WACDL Washington Association of Criminal Defense Lawyers

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Sent via email to Tristen.Worthen@courts.wa.gov

Washington State Court of Appeals Division III
500 North Cedar Street
Spokane, WA 99201
RE: Judge Fearing Recusal Request

Honorable Judges of Division III:

The Washington Association of Criminal Defense Lawyers (WACDL) fosters the integrity, independence, and expertise of criminal defense lawyers; supports the criminal defense community through education and the exchange of information; promotes the fair and just administration of criminal justice; and defends the rights secured by law for all persons accused of crime. WACDL's membership spans across the state of Washington and includes defense lawyers who zealously defend individuals accused of crimes in Spokane County.

WACDL has reviewed the recusal request submitted by the Spokane County Prosecutor's Office (SCPAO). We disagree with SCPAO's assertion that "a reasonable mind would inescapably arrive at the conclusion that Judge Fearing violated the CJC."

The United States Supreme Court has recognized that "racial bias" is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[1] It is WACDL's firm belief that silence in the face of racial injustice is a far greater threat than the appearance of impropriety alleged by the Spokane County Prosecutor's office.

The Washington Supreme Court has unequivocally acknowledged a duty to "increase access to justice, reduce and eradicate racism and prejudice, and continue to develop our legal system into one that serves the ends of justice."[2] To do that, judges must have the ability to exercise judicial discretion and speak to how race discrimination impacts the justice system in "nonexplicit, implicit, and unstated ways."[3]

Every jurist has a duty and a responsibility to call out racism when they perceive it. Appellate judges are uniquely suited to do so, being one step removed from the

[1] Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017).
[2] Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.
[3] Henderson v. Thompson, 200 Wn.2d 417, 422 (2022); State v. Jefferson, 192 Wn.2d 225, 249, 429 P.3d 467 (2018) (plurality opinion).

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parties and the controversy. Their independence is intentionally cultivated and should be protected. "Respect for the rule of law and the preservation of an independent judiciary are among the most important principles upon which our Republic was founded." [4]

In an unusual turn of events, this is a case in which the victim herself, the person who had called 911, was so horrified by the Spokane Sheriff Deputies' handling of Darnai Vaile that she tried to intervene to protect him. As a result of her and her sister's attempt to protect Mr. Vaile from what they perceived as police brutality, she and her sister were both charged with crimes, and the original alleged assault was never prosecuted. While the majority chose to sidestep the issue, race is a central factor in the larger context of this case. The defense brief opens with two paragraphs that tell a clear story that Judge Fearing felt compelled to address:

> A woman in a bar called 911 alleging that Darnai Vaile, a Black Man, kissed her without her permission. Numerous officers arrived, threw Mr. Vaile to the ground, and beat him. The victim of Mr. Vaile's unwanted kiss was horrified by the officers' attack on Mr. Vaile and she filmed the event.
>
> The State did not charge Mr. Vaile with assaulting the victim. Instead, it charged Mr. Vaile and the victim with crimes against the police. Mr. Vaile was acquitted of most charges, but the jury found him guilty of resisting arrest.

Brief of Appellant, p. 1.[5] Further into the appellant's brief, at p. 17, the defense directly noted that the event of Darnai Vaile's arrest was racially charged: "Multiple White male police officers were attacking a large Black male accused of sexually assaulting a White woman."

In his letter, Spokane County Criminal Chief Deputy Prosecuting Attorney McCollum appears to assert that Judge Fearing's opinion constitutes a wholesale declaration of animus toward law enforcement and prosecutors of Spokane County. To the contrary, we read his opinion as a declaration of animus toward the pernicious effects of racism on the criminal justice system. As our Supreme Court has recognized, condemning racism wherever it is found is an entirely appropriate judicial function.[6]

The State has complained that Judge Fearing issued his opinion without the opportunity for the parties to brief the issue. However, Judge Fearing, in his

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[4] Statement on the Rule of Law and in Independent Judiciary, https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/statement-on-the-rule-of-law-and-an-independent-judiciary/.

[5] https://www.courts.wa.gov/content/Briefs/A03/379434%20Appellant.pdf.

[6] Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020), http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

opinion, noted that he would have recommended that the issue of racial bias be briefed by the parties, allowing the state to brief the issue. The panel majority decided against this course. Judge Fearing also noted that a judge's duty is to identify and speak about racism when it appears without regard to whether or not the individual prosecutor was conscious of or intended the racial bias expressed. Further, he notes his history of support for law enforcement officers broadly, referring to those who accept this call as "brave heroes." The state's complaint that Judge Fearing's opinion undermines victims rings hollow, given that the state not only declined to charge Mr. Vaile with assault, but also charged his accuser with obstruction of justice when she responded with horror to what she saw as police brutality, and vocally protested against it.

Criminal justice relies on a constant striving for balance, with zealous advocates on each side determined to prevail in a cause they see as just. It relies on a neutral arbiter free to make decisions based upon the individual jurist's experience, research, and analysis of facts against law. At the appellate level, neutrality is ensured by the use of a panel of judges to debate, discuss, and decide on the various issues that come before them. This use of a majority allows healthy, rigorous debate, and contributes to the ongoing quest for equal justice. Dissenting and concurring opinions have a rich history as a means for judges to enhance, protest against, or otherwise differ from the majority opinion. Here, Judge Fearing used his concurrence to broaden the conversation from what the majority was comfortable with – analysis of a trial court's ruling on one item of evidence proffered by the defense – to include the context of the underlying accusation and the conduct of the trial.

The majority disagreed with Judge Fearing's effort to call out the racial bias he perceived in the arrest and prosecution of Mr. Vaile and his co-defendant. The three-judge panel also disagreed on the legal analysis, though all agreed that the trial court erred in refusing to allow Mr. Vaile to submit the audio that originally accompanied the video of his arrest. The panel remanded for a new trial. The opinion in this case was not published. Judge Fearing's opinion is a concurrence/dissent. Not being binding authority, the function of such an opinion is to engage the legal community and the community at large in a dialogue. It does not compromise any right or function of the State. It does, however, call for watchfulness against racial bias within the criminal justice system. Relying on direction from the Washington Supreme Court, Judge Fearing is within his authority to write an opinion calling for this attention.[7]

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[7] "As judges, we must recognize the role we have played in devaluing black lives.";"The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will." Open Letter from Wash. State Sup. Ct. to Members of Judiciary & Legal Cmty. 1 (June 4, 2020),

In addition, the state's effort to avoid having its cases heard by a jurist they see as unfriendly is an overreach. "Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy."[8] The effect of an entire county disqualifying a judge is not just an administrative nightmare, it is a powerful warning to judges that if they do not conform to the State's expectations, their ability to do their work as jurists will be severely curtailed, and they will be silenced. In criminal cases, both parties regularly deal with the perception that certain judges are likely to be more receptive or less receptive to their positions. Cherry-picking judges with a request for across-the-board recusal is an improper flexing of the state's power to influence judicial decisions by virtue of the weight of the number of cases it argues at the appellate court level.

In conclusion, it is our firm belief that Judge Fearing did not violate the Judicial Code of Conduct. Judge Fearing's opinion serves as an important contribution to the ongoing discourse on racial justice and the interpretation and application of the law within our legal system. The State's blanket request for recusal should be rejected.

Sincerely,

Robin Emmans

President

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http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/Judiciary%20Legal%20Community%20SIGNED%20060420.pdf.

[8] Statement on the Rule of Law and in Independent Judiciary, https://www.fedbar.org/government-relations/fba-statements-letters-and-testimony/statement-on-the-rule-of-law-and-an-independent-judiciary/.