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June 3, 2011

A. John Voelker
Acting Clerk
Wisconsin Supreme Court
PO Box 1688
Madison, WI 53701-1688

HAND DELIVERED

Re: Letter Memorandum on behalf of Respondent Peter Barca

State ex rel. Ismael R. Ozanne v. Jeff Fitzgerald, et al.
Case No. 2011AP0613-LV

State, et al. v. Dane County Circuit Court
Case No.2011 AP000765-W

Dear Mr. Voelker,

In response to the direction of this Court, on behalf of Respondent Peter Barca, please be advised that:

1. This Court should find that the Circuit Court's findings, conclusions, decision and judgment in 2011CV1244 is a final judgment pursuant to § 808.03(1) Wis. Stats. and, as such, the Petition for Leave to Appeal a Non-final Order has been rendered moot since the non-final order which was the subject of that appeal has been superseded by the final judgment. This Court has held that when a judgment "disposes of all of the substantive issues in the litigation, as to one or more parties, as a matter of law, the Circuit Court intended it to be the final document for purposes of appeal, notwithstanding the label it bears or subsequent actions taken by the Circuit Court." Harder v. Pfitzinger, 2004 WI 102, 234 Wis. 2d. 324, 682 N.W. 2d 398.z

   In Harder v. Pfitzinger, this Court also reaffirmed its previous holding in Frederick v. City of Janesville, 92 Wis. 2d 685, 688, 285 N.W.2d 655 (1979):

   > "The test of finality is not what later happened in this case but rather, whether the trial court contemplated the document to be a final judgment or order at the time it was entered. This must be established by looking at the document itself, not to subsequent events."

   Despite this Court's efforts to clarify "what constitutes finality" in Harder v. Pfitzinger, and other previous cases, it noted, that "finality questions continue to arise and thus, in Wambolt v. Illinois Farmer's Insurance Co., 2007 WI 35, 299

Wis 2d 723, 735, 728 N.W. 2d 670, 682 this Court held that effective September 1, 2007:

> "Going forward, we will therefore require that final orders and final judgments state that they are final for purposes of appeal."
>
> "A document does not fulfill this requirement with a particular phrase or magic words. Rather, the document must simply make clear, with a statement on its face, that it is the document from which appeal may follow as a right under § 808.03(1) [Wis. Stats.]." Wamboldt (supra ¶¶ 44 and 45).

Applying these standards, the Circuit Court issued a final judgment declaring 2011 Wisconsin Act 10 "void" and thereby disposed of all of the substantive issues in this litigation with respect to the Senate, the Assembly, the Joint Committee of Conference, the Secretary of State, Senator Miller and Representative Barca. In its "judgment" the Court stated:

> "...the court declares that the action of the Wisconsin Legislature Joint Committee of conference on March 9, 2011 was and is void...This is a final judgment for purposes of appeal as to the validity of actions taken on March 9, 2011. This judgment supersedes previous orders entered in this case." (¶ 18 of Court's Findings of Fact, Conclusions of Law and Judgment). (Emphasis added).

An appeal of right to the Court of Appeals from this Final Judgment is an appropriate remedy available to the Senate, the Assembly, the Joint Committee of Conference, or any other aggrieved person who may seek to intervene in the Circuit court action pursuant to § 803.09(1) or (2) Wis. Stats. An appeal is not available to the State of Wisconsin since the State is represented in this matter by the District Attorney and thus, was the prevailing party. Further, an appeal is not available to Secretary Huebsch since he is not a party to the lower court action nor has he sought to intervene as a party pursuant to § 803.09 (2) Wis. Stats. If Secretary Huebsch were to seek to intervene in this matter, Respondent Barca requests that this Court order briefs on that question since it has neither been claimed nor proven that Secretary Huebsch "relies for ground of claim or defense upon any statute or executive order or rule administered" by him or his agency. §803.09 (2) Wis. Stats.

2. As noted previously, the May 26, 2011 Circuit Court judgment is final for purposes of appeal with regard to the declaratory judgment voiding 2011 Wisconsin Act 10. The separate order of the court holding in abeyance the civil forfeiture prosecution of the four legislators asserting privilege from process is not appealable since it is not a final judgment.

3. For the reasons set forth in Section III of Respondent Barca's Response to the Petition for Supervisory Writ, this Court should not "recast" this petition as a "Petition for Original Action Publici Juris." In view of the Circuit Court's final judgment in this matter, an additional reason now exists for this Court to decline to "recast" this as an original action publici juris since an aggrieved party to the action below now has an available remedy by filing an appeal.

   Furthermore, this Court should not choose to "include its appellate power to review a Circuit Court judgment absent the filing of an appeal for the following reasons: First, it is not readily apparent that this Court has the inherent constitutional authority to exercise its "appellate authority" in the absence of an appeal. Article VII § 3(2) of the Wisconsin Constitution provides "The Supreme Court has appellate jurisdiction over all courts and may hear original actions and proceedings." The questions of whether this court should issue a supervisory writ or recast this as a petition for an original action publici juris do not implicate the limits of this Court's constitutional powers or authority. It is beyond question that the Court possesses the power and authority to assert its original jurisdiction over this matter and its superintending control over the Circuit Court. Rather the question here involves an application of the policies of this Court regarding the exercise of its superintending authority and its authority to hear original actions. As noted in this Court's internal operating procedures: "The criteria for the granting of a petition to commence an original action are a matter of case law. See Petition of Heil, 230 Wis. 428 (1939)."

   However, the exercise of this Court's "appellate jurisdiction" contemplates a series of procedural steps that serve to ensure this Court has all of the information essential to a thorough and well-informed analysis and further affords the parties an opportunity to examine and, if necessary, supplement the record and be heard on the merits of the appeal. In this instance, the Clerk of Circuit Court has not provided its record to this Court. Some of the exhibits have been provided by the Petitioners and Respondents, but most of the exhibits have not been provided. Many of the Respondent's and Petitioners' briefs that were filed with the Circuit Court and thus presumably informed the lower court's evaluation of the merits, have not been provided to this Court.

   The exercise of appellate jurisdiction must therefore be activated by an "appeal" of an aggrieved party which, in turn, invites a response and possibly a cross appeal from another party. The exercise of appellate jurisdiction must also entail a submission to this Court of a complete record. For these reasons, it is not entirely clear that this Court possesses the inherent authority to exercise its "appellate jurisdiction" within the context of an "original action publici juris." If this Court finds that it does possess the inherent authority to exercise its "appellate jurisdiction" within the context of a "recast original action publici juriis," Respondent Barca respectfully requests that this Court order the Dane County Clerk of Court to produce the record as required by § 809.15 (1) Wis. Stats. and that parties be

Then, on March 24, 2011, instead of granting the Attorney General's request for immediate relief and summary reversal, the Court of Appeals certified the matter to this Court. (Pet. App. 170 – 178).

It was at this point that the Petitioner's counsel, the Attorney General, commenced acting, and advising his clients to act, in willful and open defiance of the Trial Court's order and the Court of Appeals' certification of the question to this Court. Initially, upon receipt of the Secretary of State's letter rescinding the publication date and receipt of the Temporary Restraining Order, the Legislative Reference Bureau's attorney staff had removed the March 25, 2011 "publication date" from the bill 2011 Wisconsin Act 10 and they were not going to publish the law. (Pet. App. 360, L 7 to 361, L 3). In other words, they had acted in compliance with the Temporary Restraining Order and were intending to continue to do so. However, on March 24, 2011, Senator Scott Fitzgerald personally met with the Legislative Reference Bureau staff and insisted they "publish" 2011 Wisconsin Act 10 despite the Temporary Restraining Order. (Pet. App. 365, L23 to 367, L 3). The meeting with the Legislative Reference Bureau staff was specifically requested by Senator Fitzgerald. (Pet. App. 399, LL 1-14). The only reasonable inference to draw from the testimony of Legislative Reference Bureau Director Stephen Miller is that Senator Fitzgerald was acting on advice of Deputy Attorney General Kevin St. John when he instructed the Legislative Reference Bureau to "publish" 2011 Wisconsin Act 10 despite the Temporary Restraining Order. (Pet. App. 402, L 24 to 405, L 18).

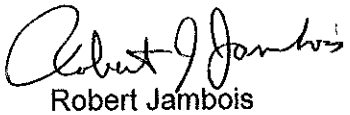
Then, on March 28, 2011, four days after Senator Fitzgerald had insisted, and Deputy Attorney General Kevin St. John had advised, that the Legislative Reference Bureau published the bill, in open and willful defiance of the Temporary Restraining Order, and three days after the Legislative Reference Bureau acted, upon direction of senator Fitzgerald and advice of Deputy Attorney General Kevin St. John, in willful and open defiance of the Temporary Restraining Order, the Attorney General filed a motion with the Court of Appeals alleging the previous petition had been rendered "moot" by the "publication" of the act. The Court of Appeals denied the motion observing:

> Moreover, it is apparent that the Attorney General does not merely request an order permitting the withdrawal of his petition; he seeks a ruling on an entirely new question: whether an action by the Legislative Reference Bureau on Friday, March 25, 2011, means that the Act, which is the subject of the injunction, has become law. The Attorney General's desire for a ruling on this issue is apparent because the only ground he offers to justify withdrawal is his legal argument and assertion that the Act has become law.

The Secretary of the Department of Administration also continued to take action implementing this Act despite the Temporary Restraining Order and even after the Department of Administration's Secretary and Petitioner's counsel, were finally warned by the court "that those who act in willful and open defiance of a court order place not only themselves at peril of sanctions. They also jeopardize the financial and governmental stability of the State of Wisconsin." (Pet. App, 515, LL 5-10).

These acts by Petitioners upon advice of their current counsel, the Attorney General, in willful and open defiance of the Trial Court's order should impel this Court to dismiss their petition. Respondent Barca does not know if Petitioners contest these material facts.

Sincerely,



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cc: by e-mail transmission to:

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Client: Representative Peter Barca