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COMMISSION ON
JUDICIAL PERFORMANCE

STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE EDMUND W. CLARKE, JR. NO. 197	**VERIFIED ANSWER OF JUDGE EDMUND W. CLARKE, JR. TO NOTICE OF FORMAL PROCEEDINGS**

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STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

INQUIRY CONCERNING JUDGE EDMUND W. CLARKE, JR. NO. 197	**VERIFIED ANSWER OF JUDGE EDMUND W. CLARKE, JR. TO NOTICE OF FORMAL PROCEEDINGS**

The Honorable Edmund W. Clarke, Jr. responds to the Notice of Formal Proceedings now pending before the Commission on Judicial Performance as follows:

1. Judge Clarke denies that he committed willful misconduct in office or conduct prejudicial to the administration of justice that brings the judicial office into disrepute or improper action within the meaning of Article 6, Section 18 of the California Constitution, which would subject Judge Clarke to removal, censure, or admonishment by the commission.

COUNT ONE

2. Judge Clarke admits that he presided over the jury selection process in *People v. Alejandro Diaz, Ivan Escobedo, Emanuel Lopez and David Banuelos*,. Case No. BA389610. The defendants were charged with murder and there were gang allegations. The trial was estimated to take four weeks. During the morning and afternoon court sessions on May 6, 2014, Judge Clarke heard the hardship requests of eighty-five prospective jurors who were seeking to be excused from jury duty. Judge Clarke intended that the hardship requests heard on May 6th be limited to those jurors who had financial hardships. Jurors who had other reasons to be excused from jury service were instructed to report on May 7th. Nevertheless, certain jurors appeared on May 6th asserting that they should not serve on the jury for reasons unrelated to financial hardship. Small groups of the jurors were called into the courtroom for questioning while the remaining jurors waited in the hallway for their turn to explain their hardship request.

3. Judge Clarke admits that during the afternoon of May 6th he heard the hardship request of Prospective Juror No. 7122, who had had written on the form provided by Judge Clarke's department that:

Please state any reason that you believe you qualify to be excused because of severe financial hardship or other serious hardship.

Having Severe Anxiety !! ☹
I work as a waitress and make minimum wages, plus I'm planning a wedding in two months and all of these things, especially this courthouse are aggravating my anxiety terribly. On the verge of a meltdown!

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

Executed on May 06, 2011, at Los Angeles, California.

(Juror's Signature)

4. The dialogue between Judge Clarke and Prospective Juror No. 7122 set forth by the commission in the Notice of Formal Proceedings is incomplete and misleading. While Judge Clarke admits that the excerpts from the transcript set forth in count one are true and correct quotations from the transcript, the entirety of the dialogue was as follows:

> THE COURT: I said 7122, thank you. And that is 138 on the random list. Good afternoon. PROSPECTIVE JUROR 7122: Hello.
>
> THE COURT: You're the only person to put a face on the form so far.
>
> PROSPECTIVE JUROR 7122: I thought I would brighten your day a little.
>
> THE COURT: Well, yes. It's not bad. It's a little dramatic I would say. So are you ever going to serve on jury duty?
>
> PROSPECTIVE JUROR 7122: You know, I thought I would be really good at it, but this is really stressful. My anxiety is through the roof right now.
>
> THE COURT: The guy next to you bothering you?
>
> PROSPECTIVE JUROR 7122: No.
>
> THE COURT: I didn't think so. I'm teasing him. All you've done so far is sit next to some very nice Citizens of our country who came here to serve, and only deal a little bit with the judge. And we can sometimes create anxiety. But you haven't seen me reach the levels that cause that yet.
>
> I'm going to excuse you, but I want you to think about

the fact that if you don't serve someone else will. If you're attitudes are not represented, someone else's are. And I find that when people don't know how the system works, maybe they're nervous about the fact it's foreign. There's nothing here that should give you severe anxiety and worry. It's a safe environment. It is our government up close, working right in front of your eyes. And, you know, you can think that the people in Sacramento care about you, and I hope they do. You can think that the people in Washington care about all of us, and I hope they do. But we are tiny drops in a large bucket. People who serve in one of my cases are one of 12 people who decide important issues for a fellow Citizen. And I think that makes them feel good, not anxious.

So that's the speech. You don't have to apologize or explain anything, I'm just hoping that next time you come in feeling better and maybe get a chance to serve.

PROSPECTIVE JUROR 7122: I also make $8 an hour at a restaurant and they don't pay for anything.

THE COURT: That's fine. And you would get an excuse for that without claiming that you're anxious and going to flip out and all those things.

PROSPECTIVE JUROR 7122: It's true.

THE COURT: I'm hoping that the next time you're called for jury duty maybe you'll be a little better off

financially and able to do a week trial and you won't feel nervous. Because my job is to make people feel like they're serving and doing a good thing, not to feel nervous. And I think if you talked to people who go through the whole process and serve, hear the arguments, decide a case and everything, that they leave feeling better. I mean, they feel better because what they've done. They feel better they saw something important. I think you will have that experience if you get a chance in the future. But right now I'm not going to ask you to do it, I'm going to excuse you, and you can go. And good luck.

PROSPECTIVE JUROR 7122: May I add something?

THE COURT: Is the wedding you're planning your own?

PROSPECTIVE JUROR 7122: Yes.

THE COURT: Okay. Well, come on, more enthusiasm from the bride, please.

PROSPECTIVE JUROR 7122: I would just like to add that, you know, everyone here in the jury has sacrificed a lot to even be here today. And, you know, anxiety is real. And the woman who is checking us in, I'm sure it's a very stressful job. The way she's treated everyone today has just been really disrespectful and —

THE COURT: You can stay then and tell me about that at the end of the day.

PROSPECTIVE JUROR 7122: I got to go.

THE COURT: No, you're staying. You're staying. You're staying on. I've been a judge for seven years. No one's ever complained about my clerk. But I'll be happy to hear your complaint at the end of the day. So go to the hall and stay and come in, act like an adult and you can face her and tell me everything she did wrong.

PROSPECTIVE JUROR 7122: Yes, sir.

[05/06/14 R.T. pp. 81:8-84:8.]

5. Judge Clarke acknowledges that he told Prospective Juror 7122 to wait in the hallway with other remaining prospective jurors so that Judge Clarke could proceed with the hardship excuses that could be done in less time than it would likely take for the anticipated further discussion with Prospective Juror 7122. Prospective Juror 7122 waited for less than an hour while Judge Clarke heard hardship requests of other jurors who had been waiting for their turns to be heard. It is Judge Clarke's regular practice, when an issue arises with a juror, which will take longer than the usual brief confirmation of a hardship request, to defer the issue until the other waiting jurors are questioned and either excused or asked to return to serve on the jury. Judge Clarke admits that the dialogue set forth in the Notice of Formal Proceedings at pages 3, 4, and 5 did occur.

6. Judge Clarke acknowledges, as he did in his initial response to the commission that in rising to the defense of his courtroom clerk, Judge Clarke made comments to Prospective Juror No. 7122 that he should not have made. Judge Clarke expressed his regret to the commission that he became upset with Prospective Juror No. 7122 at the point he concluded that the juror's accusations that his clerk had engaged in improper conduct were not credible. He has

previously expressed and continues to regret that he allowed his irritation to be reflected in his comments.

7. Although Prospective Juror No. 7122 claimed that she was suffering from "severe anxiety," her dealings with the court caused Judge Clarke to question the credibility of that assertion. Prospective Juror No. 7122 did not give the appearance of a person with anxiety in either her body language or her tone. She maintained direct eye contact when speaking with Judge Clarke, both when her hardship request was considered and when she made her complaints about his clerk. Judge Clarke was taken aback by Prospective Juror No. 7122's accusation that his clerk, who has served with Judge Clarke for over seven years, had engaged in improper conduct with the jurors. Judge Clarke has never known his clerk to be disrespectful to any prospective juror or anyone else she deals with, had never before received a complaint about his clerk, and had never considered how he would handle such a complaint.

8. Canon 3B(4), which requires that a judge be patient, dignified and courteous, also requires that a judge require "similar conduct of . . . all *staff and court personnel* under the judge's direction and control." Canon 3C(3), states that a judge *shall* "require staff and court personnel under the judge's direction and control to observe appropriate standards of conduct" and " refrain from manifesting bias or prejudice based on disability." Judge Clarke believed he had an obligation to make inquiry about the basis of the prospective juror's complaint. If, in fact, his clerk had acted improperly, Judge Clarke would have taken the appropriate action within the Los Angeles Superior Court personnel system. He determined there was no need to take any action given the statements made by the prospective juror and the juror's lack of credibility.

9. Although Judge Clarke, in hindsight, would have handled the situation differently, he does not believe that his conduct rose to the level that

would justify the public admonishment proposed by the commission, which resulted in Judge Clarke's demand for these formal proceedings. Judge Clarke denies that he violated Code of Judicial Ethics cannons 1, 2, 2A, or 3B(5) in his dealing with Prospective Juror 7122. To the extent he failed to be patient with or courteous to Prospective Juror 7122 as required by canon 3B(4) he denies that his conduct, in these circumstances, constitutes a ground for discipline under the California Constitution.

COUNT TWO

10. Judge Clarke admits that in the morning session on May 6th, he heard the hardship request of Prospective Juror No. 4688. Before Prospective Juror No. 4688 had come to Judge Clarke's department, she had been screened in the Jury Assembly Room to determine whether she spoke sufficient English to qualify as a juror. Because English is a second language for so many potential jurors in Los Angeles, the Jury Services Office of the Los Angeles Superior Court regularly screens jurors to determine whether their command of English is sufficient to qualify them as jurors. Judge Clarke was aware that the Jury Services Office uses bilingual staff, who have expertise in determining the language abilities of prospective jurors, to personally screen the jurors for eligibility. The jury services office had determined, *before* Prospective Juror No. 4688 came to Judge Clarke's department that she spoke sufficient English to be qualified to serve on a jury. The random list of jurors provided by the Jury Services Office notified Judge Clarke that the juror had been prescreened and was qualified to sit on the jury.

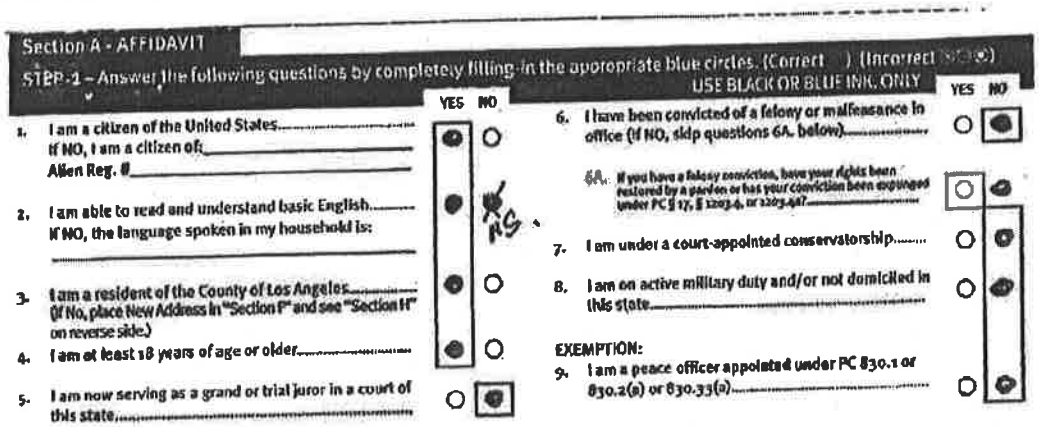
11. The English language hardship request Prospective Juror No. 4688 filled out after she came to Judge Clarke's department answered the first three questions in English with the word "None" (without any indication she did not understand the questions). The juror answered the fourth question: "Please state

any reason that you believe you qualify to be excused because of severe hardship or other serious hardship." with the words, "No hablo, Ni Entiendo Ingles."

12. Prospective Juror No. 4688 appeared to have no difficulty initially responding to Judge Clarke in English. For these reasons, and the fact that in Los Angeles County it is very common for jurors to attempt to avoid jury service by exaggerating their language difficulties, Judge Clarke questioned whether Prospective Juror No. 4688 (erroneously referred to at places in the transcript as Juror 5245) was not qualified to serve.

13. Judge Clarke acknowledges that he asked Prospective Juror No. 4688 to wait, with the other waiting jurors in the hallway, while the court staff obtained the questionnaire, which had been initially provided by Prospective Juror No. 4688 when she responded to her juror summons. In the interim Judge Clarke continued to hear the hardship requests of the other prospective jurors who had been waiting their turn.

14. That questionnaire was obtained before Prospective Juror No. 4688 was to return to the courtroom and the further dialogue set forth in the Notice of Formal Proceedings occurred. The affidavit signed by Prospective Juror No. 4688, when she responded to her juror summons, included the following responses:



Section A - AFFIDAVIT

STEP 1 – Answer the following questions by completely filling in the appropriate blue circles. (Correct) (Incorrect)

USE BLACK OR BLUE INK ONLY

	YES	NO
1. I am a citizen of the United States. If NO, I am a citizen of: ____ Alien Reg. #____	●	○
2. I am able to read and understand basic English. If NO, the language spoken in my household is: ____	●	○
3. I am a resident of the County of Los Angeles. (If No, place New Address in "Section F" and see "Section H" on reverse side.)	●	○
4. I am at least 18 years of age or older.	●	○
5. I am now serving as a grand or trial juror in a court of this state.	○	●
6. I have been convicted of a felony or malfeasance in office (If NO, skip questions 6A. below).	○	●
6A. If you have a felony conviction, have your rights been restored by a pardon or has your conviction been expunged under PC § 17, § 1203.4, or 1203.4a?	○	●
7. I am under a court-appointed conservatorship.	○	●
8. I am on active military duty and/or not domiciled in this state.	○	●
EXEMPTION: 9. I am a peace officer appointed under PC 830.1 or 830.2(a) or 830.33(a).	○	●

15. The initials of Prospective Juror No. 4688 were NS.

16. As a result, Judge Clarke continued to question the validity of Prospective Juror No. 4688's claim that she did not have the language skills to serve on the jury. In order to further explore the issue, Judge Clarke asked Prospective Juror No. 4688 to briefly wait in the hallway for a Spanish language interpreter to come to the courtroom. In the interim Judge Clarke addressed the complaint regarding his clerk raised by Prospective Juror No. 7122.

17. With the use of the interpreter the following dialogue occurred:

> THE COURT: Is the interpreter here? Did you want to try and talk to this lady? Maybe we can get her on her way. Good afternoon, ma'am.
>
> PROSPECTIVE JUROR 4688: Good afternoon.
>
> THE COURT: So now we have a certified Spanish language interpreter assisting you. Tell me —
>
> PROSPECTIVE JUROR 4688: Thank you so much.
>
> THE COURT: When you just cried, why did you cry?
>
> PROSPECTIVE JUROR 4688: I felt ashamed.
>
> THE COURT: Why ma'am?
>
> PROSPECTIVE JUROR 4688: Because I am a Citizen and I really do need to speak English and I don't know how to speak English.
>
> THE COURT: I'm sorry if you feel embarrassed about that.
>
> PROSPECTIVE JUROR 4688: I feel that way too.
>
> THE COURT: So I assume you studied long ago to take the test; right?
>
> PROSPECTIVE JUROR 4688: No. My father was German, may he rest in peace. And he had me

naturalized as a Citizen when I was two years old. And then he sent me to Mexico. And when I came back here I was already a grownup.

THE COURT: All right. So as a Citizen, some day we would like to have you serve as a juror. Now, I am not fluent in any other language, so I won't criticize someone who only knows one language. For Citizenship here you should make an effort. People would like to have someone with your background, someone with your knowledge, someone with your understanding hearing their case. So if you have time to work on your English, the next time you come in maybe you can stay to serve.

PROSPECTIVE JUROR 4688: Well, I would have to — I've got two jobs. I would have quit one of my jobs.

THE COURT: I'm not ordering you to do anything. I'm hoping you have the time to do it.

PROSPECTIVE JUROR 4688: Okay. I'll try. Of course I will.

THE COURT: Many people come and they say they don't understand English, and they actually can. And this has caused me to mistrust you, and now I feel that I should have trusted you more.

PROSPECTIVE JUROR 4688: Well, I want to thank you. I would not lie to you if I really could understand and if I really knew.

THE COURT: All right. So now you're free to go. You

> don't have to go study anything, but I think everybody here would like to see you participating, if you can find the time and if you can.
>
> [05/06/14 R.T. pp. 105:18-107:12.]

18. Judge Clarke denies that his conduct in questioning Prospective Juror No. 4688 and asking her to wait until her questionnaire could be obtained from jury services and then until an interpreter could be present violated the Code of Judicial Ethics, canons 1, 2, 2A or 3B(4).

COUNT THREE

19. Judge Clarke admits the factual allegations set forth in count three of the Notice of Formal Proceedings.

20. Judge Clarke denies that he engaged in dialogue with Prospective Juror No. 7132 in a manner that constituted a violation of the Code of Judicial Ethics as alleged by the commission such that he should be subjected to discipline.

COUNT FOUR

21. Judge Clarke admits the factual allegations set forth in count four but denies that his conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3b(4).

COUNT FIVE

22. Judge Clarke admits the factual allegations set forth in count five, but denies that his conduct violated the Code of Judicial Ethics, canons 1, 2, 2A, 3b(4) as alleged by the commission.

23. Judge Clarke denies that his conduct as set forth in the Notice of Formal Proceedings constituted a pattern of discourteous, undignified, and inappropriate treatment of members of the public.

COMMENTS

24. Judge Clarke is a hardworking judge, a dedicated public servant and a respected member of his judicial community. He believes deeply in the jury system and believes that it is an obligation of citizenship to serve when called to be a juror. He takes seriously the guidance from many sources (including the former AOC in its Bench Book on Jury Management) that a judge should explain the importance of jury service to prospective jurors.

25. Judge Clarke is also human. He does not come to this proceeding without recognition that there could have been a better way to handle his interactions with the jurors. However, there is a difference between there being a better way and conduct that merits condemnation by the commission. Judge Clarke has demanded these formal proceedings in light of the course of the prior proceedings before the commission and the opprobrium contained in the Intended Notice of Public Admonishment issued by the commission.

26. Judge Clarke responded to the allegations included in the commission's initial preliminary investigation letter, allegations made as a result of a complaint to the commission by Prospective Juror No. 7122. That response and the transcript of the proceedings, which was provided to the commission with the response, demonstrated that several of the factual allegations in the preliminary investigation letter (which is now known to have been based on the complaint made by Prospective Juror 7122) were false. The commission then issued a supplemental preliminary investigation letter raising the allegations related to Prospective Jurors Nos. 4688, 5868, and 1968.

27. After Judge Clarke's further response, the commission proposed a Notice of Intended Public Admonishment that was factually incorrect and inflammatory. The proposed public admonishment failed to include significant portions of the transcript related to Prospective Juror No. 7122, falsely stated that

Prospective Juror No. 7122 was required to wait for "several hours" and criticizing him for not expressing sufficient remorse. Judge Clarke could not accept the statements in the Notice of Intended Public Admonishment accusing him of demeaning those who are struggling financially or living in poverty. Judge Clarke has people who are struggling financially in his courtroom on a daily basis. He treats them with respect and does what he can, within the bounds of the law, to accommodate their hardships. The Notice of Intended Public Admonishment gave no weight to the pre-screening of Prospective Juror No. 4688 by Jury Services or to the other indicia of the juror's ability to speak and understand English, faulting Judge Clarke for assuming she had taken the citizenship test in English.

28. The commission rejected as "implausible" Judge Clarke's concern that jurors might think the film to be made by Prospective Juror No. 1959 involved gangs or violence, insisting that Judge Clarke's remark referred to whether the film was sexually explicit. In an apparent attempt to buttress the commission's purported knowledge of Judge Clarke's state of mind in the moment he made the comment, the commission provided counsel for Judge Clarke with a pornographic YouTube videotape which had been posted by Prospective Juror No. 1959 long before the trial proceedings on May 6, 2014. Judge Clarke had absolutely no way to know that Prospective Juror No. 1959 had made such a film. In contrast, the commission did not provide Judge Clarke's counsel with any of the many YouTube videos (including her videotaped interview with Howard Stern) made and posted by Prospective Juror No. 7122, videos which support Judge Clarke's skepticism about the statements made by Prospective Juror 7122.

29. Now the commission has filed formal proceedings alleging that Judge Clarke engaged in willful misconduct and conduct prejudicial to the administration of justice, overcharging which would suggest that the commission has become embroiled in these proceedings.

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

31. Judge Clarke refused to accept the condemnation of the commission and chose to come before the Special Masters for what he trusts will be a full and fair hearing regarding his alleged misconduct.

Respectfully submitted,

ROBIE & MATTHAI
A Professional Corporation

EDITH R. MATTHAI
LEIGH P. ROBIE

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES.

I, EDMUND W. CLARKE, JR., declare that:

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

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

Executed this 12th day of January, 2016 at Los Angeles, California.

EDMUND W. CLARKE, JR.
No. 197