

**FILED**

JAN 08 2004

**Commission on  
Judicial Performance**

**STATE OF CALIFORNIA**

**BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE**

**INQUIRY CONCERNING JUDGE  
JOSEPH W. O'FLAHERTY**

**NO. 171**

**JUDGE JOSEPH W.  
O'FLAHERTY'S ANSWER TO  
NOTICE OF FORMAL  
PROCEEDINGS**

**COUNT ONE**

Judge O'Flaherty acknowledges that in December 1999 he presided over *People v. Joy Ann Mello*, Placer County Superior Court Action No. 62-7093. Ms. Mello is an African-American and was charged with the felonies of second-degree robbery and false imprisonment by violence. Judge O'Flaherty acknowledges that in connection with voir dire, perspective jurors were sworn as required by California Code of Civil Procedure § 232(a).

The quote contained within Count One is accurate, however, it was made well after voir dire process had started. *People v. Joy Ann Mello* involved three African-American defendants accused of a vicious robbery of a service station in Cisco Grove, California. Two of the defendants, while armed, entered the service station and tied up the Caucasian employees. At one point in time during the robbery, one of the African-American defendants told the Caucasian

victims that they were not cooperating enough and that he was going to kill them. Ms. Mello was the alleged "get-away" driver.

The jury pool for *People v. Mello* was overwhelmingly Caucasian. During jury selection, Ms. Mello was the only African-American in the courtroom. Judge O'Flaherty was concerned that the defendant's race could impact the verdict in the case. Given the serious nature of the crime, Ms. Mello was facing significant time in prison if she was convicted. Judge O'Flaherty felt that he had to ensure that race would not become an issue in the trial. A change of venue was not a possibility so Judge O'Flaherty honestly believed that he needed to take strong action to eliminate any possibility that racial bias would affect the verdict in the case.

Prior to giving the instruction to the jury, Judge O'Flaherty emphasized that:

A defendant in a criminal action is presumed innocent until The People have proved him or her guilty beyond a reasonable doubt. What that means is that unless and until the people prove it beyond a reasonable doubt, then this defendant is not guilty, is innocent, just as innocent as any of the rest of us who are in here right now. [RT 902:3-9]

The Commission's charge against Judge O'Flaherty does not contain the entire statement he made to the jury. As reflected in the record, Judge O'Flaherty prefaced his remark by advising the prospective jurors:

Okay, All right. Now, a touchy subject. Some of these voir dire issues are kind of touchy here. If you feel that an issue is so sensitive that you would rather not answer it in front of all these people, we can arrange so that it would be to the court, myself, the two attorneys, the defendant and the court reporter,

but some of these questions do need to be asked.

Judge O'Flaherty admits that the defendant moved for a mistrial during the voir dire process but the motion was directed primarily to a reference to *People v. Simpson*. The record reflects that defense counsel moved the court as follows:

Gerald Langle for the defendant. I ask this be made outside the presence of the jury. Your Honor, I am afraid that the court inadvertently has prejudiced or tainted this panel. In giving the court's admonitions to the jury panel this morning, there were references to defendant's race as African-American, and then within just a couple of minutes, the court made a reference to the Simpson trial, and it's the defendant's contention that connecting those two factors in the eyes of these jurors would constitute a prejudice to the defendant that would deny her her right to a fair trial, and so we're moving for a mistrial...

The Court: How is a reference to the Simpson trial prejudice to your client?

Mr. Langel: It's the defense position, Your Honor, that the Simpson trial in the United States is widely regarded as a travesty of justice, that O.J. Simpson is a guilty individual who escaped justice because of his race and because of the circumstances surrounding his trial and in Los Angeles, and it's my fear, Your Honor, that these jurors, if they have been awake and aware these last couple of years, are aware of that fact – are aware of that widely held feeling, and it conveys to the jury a message inadvertently that perhaps we have here another African-American defendant whose going to beat justice using the justice system, and I feel there is some prejudice here.

The mistrial motion was founded and argued on the basis of the reference to *People v. Simpson* not because the prospective jurors were advised they could fabricate an excuse to get off of jury service.

The mistrial motion was denied. Count One then suggests that immediately after the denial of the mistrial motion, another, similar, instruction was given to prospective jurors regarding the race of the defendant. However, there was further voir dire examination of prospective jurors and counsel began to exercise peremptory challenges before this "second instruction" was given. When it became apparent that there would not be enough potential jurors to impanel a jury, a further call for prospective jurors was made. After additional prospective jurors were presented for voir dire, the court made the second statement contained in Count One. However, the court also asked:

Is there anybody who feels, who is willing to say that they cannot or might give the defendant a fair trial because of race? Anybody? [CT 999:27-CT 1000:2]

The foregoing demonstrates that Judge O'Flaherty did not tell the jurors to "lie" about racist feelings if they so harbored them. It shows that Judge O'Flaherty was concerned that jurors would not reveal racial feelings even when asked. He posed that very question to the venire panel. The authorization to "lie" was to come up with some reason the prospective juror could not sit if that juror had any bias toward the defendant based on race.

Joy Ann Mello was convicted and subsequently moved for a new trial. The primary ground of the motion for a new trial was that the evidence was insufficient to support the conviction. The second ground of the new trial motion was the court's mention of race in close proximity to a reference to the Simpson case, not lying. According to the defendant's moving papers, "The defendant moved for a mistrial [during voir dire] on the grounds that the trial court, by making such statements, could easily

have caused one or more of the prospective jurors to equate the widely publicized criminal trial held in Los Angeles, California, wherein the defendant, O.J. Simpson, was acquitted, even though the evidence against him was quite compelling for guilt. In essence, defendant believes the trial court unwittingly delivered the message that in the instant action the jury was faced with another African-American defendant who was attempting to beat the charges because of her race.”

Judge O’Flaherty denies that his conduct reflected abuse of authority, disregard for fundamental rights, intentional disregard of the law or was in violation of the Code of Judicial Ethics. Judge O’Flaherty was endeavoring to ensure a fair trial to a minority defendant. Judge O’Flaherty did not instruct the prospective jurors that if they harbored racial animus they should lie about that fact. The “lie” he suggested was that if they were unwilling to admit racial animus, even if asked, then they should come up with some “excuse” to get off the jury because he did not want race to play any part whatsoever in the determination of the guilt or innocence of Joy Ann Mello.

### **COUNT TWO**

Judge O’Flaherty does not challenge the accuracy of the recorded proceedings in *People v. Abbaszadeh* referenced in Count Two. However, the charging allegations do not include the entire statement made by Judge O’Flaherty. In addition to the language quoted by the Commission Judge O’Flaherty stated:

Is there anybody in the 18 who has the slightest doubt that they can give the defendant in this case as fair trial or in any way consider his nationality or race or this sort of thing? Is there anybody who feels that way? [CT 2825: 12-16]

Judge O'Flaherty does not challenge the accuracy of the reference to the appellate decision in *People v. Abbaszadeh* (2003) 106 Cal.App.4<sup>th</sup> 642. Judge O'Flaherty does challenge the assertion in the opinion that he "engages in a practice of instructing prospective jurors that if they harbor racial bias, they should lie about or hide that fact, and instead invent some other reason to be excused from serving on the jury..." Judge O'Flaherty did not tell prospective jurors in *People v. Abbaszadeh* to lie about their racial feelings. He merely stated that he understood people may not be willing to acknowledge such feelings and if so, they should "lie" about something else in order to get off the jury. Otherwise, Judge O'Flaherty would never have stated, "Is there anybody in the 18 who has the slightest doubt that they can give the defendant in this case a fair trial or in any way consider his nationality or race or this sort of thing. "

Judge O'Flaherty denies that his conduct reflected abuse of authority, disregard for fundamental rights, intentional disregard of the law or was in violation of the Code of Judicial Ethics.

In both *People v. Mello* and *People v. Abbaszadeh*, it was Judge O'Flaherty intention to provide a racial minority defendant with a fair, unbiased jury in a county heavily populated by Caucasians. Many people harbor racial animus that may never be exposed. Acknowledging yourself as someone who cannot be fair and impartial because a criminal defendant is of a certain racial minority is a real stigma. Being called a racist is considered inflammatory. In 2003, Willy Hyman, the head of the Chico, California based Human Rights Organization, Butte Community Coalition, filed suit for defamation against Butte County District Attorney Mike Ramsey, claiming that Ramsey was quoted in a newspaper article as

stating, "Mr. Hyman is a hypocrite. If there is a racist in this county, it is Mr. Hyman." Recognizing that people are reluctant to admit harboring racial animus and desiring to receive a fair trial for the defendant, Judge O'Flaherty specifically asked the jury panel where they could be fair and impartial toward a minority defendant but recognizing that human nature was such that prospective jurors would not be necessarily open about their racial feelings, he advised them to come up with some other excuse to get off jury duty if they could not openly acknowledge racial bias.

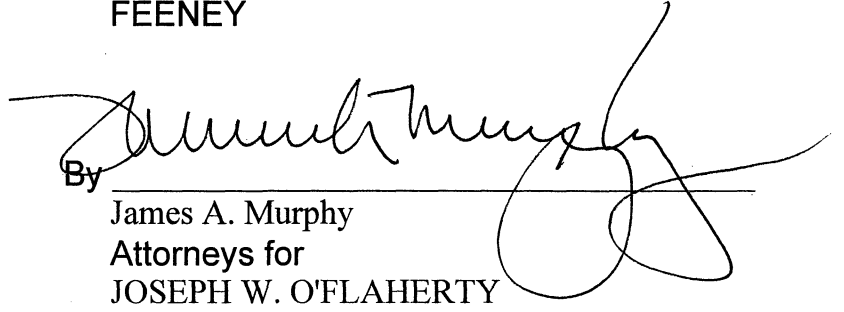
During the course of *People v. Mello* and *People v. Abbaszadeh*, there were dozens of persons, including jurors, potential jurors, lawyers, litigants and staff present during each trial when the "instruction" was given in voir dire. Not one person raised an issue when the instruction was given. Judge O'Flaherty hands out to all jurors and alternates who actually hear a case before him a questionnaire soliciting comments about the case, the attorneys, other issues and the court. Not one questionnaire received back from the jury mentioned the disputed "instruction." Judge O'Flaherty has an informal relationship with his staff and they are prone to make suggestions often. Not one staff member mentioned the "instruction" as a problem. Other than Mr. Langle, who moved for a mistrial and a new trial on the basis of a reference to *People v. Simpson*, the attorneys involved in the cases did not object or comment on the instructions.

The instruction in *People v. Abbaszadeh* was given prior to the decision rendered by the Third District Court of Appeal in *People v. Mello*. As soon as Judge O'Flaherty discovered his well intended and well-meant

effort to keep racism out of a courtroom was inappropriate, he never again gave a similar instruction in any case.

Dated: January 2, 2004

MURPHY, PEARSON, BRADLEY &  
FEENEY

By  \_\_\_\_\_  
James A. Murphy  
Attorneys for  
JOSEPH W. O'FLAHERTY

JAM.10201454



**CERTIFICATE OF SERVICE**

I, Debbie Smith, declare:

I am a citizen of the United States, am over the age of eighteen years, and am not a party to or interested in the within entitled cause. My business address is 88 Kearny Street, 10<sup>th</sup> Floor, San Francisco, California 94108-5530.

On January 8, 2004, I served the following document on the parties in the within action:

**JUDGE JOSEPH W. O'FLAHERTY'S ANSWER TO NOTICE OF FORMAL PROCEEDINGS**

BY HAND: The above-described document will be placed in a sealed envelope which will be hand-delivered on this same date by SPINCYCLE MESSENGER SERVICE of San Francisco, California, addressed as follows:

Jack Coyle  
Office of Trial Counsel  
Commission on Judicial Performance  
455 Golden Gate Avenue, Suite 14424  
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Jay Linderman  
Office of Commission Counsel  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is a true and correct statement and that this Certificate was executed on January 8, 2004.

By: Debbie Smith  
Debbie Smith