BEFORE THE COMMISSION ON JUDICIAL CONDUCT
OF THE STATE OF WASHINGTON

In Re the Matter of The Honorable Joseph Wilson Judge of the Snohomish County Superior Court	CJC NO. 9334-F-190 **STIPULATION, AGREEMENT AND ORDER OF CENSURE**

The Commission on Judicial Conduct ("Commission") and Snohomish County Superior Court Judge Joseph Wilson ("Respondent") stipulate and agree as provided for herein. This stipulation is entered pursuant to Article IV, Section 31 of the Washington Constitution and Rule 23 of the Commission on Judicial Conduct Rules of Procedure and shall not become effective until approved by the Washington Commission on Judicial Conduct.

The Commission has been represented in these proceedings by its Executive Director, J. Reiko Callner, and Judge Wilson represented himself.

I. STIPULATED FACTS

A. Respondent is now, and was at all times referred to in this document, a judge of the Snohomish County Superior Court. He has served in that capacity since 2010.

B. The Commission initiated a complaint against Respondent following publication of a court of appeals decision which chided Respondent for using profanity and for appearing to have manifested a bias against a defendant in drug court. (No. 76633-3-I, attached as Exhibit 1.) Following an investigation into that matter and similar conduct, the Commission served Respondent with a Statement of Allegations on December 20, 2019, alleging Respondent may have violated the Code of Judicial Conduct by "using language and manifesting a demeanor that was indecorous, undignified, impatient and discourteous." The Commission identified multiple hearings alleged to illustrate such intemperate behavior that occurred between January 4, 2017,

and October 10, 2019. The Commission further alleged that in the case reversed by the court of appeals noted above, Respondent's conduct, in addition to being indecorous, created the appearance he was biased and/or prejudiced against the defendant. Finally, the Commission alleged that while presiding over a suppression hearing on February 8, 2018 Respondent may have violated the Code by refusing to consider a defense attorney's argument and/or not allowing that attorney to make a record and by not deciding matters assigned to Respondent. A description of some of the particulars follows.

At a hearing in drug court on February 24, 2017, Respondent, after telling the defendant he could, "Stop with the shoulder bulls*** now" said:

> "So I got a guy standing in front of me, who won't tell me that he's got a dirty UA for alcohol, finally admits that he drank and then tells me he needs anger management. I think you're a f***ing addict and maybe you need treatment. I don't think it's got nothing to do with anger management. You think I give you anger management and that's gonna get you clean and sober? What the hell are you talking about? Have a seat, over here...Percocet and alcohol...I'm gonna relax a little bit and then figure out what to do with him."

After termination from drug court, at a sentencing hearing on March 24, 2017, Respondent said:

> "You, sir, are just a criminal, that's all you are, you're just a criminal. Do you have issues? Yep, you do. Are you going to deal with them? No, you're not.... You, the odds say, are going to die in prison."

The transcript of the February 8, 2018, hearing reflects that Respondent told an attorney who stated she was trying to make a record that:

> "You don't have the right to make a record" and "I am not going to proceed in this case with this counsel in front of me. The matter will be stricken, and re-note it in front of another judge. You may take him [directed to jailer, as the defendant was in custody]."

At a sentencing hearing on October 10, 2019, Respondent denied the prosecutor's request to have the victim present telephonically, saying in an elevated and agitated voice while pointing directly at the prosecutor,

> "Neither you nor your office have a right to tell this Court what it's going to do in its own courtroom."

C. The Commission previously sanctioned Respondent for demeanor in 2018. (See *In re Hon. Joseph P. Wilson*, CJC No. 8662-F-178 (Stipulation, Agreement and Order of Admonishment, filed May 11, 2018).) In that stipulation, Respondent agreed that [he] "did not treat [the defendant] with respect and [he] addressed him in a manner [he] should not have". Respondent further agreed that he would not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct posed to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

D. Respondent answered the current Statement of Allegations on February 20, 2020. In his answer, Respondent indicated that he did not contest the allegations, and expressed his intent to settle this matter through mutual resolution. Respondent supplemented his answer on July 27, 2020, and later disclosed to Commission staff that the court of appeals had issued a new decision, which, similar to the drug court matter detailed above, involved Respondent using "epithets and slurs" when addressing a criminal defendant, and reversing his decision on that basis, ordering the matter to be resumed with a different judge. (No. 79971-1-I, Unpublished Decision, attached as Exhibit 2.) Further conversation led to this stipulation, with Respondent agreeing he violated the Code in the manner set forth below.

II. AGREEMENT

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

1. Respondent agrees that, as evidenced by the examples cited by the Commission, he violated Canon 1, Rules 1.1 and 1.2 and Canon 2 Rule 2.8(A) and (B) of the Code of Judicial Conduct by failing to treat all individuals appearing before him in court with patience, courtesy and respect. Respondent further agrees that he violated Canon 2, Rule 2.3(A) and (B) with words and conduct that could lead a reasonable person, and which in fact led the court of appeals to conclude that he manifested a bias or prejudice against a defendant. Finally, Respondent agrees that he violated Canon 2, Rules 2.6(A) and 2.7 by refusing to consider an attorney's argument and/or not allowing an attorney to make a record and by not deciding matters assigned to Respondent.

2. Rules 1.1 and 1.2 require judges to uphold the integrity of the judiciary by avoiding impropriety and the appearance of impropriety and by acting at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary.[1]

3. Rule 2.8(A) requires judges to maintain order and decorum in the courtroom while Rule 2.8(B) mandates that judges be patient, dignified and courteous to all persons with whom they deal in their official capacity.[2]

4. Rule 2.3(A) requires that a judge perform the duties of judicial office, including administrative duties, without bias or prejudice. Rule 2.3(B) prohibits a judge from using words or exhibiting conduct that manifests bias or prejudice.[3]

5. Rule 2.6(A) states that a judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. Rule 2.7 requires a judge to hear and decide matters assigned to the judge, except when disqualification or recusal is required by Rule 2.11 or other law.

6. Interrupting litigants and attorneys and addressing them in an unduly confrontational, condescending, and harsh manner, and using foul language, all violate these ethical provisions. While the Commission's investigation found that Respondent is generally calm and professional on the bench, at times he can be impatient or volatile. This may impair the right of individuals to be fairly heard by intimidating or discouraging them from fully presenting their positions in court and erodes public confidence in the fairness and integrity of the judicial system. When Respondent recognized that he was becoming angry at an attorney who was persisting in

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[1] Canon 1 of the Code of Judicial Conduct states that a judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety. Rule 1.1 specifies, "A judge shall comply with the law, including the Code of Judicial Conduct." Rule 1.2 provides, "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."

[2] Canon 2 expresses that "a judge should perform the duties of judicial office impartially, competently, and diligently." Rule 2.8(A) specifies, "A judge shall require order and decorum in proceedings before the court." Rule 2.8(B) states, "A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, court staff, court officials and others subject to the judge's direction and control."

[3] Rule 2.3(A) specifies "A judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice." Rule 2.3(B) specifies "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so."

making a record, Respondent reassigned the matter to another judicial officer, therefore recusing himself. A judge who is subjectively angry at an attorney should, in fact, recuse from the proceeding at hand, if that anger threatens to intrude on the impartiality of the judge's decision-making. (Such recusal necessarily sets a matter over and extends the time and resources required.) It is incumbent on the judge, however, to govern his or her emotions to the point that they are not excessively provoked by simple zealous advocacy. The expression of anger here, as with the other matters addressed by the Commission, is unfortunately consistent with other instances where Respondent's anger or emotion has affected his ability to execute his duties. In accordance with the rules stated in section 1, judicial officers have an obligation to control their courtrooms in a way that minimizes disruption of court proceeding, but, as the Code instructs, "Judges can be efficient and businesslike while being patient and deliberate." Rule 2.8, Comment [1]. Language that manifests bias or prejudice, or profanity, has no place in a courtroom. Appropriate judicial demeanor plays an important role in the public's perception of justice. The judge sets the tone for the courtroom experience. Discourteous and disrespectful behavior by a judge in the courtroom erodes the public's confidence in the quality of justice administered by that judge, not only for the direct targets of such behavior, but also for all those who witness it. The public is more likely to respect and have confidence in the integrity and fairness of a judge's decision if the judge is outwardly respectful, patient and dignified. Because of the power disparity between a judge and others in the courtroom, berating a litigant or an attorney is not a proper exercise of judicial power.

B. Imposition of Sanction

1. The sanction imposed by the Commission must be commensurate to the level of Respondent's culpability and must be sufficient to restore and maintain the dignity and honor of the judicial position. The sanction should also seek to protect the public by assuring that Respondent and other judges will refrain from similar acts of misconduct in the future.

2. In determining the appropriate level of discipline to impose, the Commission considers the factors set out in CJCRP 6(c).

a. Characteristics of Respondent's Misconduct. The nature of Respondent's misconduct represents an intermittent pattern of intolerant and intemperate behavior.

The misconduct occurred in the courtroom, during court proceedings, and while the Respondent was acting in his official capacity and may have been disconcerting to both litigants and attorneys, and may discourage others from wanting to appear in his courtroom for fear of how they might be treated. Similarly, the public's respect for the judiciary is undermined by such conduct. The misconduct specifically resulted in his cases being reversed and remanded twice; a significant impact on his efficacy as a judicial officer, in these instances.

b. Service and Demeanor of Respondent. Respondent has been a judicial officer for ten years. As noted above, Respondent was previously admonished in 2018 for similar behavior. The prior discipline, as well as the number of examples of injudicious behavior noted here, are serious aggravating factors. On the other hand, Respondent has cooperated with the Commission's investigation and he accepts that his demeanor, objectively viewed, is at times injudicious as set forth in this agreement. Respondent has worked previously with an expert trainer to correct his courtroom demeanor in response to his prior discipline and by entering into this stipulation and agreeing to take additional steps to correct and avoid inappropriate behavior in the future, the Commission has a basis to believe he will modify his conduct. Respondent is on notice that repeated misconduct is necessarily met with increasingly severe sanctions.

3. Respondent and the Commission agree that Respondent's stipulated misconduct shall be sanctioned by the imposition of a "censure." A "censure" is a written action of the Commission that requires Respondent to appear personally before the Commission and finds that the conduct of Respondent is a violation of the Code of Judicial Conduct that detrimentally affects the integrity of the judiciary and undermines public confidence in the administration of justice. It is the highest level of sanction the Commission can impose on its own. With a censure, the Commission could also recommend to the Supreme Court that a respondent judge be suspended or removed from office. The Commission and Respondent agree that such a recommendation is not warranted in this matter however, given Respondent's recognition of his misconduct and its impact, and his agreement to conclude this matter by stipulation. A censure shall include a requirement that the respondent follow a specified corrective course of action.

4. Respondent agrees that he will participate in at least two hours of ethics training relevant to the misconduct, approved in advance by the Commission Chair or Chair designate, at the National Judicial College, accredited law school or judicial seminar, or a similar institution or program no later than one year from the date this stipulation is accepted by the Commission. Respondent agrees he will complete such training (not at Commission expense) and will certify the successful completion of such training in writing within one year from the date this stipulation is accepted by the Commission.

5. Respondent agrees that he will participate in behavioral coaching with an emphasis on courtroom demeanor by a qualified behavioral modification professional, approved in advance by the Commission Chair or Chair designate and not at Commission expense, until such professional has certified, in writing, that such counseling has accomplished positive changes and that in his/her opinion, the Respondent has the competency to maintain these changes in the future.

6. Respondent agrees that he will not repeat such conduct in the future, mindful of the potential threat any repetition of his conduct poses to public confidence in the integrity and impartiality of the judiciary and to the administration of justice.

7. Respondent agrees that he will promptly read and familiarize himself with the Code of Judicial Conduct in its entirety and provide written confirmation of that fact within one month of the date this stipulation is accepted.

C. Standard Additional Terms and Conditions

1. 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.

2. 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. Both the Respondent and the Commission agree that neither party will call the behavior

coach as a witness in any proceeding related to the Respondent's compliance with this stipulation, except as to whether Respondent completed the coaching described above.

3. Respondent has been unrepresented in these proceedings. He affirms that he has had an opportunity to consult with an attorney and voluntarily chooses to represent himself in this matter and enter into this agreement.

Honorable Joseph Wilson
Snohomish County Superior Court

11/17/20
Date

J. Reiko Callner
Executive Director
Commission on Judicial Conduct

11/17/20
Date

ORDER OF CENSURE

Based upon the above stipulation and agreement, the Commission on Judicial Conduct hereby orders Respondent Joseph Wilson Censured for violating Canon 1 (Rules 1.1 and 1.2) and Canon 2 (Rules 2.3(A) and (B), 2.6(A). 2.7, and 2.8(A) and (B)) of the Code of Judicial Conduct. Respondent shall not engage in such conduct in the future and shall fulfill the terms of the agreement as set forth above.

DATED this 20th day of November, 2020.

Robert Alsdorf, Chair
Commission on Judicial Conduct

EXHIBIT #1
CJC NO. 9334-F-190

FILED
1/7/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DAVID WAYNE LEMKE, Appellant.	No. 76633-3-I ORDER GRANTING MOTION TO PUBLISH

The appellant, David Wayne Lemke, has filed a motion to publish the opinion filed on December 3, 2018. The respondent, State of Washington, has filed a response. The court has taken the matter under consideration and has determined that the motion should be granted.

Now, therefore, it is hereby

ORDERED that the unpublished opinion filed on December 3, 2018, shall be published and printed in the Washington Appellate Reports.

FOR THE COURT:

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID WAYNE LEMKE, Appellant.	)	No. 76633-3-I DIVISION ONE UNPUBLISHED OPINION FILED: December 3, 2018

BECKER, J. — Appellant David Lemke seeks reversal of the standard range sentence that was imposed when he was terminated from drug court. He argues that the trial court failed to consider his eligibility for a residential DOSA (Drug Offender Sentencing Alternative). Because the record indicates that the judge's refusal to consider a DOSA was influenced by personal animus toward the defendant, we reverse and remand for resentencing before a different judge.

On January 4, 2017, the State filed an amended information charging Lemke with two counts of possession of methamphetamine and one count of shoplifting (retail theft with special circumstances), stemming from arrests two months earlier. Lemke pleaded not guilty. He was admitted to Adult Drug Treatment Court that same day. He signed an agreement stating that if he was terminated from drug court, a judge, not a jury, would decide his guilt and the State would recommend a sentence of 24 months' incarceration and 12 months' community custody.

Lemke appeared for progress hearings. The record of these hearings shows the judge becoming increasingly pessimistic about the chances of Lemke's success in drug court and increasingly disappointed with Lemke's lack of commitment to the goal of staying clean and sober. During hearings to assess Lemke's progress, the court admonished him for missing treatment sessions and having "dirty" and diluted urinalysis results, among other problems. Lemke gave excuses the judge found unpersuasive. The judge sanctioned Lemke with brief jail stays and work crew and ordered him to attend daily treatment meetings. The judge warned Lemke that if he did not change his behavior, he would be terminated from drug court.

During a hearing on February 24, 2017, Lemke reported that he had a sore shoulder from being on work crew. The judge told him he could "stop with the shoulder bullshit now." Lemke admitted he had been drinking and said he needed anger management counseling. The judge said, "I think you're a fucking addict and maybe you need treatment. I don't think it's got nothing to do with anger management. You think I'll give you anger management and that's going to get you clean and sober? . . . What the hell are you talking about?" The judge said, "You can't even give me a clean date you're so fucked up."

On March 3, 2017, the judge discussed with Lemke the results of two "diluted" urinalysis results that indicated Lemke was masking his continuing drug use. The judge said, "I'm starting to get a little bit pissed as I think about it more and more. I'd rather you just use rather than lie to me through masking."

Later that month, Lemke missed a court date. The court issued a warrant for his arrest. Lemke tried to quash the warrant during a court hearing on March 15, 2017. The judge asked Lemke if he was "on oxycodone." Lemke responded, "Yeah." The judge told Lemke that the warrant would not be quashed and he would be taken into custody and "terminated from drug court." At another hearing two days later, the judge explained that he believed Lemke was lying about why he missed the court date. He said to Lemke, "You're a manipulator. . . . And I am done with you." He ordered Lemke to return in a week for termination from drug court and sentencing. The judge noted that the charges against Lemke were two counts of possession of a controlled substance and shoplifting. "So not only is he an addict, he's also a liar and thief. Done."

At the hearing a week later on March 24, 2017, the judge articulated his reasons for terminating Lemke from drug court: "Continued use, lying to the Court, inability to follow protocols." The judge then found Lemke guilty of the charged crimes.

At this point, defense counsel interjected, "Before we proceed, the one thing that we ought to observe is that he is eligible for a residential DOSA." DOSA stands for Drug Offender Sentencing Alternative. A residential DOSA is a treatment-based alternative to a standard range sentence available to nonviolent drug offenders when deemed appropriate by the trial court. RCW 9.94A.660(3). The judge said, "I'm not giving him a residential DOSA."

The judge imposed a standard range sentence of 24 months' confinement and 12 months' community custody. He remarked on Lemke's 30-year criminal

history beginning at age 14. "You, sir, are just a criminal, that's all you are, you're just a criminal. Do you have issues? Yep, you do. Are you going to deal with them? No, you're not. . . . You, the odds say, are going to die in prison."

Lemke appeals his sentence.

Generally, a court's decision whether to grant a DOSA is not reviewable. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). Exceptions are if the trial court refused to exercise discretion at all or relied on an impermissible basis in making the decision. State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), review denied, 136 Wn.2d 1002, 966 P.2d 902 (1998). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Grayson, 154 Wn.2d at 342. A trial court's failure to meaningfully consider a sentencing alternative is reversible error. Grayson, 154 Wn.2d at 342.

Lemke contends the judge denied his request for a DOSA without a meaningful inquiry, based in part on openly expressed personal animosity toward Lemke. The State responds that it is "clear" that the court grounded its denial in an assessment that Lemke was not amenable to treatment.

Judges have a duty to conduct themselves with respect for those they serve, including the litigants who come before them. "A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute." Code of Judicial Conduct, Canon 2 cmt. 1.

Epithets and slurs are manifestations of bias or prejudice. Code of Judicial Conduct, Canon 2 cmt 2.

No judge wielding the power of the State in any courtroom has any good reason to call a litigant a "fucking addict" and "just a criminal." The judge's manifestation of personal animosity toward Lemke is not something we can write off as a byproduct of the informal and confrontational culture of drug court. A "fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955). The sentence must be reversed.

At resentencing, the court will follow State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714 (2018), in imposing legal financial obligations. In response to a supplemental assignment of error and supplemental brief filed by Lemke concerning Ramirez, the State conceded that the $200 criminal filing fee, the $100 DNA fee, and the $900 drug court fee should not be imposed.

Reversed and remanded for resentencing before a different judge.

Becker, J.

WE CONCUR:

EXHIBIT #2
CJC NO. 9334-F-190

FILED
9/28/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. CHERRINGTON, ALECIA MARIE, DOB: 07/12/1981, Appellant.	))))))))))	No. 79971-1-I (Consolidated with Nos. 79972-0-I, 79973-8-I, 79975-4-I, 79974-6-I, 79976-2-I) UNPUBLISHED OPINION

BOWMAN, J. — Judges have a duty to conduct themselves with respect for those they serve, including the litigants who come before them. The trial court denied Alecia Cherrington's request for a prison-based drug offender sentencing alternative (DOSA) after addressing her using epithets and slurs. Epithets and slurs are manifestations of bias or prejudice. CJC 2.3 cmt. 2. We reverse and remand for resentencing before a different judge.

FACTS

The State charged Cherrington with 13 felonies under six cause numbers. The informations alleged Cherrington committed residential burglary, identity theft, possession of stolen property, forgery, unlawful production of payment instruments, and possession of a controlled substance between November 2015 and August 2018. Cherrington pleaded guilty as charged to all counts.

On April 25, 2019, Cherrington appeared before the court for sentencing. The State requested a concurrent high-end standard-range sentence of 84 months of confinement. Cherrington requested a prison-based DOSA to address her long history of addiction.

Three witnesses addressed the court on Cherrington's behalf. Two drug and alcohol counselors described Cherrington's successful participation in the King County Drug Court program[1] related to a separate felony charge.[2] They told the court that Cherrington held herself accountable throughout the treatment process and that none of her urinalysis tests (UAs) showed the use of drugs or alcohol. One of the counselors explained:

> [S]he had clean UAs throughout. It was pretty clear to me early in working with [Cherrington] in our group, she was pretty open about all her past behavior was directly tied to her use of methamphetamines and other substances.

He said that Cherrington "kind of became a leader in group. People really rallied around her. She really supported other people." A case manager from a community health program told the court that she had "been working with [Cherrington] for several months, and I've really seen a tremendous improvement. Once she did get clean and sober, she really did show remorse, and she followed up with all of her appointments."

[1] Drug court is a "[t]herapeutic court" where a judge has statutory authority to work "in ways that depart from traditional judicial processes to allow defendants . . . the opportunity to obtain treatment services." RCW 2.30.010(4)(a), .030(1).

[2] It appears from the record that Cherrington participated in the King County Drug Court program in October 2018. After six months, the court discharged Cherrington from the program and dismissed her felony charge in anticipation of her long prison sentence in this case.

A Department of Corrections (DOC) risk assessment report recommended "with reservation" that the court grant Cherrington's request for a DOSA. While the report noted Cherrington's lengthy criminal history and poor past performance under supervision, it concluded, "[T]he progress she made during her most recent term of supervision, coupled with her recent participation in a Drug Court Program, could indicate possible success in a DOSA."

Cherrington's defense attorney also addressed the court in support of her request for a DOSA. He highlighted the DOC recommendation in favor of granting a DOSA. Counsel explained that the DOC evaluator

> gave every reason why you shouldn't, every reason under the sun, why you should not grant [the DOSA]. And then she did [recommend to grant it]. And I had to figure out how she did that, because I know her, and she's not a soft touch. She did it because of [Cherrington's] age,[3] and she did it because of what [Cherrington's] doing now.

The court responded:

> THE COURT: She's past the sweet age, 27 to 33.
> [DEFENSE COUNSEL]: Oh?
> THE COURT: That's the age that you can get them. [The recommendation is] not based on age.

Counsel then argued that Cherrington needs the prison-based DOSA "[b]ecause of the structure." He pointed out that the DOC evaluator agreed that Cherrington "needs the structure" of a DOSA. Counsel said, "I understand prison structure, but when she's released, how much time after she's released and to what end?" The court responded that "[i]f she wants to use, she will use. If she doesn't want to use, she won't use. This is not rocket science."

[3] Cherrington was 37 years old at the time of sentencing.

Cherrington then addressed the court on her own behalf. She argued that she needs the therapeutic setting of a DOSA to learn how to maintain her sobriety. She explained that she managed to get "clean and sober" on her own but that she had "one slipup, and I'm scared. I don't want to go back out and use." Cherrington told the court that she used alcohol two weeks earlier because "I know that I'm going to prison. I know that I'm losing everything that I gained, but then that could have just made me lose a lot more, and I read all the victim statements, and it just was a little bit much for me." Then these exchanges occurred:

> THE DEFENDANT: . . . And so I know that I need more help than —
> THE COURT: What help do you need?
> THE DEFENDANT: Like, relapse — relapse warning signs. I'm, like, "Who is this" —
> THE COURT: What, you need, like, a little red light to go off "EEE, EEE, EEE" (indicating)? Something like that?
> . . . .
> . . . What do you need?
> THE DEFENDANT: I need to identify my problems or why I tick the way I do.
> THE COURT: You already know what they are.
> THE DEFENDANT: If I did, then I wouldn't be where I'm at right now.
> THE COURT: You're exactly where you are right now because you know what they are.
> THE DEFENDANT: Okay.
> THE COURT: You don't believe me?
> THE DEFENDANT: I didn't say I didn't believe you. I don't know.
> THE COURT: Yes, you do. And you'd think that somebody who is as long in the tooth as you are —
> THE DEFENDANT: What does that mean?
> THE COURT: Old.
> . . . .
> THE DEFENDANT: Oh.
> THE COURT: — that maybe you would have some honesty around it. It would seem to me, when you're looking at the

guy who is going to send you away for 84 months, and you're making a pitch to not get the 84 months, that maybe you would come in with a little bit of honesty.

THE DEFENDANT: Honesty about what, Your Honor?

THE COURT: About you and your addiction.

THE DEFENDANT: My addiction is horrendous.

THE COURT: You just told me, "I don't know why I'm using. I don't know why I relapse," and I call bullshit on that.

. . . .

. . . Don't give me any BS[4] about you don't know why. You spent a fair amount of time talking with yourself about it.

THE DEFENDANT: I'm not trying to give you any BS.

THE COURT: You want to blow smoke up my robe, go somewhere else. Thirty-seven years you've been running from yourself and your issues. You know exactly why you use. You just don't want to deal with them in a forthright manner.

. . . .

THE DEFENDANT: I know that I'm an addict, and I know I have a problem, and I know that I need help.

. . . .

THE COURT: What's your problem?

THE DEFENDANT: I know I'm an addict. I know I have a problem.

THE COURT: No shit. That's it? That's all you're giving me? "I know I'm an addict. I know I have a problem. And I want help with my problem."

THE DEFENDANT: I want to be a better person. I want to be — I don't think it's the end of the road for me.

THE COURT: What's that mean, "be a better person"? I never really understood what that means.

. . . .

THE DEFENDANT: To be able to function normally in society — be able to go —

THE COURT: What does "normal" mean?

THE DEFENDANT: I don't know.

. . . .

THE COURT: I don't know what normal means; do you? You're striving for something you don't understand. How about just accepting yourself as an addict?

THE DEFENDANT: I do.

THE COURT: You don't. I can see the shame written all over your face. Every time you say the word "addict," you look

[4] Bullshit.

down. I don't know — what's so bad about being an addict? What's so bad about that?

. . . .

THE DEFENDANT: There's nothing.

THE COURT: Then why are you so ashamed about being an addict? Why do you shame yourself every day for being an addict?

THE DEFENDANT: I don't know.

THE COURT: Do they talk about these things at any of the treatment programs you've been in? Any of the DOSAs? Any of the inpatient? Any of the outpatient crap that you've been in? . . .

THE DEFENDANT: No.

THE COURT: No? Weird, huh? You think addiction is a disease or a moral failing?

THE DEFENDANT: A disease.

. . . .

THE COURT: . . . If you had cancer, would you be walking around the streets of Seattle going, "Oh, my God, I've got cancer. I'm such a shitty person. I don't deserve to be around. I don't deserve to live"? Would you?

THE DEFENDANT: No.

. . . .

THE COURT: Well, maybe you need to ask yourself that. That's part of coming to terms with being an addict. Maybe forgiving yourself for nothing that you had anything to do with. Maybe when you get up in the morning, instead of the first thought going through your head, "Oh, I'm an addict, I'm such a shitty person," maybe the first thought is, "Hey, I wonder what today is going to bring." . . .

How is that working out for you, these 37 years waking up every morning thinking that you're a piece of shit because you're an addict?

THE DEFENDANT: Not fun.

. . . .

THE COURT: . . . This is not rocket science. If you want to stop using, you have to figure out why you're using. I want to throw my pen at you right now to see if that gets you right through the head. . . .

. . . .

So let me sum this all down to one thing. Ultimately, what is the issue? It's one word. It's four letters. What do you think it is? It begins with "F." Anything? Anything at all?

THE DEFENDANT: No.

THE COURT: Fear. . . .

. . . Fear only has power when nobody knows about it. And when everybody else knows, there is no longer fear, and fear is

based on the unknown. You don't know exactly what you're going to find, and you're afraid to look. You want me to tell you what you're going to find?

THE DEFENDANT: Yes.

THE COURT: You individually, specific to you? Well, how the hell would I know that, but I'll tell you anyways. When did you start using all mood-and-mind-altering substances? Marijuana? Alcohol? Mom's little blue pills? Dad's little yellow ones over here?

THE DEFENDANT: At age 11.

THE COURT: Eleven? I would think around eight myself, but I'll take eleven.

. . . .

. . . Here's what you're going to find when you get down there to that place: You're going to find yourself a scared little girl who doesn't know shit about anything, who is scared, who is alone, who is lost. She's not responsible for any of this, she didn't ask for any of this, and she doesn't know what to do. That's what you're going to find. And what the hell is so scary about that?

And here's why being an addict is such a gift that's been given to you that normal people will never understand. When you're down there and you grab this little girl and you embrace her and tell her that you love her, you have the ability to bring her forward to the present. And as you're doing that, and as you're walking with her and teaching her, you're teaching her all the things that you want her to be. You're instilling in her all the value and all the integrity and all the selflessness that you want her to have, so that by the time she's here, you've created yourself a new human being through recovery. It's a miracle that normal people don't get the opportunity to do; only addicts have this ability. Most people don't have to examine themselves and examine their life.

. . . .

. . . What's so hard about this? What's so hard about this conversation?

THE DEFENDANT: Fear.

THE COURT: Fear. Fear of what? Nothing, man. I know; right? You think about it, it's, like, fear of self, and then you're, like (indicating), nothing. You don't need treatment. You just need to be honest. . . .

. . . .

. . . I would give up figuring out what the future brings. That's an exercise in futility. I would live for today, because tomorrow's gone, and yesterday's only a dream. And one of my most favorite sayings is this . . . [:] a woman, like that of a tree, is best measured when laid down. In order to measure a tree, you cut it down, and you run the tape along it to get an accurate measurement. A woman, or a human being, is best measured

> when they're laid down when they have taken their last breath, because you don't know the ripple in the pond from the stone that you have thrown, what effect it's going to have, until your last breath. You don't know what actions are going to impact people in the future, or even in the past, until it's all said and done.
>
> . . . .
>
> My heart breaks for you and your inability to love yourself and your reluctance to be honest. I think you have a smidgen of it, because you have acknowledged some of the issues that I have talked about. I think I have ruined your using for the next 20 years, because now when you use, you're going to be thinking, "Well, hell, I'm only using because I'm afraid." That has a way to knot you and start pissing you off because then you don't want to be subject to something else.

After the long exchange,[5] the court denied Cherrington's request for a DOSA because "[t]here's just too many crimes and too many cases to ignore" and "I believe if you take some of these things from today, you don't need a therapeutic setting. You just need to believe in you. You just need to forgive yourself, and you'll be just fine." The court sentenced Cherrington to 72 months in prison and 12 months of community custody. Cherrington appeals.

ANALYSIS

A DOSA is a statutory deviation from the standard sentencing range that allows a trial court to give eligible offenders a reduced sentence with treatment and increased supervision to assist in substance abuse recovery. State v. Yancey, 193 Wn.2d 26, 30-31, 434 P.3d 518 (2019); see RCW 9.94A.660. A trial court has broad discretion in determining whether to grant a DOSA. State v. Grayson, 154 Wn.2d 333, 335, 342, 111 P.3d 1183 (2005). The decision whether to grant a DOSA is generally not reviewable unless the sentencing court

[5] The transcript of this exchange spans 21 pages.

refused to exercise discretion or relied on an impermissible basis for its decision. State v. Lemke, 7 Wn. App. 2d 23, 27, 434 P.3d 551 (2018). "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered." Grayson, 154 Wn.2d at 342. A trial court's failure to consider a sentencing alternative meaningfully is reversible error. Lemke, 7 Wn. App. 2d at 27.

> Judges have a duty to conduct themselves with respect for those they serve, including the litigants who come before them. "A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."

Lemke, 7 Wn. App. 2d at 27 (quoting CJC 2.3 cmt. 1).

In Lemke, we addressed similar conduct from the same judge that sentenced Cherrington here. Lemke participated in the Snohomish County Adult Drug Treatment Court program. Lemke, 7 Wn. App. 2d at 25. During a review hearing to address lack of compliance with the program, Lemke reported that he had a sore shoulder from being on work crew. Lemke, 7 Wn. App. 2d at 25. The judge replied that Lemke could " 'stop with the shoulder bullshit now' " and " 'I think you're a fucking addict and maybe you need treatment.' " Lemke, 7 Wn. App. 2d at 25. Before terminating Lemke from the drug court program, the court noted that the charges against Lemke were two counts of possession of a controlled substance and shoplifting. Lemke, 7 Wn. App. 2d at 26. The judge commented, " 'So not only is he an addict, he's also a liar and thief.' " Lemke, 7 Wn. App. 2d at 26. At sentencing, the judge denied Lemke's request for a DOSA, stating, " 'You, sir, are just a criminal, that's all you are, you're just a

criminal. Do you have issues? Yep, you do. Are you going to deal with them? No, you're not. . . . You, the odds say, are going to die in prison.' " Lemke, 7 Wn. App. 2d at 26-27.[6]

We made clear in Lemke that "[n]o judge wielding the power of the State in any courtroom has any good reason to call a litigant a 'fucking addict' and 'just a criminal.' " Lemke, 7 Wn. App. 2d at 27-28. Here, the words leveled at Cherrington may be different from those cast at Lemke, but the import is the same. And the judge was not addressing Cherrington in the context of drug court, where the court has discretion to work in ways that depart from traditional judicial processes. See RCW 2.30.010(4)(a), .030(1). Due process requires a fair hearing in a fair court. Lemke, 7 Wn. App. 2d at 28 (quoting In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955)). A fair hearing requires that the judge not only be impartial but also that the judge appear to be impartial. State v. Solis-Diaz, 187 Wn.2d 535, 540, 387 P.3d 703 (2017). Epithets and slurs are manifestations of bias or prejudice. Lemke, 7 Wn. App. 2d at 27 (citing CJC 2.3 cmt. 2).

> Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or

[6] Alteration in original.

> prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

CJC 2.3 cmt. 2.

The State argues that Cherrington takes the court's remarks out of context and that when viewed as a whole, "they show great sympathy for her and confidence in her capacity for self-improvement." It argues that "[i]t would be sad if this court were to announce a rule that discouraged judges from engaging in serious conversations with convicted persons about their addictions and the possibility of change." But this assumes that the only means to a serious conversation with a litigant about their addiction is with epithets and slurs. We reject that premise. And while the judge may have intended his remarks on the whole to encourage Cherrington "to believe in herself and not be ashamed of things that she could not control," his harsh and inappropriate language defeated the purpose.[7]

[7] We note that this court addressed similar behavior by the same judge in State v. Walker, No. 77707-6-I (Wash. Ct. App. July 29, 2019) (unpublished), http://www.courts.wa.gov/opinions/pdf/777076.pdf. "Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions." GR 14.1(c). In Walker, the judge's interaction with the defendant occurred during a hearing accepting her into drug court. Walker, No. 77707-6-I, slip op. at 6. The conduct here exceeds that displayed in Walker and did not occur in the context of a preliminary hearing in drug court. See Walker, No. 77707-6-I, slip op. at 7-11.

We reverse and remand for sentencing before a different judge.[8]

Bowman, J.

WE CONCUR:

Smith, J.

Mann, C.J.

[8] Cherrington also argues that the costs of community custody imposed at sentencing "are statutorily prohibited and must be stricken" because she is indigent. Because we remand for sentencing, we do not reach that issue.