STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

MARK C. DILLON,

a Justice of the Supreme Court, Westchester
County.

DETERMINATION

THE COMMISSION:

Henry T. Berger, Esq., Chair
Honorable Frederick M. Marshall, Vice Chair
Honorable Frances A. Ciardullo
Stephen R. Coffey, Esq.
Lawrence S. Goldman, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Gerald Stern (Robert H. Tembeckjian, Of Counsel) for the Commission

Michael F. X. Ryan for Respondent

The respondent, Mark C. Dillon, a justice of the Supreme Court, Westchester County, was served with a Formal Written Complaint dated October 31, 2000, containing two charges. Respondent filed an answer dated January 8, 2001.

By Order dated May 14, 2001, the Commission designated Honorable Leon B. Polsky as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on July 19, 2001, and the referee filed his report with the Commission on September 19, 2001.

The parties submitted briefs with respect to the referee's report. On December 20, 2001, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

As to Charges I and II of the Formal Written Complaint:

1. Respondent served as an appointed County Court judge, Westchester County, from June 1997 through December 1997. Prior to that time, respondent had served as a justice of the Yorktown Town Court from 1987 to 1997. In the fall of 1997 he was a candidate for election to a full term as a County Court judge, in a general election scheduled for November 4, 1997. Respondent was not elected in November 1997 and left the bench on December 31, 1997.

2. In November 1999 respondent was elected to the Supreme Court, Westchester County, and he returned to the bench in January 2000.

3. Respondent was assigned to the case of People v. Darryl Holland, in which the defendant was charged with first degree murder. The case was tried over several weeks and resulted in a transcript exceeding 4,600 pages. On October 28, 1997,

the jury returned a verdict of guilty on three counts of murder and one count of robbery. Before that date, the Holland case had been the subject of ongoing press attention. Respondent was aware that the press was present or likely to be present in the courtroom on October 28, 1997, when the verdict was announced.

As to Charge I of the Formal Written Complaint:

4. On October 28, 1997, after the jury announced the verdict in the Holland case, there was an emotional display by a juror, and respondent called a recess in order to allow the jurors to compose themselves. After a brief recess, the jurors returned to the courtroom, and the jury was polled. Respondent then addressed the jurors and made the following remarks, a portion of which were reported in the local press:

> I want you all to sleep well tonight because -- while my opinion probably isn't worth anymore or less than anyone else -- I agree with your verdict.
>
> I think the verdict you've rendered in this case is consistent with the evidence that I saw from the witnesses and from the documents and from the stipulations.

As to Charge II of the Formal Written Complaint:

5. On October 28, 1997, after respondent excused the jury in the Holland case, he held a court proceeding in which *inter alia* he scheduled sentencing, ordered a pre-sentencing report, discussed bail, heard post-verdict applications and advised the victim's family of their right to be heard at sentencing. Respondent also

chastised defense counsel and lauded the police and prosecution with remarks that in part were reported in the local press. Respondent said the following:

> THE COURT: I have some other comments which pertain to the case which has nothing to do with the sentencing phase of the case.
>
> Beginning with the opening statements at the trial, the prosecutor claimed to the jury – and I think ultimately proved to the jury – that the people that were involved in the investigatory stage of this case were – and I'm paraphrasing – honest, hard-working and dedicated and earnest individuals and also in the opening statement of the defense counsel, the defense counsel argued that the police lied; that there were violations of the constitution; that there were conspiracies amongst the police and between the police and the Assistant District Attorneys and, of course, those were opening statements.
>
> We then heard evidence in the case and in my view the evidence that was produced in this courtroom throughout the month of October supported the arguments that had been made by Mr. McCarty on behalf of the Prosecution; but did not in any way support the rather scurrilous allegations that were made by the defense in its opening statement.
>
> MR. TRAYNOR: I object to that.
>
> THE COURT: You may object, but I think this is worth saying. It is time that some judges speak out; that there are too many cases where persons who are facing a mountain of evidence will either try to blame the victim, that didn't happen here, or to allege misconduct on the part of the police and prosecutors –
>
> MR. TRAYNOR: I object to that.
>
> THE COURT: – and certainly allegations of misconduct is appropriate, if there is some evidence. I don't think it is appropriate in cases such as this where there is

absolutely no evidence of misconduct on the part of police and prosecutors.

My view of the evidence is that these police and prosecutors were in fact dedicated individuals, so dedicated to their jobs, in fact, that they slept in some cases at the Mount Vernon Police Department in their offices instead of going home to their families in order to remain hot on the leads of the case. Assistant District Attorneys coming into the police department at 1:30 in the morning in order to provide the legal advice that is sought from them by the police department.

These individuals, according to the evidence that I saw, were honest, intelligent, hard-working individuals and like the Canadian Mounties, "They got their man," but they did it in the way that the law asks them to do it.

To the extent that reputations have been attacked or tarnished, the Court takes this opportunity to restore the reputations of the following individuals who I'm going to identify by name and who I think an apology is owed to -- although I don't expect an apology would be given -- to Mount Vernon Detective Arthur Glover, Mount Vernon Detective Michael Rotunda, Mount Vernon Detective Donte Barrera, Mount Vernon Detective Mora, the Mount Vernon Police Department, generally speaking, Assistant District Attorney Robert Neary, Chief Deputy Frank Donahue, the Assistant District Attorney's Office [sic], generally speaking, and Assistant District Attorney [sic] Jeanine Pirro.

All of those names we heard in one fashion or another within the context of which I speak during the course of this trial.

Anything further for the record?

MR. TRAYNOR: Yes, Judge, I was precluded from calling a number of witnesses to the trial, so I object to the

Court now making that statement regarding the reputations being tarnished.

Additional findings:

6. During the sentencing proceeding in Holland, Assistant District Attorney James McCarthy remarked that respondent had exhibited patience toward defense counsel and had conducted a fair trial.

7. On appeal to the Appellate Division, Second Department, defense counsel did not raise any issues of judicial misconduct. The Appellate Division unanimously affirmed the conviction on January 24, 2000. Leave to appeal to the Court of Appeals was denied.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2, 100.3(B)(1), 100.3(B)(3) and 100.3(B)(9) of the Rules Governing Judicial Conduct. Charges I and II of the Formal Written Complaint are sustained, and respondent's misconduct is established.

Respondent's comments at a post-verdict proceeding violated established ethical standards and constituted an unacceptable display of partiality.

Respondent's excoriation of defense counsel was clearly inappropriate and reveals a lack of understanding and respect for the role of defense counsel. Respondent's comments were gratuitous and unrelated to any issue before the court at that time. The

focus of respondent's wrath was the purported "scurrilous allegations" against the police and prosecutors in defense counsel's opening statement, yet neither that statement nor any other portions of the record cited by respondent in this proceeding warrant the excessive, demeaning diatribe respondent delivered. Defense counsel's criticisms of the police and prosecutors were (apart from an obscure reference to the District Attorney) legitimate arguments for a defense attorney who was setting the stage for a challenge before the jury to the voluntariness of a crucial videotaped confession. The suggestion by respondent that the defense attorney should apologize to the police and prosecutors, whom respondent lavishly praised and singled out by name, was entirely inappropriate. Any such apology might have undermined the defendant's case on appeal. The gratuitous remark, "although I don't expect an apology would be given" was insulting and snide. Respondent's conduct violated established ethical standards requiring a judge to act in a manner that upholds public confidence in the integrity and impartiality of the judiciary and to treat lawyers with courtesy, dignity and patience (Sections 100.2 and 100.3[B][3] of the Rules Governing Judicial Conduct).

Respondent's prefatory comment, "It is time that some judges speak out" suggests that he was fully conscious of delivering an extraordinary, partisan speech. The fact that respondent made these statements in a publicized case shortly before an election in which both he and the District Attorney were candidates raises a question as to whether his comments were motivated by political concerns. *See* Matter of Brennan (NY

Commn on Jud Conduct, Feb. 8, 2001). As a judge, respondent has an obligation to avoid even the appearance of impropriety (Section 100.2 of the Rules). His highly charged, pro-prosecutorial comments violated that standard and conveyed the impression that he was using a judicial proceeding for political grandstanding. Respondent undoubtedly knew, or should have known, that his comments would be publicized, and he should have been sensitive to the appearance created by his remarks. It is troubling that respondent fails to recognize that his comments were improper.

Respondent's comments expressing his agreement with the jury's verdict were also improper. The ethical standards prohibit a judge from commending or criticizing a jury for their verdict, other than in a court order or opinion in a proceeding. Section 100.3(B)(9) of the Rules; Matter of Cunningham, 1995 Ann Report of NY Commn on Jud Conduct at 109; *see also* Section 15-4.3 of the ABA Standards (Criminal Justice Section). Respondent's commentary about the verdict was not in a court order or opinion, but was a gratuitous expression of his personal views. Respondent's avowed purpose in making the comments – to allay the apparent emotionalism of jurors after the verdict was delivered – does not justify his inappropriate comments. No matter how stressful the proceedings, a judge must remain neutral in the presence of a jury, and jurors should receive neither criticism for their verdict nor reassurance that they acted correctly.

Respondent challenges the Commission's jurisdiction to consider his conduct prior to his assuming his current judicial office. Although respondent's

misconduct occurred in 1997, shortly before he left office as a County Court judge, the Commission has jurisdiction to impose discipline. It is well-established that a judge can be disciplined for misconduct that occurred during a prior term of office, notwithstanding that the judge, after leaving office, did not serve as a judge for several years and later assumed a different judicial office. Matter of Bailey v. Comm on Jud Conduct, 67 NY2d 61 (1986).

We do not agree with the dissenter's position that the fact that this conduct occurred four years ago justifies a lesser sanction. At the time of these events respondent had been a County Court judge for only a few months but had previously served for ten years as a town justice. He had been entrusted to try an extremely serious case in which the top charge was murder in the first degree. That the trial was highly charged and emotional exacerbates, rather than mitigates, respondent's behavior.

We note that respondent has previously received a warning concerning his violation of the ethical rules. In 1989 respondent received a confidential letter of dismissal and caution concerning improper conduct during his campaign for judicial office.

By reason of the foregoing, the Commission determines that the appropriate sanction is admonition.

As to Charge I, Mr. Berger, Judge Marshall, Judge Ciardullo, Mr. Goldman,

Ms. Hernandez, Judge Luciano, Judge Peters and Judge Ruderman concur. Mr. Pope dissents and votes that the charge be dismissed.

As to Charge II, all concur.

As to the sanction, Mr. Berger, Judge Marshall, Mr. Goldman, Ms. Hernandez, Judge Peters and Mr. Pope concur. Judge Ciardullo, Judge Luciano and Judge Ruderman dissent as to the disposition and vote that respondent be issued a letter of caution.

Mr. Coffey was not present.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: February 6, 2002

Henry T. Berger

Henry T. Berger, Esq., Chair
New York State
Commission on Judicial Conduct

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DISSENTING OPINION
BY JUDGE CIARDULLO

While I concur with the conclusion that respondent's conduct as to both Charges I and II violated the ethical rules, I believe that the sanction should be mitigated by the fact that the judge's conduct occurred four years ago and appears to be an isolated incident of misbehavior on the bench. I also note that the judge's comments, while improper, occurred in the context of a highly charged murder trial and a courtroom setting that was particularly emotional. Accordingly, I respectfully dissent and vote that the appropriate disposition is a letter of caution.

Dated: February 6, 2002

Frances A. Ciardullo

Honorable Frances A. Ciardullo, Member
New York State
Commission on Judicial Conduct