STATE OF CALIFORNIA

BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING JUDGE RUFFO ESPINOSA, JR.	**DECISION AND ORDER IMPOSING PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Ruffo Espinosa, Jr., a judge ofthe Los Angeles County Superior Court. Judge Espinosa and his attorney, Edward P. George, Jr., appeared before the commission on February 1, 2006 pursuant to rule 116 of the Rules of the Commission on Judicial Performance to contest the imposition of apublic admonishment. Having considered the written and oral objections and argument submitted by Judge Espinosa and his counsel, and good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

Judge Ruffo Espinosa, Jr., is a judge of the Los Angeles County Superior Court. His current term commenced in January 2001.

In the case of *People v. Netterville*, BA220480, which was before Judge Espinosa on October 30, 2003, October 31, 2003, January 29, 2004, and February 5, 2004, Judge Espinosa denied the defendant full opportunity to be heard through counsel regarding sentencing, treated defense counsel in a rude and impatient manner, and abused the contempt power by holding in contempt and immediately incarcerating an attorney who had sought to be heard on his client's behalf.

Defendant Netterville appeared before Judge Espinosa on aprobation violation matter on October 30 and 31, 2003. On October 31, 2003, after finding the defendant in violation of probation, Judge Espinosa ordered a diagnostic study pursuant to Penal Code section 1203.03.

On January 29, 2004, the defendant was returned to court after the Department of Corrections had issued a report following the diagnostic study, recommending state prison. When Judge Espinosa asked defense counsel, Deputy Public Defender (DPD) Michael Pentz, if he wished to address the court, DPD Pentz presented his position that the recommendation from the Department of Corrections was "sort of a split decision[,]" (R.T. 1:27) with the psychologist's report recommending that the defendant be granted probation, to include conditions that he successfully complete alcohol and drug treatment programs, and the associate warden making the "official recommendation" (R.T. 2:17–18) of commitment to state prison. Judge Espinosa stated that he was "going to look at and consider the overall recommendation, which is that [the defendant is] not amenable [to probation]" (R.T. 2:25–26) because he had attempted to minimize his culpability and had expressed no remorse for stabbing his cohabitant. The judge then said:

> I have considered and read [the report], and I don't think I need to put more on the record so the Court does intend to follow the recommendations of the California Department of Corrections. [¶] Waive time for sentencing?

(R.T. 3:3–7.)

DPD Pentz said that he was still responding to the court's question as to whether he wished to be heard. DPD Pentz then pointed out that the warden's overall recommendation of state prison was based on a recommendation from a correctional counselor who had based his recommendation on incorrect information about the defendant's criminal history. DPD Pentz said that the counselor's report referred to a criminal history of over twenty years, although the defendant's first misdemeanor conviction was actually in 1995. Judge Espinosa stated that he did not have any trouble continuing the matter to get more complete information about the defendant's criminal history, and added that in view ofthe split decision and the defendant's minimal criminal history as set forth in the probation report, he would be "hard pressed" (R.T.6:3) to send him to prison based on his record. The matter was continued to February 5, 2004, and the prosecutor was asked to get more complete information about the defendant's criminal history.

At the beginning of the hearing onFebruary 5, Judge Espinosa noted that the defendant had performed poorly onprobation. He mentioned the conclusions of the Penal Code section 1203.03 report, and said that he had looked at various letters that had been submitted on the defendant's behalf. He considered a letter from the defendant. Addressing the defendant, the judge expressed concern about the defendant's "multiple arrests" (R.T. 3:16) for assaults, the previous conviction for which he was placed on probation, and the violence of the incident giving rise to the probation violation. Judge Espinosa told the defendant that stress was not an excuse for violence. He noted again that the defendant had not done well on probation. Judge Espinosa said that since the defendant's history was "not that aggravated" he would "offer" (R.T. 4:28) the mid-term of three years in state prison.

DPD Pentz asked to be heard. Judge Espinosa replied, "Of course, I'm going to allow you, but I'm just telling you how I view this. I want you to know that I'm willing to be swayed. Okay?" (R.T. 5:27–6:2.) The judge added:

> And I've been going on this case back and forth for quite along time, and I'm tired. And the county, frankly, is under monetary restraints right now. What are we going to do, send him back to probation so he can do the same thing over and over again? [¶] You know, this gets old after a while so go ahead and make your pitch.

(R.T. 6:7–14.)

The prosecutor then reminded Judge Espinosa that he had asked her to check the defendant's record; she mentioned the defendant's three prior arrests in the 1980's as well as his misdemeanor conviction in 1995, another conviction in 1996, and his performance on probation. When asked to respond, DPD Pentz pointed out that an arrest cannot be considered "aggravating in any way." (R.T. 7:23.) Judge Espinosa said he agreed an arrest should not be used against a person, and then asked, "What if a person has ten arrests for the same offense over and over again. Isn't that a little unusual?" (R.T. 8:1-3.) DPD Pentz responded by describing the defendant as someone with a mental illness who tended to self-medicate with alcohol and sometimes with drugs. Judge Espinosa asked if someone who self-medicates with alcohol is "any less of a danger than someone that's just a bad guy?" (R.T. 8:25–26.) DPD Pentz said that someone who is mentally ill and self-medicates with alcohol "needs to be a part of a structured program that addresses those concerns." (R.T. 8:28–9:2.) Judge Espinosa noted that the defendant had previously been evaluated by apsychologist and psychiatrist; he said, "We had a 1368 [competence proceeding]." He added, "You know, frankly, I don't want to keep him on probation anymore." (R.T. 9:7–8.) Upon being informed by the prosecutor that the judge already had found the defendant in violation of probation, the judge said, "All right. So you know frankly, Counsel, let's stop wasting our breath." (R.T. 9:15–16.) He then said that he would impose asentence of three years in state prison.

This exchange followed:

> MR. PENTZ: Your Honor, I'm sorry to interrupt the Court, but I've yet to speak to what is an appropriate sentence in this case.
>
> THE COURT: All right.
>
> MR. PENTZ: And I know the Court is busy, but I don't think speaking on behalf of my client is a waste ofanybody's time.
>
> THE COURT: Counsel, I'm never too busy.

> MR. PENTZ: I would just ask the Court for leave to speak without interruption. The Court seems to have made up its mind, but I haven't had a chance --
>
> THE COURT: Frankly, I have made up my mind.
>
> MR. PENTZ: I got that from the last hearing when I was unable to speak, but now I really want to address the Court and on the record.
>
> THE COURT: I want it clear that you're addressing the Court for the benefit of the record.
>
> MR. PENTZ: Well, actually, I'm exercising my client's right to have him represented in court.
>
> THE COURT: It's not going to sway me to give him any less because I have considered this. I already know what you're going to say[,] frankly. [¶] You're going to talk about his mental illness, what a good guy he is, all the letters of recommendation, and so on and so forth, and I've taken all that into account. [¶] I've also taken into account the psychiatric reports, and I've looked at his history and his behavior while he has been on probation to me [sic], and yes, I do have acalendar. But if you want to make a record, I'll sit back, sway on my chair, and then you can put five minutes worth. All right? [¶] Go ahead.

(R.T. 9:26–11:4.)

DPD Pentz said that his remarks might not even take five minutes. He noted that resources were "stretched everywhere" (R.T. 11:10) and said that it would not help to lock the defendant up and then release him back into the community. Less than one minute after DPD Pentz began speaking, as he began to refer to a letter that had been submitted to the court, Judge Espinosa interrupted to ask when the defendant had been arrested, saying that he wanted to calculate his credits [for jail time already served]. DPD Pentz then mentioned "community reintegration" (R.T. 12:14) and rehabilitation, and began to describe a specific program he had looked into for the defendant:

> MR. PENTZ: What we do have in place is Mr. Netterville has people at Oasis House and a program whose funding and --
>
> THE COURT: Excuse me a second, sir. I have to calculate the credits because I know what I'm going to do. All right?

(R.T. 12:22–27.)

A discussion of credits followed. Judge Espinosa secured counsel's agreement as to the amount of credit, and this exchange followed.

> THE COURT: All right. Then Mr. Netterville, you are sentenced to --
>
> MR. PENTZ: Your Honor, the Court still has not allowed me to complete --
>
> THE COURT: Okay, Counsel --
>
> MR. PENTZ: I'm disheartened here.
>
> THE COURT: Counsel, you be quiet. I've made up my mind. I'm not going to listen -- onemore peep out of you, and you're in contempt of court. Do you understand this?
>
> MR. PENTZ: I understand that.
>
> THE COURT: All right. Then be quiet.

(R.T. 14:3–14.)

Judge Espinosa proceeded to sentence the defendant to three years in state prison. When he finished, he said, "Next case." (R.T 15:15.) This exchange followed:

> MR. PENTZ: I'd like to state as [sic] an objection to these proceedings, Your Honor, with what I take to be the cavalier way with which this Court --
>
> THE COURT: All right, Counsel, that will be $50.00.
>
> MR. PENTZ: Your Honor, the Court is going to have to set --
>
> THE COURT: Do you want to go for a hundred?
>
> MR. PENTZ: If the Court can set it for $250, I want [a] hearing on it, and I want to order a transcript.
>
> THE COURT: That will be $250. You are sanctioned. That will be payable -- I'll give you a chance to appeal this.
>
> MR. PENTZ: Judge, I'm requesting ahearing.
>
> THE COURT: This is a direct --

> MR. PENTZ: I'm requesting ahearing. I hope the Court understands my request.
>
> THE COURT: Your request for a hearing is denied. You've already had a hearing. How many hearings do you want?
>
> MR. PENTZ: A hearing on an order to show cause is a fundamental law, Your Honor. I'm asking for that. I'll bring you the Penal Code -- the civil code section if you wish.
>
> THE COURT: This is a direct contempt of court, and you are ordered to pay the sum of -- what did we say? -- $250?
>
> MR. PENTZ: I think that was the last sum, yes.
>
> THE COURT: Payable by -- when can you pay that? -- orfive days in the county jail. What do you want?
>
> MR. PENTZ: Judge, it's --
>
> THE COURT: All right. Do you want five days in the county jail?
>
> MR. PENTZ: I'm ready to surrender.
>
> THE COURT: Take him in. That's five days in the county jail, Counsel.

(R.T. 15:16–17:2.)

Attorney Pentz was removed from the courtroom and taken to a holding cell. After unrelated matters were heard, Mr. Pentz appeared before Judge Espinosa, represented by Chief Deputy Public Defender Greg Fisher. Judge Espinosa told DPD Pentz that he had given the judge no alternative but to remove him from the courtroom; Judge Espinosa said that Mr. Pentz had continued to disobey the court after being warned, and had "openly insulted" the court. (R.T. 17:16.) The judge said that he was going to impose five days in jail, and that he would stay the sentence because he knew that DPD Pentz was an attorney and might want to seek review. Judge Espinosa also said it was "entirely false at least from this Court's perspective" (R.T. 19:6–7) that he had not given DPD Pentz an opportunity to speak or to fully state his position as to defendant Netterville's sentence. He said that "this attorney kept on arguing even after the Court made aruling[,]" and that he was "deeply insulted by this behavior." (R.T. 19:17–20.) Judge Espinosa added that unless there was some reason for a further stay, DPD Pentz should "bring [his] toothbrush" (R.T. 19:22–23) when he next appeared.

Judge Espinosa issued a written order of contempt, dated February 5, 2004 and filed on February 9, 2004. The order stated that DPD Pentz continued to argue after being ordered to be quiet; used the word "cavalier," an insult, in open court; argued that he was entitled to a hearing on contempt and "further insulted the court by insinuating that the court didn't understand that he was entitled to a hearing"; and "sarcastically threw his hands in the air [and] waved them" while saying that he was ready to surrender. The order further stated that the court "felt compelled to order Mr. Pentz removed from the court room [sic] in order to continue the orderly process of other court proceedings[,]" and included a finding that DPD Pentz "had knowledge of the order and was able to comply by simply taking awrit without the necessity of mocking the court and challenging it to find him in contempt."

On May 28, 2004, Orange County Superior Court Judge Daniel Didier, sitting by assignment, granted DPD Pentz's petition for a writ of habeas corpus, annulling the contempt order. Judge Didier concluded, after examining the record to determine whether there was any substantial evidence to support the contempt finding, that "the record in this case does not disclose a clear instance of disorderly, contemptuous, or insolent behavior towards the respondent court tending to interfere with the due course ofa trial or other judicial proceeding within the meaning of Code of Civil Procedure § 1209(a)(1)." Judge Didier noted that although DPD Pentz was allowed to comment on his client's situation, he "was not afforded an opportunity to fully advance plausible sentencing options deemed appropriate for the defendant's situation"; instead, Judge Espinosa interrupted DPD Pentz, directed him to be quiet, and warned him that he would be in contempt if he spoke again. According to Judge Didier, "To the extent the contempt adjudication is premised on [DPD Pentz's] failure to observe [Judge Espinosa's] order to remain silent, such order is without evidentiary support as [Mr. Pentz's] conduct was not contemptuous. A lawyer has a duty to protect and advance the interests of his or her client at all times. This duty encompasses the right to make objections or advance other points in the client's behalf in a timely manner." Judge Didier also stated that although DPD Pentz was not entitled to a hearing on adirect contempt, his repeated requests for such a hearing, apparently made in good faith, did not constitute contempt. Finally, Judge Didier rejected the notion that DPD Pentz's use ofthe word "cavalier" constituted contempt, noting that "cavalier" has varying meanings. Judge Didier stated that to the extent the contempt finding might have been based on language that was not in itself contemptuous, offensive tone, and/or mannerisms such as facial expressions or gestures, a judge must warn an attorney before taking disciplinary action. Judge Didier pointed out that "contempt is a drastic remedy which should be used only when necessary in order to maintain law and order[,]" and concluded that the record "simply does not reveal the quantum of substantial evidence necessary to sustain the order of contempt issued by [Judge Espinosa]."

In addition to DPD Pentz's petition for habeas relief, an appeal of defendant Netterville's conviction was filed, based on Judge Espinosa's alleged failure to allow the defendant to be heard through counsel at sentencing. On January 7, 2005, the Court of Appeal issued its decision vacating the defendant's sentence and remanding the matter for resentencing before a different judge. (*People v. Charles Netterville* (January 7, 2005, B173174) [nonpub. opn.] [2005 Cal.App.Unpub. LEXIS 197] (*People v. Netterville*).) The appellate court found that Judge Espinosa handled the *Netterville* case properly up to the point at which he stated that he intended to sentence the defendant to the midterm in state prison but

was willing to be swayed. According to the Court of Appeal, however, shortly thereafter Judge Espinosa said that he had made up his mind, stated that further argument would not sway him, suggested that he would be inattentive by saying that he would "sit and sway" in his chair while DPD Pentz spoke, and quickly interrupted defense counsel's argument with a question about calculating sentence credits, indicating that he was not listening. (*Id*. [pp. 28, 40].) The appellate court found that Judge Espinosa "not only precluded Pentz from completing his argument, but refused to listen during an earlier portion of that argument." (*Id*. [p. 43].) The Court of Appeal held that Judge Espinosa "committed a miscarriage of justice and reversibly erred in violation of appellant's rights to counsel and fair trial by precluding Pentz from completing his sentencing argument." (*Ibid*.)

With respect to the contempt issue, the Court of Appeal determined that Judge Espinosa ordered DPD Pentz immediately into custody in violation of the mandatory stay provisions of Penal Code section 1209(c), which provides that, subject to certain exceptions, when an order of contempt is made affecting an attorney, the execution of any sentence shall be stayed for three court days. The appellate court noted that the judge apparently was aware of the provision, having referred to it when DPD Pentz reappeared with counsel by stating that he knew he would have to stay the sentence because DPD Pentz was an attorney. (*People v. Netterville, supra* [p. 46].) The appellate court also found that when DPD Pentz appeared with counsel, Judge Espinosa mischaracterized the record of the proceedings leading to the contempt finding, and later made various material omissions and misstatements in the written contempt order. (*Ibid*. [pp. 48-51].) Based on these findings, the Court of Appeal held that there was a doubt that Judge Espinosa could maintain his objectivity, and that the case must be remanded for resentencing before a different judge.

Judge Espinosa's conduct in this matter constituted, at a minimum, improper action. By denying the defendant a full right to be heard, through counsel, regarding sentencing, the judge violated canon 3B(7) of the Code of Judicial Ethics, which requires that a judge accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law.

In addition, Judge Espinosa's treatment of DPD Pentz constituted serious misconduct. Judge Espinosa held DPD Pentz in contempt in contravention of the mandatory stay provisions of Code of Civil Procedure section 1209(c). Further, as stated by the Court of Appeal, DPD Pentz was held in contempt and made to suffer "the ignominy of being removed from the courtroom simply for doing his job." (*People v. Netterville, supra* [p. 42].) The power of a judge to silence an attorney does not arise until after the attorney has had a reasonable opportunity for legitimate advocacy. (See *Cooper v. Superior Court* (1961) 55 Cal.2d 291, 298.)

Judge Espinosa's conduct also was contrary to canon 2A, which provides that a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, canon 3B(2), which requires that judges be faithful to the law, and canon 3B(5), which requires that judges perform judicial duties without bias or prejudice. In addition, the judge's treatment of DPD

Pentz was contrary to canon 3B(4), which requires judges to be patient, dignified and courteous toward those with whom the judge deals in a judicial capacity.

Commission members Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Justice Judith D. McConnell, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, Ms. Barbara Schraeger and Mr. Lawrence Simi voted to impose apublic admonishment.

Dated: February 9, 2006

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Marshall B. Grossman
Chairperson