BEFORE THE COMMISSION ON JUDICIAL CONDUCT

OF THE STATE OF WASHINGTON

In Re the Matter of

HON. EVAN E. SPERLINE
Judge, Grant County Superior Court

CJC No. 4126-F-108

STIPULATION, AGREEMENT AND ORDER OF ADMONISHMENT

The Commission on Judicial Conduct and Evan E. Sperline, Grant County Superior Court Judge, do hereby stipulate and agree as provided for herein, pursuant to Rule 23 of the Commission's Rules of Procedure. This stipulation shall not become effective until approved by the Washington Commission on Judicial Conduct.

I. STIPULATED FACTS

A. Background

1. The Honorable Evan E. Sperline (Respondent) is now, and was at all times referred to in this document, a judge of the Grant County Superior Court.

2. In August 2003, the Commission on Judicial Conduct (Commission) began investigating information it received indicating Respondent may have breached the Code of Judicial Conduct by appearing to advocate for a party in a case over which he previously presided (Matter A). While investigating this allegation, the Commission learned that Respondent, in two unrelated cases in 1999, may have violated the Code by contacting the Court of Appeals to defend rulings he made that were reversed on appeal while those matters were potentially subject to reconsideration (Matters B and C). On October 8, 2003, the Commission sent Respondent a letter informing him that the Commission was commencing initial proceedings regarding these matters. A Statement of Allegations was enclosed and his response was invited. Respondent replied to the Statement of Allegations on October 29, 2003.

B. Conduct Giving Rise to Charges

1. Matter A.[1]

Respondent issued an order suppressing evidence in a criminal case over which he presided. The State appealed. On March 13, 2003, the Court of Appeals filed an unpublished opinion reversing Respondent's suppression order. On March 17, 2003, while the matter was still pending in the Court of Appeals and subject to a motion for reconsideration, Respondent wrote to the attorneys of record expressing his dissatisfaction with the appellate opinion because, he asserted, it "did not address the basis upon which the trial court's suppression order was made." A copy of this letter was also filed in the trial court's case file. After suggesting that counsel could decide whether the concerns he raised in his letter "warrant[ed] a motion for reconsideration to the Court of Appeals," Respondent explained how the appellate court's opinion failed to address the rationale supporting his order suppressing evidence. (This letter is attached hereto as "Exhibit A.")

2. Matter B.[2]

On August 10, 1999, the Court of Appeals filed an unpublished opinion that reversed and remanded Respondent's sentencing decision to impose an exceptional sentence on a defendant convicted of vehicular homicide. On August 18, 1999, Respondent wrote to the judges who participated in the appellate opinion to convey his disagreement with the court's opinion. Copies of the letter were made part of the appellate record and filed in the trial court's case file. In his letter to the appellate judges, Respondent described the court's opinion as "wrong, demeaning, and unsupported by law (especially the cases you purport to base it on), logic, common sense, morality or public policy." Respondent concluded the letter by asking the court to publish its opinion. (This letter is attached hereto as "Exhibit B.")

1/ State v. Villegas, Grant County Cause No. 02-1-00118-4; Court of Appeals No. 21100-2-III.

2/ State v. Angel, Grant County Cause No. 97-1-00718-9; Court of Appeals No. 17472-7-III.

3. Matter C.[3]

In an unpublished opinion filed on November 23, 1999, the Court of Appeals reversed and remanded Respondent's sentencing decision that the crimes for which the defendant was convicted constituted the same criminal conduct for purposes of sentencing. On November 29, 1999, Respondent wrote to the judges of the appellate court to communicate his disagreement with the appellate opinion. Copies of his letter were provided to the attorneys of record and filed in the trial court's case file. In this letter to the appellate judges, Respondent objected to the court's conclusion that he abused his discretion and specified reasons why the defendant's sentence should be affirmed. Respondent concluded his letter by stressing that he was "frustrated and disheartened at [the court's] approach to these cases," and further asserted the judges were "creating an atmosphere of terrorism for the trial judges in Division III." (This letter is attached hereto as "Exhibit C.")

4. When Respondent wrote each of the foregoing letters, the appellate court had published, filed and circulated to Respondent and counsel its opinion in each case, but had not issued its mandate terminating review of the cases. Each appellate opinion Respondent discussed was, therefore, still subject to a motion for reconsideration. In addition, each case was returned to the trial court for further proceedings before Respondent.

5. After receiving Respondent's letters in Matters A and C, the state moved for an order in the Court of Appeals requiring that those cases be heard by a judge other than Respondent on remand, arguing that Respondent's conduct created the appearance of partiality or bias. The Court of Appeals ordered the cases assigned to a judge other than Respondent.

II. AGREEMENT

A. Respondent's Conduct Violated the Code of Judicial Conduct

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3/ State v. Dalluge, Grant County Cause No. 97-1-00540-2; Court of Appeals No. 17541-3-III.

1. Respondent accepts the Commission's determination that the foregoing conduct violates Canons 1, 2(A) and 3(A)(7) of the Code of Judicial Conduct.[4]

2. In Matter A, Respondent advised counsel of potential arguments to make for a motion to reconsider. Although Respondent only expressed a desire to have a legal issue addressed and not that it be resolved in any particular way, to a reasonably prudent and disinterested person it appears as though Respondent was advocating on behalf of, or assisting, one party (the non-prevailing party) at the expense of the other party (the prevailing party). Such apparent advocacy creates a perception of partiality, bias or prejudice. Avoiding the appearance of partiality, bias or prejudice, as mandated by Canons 2 and 3, is as important to developing public confidence in the judiciary as avoiding the impropriety itself.[5]

3. The manner in which Respondent defended his sentencing decisions and criticized the appellate judges for their contrary opinions in Matters B and C also compromised Respondent's impartiality or appearance of impartiality. Respondent wrote to the appellate court to express his sincere frustration with the court and to object to what he perceived as the court's misguided opinions. Respondent states that he did not intend his letters to influence the decision of the Court of Appeals (with the exception of the decision to publish in Matter B).[6] Nevertheless, Respondent's strong reaction to the appellate court's opinions, and his insistence that his rulings were correct even though reversed, evidenced a personal involvement in those cases that

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4/ Canon 1 of the Code of Judicial Conduct provides, "Judges shall uphold the integrity and independence of the judiciary." Canon 2 provides, "Judges should avoid impropriety and the appearance of impropriety in all their activities," and Canon 2(A) specifies, "Judges should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3 provides, "Judges shall perform the duties of their office impartially and diligently." Finally, Canon 3(A)(7) provides in part, "Judges shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing."

5/ State v. Madry, 8 Wn.App. 61, 70 (Div. II 1972); State v. Dugan, 96 Wn.App. 346, 354-55 (Div. II 1999).

6/ Rule 12.3(e) of the Rules of Appellate Procedure allows non-parties to request an unpublished opinion be published, and requires such requests to be filed with the Court of Appeals within the same 20-day period provided for motions for reconsideration. A request from a trial judge to publish an appellate opinion would not, in and of itself, violate the Code of Judicial Conduct.

would lead a reasonable observer to question Respondent's ability, or apparent ability, to be objective, neutral and detached when presiding over those cases on remand.[7]

4. The conduct described above also constitutes improper public comment on pending cases. Generally, the requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.[8] It is of no consequence whether the cases were then pending in the appellate court or before Respondent in the trial court, as Canon 3(A)(7)'s proscription applies to cases pending in any court, trial or appellate. Further, Respondent's comments were made publicly. While Respondent's comments were not as broadly disseminated as if, for example, they were made in the media for public consumption, his comments were made to other judges and attorneys, and were preserved as part of the public records in the trial and appellate courts and were thus open and available to the general public. Finally, Respondent's comments were substantive and on the very merits of the proceedings at issue. The comments might, therefore, reasonably be expected to affect the outcome or impair the fairness of those proceedings.

7/ The Nebraska Supreme Court, in a case sanctioning a judge for similar, but far more blameworthy conduct, provided a useful explanation of why it is inappropriate for a trial judge to advocate for his or her rulings that are reversed on appeal. The Nebraska court observed:

> When a judge becomes embroiled in a controversy, the line between the judge and the controversy before the court becomes blurred, and the judge's impartiality or appearance of impartiality may become compromised. In this case, the respondent [judge] abandoned the judicial role to become an advocate for her own ruling. Such behavior by the respondent discloses an unhealthy and wholly improper concern with the protection of her own rulings from appellate reversal. Simply stated, the individual judge of the court whose order is being reviewed is not a proper party to the proceeding. The responsibility of a judge is to decide matters that have been submitted to the court by the parties. The judge may not, having decided a case, advocate for or, as in this case, materially assist one party at the expense of the other. Such advocacy creates the appearance, and perhaps the reality, of partiality on the part of the judge. This, in turn, erodes public confidence in the fairness of the judiciary and undermines the faith in the judicial process that is a necessary component of republican democracy.

In Re Complaint Against White, 651 N.W.2d 551, 562-63 (Nebraska 2002) (internal citations and quotations omitted).

8/ See, Comment to Canon 3(B)(9) of the 1990 ABA Model Code of Judicial Conduct; White, 651 N.W.2d at 561; U.S. v. Microsoft, 253 F.3d 34, 112 (D.C. Cir. 2001).

B. Sanction

1. Pursuant to the Commission's Rules of Procedure, the sanction imposed by the Commission should be appropriate to the level of culpability and should be sufficient to restore and maintain the dignity and honor of the judicial position and to protect the public by assuring that the judge will refrain from acts of misconduct in the future.

2. In accepting this stipulation, the Commission takes into account the aggravating and mitigating factors identified in Rule 6(c) of its Rules of Procedure. Respondent has been a superior court judge for Grant County since 1983 and has had no prior disciplinary actions brought against him. While the misconduct occurred in Respondent's capacity as a judge, and three instances cannot be considered isolated acts, Respondent did not intentionally violate his oath of office nor exploit his official capacity for personal gain. Because Respondent's letters were not broadly disseminated, the adverse effect the misconduct has had upon the integrity of and respect for the judiciary is relatively slight. Finally, Respondent has cooperated with the Commission's investigation, acknowledges that the acts occurred and agrees not to engage in such conduct in the future.

3. Respondent maintains that his conduct does not violate the provisions of the Code of Judicial Conduct, or that it does so in a manner so insignificant and inadvertent that no sanction should be imposed, as provided in the Preamble to the Code of Judicial Conduct. Because Respondent does not deny any of the facts upon which the Commission has determined to base a sanction, however, Respondent acquiesces in that sanction. Respondent, moreover, recognizes that this public proceeding may serve as guidance to other members of the judiciary.

4. Based upon the stipulated facts, upon consideration and balancing of the aggravating and mitigating factors and Respondent's desire to resolve this matter, Respondent and the Commission agree that Respondent's stipulated misconduct shall

be sanctioned by the imposition of an admonishment.

Standard Additional Terms of Commission Stipulation

5. Respondent agrees that by entering into this stipulation and agreement, he waives his procedural rights and appeal rights in this proceeding pursuant to the Commission on Judicial Conduct Rules of Procedure and Article IV, Section 31 of the Washington State Constitution.

6. Respondent further agrees that he will not retaliate against any person known or suspected to have cooperated with the Commission, or otherwise associated with this matter.

DATED this 20th day of January, 2004.

Evan E. Sperline
Honorable Evan E. Sperline

2/20/04
Date

Barrie Althoff
Barrie Althoff, Executive Director
Commission on Judicial Conduct

February 20, 2004
Date

ORDER OF ADMONISHMENT

Based on the above Stipulation and Agreement, the Commission on Judicial Conduct hereby orders and Respondent, Evan E. Sperline, hereby is admonished for the above set forth violations of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future.

DATED this 10TH day of MARCH, 2004

K. Collins Sprague, Chair
Commission on Judicial Conduct

The Superior Court of Washington
In and For the County of Grant

'AN E. SPERLINE, Judge
Department One
983 -

P. O. Box 37
Ephrata, WA 98823

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Evan.Sperline@courts.wa.gov

March 17, 2003

Paul J. Wasson
Attorney at Law
2521 W. Longfellow Avenue
Spokane, WA 99205-1548

Carolyn J. Fair
Deputy Prosecuting Attorney
P. O. Box 37
Ephrata, WA 98823

Re: ***State v. Michael A. Villegas***
Court of Appeals No. 21100-2-III
Grant County Cause No. 02-1-00118-4

Counsel:

I have long since learned that, during the time for motion for reconsideration, it's inappropriate for a trial judge to express to the Court of Appeals disagreement or dissatisfaction with an appellate opinion. I mean to scrupulously abide by that limitation, so I ask in advance that neither of you communicate this letter to the Court.

On the other hand, I can identify no ethical principle that would prohibit me from communicating my concerns to you. Counsel can decide, without offending me in any way, whether my concerns warrant a motion for reconsideration to the Court of Appeals. In further deference to any ethical consideration, I ask further that you not respond to this letter or otherwise advise me regarding a decision, one way or the other, on making a motion for reconsideration.

My concern with the decision of Division 3 in this case is that they did not address the basis upon which the trial court's suppression order was made. I can most economically address the issue by quoting from pages 4 and 5 of the appellate opinion:

> However, property will not be deemed voluntarily abandoned, and thus not subject to a warrantless search, if a person abandons it because of unlawful police conduct...
> ...The term *abandoned* must be analyzed in the constitutional sense because the issue here is whether Mr. Villegas, in denying he had any personal property inside

EXHIBIT A

> the apartment, relinquished any expectation of privacy in his duffel bag such that the eventual governmental seizure should be considered reasonable.

Thus, Division 3 found that abandonment occurred when, and because, the defendant denied he had personal property present in the apartment. What the Court did not address--and what was the basis of the trial court order--is whether it was unlawful police conduct that precipitated the abandonment.

The defendant expressly declined to speak with the officers executing the warrant and requested counsel. After he did so, and as they were about to carry out their search authority, the officer having custody of the defendant asked him if he had any personal property on the premises. This put the defendant to a Hobson's choice: he could either admit that he had personal property present (and thus confess to illegal possession of drugs) or he could deny it, and be deemed to have abandoned in the way reasoned by Division 3. The question literally required the defendant to choose between his 5th Amendment and 4th Amendment rights.

I believe the record will reflect that the officer who asked this question testified that there was no particular reason for it beyond standard police procedure when a person is present in a place where a search is to be conducted.

I would in no way be offended if my good colleagues at Division 3 resolved differently than I the issue regarding compelling the defendant to choose between his rights. But it is troubling to have them not address it at all, especially when it was the basis for this court's decision.

Very truly yours,

EVAN E. SPERLINE

Evan E. Sperline

cc: trial court file

Superior Court of the State of Washington

For the County of Grant

GRANT COUNTY COURTHOUSE
POST OFFICE BOX 37
EPHRATA, WASHINGTON 98823
(509) 754-2011

EVAN E. SPERLINE, *Judge, Dept. 1*
KENNETH L. JORGENSEN, *Judge, Dept. 2*
JAMES R. BROWN, *Court Commissioner*

MINDI FINKE, *Court Administrator*
LINDA L. PERKINS, *Reporter, Dept. 1*
ROSALIE RILEY *Reporter, Dept. 2*

August 18, 1999

Hon. Frank Kurtz, Judge
Court of Appeals of the State
of Washington
Division Three
P. O. Box 2159
Spokane, WA 99210

Re: ***State v. Eustaquio C. Angel***
Cause No. 17472-7-III

Your Honor:

I threw away the first letter I wrote to you upon reading your opinion in this case. It's probably a good thing.

I do want the court to know that its opinion is wrong, demeaning, and unsupported by law (especially the cases you purport to base it on), logic, common sense, morality or public policy. In seventeen years of doing this, nothing has left me feeling so frustrated, powerless, futile and dismayed as your opinion in this case.

If you're going to advance a policy that limits the sentence of a drunk, reckless killer with a car to less than half of what it would be for a drunk, reckless killer with anything else, then I think you ought to do it publicly. Please publish your opinion.

Sincerely,

Evan E. Sperline

Evan E. Sperline

cc: Hon. John Schultheis
Hon. Dennis Sweeney

EXHIBIT B

Superi Court of the State of W ington
For the County of Grant
GRANT COUNTY COURTHOUSE
POST OFFICE BOX 37
EPHRATA, WASHINGTON 98823
(509) 754-2011

EVAN E. SPERLINE, *Judge, Dept. 1*
KENNETH L. JORGENSEN, *Judge, Dept. 2*
JAMES R. BROWN, *Court Commissioner*

MINDI FINKE,
Court Administrator
LINDA L. SPERLINE
Reporter, Dept. 1
ROSALIE RILEY
Reporter, Dept. 2

November 29, 1999

Honorable Judges of Division Three,
Court of Appeals of the State of Washington
P. O. Box 2159
Spokane, WA 99201

Re: ***State v. Dalluge***
Grant County Cause No. 97-1-00540-2
Court of Appeals No. 17451-3-III

Your Honors:

I'm baffled by your decision in this case. Because you would apply the law differently, the trial judge is guilty of an *abuse of discretion*?

Enclosed are your opinion in *Dalluge* and a transcript of the sentencing hearing. Please note the following:

- I was provided with a DOC presentence report that stated Mr. Dalluge's offender score was "2"-- it assumed the two current offenses should be counted as one offense for sentencing.

- The state apparently agreed with DOC; the Prosecutor submitted a Judgment and Sentence showing an offender score of "2."

- After I raised the issue of offender score, both the Prosecutor and defense counsel commented. Neither said a word about "different criminal intent," the basis for your decision.

- Neither asked for more time to brief the issue. Neither cited any of the cases your opinion relies on. Neither objected to my conclusion--instead, each acknowledged that it was a statutory standard "very difficult to apply, particularly in sex cases."

- There was no post-sentencing motion for reconsideration or to vacate, correct or modify the Judgment and Sentence.

EXHIBIT C

In short, there was no opportunity for the trial judge to avoid the error. On this record, you conclude that I abused my discretion.

If the defendant had assisted Mr. Alvarez in raping the victim, and then assisted Mr. Anstrom in raping the victim, would his two convictions based on complicity then constitute the same criminal conduct? According to *State v. Tili*, 139 Wn.2d 107 (Oct. 7, 1999), and *Palmer* (on which you rely), if Mr. Dalluge had actually raped the victim twice, rather than assisting someone else once, his two convictions would be the same criminal conduct. So, your decision establishes the proposition that Dalluge--the accomplice/principal--should have an offender score of "4," while Tili or Palmer--the multiple principal rapists--should have a score of "1."

As far as I can tell, this is a case of first impression (same criminal conduct standard applied to two convictions of the same offense, one as an accomplice and one as a principal). Can a trial judge abuse his discretion under that circumstance?

I've also enclosed your decisions in *State v. Hart* and *State v. Walsh*, in comparison of which I've discovered only one significant difference: Hart moved to withdraw his plea and Walsh did not. Since, according to *Hart*, the court *must* permit the defendant to withdraw his plea when an error in the offender score is discovered, then the assistance of counsel in *Walsh* must, by definition, have fallen below that objective standard and been ineffective. You don't mention that, however. You just say the defendant waived. In *Dalluge*, there is the additional astonishing notion that apparently an elected prosecutor cannot waive the state's statutory rights in the way a public defender can waive a criminal defendant's constitutional ones.

Even after a long walk to cool down and an intervening weekend, I am frustrated and disheartened at your approach to these cases. You are creating an atmosphere of terrorism for the trial judges in Division III. Frankly, I'm at a loss to decide how to avoid such outcomes, and how to register my protest, except by such feeble letters as this one.

Sincerely,

Evan E. Sperline

Evan E. Sperline

cc: Mr. Knodell
Mr. Ahrend
Mr. Romero