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June 29, 2010

Court of Appeals Publication Committee
c/o Wisconsin Court of Appeals
P.O. Box 1688
Madison, Wisconsin 53701-1688

RE: State v. Marquis N. Singleton, No. 2009AP002089-CR, District I, 6/23/10

Dear Judges Brown, Fine, Anderson, Brunner, and Dykman:

I am writing, both in my role as Amicus Chair for the Wisconsin Association of Criminal Defense Attorneys and as a concerned appellate litigator with more than 23 years of appellate experience, to request that the Committee ***not*** order the publication of this case. A copy of the *Singleton* decision is enclosed for easy reference.

My concern is not with the Court's ultimate decision in *Singleton*. I have not researched the matter and do not know whether that decision is correct or not.

Rather, my concern is solely with the process used by the Court in issuing a decision of state-wide applicability when, as here, Mr. Singleton was not represented by counsel. I believe as a matter of principle that the Court should be very hesitant to publish decisions in which one or both parties are unrepresented by counsel. Such a procedure is neither wise nor necessary.

By definition, a published decision is one of potentially widespread importance, one that:

1. Enunciates a new rule of law or modifies, clarifies or criticizes an existing rule;

2. Applies an established rule of law to a factual situation significantly different from that in published opinions;

3. Resolves or identifies a conflict between prior decisions;

4. Contributes to the legal literature by collecting case law or reciting legislative history; or

5. Decides a case of substantial and continuing public interest.

Wis. Stat. (Rule) 809.23(1)(a). The decision, in short, should be published only when it has "significant value as precedent." *See* Wis. Stat. (Rule) 809.23(1(b)6.

Legal representation by both sides in such a matter is especially important. The adversarial system recognizes that even the most conscientious judges cannot be all-knowing and that the correct answer to a legal or factual dispute is best resolved when both sides present their best arguments. Only under those circumstances can the Court be assured (to the degree possible) that the arguments on both sides have been fully marshaled and it is not missing something important.

While litigants have no right to the appointment of counsel in civil proceedings or in collateral attacks on a conviction or sentence, that is a different issue from whether a particular decision should be published. An individual no doubt may suffer an injustice should the absence of counsel result in a judgment against him, but that injustice generally is limited to the particular litigant. Should that decision be published, however, it becomes controlling precedent which only the Supreme Court can correct. Any errors in a published decision resulting from the absence of full adversarial testing thus could negatively affect any number of individuals in the period before the error is corrected.

Publication of *pro se* cases, and the significant potential for resulting damage, also is wholly unnecessary, even if the Court deems it important to resolve a matter of statewide interest without waiting for the issue to be raised in a case with legal representation for both litigants.

I am co-chair of the Pro Bono Project of the Wisconsin State Bar's Appellate Practice Section. The members of the Pro Bono Project have volunteered for appointment to represent litigants who otherwise would be unrepresented in cases where the Supreme Court or Court of Appeals has requested such appointment to insure that significant legal questions presented in a particular case are fully briefed. The Court need only contact Colleen Ball or me with a request for volunteer counsel and we will contact our list of attorneys to find an appropriate volunteer to take the appointment.

Although the Supreme Court regularly uses the services of the Pro Bono Project, I note that the Court of Appeals rarely does so. I would suggest that, if a case is significant enough to justify publication, it is significant enough to take care that the decision results from a proper application of the adversarial system rather than the type of one-sided presentation inherent in *pro se* litigation.

I accordingly ask that the Committee *not* order the decision in *Simpleton* to be published. I thank the Committee for considering this request.

Respectfully submitted,

HENAK LAW OFFICE, S.C.

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Robert R. Henak

cc: Hon. Kitty K. Brennan
Hon. Joan F. Kessler
Hon. Patricia S. Curley
Mr. Marquis N. Singleton
AAG Sally Wellman

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