

COA NO. 43927-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL NORRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Wulle, Judge

AMENDED BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court violated the appearance of fairness, the Code of Judicial Conduct, and appellant's due process right to a fair and impartial judge in denying appellant's motions for recusal.

2. The court erred in imposing a sentence for count 9 that exceeds the statutory maximum. CP 128, 129.

3. The court erred in imposing a sentence for count 8 that exceeds the statutory maximum. CP 128, 129.

4. The court erred when it found appellant has the current or future ability to pay legal financial obligations. CP 127.

Issues Pertaining to Assignments of Error

1. The appearance of fairness, the Code of Judicial Conduct, and due process require a judge to recuse himself when a disinterested person might reasonably question the judge's impartiality. Here, appellant was accused of sex offenses against children, including acts against a male. Where the Commission on Judicial Conduct had censured the trial judge for biased remarks directed toward gays and where the judge repeatedly expressed a personal emotional response to viewing the evidence in this case, did the judge err in refusing to recuse himself?

2. Where the statutory maximum for the second degree child molestation conviction under count 9 is 10 years, did the court exceed its

statutory authority in imposing a 420 month exceptional sentence on that count?

3. Where the statutory maximum for the second degree child molestation conviction under count 8 is 10 years, did the court exceed its statutory authority in sentencing appellant to a combined term of confinement and community custody that exceeds the statutory maximum for that count?

4. Did the court err when it found, absent an inquiry into the appellant's individual circumstances, that he has the current or future ability to pay legal financial obligations?

B. STATEMENT OF THE CASE

The State originally charged Michael Norris with four counts of first degree child rape (counts 1, 2, 3, 5); two counts of second degree child rape (counts 4, 12); one count of third degree child rape (count 13); two counts of first degree child molestation (counts 5, 6); two counts of second degree child molestation (counts 7, 8); and two counts of sexual exploitation of a minor (counts 9, 10). CP 5-7. The alleged victims were a male and a female. CP 3-4.

At a March 9, 2007 hearing, Norris requested the court remove his current attorney, Jeffrey Barrar, and allow him the opportunity to hire

Clayton Spencer as new counsel. RP¹ (3/9/07) 34-36. The Honorable John Wulle denied his request to remove Barrar at that time but indicated it would allow Norris to hire new counsel. RP (3/9/07) 36-38, 50.

It was noted at the March 9 hearing that video evidence involving both children existed. RP (3/9/07) 44. The judge expressed concern about what child pornography may or may not be appropriate to show to a jury or the public. RP (3/9/07) 45. The prosecutor suggested a closed court proceeding where only jurors could view the video, referencing the same procedure being used in the "Claussen" case over which the judge had presided. RP (3/9/07) 49. The judge said he was sensitive to the fact that a trial takes place in a public setting, "but I'm not going to be turning this into a circus for viewing of child pornography, it's just not appropriate. But I, again, I'm making that as a generalized human statement, not as a decision or a ruling of the Court." RP (3/9/07) 50.

¹ The verbatim report of proceedings is referenced as follows: 1RP - one volume consisting of 1/19/07, 4/13/07, 5/3/07, & 5/11/07; 2RP - one volume consisting of 10/25/07, 11/8/07, 11/21/07 & 12/28/07; 3RP - one volume consisting of 7/30/12 & 9/4/12. The verbatim report of proceedings from the previous appeal under 37842-6-II, transferred to the present appeal, are identified by hearing date and include: 9/26/06, 2/1/07, 3/9/07, 3/30/07, 4/19/07, 6/14/07, 7/13/07, 7/24/07, 8/7/07, 8/23/07, 8/24/07, 8/31/07, 9/13/07, 9/28/07, 11/1/07, 11/7/07, 11/29/07, 1/3/08, 1/25/08, 2/4/08 (two volumes), 2/13/08, 3/4/08, 4/8/08, 4/16/08, 4/21/08, 4/24/08.

There was discussion about how much evidence the jury would be allowed to see. RP (3/9/07) 44-45, 49. The judge said if he was being asked to limit what the jury sees, then "I guess at some point I'll have to . . . make that call" and preview the images. RP (3/9/07) 53. The judge further remarked that he did not want to see the images. RP (3/9/07) 53.

The prosecutor placed on the record that he would seek an exceptional sentence of life in prison. RP (3/9/07) 48. Defense counsel indicated a jury trial would be waived on the alleged aggravators and that the judge would be asked to determine the factual basis for any exceptional sentence. RP (3/9/07) 50-51.

At the March 30, 2007 hearing, the judge expressed concern that jurors might violate federal law if they viewed the pornographic images. RP (3/30/07) 74. He wondered "Are immunity issues involved? I mean, I'd like -- I'd be interested in what the Department of Justice is saying from the federal level, because the potential to expose -- I mean, even myself sitting here looking at something that -- that -- that I consider to be highly distasteful to me, personally, could put me in -- in a position of being in violation of the law." RP (3/30/07) 75-76.

Discussion turned to how to find a fair and impartial jury to try the case. RP (3/30/07) 76-78. The judge said "I have no problem bringing in as many people as we need to finding a fair and impartial panel, and have

a special questionnaire if that's what it takes, and find out what people's sensitivities are. I mean, if someone is going to be so -- I was going to say grossed out -- so deeply offended by the viewing of this, then maybe we should be looking at it." RP (3/30/07) 78-79. The court noted "I can tell you, *as I've told you in private*, that I have no desire to see it, okay." RP (3/30/07) 80 (emphasis added). An off-the-record in chambers discussion on the subject had apparently taken place by that time. RP (3/30/07) 70, 73, 80.

Further discussion involved how the courtroom could be set up to allow the jury to view the pornographic evidence while shielding it from public view and courtroom staff. RP (3/30/07) 81-84. Defense counsel referenced what he described as a "similar case back in the late 80's" that raised the same issue. RP (3/30/07) 84. The judge asked if either attorney had a problem with him talking to the judge who handled that previous case. RP (3/30/07) 84. Neither attorney objected. RP (3/30/07) 84.²

Meanwhile, arrangements were made for Norris to view the video evidence that the State planned to use at trial. RP (3/30/07) 63-64. On April 13, 2007, a record was made that Norris declined to view that evidence. 1RP 10-19. Norris's attorney, Barrar, described the evidence as

² At the August 7, 2007 hearing, Judge Wulle confirmed he spoke with the judge in the other case about the issue. RP (8/7/07) 263.

"explicit" and distasteful" and stated "The jury will find it so." 1RP 13. Barrar wanted Norris to see it before he exercised his right to a jury trial. 1RP 13. The judge said he had bent over backwards to make arrangements for Norris to view this evidence. 1RP 15. Norris explained he was in the process of retaining Clayton Spencer as his attorney and was advised that he did not have to view the evidence at this point. 1RP 15-16. Norris wanted to view the evidence at a future date. 1RP 19. The judge told him there would be no future date: "It's now or never; that's the simple answer." 1RP 19. Norris responded his new attorney would have to deal with that. 1RP 19. On April 9, 2007, the judge allowed Clayton Spencer to substitute in as Norris's attorney. RP (4/9/07) 88.

On June 14, 2007, Norris moved for re-assignment of the trial judge under "RCW 4.12." CP 318-20. In support, Norris maintained:

- (a) Former counsel may have made disparaging comments about Norris in communicating with the judge outside of Norris's presence;
- (b) In two prior court hearings, the judge referenced and compared the factual or legal issues in Norris's case to a prior case, suggesting the judge had prejudged Norris's case;
- (c) In one hearing, the judge expressed his "distaste" and "disgust" with child pornography and wished that he did not have to view the evidence in this case;
- (d) In one hearing, the judge discussed his desire to keep the viewing of all video or photographic evidence from the public, to include the sound because of his experience with a previous similar case, expressing something to the effect that he will never forget that sound.

CP 319-20.

Norris acknowledged the judge had already made discretionary rulings, but maintained he repeatedly asked his former counsel to file an affidavit of prejudice and motion for reassignment earlier, only to be told it would not matter because "any judge will treat you the same." CP 320.

The State argued Norris was not entitled to recusal of the judge as a matter of right under RCW 4.12.050 because the judge had already made discretionary rulings in the case.³ RP (6/14/07) 5-7. The judge denied the motion on the basis that he had already made discretionary rulings. RP (6/14/07) 11, 25, 27.

With reference to subparagraph "a" of Norris's motion, the judge did not recall former counsel making disparaging comments about Norris during any in-chambers meeting. RP (6/14/07) 13-14.

With reference to subparagraph "c" of the motion, the judge questioned whether he had actually used the words "distaste" and "disgust," but said "I will tell you that as a human being, I have no desire to view child pornography. And I am not looking forward to being sitting

³ The State also initially argued the motion, insofar as it sought a change of judge as a matter of right, was not made within 30 days of the trial date and thus untimely under CrR 8.9. RP (6/14/07) 4-6. The State backed off on that allegation after defense counsel pointed out the trial date was more than 30 days away. RP (6/14/07) 11; see CP 316 (setting trial date as August 27, 2007).

here viewing it. If, in fact, it is what is truly depicted. But I don't believe I ever characterized it that way. And I'd also raise another point with you, is that I'm not the fact finder in this case. It's going to be the jury that's the fact finder. " RP (6/14/07) 15-16. The judge continued, "the viewing of child pornography, I don't believe I would be alone in the personal human reaction to that." RP (6/14/07) 16. The judge reiterated, "I can honestly say I'm not looking forward to that. I don't think most people would look forward to viewing that." RP (6/14/07) 16-17.

With reference to subparagraph "d" of the motion, the judge acknowledged, "there's a certain amount of, I believe, truth in that." RP (6/14/07) 24. There was discussion about how to go about presenting that information. RP (6/14/07) 24. As for similar cases, the judge recalled his 14 plus years as an assistant attorney general doing "a lot of child abuse work," and there were certain cases that he would never forget. RP (6/14/07) 24-25. He may even have expressed this to Norris. RP (6/14/07) 25. But he did not think it affected his ability to be fair and impartial. RP (6/14/07) 25. According to the judge, "I believe that the trier of fact, who we don't know who they're going to be yet, will in fact be the deciding factor in this case." RP (6/14/07) 26. On the disparagement issue, the court invited the defense to seek out additional information from

Norris's former attorney and bring the matter back before the court if so desired. RP (6/14/07) 25-26.

The prosecutor set forth his understanding that Norris had not alleged actual prejudice, but that the court would allow briefing on the issue. RP (6/14/07) 27. The judge said that was correct. RP (6/14/07) 28.

Defense counsel responded, "Just for the record, your Honor, there is an affidavit of prejudice with a supporting declaration. I've articulated for the Court that Mr. Norris believes the Court has made extra-judicial statements in this case which bears upon this Court's ability to set [sic] and to provide him a fair trial in this case. And to whit [sic], the Court is somewhat prejudiced against him in the nature of the case in which he's involved with. So that was provided in the declaration that he has. This Court has gone through subparagraphs a, b, c, and d. You've indicated that it does not affect your ability, you've indicated you're not the finder of fact in this case. And so therefore, I think the Court has addressed that issue as to prejudice." RP (6/14/07) 28-29.

The judge replied, "I'm not trying to close the door. I'm leaving the door open for you and your client if you feel there's actual prejudice, to bring that to me, my attention." RP (6/14/07) 29.

On September 28, 2007, during the course of discussing the court's ruling on access to the pornographic evidence, the judge commented "I'm

not looking to put child pornography out on the streets, I'm not looking to titillate anyone. I just don't even want to see it myself. I didn't ask for this trial. I don't want to see these images. What little bit I've seen, to put a point on it in language I knew from the streets of New York, it grossed me out, okay?" RP (9/28/07) 40-41.

The State amended the information in October 2007, adding one count of third degree child rape and alleging aggravating circumstances for each count that (1) Norris used his position or status to facilitate the commission of the offense, including positions of trust and confidence; and (2) the offense was an ongoing pattern of sexual abuse of the same victim under 18 years old manifested by multiple incidents over a prolonged period of time. CP 13-17.

At the November 29, 2007 hearing, the judge remarked, "I have looked at just snippets of the proposed evidence. And I'm going to have to use sort of a street term. I am concerned about the ability to get a jury that's capable of viewing what I would characterize – and again, I'm using, for lack of a better term, street language – material that is gross, okay, and in some way not inflame them at the same time." RP (11/29/07) 17-18.

In January 2008, Norris made another motion to recuse the judge under RCW 4.12.040. CP 321-33. Norris noted his earlier motion had been denied, but stated "In recent weeks, I have learned that J. Wulle has

been censured by the State's Commission on Judicial Conduct for actions which, in part, included gratuitous and prejudicial references regarding sexual orientation. I am charged with various sex offenses, many of which involve homosexual acts, and given the nature of J. Wulle's prejudices, I do not believe I will receive a fair and impartial trial before the assigned court." CP 322.

Attached to the motion was a copy of the "Stipulation, Agreement and Order of Censure" in the Matter of The Honorable John P. Wulle, Judge of the Clark County Superior Court, filed on December 7, 2007. CP 324-33. According to the Stipulation, Agreement and Order of Censure, the judge, while attending a 2006 training conference as a representative of the Clark County Superior Court, engaged in the following instances of inappropriate conduct:

(1) The judge interrupted group discussions by using profanity and expletives to express his disapproval or indifference to pursuing federal finding for the Clark County Juvenile Recovery Court.

(2) When the facilitator assigned to the Clark County team introduced himself to the group during the first breakout session, he noted he was from San Francisco, a city he characterized as very liberal and litigious. The judge interjected "Yeah, and very gay." This comment was gratuitous and seemed to be directed at the facilitator.

(3) During the same session, the facilitator mentioned he was required to conduct a follow-up visit with the team in Clark County. In response, the judge questioned out loud whether the facilitator, who is African-American, would be welcomed in Vancouver, suggesting

the community was "awfully white" and alluding to the term "BIV." In this context, "BIV" was meant as an acronym for "black in Vancouver," which is locally understood by some to refer to perceived problems historically associated with racial profiling in Vancouver.

(4) Later in the week, during a break in the conference, other faculty members asked the judge who Clark County's facilitator was, and he answered "the black gay guy."

(5) During a breakout session, the team's facilitator wrote a star on an assignment the team completed and jokingly said "Clark County gets a star." The judge replied, "I don't need a star, I'm not a Jew."

(6) A team member asked the judge to lower his voice during a plenary session and he acknowledged the request by raising his middle finger at the team member.

(7) During a breakout session, the judge became frustrated at the pace or direction of discussion and announced it was time for the group to move on to the next topic. When a fellow team member respectfully spoke up to disagree, the judge angrily yelled "F--- you," threw down his pen and left the room. Members of the team were shocked by the unjustified outburst. When the judge returned to the group, he did not apologize, but rather sat in the back and did not engage in any further discussion at that session.⁴

CP 325-27.

The judge's conduct at the conference violated former Canons 1, 2(A) and 3(A)(3) of the Code of Judicial Conduct. CP 327. Former Canons 1 and 2(A) require judges to uphold the integrity of the judiciary by avoiding impropriety and the appearance of impropriety and by acting

⁴ Several witnesses present at the conference noted they smelled an odor of alcohol emanating from the judge. The judge denied consuming alcohol at the conference and suggested the odor from cough syrup may have been misconstrued as an odor of alcohol. CP 327.

at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.⁵ CP 328. The judge's behavior at the conference "created the appearance Respondent is biased or prejudiced, and thus undermined public confidence in his integrity and impartiality." CP 328.

The Commission censured the judge. CP 328. There were some mitigating factors at play, but the judge failed to demonstrate any appreciation for the seriousness of his action, never apologized for them, minimized his responsibility and lacked personal insight into the imprudence of his speech and behavior. CP 329. In addition, the judge's initial response to the Commission was inaccurate and evasive in several respects, and at minimum demonstrated lack of insight into his own behavior. CP 330.

A hearing on Norris's second motion to recuse was held on January 25, 2008. RP (1/25/08). The prosecutor argued the second motion, like the earlier motion, was time-barred if it sought recusal as a matter of right under RCW 4.12.050. RP (1/25/08) 411. The prosecutor further argued the motion did not allege any specific instance of actual prejudice germane

⁵ Former Canon 1 is now codified at Canon 1.2. Former Canon 2(A) is now codified, with modified language, at Canon 2.2. Former Canon 3(A)(3), now codified as Canon 2.8(B), requires judges to be patient, dignified and courteous to all persons with whom they deal in their official capacity. CP 328.

to Norris's case. RP (1/25/08) 411-15. The prosecutor remarked "if the Court is looking at a decision where there is an appearance of unfairness, then the Court -- I understand why the Court would want to -- want to take a -- a moment." RP (1/25/08) 415. According to the prosecutor, Norris could not point to a decision tainted by an appearance of unfairness, but rather "just the fact that some of the conduct he's engaged in may be of a concern to -- to Your Honor based on things that occurred not in a judicial setting." RP (1/25/08) 415-16.

In response, defense counsel said he did not want to address the matter in this context, but the prosecutor forced his hand in being unwilling to address the issue quietly and discreetly. RP (1/25/08) 416-17. The Commission determination "affects the overall totality in this case and the appearance of fairness based upon the nature of his offenses, the nature of his act." RP (1/25/08) 417.

The judge denied the motion to recuse, stating, "For the record, I would duly note the attachment stipulation page 6. I suggest that people read line 9 through line 15."⁶ RP (1/25/08) 418-19. The judge expressed

⁶ Page 6, lines 9 through 15 read "In mitigation, Respondent's conduct appears to have been an aberration. He believes the conduct occurred as a result of misguided attempts to fit in with the team and/or be humorous. Witnesses familiar with Respondent described his behavior at the conference as being out of character. These witnesses do not believe Respondent to be racist, homophobic or anti-Semitic. Respondent's

that he prided himself on bending over backwards to treat everyone fairly, that he bent over backwards to make sure Norris had adequate representation and resources, that he had erred on the side of protecting the rights of the defendant, and he would continue to do so. RP (1/25/08) 419. The judge further stated "I have made discretionary rulings in this case; therefore, the motion is denied." RP (1/25/08) 419.

On February 4, 2008, the judge held a hearing during which the State went step-by-step through the video and photographic evidence it intended to present at trial. RP (2/4/08) 422-574. During the course of that hearing, the judge commented, "From the beginning there has been no one who wants to look at these images any less than me. If I could get rid of this case, I would. But I have a responsibility and I'm going to fulfill it." RP (2/4/08) 450. At one point, he asked an image be removed from the computer screen that was being reviewed: "I just don't need to see the image." RP (2/4/08) 494.

By this stage of the proceedings, a persistent issue was whether and under what circumstances the State needed to give the defense access to the video and photographic evidence it intended to use at trial. See

reputation is generally that of a thoughtful jurist. There is no indication that Respondent exploited his judicial position to satisfy personal desires. Respondent maintains that he did not intend to offend or demean anyone." CP 329.

State v. Norris, 157 Wn. App. 50, 55-65, 236 P.3d 225 (2010) (setting forth history), review denied, 170 Wn.2d 1017, 245 P.3d 773 (2011). At the February 13, 2008 hearing, in the midst of argument on whether Norris's discovery rights had been violated and what access the defense expert should have to the evidence, the prosecutor referenced the February 4 hearing as "the moment we've all waited for." RP (2/13/08) 625. The judge jumped in: "I wasn't waiting for it, counselor." RP (2/13/08) 625. The prosecutor meant the moment defense counsel had been waiting "with all the motions." RP (2/13/08) 625. While the prosecutor argued the defense expert would not have any input into some of the evidence and mentioned the court might remember viewing an item, the judge interjected "Counsel, I . . . will not ever forget the images that I viewed . . . as much as I'd like to." RP (2/13/08) 626-27.

In April 2008, Norris filed a motion to dismiss the case under CrR 8.3 and CrR 4.7 because his right to discovery had been denied and the delay in obtaining the evidence to be used against him at trial forced him to sacrifice his speedy trial right. CP 18-43. The judge denied the motion. CP 44-47.

Norris moved for discretionary review in the Court of Appeals, contending the trial court erred in denying his motion to dismiss and in ruling federal law relieved the State of its pretrial obligation to produce

copies of photographs or images that the State intended to use against him at trial. Norris, 157 Wn. App. at 54. This Court reversed the trial court's ruling that the State is exempt from CrR 4.7's requirements and, after determining two key findings of fact were not supported by the record, held the State violated its discovery obligations in withholding evidence it intended to use at trial from the defense. Id. at 65-67, 71-72.

This Court further held (1) the federal Adam Walsh Act does not preempt CrR 4.7 and that the State has an obligation to produce to the defense copies of the photographs it intends to use against Norris at trial; and (2) the trial court erred to the extent that it placed any burden on Norris to show a need for production and failed to place the burden on the State to show a need for a protective order or to draft an appropriate protective order. Id. at 78.

The case was remanded for further proceedings, including consideration of Norris's motions to dismiss based on violation of his speedy trial rights and prosecutorial mismanagement, as well as his motions to suppress the evidence withheld by the State. Id. at 55.

On remand, Norris ultimately entered into a stipulation that admitted various facts and waived his pending CrR 4.7 and CrR 8.3 motions, his right to a jury trial, and his constitutional and CrR 3.3 rights to a speedy trial. CP 114-118, 120-21, 220-23. Part of the agreement was

that the State would recommend an exceptional sentence of 35 years in conjunction with an anticipated federal sentence. CP 120.

Defense counsel subsequently moved to withdraw and substitute counsel, and further moved for the recusal of the judge, based on an in-chambers meeting that occurred between counsel, the prosecutor, and the judge before Norris entered into the stipulations and waivers. CP 280-90.

The judge found no impropriety, denied the motion to withdraw and substitute counsel, and did not recuse himself. 3RP 25-27, 32. At a hearing on the matter, the judge recalled that the attorneys appeared in his chambers and told him that the case had a federal implication, to which the judge replied, "okay, fine." 3RP 26. The only comment he made during the conversation was "let me know when you have the agreement." 3RP 26. The judge further recalled the attorneys came to him, and was "shocked" to learn at the hearing that the request to talk to him came from defense counsel. 3RP 10, 26.

The judge denied the motion to recuse because there was "no credible evidence of anything inappropriate that was done in my chambers. I simply listened to attorneys who came to me with a request, they told me what they were going to do and I just went fine, let's go it or, you know, let me know when you've got it done. That I don't believe is me exercising anything more than the listening mode. Okay. On that basis

I'm denying all the requests." 3RP 27. He was starting to feel "on a personal level" that the delays in the case were for "the sole purpose of delay, so I think it's time we have resolution of this case." 3RP 27. The judge denied a motion for reconsideration. 3RP 28-32.

The trial immediately took place, with the judge sitting as trier of fact. 3RP 33-72. In the process of going through what could be relied on for the purposes of the trial, the prosecutor asked whether the judge recalled the images he had viewed at the February 4, 2008 hearing. 3RP 40-41. The judge replied, "I recall the hearing, Counselor, but not the images. I've made a consolidated effort to block those out of my memory. I have to admit that I had an emotional reaction to them . . . [i]n a negative way." 3RP 41. When asked if he had any comment, defense counsel responded that Norris had stipulated to the findings of fact "if that would be sufficient." 3RP 41. The prosecutor did not think the stipulation was sufficient. 3RP 41-42. He did not ask the judge to look at the images again, but wanted to confirm the judge had an independent recollection of viewing them. 3RP 42-43.

The judge responded, "There is nothing more that I desire to do than to never see these images again" and "I have enough of a recollection of what was depicted." 3RP 43. The judge further commented "I recall depictions, Counselor, but I've tried to block them out of my mind, if I can

be as blunt as I can." 3RP 43. The judge said, "I'm disgusted by looking at the images. I was deeply offended, okay. . . . And that was not a judicial response, that was a human response. . . . As a parent, I had that response, I admit it." 3RP 43-44. The judge reiterated it had a recollection but had tried very hard to blot it out of his mind. 3RP 44. But "for the record," he had not been successful in blotting it out. 3RP 45.

The judge found Norris guilty of counts 1 through 9 and 12, and also found the aggravating circumstances alleged for those counts. CP 272-77; 3RP 66-72.⁷ In imposing sentence, the judge stated, "I cannot believe that I am hearing what I consider to be unimaginable crimes. The cruelty you have showed these children, the depravity of the images I had to view just boggles the mind, and for that reason I am inclined to give you a life sentence, but I'm going to honor the agreement that you made with the State, 35 years." 3RP 103. The court imposed an exceptional sentence for all counts and sentenced Norris to a total of 420 months confinement, to run concurrently with a federal sentence. CP 128-29. This appeal timely follows. CP 141-57.

⁷ Counts 10, 11 and 13 were dismissed by agreement. CP 128; 3RP 57, 64-65, 71-72.

C. ARGUMENT

1. THE TRIAL JUDGE ERRED IN FAILING TO RECUSE HIMSELF BECAUSE HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

The trial judge violated the appearance of fairness doctrine, the Code of Judicial Conduct, and due process in failing to recuse himself from Norris's case. A reasonable person could question the judge's ability to be fair and impartial in light of the judge's remarks directed toward gays and his intensely personal reaction to viewing the State's proposed evidence in this case.

The two motions for reassignment at issue here are those filed and heard in June 2007 and January 2008. CP 318-20, 321-33; RP (6/14/07) 3-29); RP (1/25/08). Norris was not entitled to automatic removal of the judge under RCW 4.12.040/050 because he had already made discretionary rulings in the case. That, however, is not the end of the legal analysis.

"Due process, the appearance of fairness doctrine and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) also require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned."⁸ State v. Dominguez, 81 Wn. App. 325, 328,

⁸ The Code of Judicial Conduct was revised effective January 1, 2011. Former Canon 3(D)(1) is now codified at Canon 2.11(A).

914 P.2d 141 (1996). An unbiased judge and the appearance of fairness are hallmarks of due process. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009); U.S. Const. amend. XIV; Const. art. 1, §§ 3, 22.

The Code of Judicial Conduct (CJC) guides the analysis. Sherman v. State, 128 Wn.2d 164, 204-05, 905 P.2d 355 (1995); State v. Davis, 175 Wn.2d 287, 305, 290 P.3d 43 (2012). "Washington cases have long recognized that judges must recuse themselves when the facts suggest that they are actually or potentially biased." Tatham v. Rogers, 170 Wn. App. 76, 93, 283 P.3d 583 (2012). A judge's failure to recuse himself or herself when required to do so by the judicial canons is a violation of the appearance of fairness doctrine. Tatham, 170 Wn. App. at 94. The rule for recusal is set forth in former Canon 3(D)(1), which commands judges to "disqualify themselves in a proceeding in which their impartiality might reasonably be questioned." Davis, 175 Wn.2d at 306.

One instance in which a judge must disqualify himself is where "the judge has a personal bias or prejudice concerning a party[.]" Former Canon 3(D)(1)(a).⁹ Former Canon 3(A)(5) similarly provides "Judges shall perform judicial duties without bias or prejudice." The comment to former Canon 3(A)(5) states "A judge who manifests bias on any basis in

⁹ Former Canon 3(D)(1)(a) is now codified at Canon 2.11(A)(1).

a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."¹⁰

Bias or prejudice is not presumed, but a violation of the appearance of fairness is established when there is some evidence of the judge's "actual or potential bias." State v. Post, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992); Dominguez, 81 Wn. App. at 328-29. "In determining whether recusal is warranted, actual prejudice need not be proved; a 'mere suspicion of partiality' may be enough to warrant recusal." Davis, 175 Wn.2d at 306 (quoting Sherman, 128 Wn.2d at 205). A judge's estimate of his own ability to impartially hear a case is not the test for disqualification. Rather, "[t]he test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that 'a reasonable person knows and understands all the relevant facts.'" Sherman, 128 Wn.2d at 206 (quoting In re Drexel Burnham Lambert, 861 F.2d 1307, 1313 (2d Cir. 1988)).

This Court generally reviews a trial judge's decision on a recusal motion for abuse of discretion. Davis, 175 Wn.2d at 305. A trial court necessarily abuses its discretion when applies the wrong legal standard or bases its ruling on an erroneous view of the law. State v. Lord, 161 Wn.2d

¹⁰ The substance of the prohibition and comment is now codified at Canon 2.3

276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The CJC, however, lists several specific instances where a judge's duty to recuse is "clear and nondiscretionary." State v. Carlson, 66 Wn. App. 909, 918, 833 P.2d 463 (1992), review denied, 120 Wn.2d 1022, 844 P.2d 1017 (1993). Such instances include the situation where "the judge has a personal bias or prejudice concerning a party." Carlson, 66 Wn. App. at 919 n.4 (citing former CJC Canon 3(C)(1)(a), currently codified as CJC Canon 2.11(A)(1)).

The judge necessarily abused his discretion if he denied the motions solely on the basis that he had already made discretionary rulings without determining whether he should be removed under appearance of fairness, CJC, and due process considerations. RP (6/14/07) 11, 25, 27; RP (1/25/08) 419; Lord, 161 Wn.2d at 284; Quismundo, 164 Wn.2d at 504. Even if the judge applied the correct legal standard, the judge still abused his discretion in failing to remove himself for the reasons set forth below.

The State alleged Norris engaged in sexual activity with two children, including a male. CP 3-7. As found by the Commission on Judicial Conduct, the judge made comments that were demeaning to gay people at a training conference in 2006. CP 326-28. Such remarks convey the appearance that the judge harbors antagonism towards those

who engage in homosexual activities.¹¹ The Commission determined the judge's behavior at the conference created the appearance the he "is biased or prejudiced, and thus undermined public confidence in his integrity and impartiality." CP 328. Although the judge made these remarks outside the courtroom, the judge made them in his official capacity representing the Clark County Superior Court at a national conference. CP 328-29.

This evidence shows, at the very least, an appearance that the judge is biased against those who engage in homosexual activities — a category of people that includes Norris. This is evidence of the judge's "actual or potential bias." Post, 118 Wn.2d at 619. Again, "[i]n determining whether recusal is warranted, actual prejudice need not be proved; a 'mere suspicion of partiality' may be enough to warrant recusal." Davis, 175 Wn.2d at 306. "If it is a close case, the balance tips in favor of recusal." United States v. Holland, 519 F.3d 909, 912 (9th Cir. 2008).

The judge's actual or apparent prejudice towards gay people is not the only problem here. The judge's emotional reaction to the evidence involved in this case also creates an appearance of partiality.

¹¹ The comment to CJC Canon 2.3, effective Jan. 1, 2011, provides "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."

The judge made it known he did not want to see the images the State intended to use at trial. RP (3/9/07) 53; RP (3/30/07) 80. In denying the first motion to recuse, the judge questioned whether he had used the words "distaste" and "disgust" in referring to the pornography, and maintained he did not characterize his response in that manner. RP (6/14/07) 15-16. In fact, he had earlier acknowledged such images were "highly distasteful to me, personally." RP (3/30/07) 75-76. And the judge effectively adopted the feeling of "disgust" in commenting "the viewing of child pornography, I don't believe I would be alone in the personal human reaction to that." RP (6/14/07) 16.

The judge cannot be criticized for simply having those feelings. Judges are human and have human emotions. The judge's reaction here is the natural reaction that most people would have upon viewing such images. But judges, because of their position, are held to a higher standard. Whatever intense emotion a judge might harbor, the judge cannot vent that emotion in a court of law in the manner it was here without violating the appearance of fairness.

The problem is that the judge felt compelled to repeatedly place on the record, gratuitously, his personal discomfort with the evidence at issue, suggesting to a disinterested observer that the judge's emotional reaction to the evidence was so intense that he was unable to conceal it. A judge

must "exercise self-restraint and preserve an atmosphere of impartiality" — a requirement that includes demeanor as well as actions. Anderson v. Sheppard, 856 F.2d 741, 745 (6th Cir. 1988) (quoting Knapp v. Kinsey, 232 F.2d 458, 466 (6th Cir), cert. denied, 352 U.S. 892, 77 S. Ct. 131, 1 L. Ed. 2d 86 (1956)). Judge Wulle failed in this regard.

In denying the first motion to recuse, the judge attempted to mollify Norris's concerns by stating he would not be the trier of fact in the case. RP (6/14/07) 15-16, 26. That response is of interest for several reasons. First, that is not the standard for when a judge should recuse himself. If it were, then there would never be a justified recusal in a case tried by a jury. Second, the fact that the judge felt compelled to justify his refusal to recuse himself on the basis that he would not be the trier of fact suggests that, if he were the trier of fact, there would be a justified concern about his ability to remain a neutral arbiter of justice. Third, the judge ended up sitting as trier of fact in Norris's bench trial, ultimately bringing the appearance of fairness concern full circle.

After denying the first motion to recuse, the judge persisted in gratuitously inserting his personal reaction to the evidence into the record: "I just don't even want to see it myself. I didn't ask for this trial. I don't want to see these images. What little bit I've seen, to put a point on it in

language I knew from the streets of New York, it grossed me out, okay?"
RP (9/28/07) 40-41.

After denying the second motion to recuse, the judge's revulsion continued to find expression, confirming the concerns already pointed out in the first motion to recuse. At the February 4, 2008 hearing during which the judge viewed images the State intended to use, the judge commented, "From the beginning there has been no one who wants to look at these images any less than me. If I could get rid of this case, I would. But I have a responsibility and I'm going to fulfill it." RP (2/4/08) 450.

At the bench trial, the judge finally gave full vent to his feelings: "I'm disgusted by looking at the images. I was deeply offended, okay. . . . And that was not a judicial response, that was a human response. . . . As a parent, I had that response, I admit it." 3RP 43-44. The judge initially denied being able to recall the images that were evidence at trial: "I recall the hearing, Counselor, but not the images. I've made a consolidated effort to block those out of my memory. I have to admit that I had an emotional reaction to them . . . [i]n a negative way." 3RP 41. When the prosecutor, trying to protect the record for appeal, persisted in trying to verify that the judge recalled the images viewed at the February 4, 2008 hearing, the judge hedged and said he had "enough of a recollection of

what was depicted," although he tried to block them out of his mind. 3RP 43.

These are the comments of an ordinary human inflamed by the disturbing images he had viewed. These are not the comments of a neutral and impartial judge under the appearance of fairness standard.

In opposing the second motion for recusal, the State argued Norris could not show actual prejudice. RP (1/25/08) 411-15. But "actual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating." Sherman, 128 Wn.2d at 205. The critical concern in determining whether a proceeding satisfies the appearance of fairness doctrine is how it would appear to a reasonably prudent and disinterested person. Chicago, Milwaukee, St. Paul, & Pac. R.R. Co. v. Human Rights Comm'n, 87 Wn.2d 802, 810, 557 P.2d 307 (1976). "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." State v. Madry, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972). "Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised." State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

The dispositive question is whether Judge's Wulle's impartiality might reasonably be questioned. Davis, 175 Wn.2d at 306. That standard is satisfied here. The judge's expressions of prejudice toward gay people, and his repeated expressions of personal discomfort with the evidence in the case, demonstrate to a disinterested observer that his neutrality was open to question.

Because Judge Wulle should have recused himself before Norris entered into the stipulation, before he sat as trier of fact at the bench trial, and before he sentenced Norris, the stipulation, the verdict, and the judgment and sentence must be vacated. The proper course is to remand for further proceedings before a different and impartial trial court judge.¹² Romano, 34 Wn. App. at 570; Madry, 8 Wn. App. at 71; see Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L .Ed. 2d 35 (1999) ("biased trial judge" is an example of structural error regarding "automatic reversal," citing Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749 (1927)).

¹² Judge Wulle retired from the bench in 2013. See Commission Decision filed December 14, 2012; Amended Commission Decision filed January 9, 2013 (available at http://www.cjc.state.wa.us/CJC_Activity/public_actions_2012.htm (accessed Aug. 27, 2013)).

2. THE SENTENCE ON COUNT 9 EXCEEDS THE 10 YEAR STATUTORY MAXIMUM.

The sentence for second degree child molestation is limited by law to a maximum of 10 years. The 420 month exceptional sentence imposed on count 9 must be reversed because it exceeds the statutory maximum.

Sentencing errors may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). Whether a trial court exceeded its statutory authority under the Sentencing Reform Act is an issue of law reviewed de novo. State v. Murray, 118 Wn. App. 518, 521, 77 P.3d 1188 (2003).

RCW 9A.20.021(1) provides in relevant part: "Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following: . . . (b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine[.]"

Under the Sentencing Reform Act, an exceptional sentence upward may be based upon various aggravating factors. RCW 9.94A.535(2), (3). The sentencing judge, however, cannot impose an exceptional sentence greater than the statutory maximum determined by the legislature. State v.

Gore, 143 Wn.2d 288, 313-14, 21 P.3d 262 (2001), overruled on other grounds by State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005).

Second degree child molestation is a class B felony with a statutory maximum sentence of 10 years (120 months). RCW 9A.44.086(2); RCW 9A.20.021(l)(b). The court imposed an exceptional sentence of 420 months confinement for the second degree child molestation conviction under count 9. CP 128, 129. The term of confinement for count 9 exceeds the 10 year (120 month) statutory maximum for that crime by 300 months.

"When a trial court exceeds its sentencing authority under the SRA, it commits reversible error." Murray, 118 Wn. App. at 522. The appropriate remedy is reversal of the erroneous, void portion of the sentence. State v. Eilts, 94 Wn.2d 489, 496, 617 P.2d 993 (1980). This Court should therefore reverse the sentence on count 9 and remand for correction to ensure the sentence does not exceed the 10 year statutory maximum.

3. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY FOR COUNT 8 EXCEEDS THE 10 YEAR STATUTORY MAXIMUM.

The 36 month term of community custody for count 8, in combination with the 10 year term of confinement, is excessive because it exceeds the 10 year statutory maximum for the crime. Remand to the trial

court is required to amend the community custody term and ensure the combined term does not exceed the statutory maximum.

As noted above, second degree child molestation is a class B felony with a statutory maximum sentence of 10 years (120 months). RCW 9A.44.086(2); RCW 9A.20.021(l)(b). For the second degree child molestation conviction under count VIII, the court imposed 120 months confinement in addition to 36 months of community custody for a combined total of 156 months. CP 128, 129. The combined term of confinement and community custody for the second degree child molestation conviction under count VIII thus exceeds the 10 year (120 month) statutory maximum.

RCW 9.94A.701(9) provides "The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021."

Norris was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. Under RCW 9.94A.701(9), the trial court, not the Department of Corrections, has the obligation to reduce the term of community custody to avoid a sentence in excess of the statutory maximum. State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012).

Where a defendant is sentenced to the statutory maximum term of confinement, the term of community custody must be reduced so that the total sentence does not exceed statutory maximum. State v. Winborne, 167 Wn. App. 320, 329, 273 P.3d 454, review denied, 174 Wn.2d 1019 (2012). A notation on the judgment and sentence that the combined term cannot exceed the statutory maximum is insufficient. Winborne, 167 Wn. App. at 329; CP 129. The case must therefore be remanded to enable the trial court to reduce the community custody term on count 8 so that the total sentence for that count does not exceed the statutory maximum of 10 years.

4. THE COURT ERRED WHEN IT FOUND NORRIS HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

To enter a finding regarding ability to pay legal financial obligations, a sentencing court must consider the individual defendant's financial resources and the burden of imposing such obligations on him. State v. Bertrand, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011), review denied, 175 Wn.2d 1014, 287 P.3d 10 (2012). The record does not reflect the requisite consideration here. The court's finding on Norris's ability to pay must therefore be stricken. CP 127.

The court ordered Norris to pay a total of \$28,748 in legal financial obligations, broken down as follows: (1) \$24,798 in defense costs,

including cost for a court appointed defense expert; (2) \$2,650 fees for a court appointed attorney; (3) \$200 in court costs; (4) \$500 fine under RCW 9A.20.021; (5) \$100 DNA collection fee; and (6) \$500 victim penalty assessment. CP 130-31. The judgment and sentence provides "[a]ll payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, *commencing immediately*[" CP 131 (emphasis added).

RCW 10.01.160(3) provides "The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." This Court reviews the trial court's decision on ability to pay under the "clearly erroneous" standard. Bertrand, 165 Wn. App. at 403-04.

In the judgment and sentence, the trial court checked the box next to the following pre-printed, generic language:

2.5 Ability To Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds: That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 127.

Norris challenges this finding on the ground that the court did not actually consider Norris's individual financial resources and the burden of imposing such obligations on him. 3RP 102-03, 106-07. The court stated, "he has the ability to pay in the future," but articulated no basis for that finding. 3RP 107. While formal findings are not required, to survive appellate scrutiny the record must establish the sentencing judge at least considered the defendant's financial resources and the "nature of the burden" imposed by requiring payment. Bertrand, 165 Wn. App. at 404.

At sentencing, the prosecutor asserted "Mr. Norris is employable and not infirmed as he stands before you today." 3RP 100. The record does not show the court gave that assertion any credence. Regardless, "[n]ot being a witness, a prosecutor's assertions are neither fact nor evidence, but merely argument." State v. Ford, 137 Wn.2d 472, 483 n.3, 973 P.2d 452 (1999).

The presentence report shows Norris declared bankruptcy in 2006, his house was foreclosed in 2007 due to his arrest, and he had a savings account, which "slowly dwindled since the start of this case." CP 302.¹³ Norris was 45 years old at the time of sentencing. CP 124. His minimum

¹³ The declaration of indigency shows he had no money at the time of sentencing. CP 309.

term of confinement is 35 years, with a maximum term of life on the class A felony convictions. CP 128-29. If Norris serves the minimum term of confinement, he will be about 75 years old when he is released.¹⁴ The financial burden imposed on Norris — \$28,748 — is substantial. The record shows no consideration of Norris's ability to obtain employment as a 75-year-old convicted sex offender.

As in Bertrand, this record reveals no evidence or analysis supporting the court's "finding" that Norris had the present or future ability to pay his legal financial obligations. Cf. State v. Baldwin, 63 Wn. App. 303, 311, 818 P.2d 1116, 837 P.2d 646 (1991) (statement in presentence report that Baldwin was employable showed sentencing court properly considered burden of costs under RCW 10.01.160(3)).

Defense counsel cited Bertrand in arguing the court should not impose the legal financial obligations, but the court did not conduct the analysis required by Bertrand. 3RP 102. Accordingly, the court's determination that Norris had the present or future ability to pay the legal financial obligations was clearly erroneous and should be stricken. Bertrand, 165 Wn. App. at 405. Moreover, before the State can collect legal financial obligations, there must be a properly supported,

¹⁴ The judgment and sentence reflects Norris received 1815 days credit for time served. CP 129.

individualized judicial determination that Norris has the ability to pay. Id.
at 405 n.16.

D. CONCLUSION

For the reasons set forth, Norris requests that this Court (1) vacate the stipulation and judgment and sentence and remand for a new trial; (2) vacate the erroneous portions of the sentences for counts 8 and 9 and remand for correction to ensure those sentences do not exceed the statutory maximum; and (3) strike the unsupported finding on ability to pay legal financial obligations from the judgment and sentence

DATED this 24th day of August 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 43927-1-II
)	
MICHAEL NORRIS,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF AUGUST, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **AMENDED BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL NORRIS
NO. 41075-086
FEDERAL CORRECTIONS COMPLEX
P.O. BOX 6000
FLORENCE, CO 81226

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF AUGUST, 2013.

X *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

August 29, 2013 - 3:27 PM

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