be against a particular party ... and sufficient to impair the
2 judge's impartiality so that it appears probable that a fair trial cannot be held.
(Citations.)

3 *Ensher, Alexander & Barsoom, Inc. v. Ensher* (1964) 225 Cal.App.2d 318, 322-323.

4 In the present case, there is nothing about Judge Massullo's husband giving a
5 presentation about a general area of criminal law which demonstrates bias or that shows that
6 Judge Massullo cannot be fair and impartial. Taken to its logical conclusion, the District
7 Attorney's position would require Judge Massullo - or any criminal judge - to declare a conflict
8 if the judge's spouse sat on a panel that discussed DNA evidence where DNA was used in a
9 pending trial. Clearly, there is no such requirement.

10 Likewise, there are no facts which show that because Judge Massullo's husband
11 represented a criminal defendant in an unrelated case in federal court that Judge Massullo cannot
12 be fair and impartial in this matter. There are no facts presented at all that show that Judge
13 Massullo is in any manner financially interested in the pending cases or that she cannot be fair
14 and impartial.

15 In the instant challenge, the District Attorney has taken issue with the rulings made by
16 Judge Massullo which are not favorable to the District Attorney's Office. The District Attorney
17 asserts that orders made by a judge who is disqualified from hearing a matter must be set aside.
18 Thus, it appears that the District Attorney is attempting to set aside the orders about which she
19 does not agree. However, if the District Attorney disagreed with the rulings of Judge Massullo,
20 the remedy is not to file a challenge pursuant to Code of Civil Procedure § 170.1. A party's
21 remedy for an erroneous ruling is not a motion to disqualify, but rather review by appeal or writ.
22 See *Ryan v. Welte* (1948) 87 Cal.App.2d 888, 893: "[A] wrong opinion on the law of a case does
23 not disqualify a judge, nor is it evidence of bias or prejudice." Otherwise, the court said, "no
24 judge who is reversed by a higher court on any ruling or decision would ever be qualified to
25 proceed further in the particular case." *Ibid.* The proper remedy is an appeal from the erroneous
26 ruling. *Ibid.* Also see, 2 Witkin, California Procedure, Courts, §119.

27 As stated in *Liteky v. United States* (1994) 510 U.S. 540, 555, in discussing the
28 extrajudicial source doctrine:

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First, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion....Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion....

Code of Civil Procedure § 170 states that it is the duty of the judge to hear matters assigned to him or her. Indeed, the Court of Appeal has stated that it is the court's *obligation* not to recuse itself where there are no grounds for disqualification.

Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge appears to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified. (Citation.)

Briggs v. Superior Court (2001) 87 Cal.App.4th 312, 319.

Judge Massullo has a duty not to recuse herself in this case because she is not biased or prejudiced against or in favor of any party or party's attorney.

III.

CONCLUSION

The District Attorney has failed to meet her burden of showing that Judge Massullo is financially interested in these proceedings. The District Attorney has also failed to meet her burden of showing that Judge Massullo is biased or that the People cannot get a fair and impartial hearing. Thus, the challenge must be denied and Judge Massullo must continue to hear the instant matter.

Dated: July 6, 2010

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