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January 20, 2012

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*Additional Parties listed on Page 3

You are hereby notified of the following order:

No. 2011AP613-LV Ozanne v. Fitzgerald L.C.#2011CV1244
No. 2011AP765-W State v. Circuit Court for Dane Cnty. L.C.#2011CV1244

Before Michael J. Gableman, J.

On December 30, 2011, respondent Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, filed a motion requesting, inter alia, that I recuse myself from participation in these cases. On January 17, 2012, respondent Senator Mark Miller joined the motion. The motion for recusal is denied.

Respondent Ozanne brings this motion because he states that he believes that my participation in these cases presents the appearance of impropriety. He states this conclusion based on the fact that the Michael Best & Friedrich firm was involved in the cases and had previously represented me.

As the United States Supreme Court has declared, those in the judiciary are presumed to act with honesty and integrity. Withrow v. Larkin, 421 U.S. 35, 47 (1975) (stating that there is a "presumption of honesty and integrity in those serving as adjudicators"); see Bridges v. California, 314 U.S. 252, 273 (1941) ("[T]o impute to judges a lack of firmness, wisdom, or honor" is a premise "which we cannot accept"); see also Milburn v. State, 50 Wis. 2d 53, 62, 183 N.W.2d 70 (1971) (holding that judges are presumed to make their decisions "in fidelity to [their] oath of office" and to "try each case on its merits").

This court provided specific guidance as to when a judge must recuse him or herself in Donohoo v. Action Wisconsin, Inc., 2008 WI 110, 314 Wis. 2d 510, 754 N.W.2d 480. See also State v. Henley, 2011 WI 67, __ Wis. 2d __, 802 N.W.2d 175, cert. denied, 565 U.S. __ (2011). Donohoo instructs that a Justice must recuse him or herself from a case only where 1) they cannot act in a fair and impartial manner, or 2) by participating in the case, they would give the appearance that they were not able to act in a fair and impartial manner. Donohoo, 314 Wis. 2d 510, ¶24. Each Justice alone must make the determination of whether one or more of these two circumstances is present. Id. As Donohoo stated:

> Section 757.19(2)(g), Stats., mandates a judge's disqualification only when that judge makes a determination that, in fact or in appearance, he or she cannot act in an impartial manner. It does not require disqualification in a situation where one other than the judge objectively believes there is an appearance that the judge is unable to act in an impartial manner; neither does it require disqualification . . . in a situation in which the judge's impartiality "can reasonably be questioned" by someone other than the judge.

Id. (quoting State v. Harrell, 199 Wis. 2d 654, 663–64, 546 N.W.2d 115 (1996) (quoting State v. American TV & Appliance, Inc., 151 Wis. 2d 175, 182–83, 443 N.W.2d 662 (1989))).

Chief Justice Roberts recently reiterated and elaborated on these principles in his 2011 report on the judiciary. See John G. Roberts, Jr., 2011 Year-End Report on the Federal Judiciary, available at http://www.uscourts.gov/Libraries/Statistics_PDFs/2011Year-EndReport.sflb.ashx. In the report, Chief Justice Roberts noted that, "[a]s in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case." Id. at 9. "Indeed," he added, "if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its members may participate." Id. Chief Justice

Roberts further explained that the U.S. Supreme Court is distinct from the lower federal courts with respect to recusal matters, because unlike district and circuit court judges, there is no one to take the place of a recusing Justice. Id. Consequently, "if a Justice withdraws from a case, the Court must sit without its full membership." Id.

In his report, Chief Justice Roberts also commented that "[a] Justice . . . cannot withdraw from a case as a matter of convenience or simply to avoid controversy. Rather, each Justice has an obligation to the Court to be sure of the need to recuse before deciding to withdraw from a case." Id. Concluding his remarks on the subject, Chief Justice Roberts observed that "a judge should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety, nor be apprehensive of unjust criticism. Such concerns have no role to play in deciding a question of recusal." Id. at 10 (internal quotation marks and citation omitted).

As with the U.S. Supreme Court, there is no one to replace a Justice on our court who recuses himself or herself from a case. A Justice simply should not withdraw from a case because of "partisan demands, public clamor or considerations of personal popularity or notoriety." I therefore agree with Chief Justice Roberts' reasoning, and find it consistent with our own precedent and with sound principles of judicial ethics and administration.

Accordingly, having carefully considered the circumstances of these cases, the law and reasoning set forth above, and the submissions of the parties, I have determined that recusal is neither justified nor warranted.

Therefore, having carefully considered the motion of respondent Ismael R. Ozanne, District Attorney for Dane County, Wisconsin, individually directed to Justice Michael J. Gableman for his recusal from participation in Case Nos. 2011AP765-W and 2011AP613-LV;

IT IS ORDERED that the motion to Justice Michael J. Gableman individually is hereby denied.

A. John Voelker
Acting Clerk of Supreme Court

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