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## Judge Moody's comments termed unsettling

**Jurist calls cornerstone of U.S. justice system a 'legal fiction' during sentencing**

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For years, many Monterey County defense attorneys have complained that judges Russell Scott and Robert Moody are pro-prosecution. Recent statements by Moody may shed light on those concerns.

In recent weeks, in court and to The Herald, Moody has made comments questioning the integrity of defense lawyers and one of the basic tenets of the American justice system -- the presumption of innocence.

In late April, in his Salinas chambers, Moody questioned The Herald's request to view the court file of one of three Toro Park teenagers charged with a home invasion robbery. Moody said the file was empty save for an unusual pretrial packet filed by Salinas attorney Juliet Peck, a defense attorney in the case.

Moody said the lengthy document, which contained dozens of letters in support of the young man, was one-sided and shouldn't be given credence. In general, he said, documents filed by prosecutors were more balanced because they were based on investigation.

Moody criticized the media for talking to defense attorneys because, he said, they never speak the truth, they only say what is in the best interest of their clients.

The Code of Judicial Ethics requires judges to be impartial.

On Thursday, Moody said the comments were misinterpreted, that what he meant was that all attorneys were advocating for clients and shouldn't be viewed as impartial.

"It surprises me when attorneys are constantly put in that posture (by the media) when they are in fact advocating for a client," he said. "I wasn't trying to disparage anybody. I think what I meant was that they shouldn't be given the status of impartial comments."

Peck, the attorney who wrote the document, said the comments were troubling.

"I am shocked, disturbed and deeply disappointed to learn of Judge Moody's comments regarding a filing by our firm," Peck said last week. "It's really very extreme and raises serious questions. Judge Moody's statements, I'm sure, are deeply unsettling to the entire defense community and should be to the entire legal community."

Asked how she would approach the issue in future hearings for their client, Bobby Barminski, Peck said, "At this point we're simply absorbing the comments the judge made and what seems most appropriate is for him to recuse himself."

Perhaps more surprising were comments that Moody made during a court session Thursday morning.

Mario Trujillo, 20, was in court for sentencing on conviction for possession of a weapon from which the serial number had been removed, and for a gang enhancement. Trujillo was convicted of the charge in September by a jury, which hung 8-4 for acquittal on an unrelated murder charge.

Prosecutor Carol Reed argued for a prison sentence based on Trujillo's gang affiliation. Trujillo's lawyer, Eugene Martinez, asked for probation, arguing that his client's only prior conviction was for a misdemeanor prowling offense.

Neither attorney, nor the probation officer, mentioned the murder charge in their recommendations.

Moody, however, cited the murder charge as a factor in aggravation to enhance Trujillo's sentence to the upper term of

seven years in prison.

Martinez objected that his client had not been convicted of the murder charge and "is presumed innocent."

The presumption of innocence, Moody responded, "is a legal fiction."

When determining factors in mitigation and aggravation in sentencing, Moody said, case law allowed him to apply a standard of the preponderance of the evidence, rather than proof beyond a reasonable doubt.

"That's a different standard and there is no presumption" of innocence, the judge said.

Outside of court, Martinez said Trujillo would appeal the sentence.

"I've never seen a case where if a client is still pending for trial, a judge can use that charge for the purpose of enhancing the sentence on another charge," he said.

Well-known San Francisco appellate attorney Dennis Riordan said Moody's legal ruling may be correct, despite his "pejorative" comment about the presumption of innocence.

The issue is before the U.S. Supreme Court, which previously ruled in *Blakely vs. Washington* that facts used to elevate a sentence must be found true by a jury.

The California Supreme Court later ruled that the *Blakely* ruling did not apply in California because this state's sentencing laws were different from the state of Washington. That ruling is on appeal to the high court.

Moody "may be absolutely wrong or in a much stronger position, depending on the outcome," Riordan said.

But another legal expert said Moody's ruling was a "clearly reversible error."

Jeff Adachi, San Francisco's public defender, said the rules of court prevent a judge from applying facts from an unrelated crime in enhancing the sentence in another.

Beyond the legal ruling, Adachi said, Moody's comments were disturbing.

"The judge's comments regarding the presumption of innocence are not only legally wrong, but ethically wrong," he said. "As a judge, it's his responsibility to uphold the law, including the presumption of innocence. For a judge to display such willful disregard for one of the basic tenets of our justice system is sad and wrong."

Moody declined to comment on his ruling because it involves a pending case.

Speaking generally, he said, the presumption of innocence may be a legal fiction because the court asks jurors to presume something that may not be true.

"It is, however, the cornerstone of our system in adjudicating the question of guilt or innocence, and I take it very seriously and to heart and I rigorously adhere to it in cases where the question before the trier of fact is the question of guilt or innocence."

Moody said he emphasizes the presumption to every jury that sits in his courtroom and makes jurors swear to uphold the standard.

Some in the defense bar agreed with him.

"I have tried plenty of cases in front of Judge Moody and I'm very comfortable with his application of the law in that respect," said Salinas attorney Miguel Hernandez. "He takes pains to make sure that the prospective jurors understand that concept and are willing to adhere to it. Additionally... his demeanor when he addresses jurors in this is very sincere and he wants them to really let this sink in."

As for Moody's comments on the presumption of innocence and the integrity of defense attorneys, Hernandez said: "I can't defend him on that. I think people a lot of time say things when they're irritated."

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