

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

IN THE MATTER CONCERNING
JUDGE STEPHEN P. GILDNER

DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT

This disciplinary matter concerns Judge Stephen P. Gildner, a judge of the Kern County Superior Court since 1990, whose current term began in January 2003. Judge Gildner and his attorney, Edith R. Matthai, Esq. of Robie & Matthai, appeared before the commission on December 8, 2004 pursuant to rule 116 of the Rules of the Commission on Judicial Performance to contest the imposition of a public admonishment. Having considered the written and oral objections and argument submitted by Judge Gildner 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

A. Issuing Bench Warrants Without Lawful Authority: *People v. Ricardo Jimenez* and *People v. Pablo Ramirez*.

Judge Gildner presided over *People v. Jimenez* (Kern County Superior Court No. BF094351) on March 7, 2001. The defendant had been ordered to be present at 9:00 a.m. for a pre-preliminary hearing conference. The deputy public defender who had been assigned the case advanced the matter to 8:30 a.m. for the purpose of declaring that his office had discovered that it had a conflict of interest with respect to representation of Mr. Jimenez and to facilitate appointment of successor counsel. When Judge Gildner called the matter at approximately 8:45 a.m., the defendant was not present. After Judge Gildner announced that he would issue a bench warrant, defense counsel asked that the judge not issue the warrant because counsel did not know whether the defendant had been notified to be present at 8:30, rather than at 9:00. Judge Gildner responded that there was no information that the defendant had not been notified. Thereupon, he issued the warrant, forfeited bail, and vacated the court dates previously set.

When Mr. Jimenez arrived during the 9:00 a.m. calendar call, he was taken into custody on the warrant issued by Judge Gildner. The bailiff asked Judge Gildner if he wanted to take the matter up that day or put it over. Judge Gildner told the bailiff to put the matter over; when defense counsel asked that the matter be recalled that day, Judge Gildner refused.

Judge Gildner presided over *People v. Pablo Ramirez*, Case No. BF094487 on March 8, 2001 and March 14, 2001. Mr. Ramirez had been ordered to appear for his pre-preliminary hearing at 9:00 a.m. on March 14, 2001. The public defender's office put the matter on calendar on March 8 to declare a conflict and facilitate appointment of a new attorney. The defendant had not been notified that he needed to be present at the March 8 hearing. When Judge Gildner called the matter on March 8, Mr. Ramirez was not present. The transcript of the matter includes the following colloquy with defense counsel:

THE COURT: Is Pablo Ramirez present? No response. [¶] He appears to be out of custody. Mr. Moore from the Public Defender's Office is present, Mr. Cooley is also present, Ms. Zimmer is here on behalf of the People. [¶] This is the time and place set for hearing on the Public Defender's application for an order relieving it as attorney of record.

MR. MOORE: If your Honor is inclined to issue a bench warrant, I would simply ask the matter be dropped and remain on calendar for the date Mr. Ramirez was previously ordered back.

THE COURT: Tell me this, Mr. Moore: If your office has a conflict, how can you remain on the case?

MR. MOORE: Well, what I want to avoid is until we are – until we are relieved, we represent him, and it's my duty to make sure that adverse consequences, or do my best to protect him against adverse consequences.

THE COURT: I understand what you are wanting to avoid, but you are also avoiding a response to my question. [¶] How can you continue to represent him if your office has a conflict?

MR. MOORE: I don't know at which point the conflict ripens to a level that we are ethically unable to represent him. I don't –

THE COURT: Well, Mr. Moore, surely it has ripened to that point; otherwise this motion is frivolous. Somebody in your office brought it on calendar.

MR. MOORE: Well, I don't know if they would – if that conclusion would differ or change and, in fact, I don't believe it would if the facts were known that if you then declare the conflict, a bench warrant will go out for the client. [¶] I don't have any reason to believe that there is basis – well, I want to avoid the situation we had yesterday where an individual may not have been notified

about the nature of a court appearance. Certainly, there is no indication that Mr. Ramirez was ordered by the Court to come back on March 8th; that Mr. Ramirez, it's my understanding, was ordered to come back to court on March 14th, that's the date of the next court appearance. [¶] If the Court is going to be inclined to issue a bench warrant, then I simply would say, well, let's do it – let's declare the conflict when Mr. Ramirez is next ordered to return to court.

THE COURT: Well, you should do something about that in your office. I am going to forfeit bail, issue a bench warrant, no bail on that warrant, day or night service.

When Mr. Ramirez appeared as previously ordered on March 14, and the deputy public defender attempted to address the court, Judge Gildner refused to allow him to do so. A private attorney was appointed to represent the defendant. After appointing the attorney, Judge Gildner ordered Mr. Ramirez taken into custody on the previously-issued bench warrant.

Based on these facts, the preliminary investigation letter asserted that Judge Gildner issued the bench warrants in the foregoing matters without legal authority to do so, and his refusal to give the defendants an opportunity to explain their earlier non-appearance when they appeared as originally ordered constituted an abuse of judicial power. Under Penal Code sections 978.5(a) and 1305(a), issuance of a bench warrant and forfeiture of bail is proper only if the defendant's presence at the subject hearing was "lawfully required." "A defendant's presence is 'lawfully required' when there is 'a specific court order commanding his appearance at a date and time certain' ([citation]) or when a defendant has notice because he or she is present when the date and time for a mandatory appearance are set, even though the court did not specifically order his or her personal presence ([citation])." (*People v. Ranger Ins. Co.* (1992) 6 Cal.App.4th 1301, 1304.)

In response, Judge Gildner stated through counsel as follows:

Judge Gildner determined that neither Public Defender offered a sufficient excuse for the defendants' failure to appear, because neither attorney would definitively state that the defendant had not been notified to be present at the hearing. As a result, Judge Gildner exercised his discretion to not continue the matter and issued the bench warrants and forfeited bail to ensure that the defendants were brought before the court so that new counsel could be assigned.

In *Jimenez*, the defendant appeared in court the same day as the bench warrant was issued and was remanded on the warrant.... The Commission has expressed concern that Judge Gildner "refused to consider recalling the bench warrants where it appeared that the defendant's failure to appear was neither unlawful nor willful." Again, there is no legal authority that requires the court make a finding that the defendant's failure to appear was "unlawful or willful" prior to issuing a bench warrant or prior to detaining the defendant pursuant to

that warrant. There is no legal authority that mandates that a court recall a bench warrant nor is there authority requiring the court to hold a hearing upon a defendants [sic] eventual appearance in court.

Judge Gildner may have correctly concluded that he could not hear the motions without the presence of the defendants. Nonetheless, the issuance of bench warrants was unlawful, as there is no evidence that defendants Ramirez and Jimenez had notice of the hearings set in their cases, or that there was a court order commanding their appearance or that they were present when the date and time for the appearances were set. No statute authorizes issuance of a bench warrant when a defendant has not been ordered to appear and was not present at the setting of a hearing at which the defendant's presence is mandatory.

Judge Gildner suggests that counsel failed to present sufficient excuse for the clients' failures to appear. However, they were not required to do so in the absence of evidence of a valid order to appear. As expressed in *People v. North Beach Bonding Co.* (1974) 36 Cal.App.3d 663, 669,

It is absurd to contend that an attorney by appearing without his client ... before the latter was directed to appear could place his client in default. The remedy, if the appearance of the defendant was necessary, was to refuse to entertain the motions without the presence of the defendant

(See also *People v. Classified Ins. Corp.* (1985) 164 Cal.App.3d 341, 346 [construing statutes to permit forfeiture of bail in situation where the defendant does not even have notice of the court date requiring his appearance may render statute unconstitutional as violative of due process requirement of notice]; *Simmons v. Superior Court* (1988) 203 Cal.App.3d 71, 77 [court may order defendant to be present at later bail hearing if the facts and circumstances so justify, and then issue bench warrant if defendant fails to appear as ordered].)

Judge Gildner is an experienced jurist and former prosecutor with many years of experience in the field of criminal law. There was nothing that suggested either defendant had notice. Under such circumstances, the warrants could not issue, irrespective of whether defense counsel provided any explanations. No reasonable or reasonably competent judge would assume or conclude otherwise.

In Judge Gildner's objections submitted through counsel pursuant to rule 116, the judge admitted that he lacked authority to issue these two warrants, but contended that the mistaken issuance constituted only legal error for which he should not be disciplined. In *Oberholzer v. Commission on Judicial Performance* (1989) 20 Cal.4th 371, 398, the California Supreme Court held that the commission may not discipline a judge for "mere legal error, without more." The court specified certain instances of conduct or circumstances that "in addition" to the "legal error," would support investigation and discipline by the commission, namely, "bad faith," "bias," "abuse of authority," "disregard for fundamental rights," "intentional disregard of the law," "or any purpose other than the faithful discharge of judicial duty." (*ibid.*) Here, the issuance of the warrants was both legally erroneous and in

violation of the fundamental right to notice. As such, the judge's actions constitute misconduct that subjects him to discipline under *Oberholzer*.

Judge Gildner's further refusal to give the defendants an opportunity to explain the earlier failures to appear promptly after they appeared as previously ordered, under the circumstances, appears callous and punitive. The judge's explanation that he did not conduct a hearing on the issue as soon as the defendants appeared simply because there is no express legal requirement that he do so "suggests an abdication of his responsibility" to determine whether the defendant's presence had been lawfully required and an abuse of his power to issue warrants. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 851.)

As further justification for issuance of the bench warrants in the above matters, Judge Gildner, through counsel, stated:

Judge Gildner believed that the defendants' presence at the hearing was required because it concerned their Sixth Amendment right to conflict-free counsel at all phases of the criminal process.... The Public Defender's motions to be relieved placed Judge Gildner in a difficult situation. If Judge Gildner were to grant the motions in the absence of the defendants, thereby relieving the Public Defenders, the defendant would then be without counsel in violation of the Sixth Amendment. If Judge Gildner did not grant the motion, after being appraised [sic] of the existing conflict and waited an indeterminate time for the respective defendants to appear, the defendants would be deprived of their Sixth Amendment right to conflict-free counsel, albeit for that period. Judge Gildner believes that it is not "okay" to violate the defendants' Sixth Amendment right to counsel, even for a short time. In fact, had Judge Gildner conducted the hearing and granted the motion in the absence of the defendant he could have been susceptible to discipline for doing so.

Judge Gildner's assertion that forfeiture of bail and issuance of the warrants was necessary at that juncture to protect the defendants' right to conflict-free counsel is unpersuasive. Simply continuing the hearings on counsel's motions to withdraw until such time as the defendants had been notified to be present would have protected that right. (See *Kloepfer v. Commission on Judicial Performance, supra*, 49 Cal.3d at 851 [judge's assertion that he issued warrant in part because he lacked confidence in counsel's ability to appear on behalf of the defendant did not satisfactorily justify issuance of a bench warrant for the client, rather than a continuance and an order that the defendant appear].) The judge's conduct in refusing to give the defendants an opportunity to explain the failures to appear when they did appear as previously ordered was inconsistent with the judge's assertion that his purpose in issuing the bench warrants was to protect the defendant's right to the effective assistance of counsel. Incarcerating the defendants when they appeared did nothing to further the purpose of ensuring the right to conflict-free counsel.

The judge's actions, as set forth above, violated canons 2A ("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” and 3B(7) (“A judge shall accord to every person who has a legal interest in a proceeding ... full right to be heard according to law”).

B. Refusal To Hear Defendant’s Explanation For Late Arrival On Trial Date.

The case of *People v. Curtis Moore* (Kern County Superior Court No. BF103576) was set for trial on December 29, 2003, at 9:00 a.m. Judge Gildner, who was presiding over the master calendar, called the case shortly after 9:00 a.m. Deputy Public Defender T.D. Pham stated that the defendant was not present and asked that the matter be trailed. Judge Gildner refused to do so and instead vacated the trial date, forfeited bail, and issued a bench warrant at approximately 9:13 a.m.

A few minutes later, Mr. Pham met Mr. Moore in the hallway. Mr. Moore explained that he was late because he initially had gone to the wrong courtroom. Mr. Pham and Mr. Moore then entered Judge Gildner’s courtroom. Mr. Pham attempted to have the case recalled, but Judge Gildner did not respond to Mr. Pham’s request. Mr. Pham left the courtroom to appear in a trial in another courtroom; Mr. Moore remained in the courtroom.

Supervising Deputy Public Defender Art Titus explained to Judge Gildner off the record that the reason Mr. Moore was late was that he initially had gone to the wrong courtroom. Toward the end of the calendar, Mr. Titus asked to have the matter recalled. Judge Gildner refused to do so. When Mr. Titus asked what Mr. Moore should do to clear the matter up, Judge Gildner stated that Mr. Moore would be arrested. Mr. Moore was then surrendered to the bailiff and was remanded into custody. (Mr. Moore remained in custody and next appeared before another judge on December 31, 2003, at which time a new trial date was set.)

Judge Gildner’s refusal under the circumstances to allow Mr. Moore to present evidence that his late appearance was unintentional or that mitigating circumstances existed constituted misconduct. (See *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 850 [judge remanded defendant for failing to comply with court order to speak with District Attorney before pre-trial conference, refusing to hear defendant’s explanation for non-compliance].) The judge’s conduct violated canons 2A (“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”), and 3B(7) (“A judge shall 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”). While the judge was entitled to exercise discretion in determining when to hold the hearing, the discretion afforded trial courts

... is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. (*Bailey v. Taaffe* (1866) 29 Cal. 422, 424.)

In response to the commission's preliminary investigation letter, Judge Gildner's justification for refusing to recall Mr. Moore's case when he appeared was that he had no legal obligation to "automatically" recall the bench warrant and had no legal obligation to set a hearing that day to consider if the bench warrant should be recalled. Judge Gildner's refusal to recall the matter and consider recalling the bench warrant was unreasonable under the circumstances, particularly as the undisputed reason for the defendant's late appearance was that he had initially gone to the wrong courtroom. The judge's refusal to give Mr. Moore a prompt hearing appears arbitrary and creates the appearance of substantial unfairness.

C. Informing Criminal Defendants At Pre-Preliminary Hearing That They Would Not See Same Offer Again.

In the fall of 2000, the Kern County Superior Court implemented a new pre-preliminary hearing procedure. As Judge Gildner explained in his response to the commission's preliminary investigation letter as well as in his rule 116 objections, under the new system, a pre-preliminary hearing is scheduled before the preliminary hearing in felony cases for the purpose of encouraging the early disposition of criminal matters. Under the new program, according to the judge, the district attorney's office is encouraged to and generally does make the best possible plea offer at the pre-preliminary hearing conference, taking the defendant's early plea into account as a mitigating factor.

Generally, under court policy and in actual application, the pre-preliminary hearing offer is the best available to the defendant and typically is not held open after that hearing. Judge Gildner acknowledged, however, that at all times it was and is the policy of the court to handle each case on its individual merits and circumstances, and that there are many occasions when judges accept a negotiated disposition where the sentence is the same or lower than the pre-preliminary hearing offer. Judge Gildner "many times" has personally accepted pleas to dispositions later in a case that are more lenient than the offer made by the district attorney at an earlier stage of the proceedings.

Notwithstanding the foregoing policy of handling each case on the merits, Judge Gildner, while presiding over pre-preliminary hearings and conferences between October 2000 and February 2001, frequently told defendants they *never* would receive an offer as or more lenient than the pre-preliminary hearing offer. This admonition admittedly overstated both the court policy and actual practice, and was not correct. Judge Gildner concedes that it carried the potential of coercion, and he has assured the commission that the practice ceased after attorneys pointed out the potentially coercive effect. The admonition may have convinced some defendants to accept offers at the pre-preliminary hearing that they otherwise would have rejected. The warning also created an appearance that criminal defendants might be punished or retaliated against for refusing the early offer of settlement.

Contrary to the judge's assertion that the admonition was meant to ensure the defendants "were fully informed of the circumstances so that they could make a meaningful choice," it was misleading and had the opposite effect. As with any plea offer that is not held open, there was no *guarantee* that any defendant would receive the same or better offer later

in the proceedings. However, the judge's admonition to defendants that they would "never" see the same or a better offer admittedly was incorrect. The judge's conduct violated canon 2A ("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").

The conduct set forth above was at a minimum improper action within the meaning of article VI, section 18(d) of the California Constitution, and suggests a pattern of failing to ensure the rights of criminal defendants. (See *In re Whitney* (1996) 14 Cal.4th 1, 2-3.)

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mr. Jose C. Miramontes, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. There is currently one public member vacancy on the commission.

Dated: January 3, 2005

Hon. Vance W. Raye
Chairperson