STATE OF MINNESOTA

IN SUPREME COURT

CO-98-261

OFFICE OF APPELLATE COURTS

JUL 15 1998

FILED

MOTION FOR A PUBLIC HEARING;
MOTION FOR RECONSIDERATION OF GROUNDS
FOR JUDICIAL RECALL; MOTION TO PRESENT
ORAL ARGUMENT; MOTION TO RECUSE

Gregory Wersal, attorney at law, does hereby move the Supreme Court as follows:

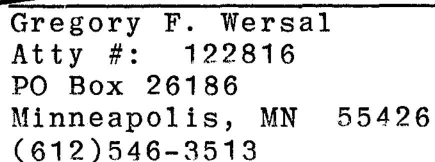
1) For the Court to issue an Order scheduling a public hearing to be held regarding the grounds for the recall of judges which is to be established by the Supreme Court pursuant to Minn. Stat. Chapter 211C.02.

2) For the Court to reconsider its Order filed July 2, 1998 promulgating the grounds for judicial recall, specifically amending the grounds as follows: "~~No~~ A judge may be recalled for the discretionary performance of a lawful act or a prescribed duty."

3) For an Order of the Court scheduling oral argument on the above motions for reconsideration and for public hearing.

4) Gregory Wersal moves for the recusal of all Justices who would themselves be subject to recall elections.

7-15-1998
Date



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STATE OF MINNESOTA

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MEMORANDUM

I. THE COURT SHOULD HOLD A PUBLIC HEARING.

The Supreme Court has been directed by the Legislature pursuant to Minn. Stat. Chapter 211C.02 to determine the grounds for the recall of judges. In fulfilling this obligation, the Court is acting in a quasi-legislative role, actually drafting a law.

When other governmental bodies, such as state agencies, act in a quasi-legislative role, the administrative procedure act requires notice of a hearing and a hearing where the rules are to have the force and effect of law. Wacha v. Kandiyohi County Welfare Bd., 308 Minn. 418, 242 N.W. 2d 837 (1976), Minn. Stat. Chapter 14. In the same way, the Supreme Court, as part of the democratic process, should hold a public hearing on the grounds for judicial recall so that the people of the State of Minnesota can have notice and opportunity to comment. In addition, various groups which regularly attend district court hearings, such as Mothers Against Drunk Driving or assault victim advocacy groups, will have no opportunity for input into this process without a public hearing. Once the court issues its grounds for judicial recall, they will have the force and effect of law. The Clerk of Appellate Courts had assured members of the public that there would be a public hearing and that they would receive notice of it (See Affidavit of Warrren Higgins). Without an opportunity for the public to comment prior to the adoption of

these grounds for judicial recall, due process and elemental concepts of democracy will have been violated.

II. GROUNDS FOR JUDICIAL RECALL SHOULD BE RECONSIDERED AND AMENDED TO PROVIDE "A JUDGE MAY BE RECALLED FOR THE DISCRETIONARY PERFORMANCE OF A LAWFUL ACT OR A PRESCRIBED DUTY."

Except for one change, the Supreme Court has adopted word for word the grounds for recall established by the Legislature for all other state offices as set out in Minn. Stat. Sec. 211C.02. In addition, the Supreme Court has adopted word for word the definitions of "malfeasance", "nonfeasance", and "serious crime" set out in Minn. Stat. Sec. 211C.01. The only change, and it is a major change, is that the Court has added one sentence to the grounds which states "no judge may be recalled for the discretionary performance of a lawful act or prescribed duty." By this one sentence, the Court has completely vitiated the provisions which call for a judges recall for "malfeasance" and "nonfeasance". Virtually all acts of a judge are discretionary, even those which constitute "malfeasance" and "nonfeasance".

For example, Minn. Stat. 169.121 Subd. 1c requires that on certain gross misdemeanor DWI's that a judge either set bail at $12,000 or require the defendant to participate in a conditional release with electronic alcohol monitoring done on a daily basis. Yet judges have released defendants with bail less than the

$12,000, in fact judges have set no bail and no conditional release in some cases - in complete derogation of Minnesota Law. In these cases, the judges have applied their discretion in setting bail. Yet in each case, the judge has committed "nonfeasance" as it is defined by violating the clear statutory requirements. The language "no judge may be recalled for the discretionary performance of a lawful act or a prescribed duty" is far too broad in its possible application.

In fact, the language currently vitiates the entire purpose of Minnesota Constitution Article 7 Section 6 which states ". . . a judge of the Supreme Court, the Court of Appeals, or the District Court is subject of recall by the voters". The clear meaning is that the voters shall be allowed to have recall elections. No restrictions are noted on the publics ability to recall. While the amendment does provide for the Supreme Court to establish the grounds for recall, the Court does not have the authority to establish language which is so broad that virtually no discretionary acts of a judge are subject to recall. The Minnesota Constitution clearly meant to have judges recalled for discretionary acts. A judge's entire job is to use his discretion in applying the law in the cases that come before him.

Finally, the Court's current Order means that the only reasons for recall are essentially the same reasons for which a judge would

be subject to discipline for a violation of the Code of Judicial Conduct. The people of Minnesota already had available to them the protections provided by the Code of Judicial Conduct and the Board of Judicial Standards for the discipline and removal of a judge prior to the enactment of Minnesota Constitution Article 7 Section 6 in 1996. Again, clearly the people of Minnesota expected that recall elections were meant to encompass issues far more broad than mere nonfeasance, malfeasance, or criminal acts which could already be handled by the Board on Judicial Standards.

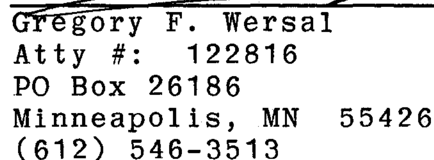
III. THE COURT SHOULD ALLOW ORAL ARGUMENT ON THE MOTIONS FOR RECONSIDERATION AND THE MOTION FOR PUBLIC HEARING.

The Court should allow oral argument on the Motions for Public Hearing and the Motion for Reconsideration. The Court without notice to the public and without a public hearing adopted grounds for judicial recall by an Order filed July 2, 1998. Oral argument on the Motion, would be the only public input into the process to date. The grounds for judicial recall will become part of a statute and have the force and effect of law. This issue is one which will effect the legal rights of all citizens to recall elections. It is an issue of grave importance and oral argument would be appropriate on the motions.

IV. ALL JUSTICES SHOULD RECUSE THEMSELVES FROM CONSIDERATION OF THIS CASE WHO HAVE AN INTEREST IN THE ISSUES.

Each justice who is being asked to decide the grounds of recall when that judge would have a direct interest on whether that judge himself could be recalled in the future, should recuse themselves. Each judge in that position has a direct conflict between their <u>personal</u> desire to remain in office and the desire of the people of Minnesota to have vigorous and broad recall elections where judges are held accountable for their discretionary actions. Even if there were not a direct conflict, the appearance of impropriety demands recusal. The appearance of impropriety is made all the more strong when one looks at the facts which surround the issuance of the Court's Order. On February 11, 1998 the Court ordered the appointment of members to a Judicial Recall Rules Committee. The purpose of that committee was to make recommendations to the court for what grounds of recall of judges should be established by the court. Yet, review of the court files shows that this committee has never issued a formal report or filed such a report with the Office of the Clerk of Appellate Court. Also the fact that the Court hs not held a public hearing nor issued any notice of a public hearing, despite the fact that the Office of the Clerk of Appellate Court assured members of the public there would be such a hearing confirms the appearance of impropriety.

7-15-1998
Date



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AFFIDAVIT OF WARREN HIGGINS

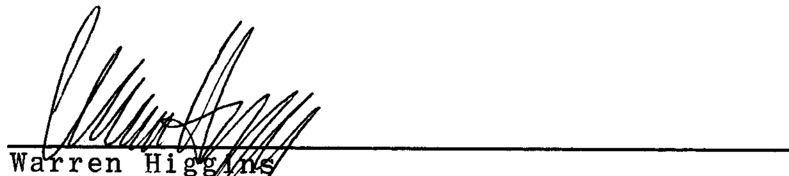
Having been duly sworn under oath Warren Higgins states as follows:

1) I am a resident of the State of Minnesota, currently residing at 3840 Ballantrae Road, Eagan, Minnesota, and have in the past had several conversations with Fred Grittner, the Clerk of Appellate Courts because of my interest in judicial recall elections.

2) In approximately February 1998, in a personal conversation with Mr. Grittner, I was assured that prior to any order establishing grounds for recall, the Court would hold a public hearing on the grounds for judicial recall and that I would receive notice of such public hearing.

3) I have never received any notice of a public hearing nor to my knowledge has any public hearing been held.

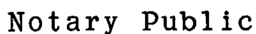
4) That on February 11, 1998, the Court filed an Order with Clerk of Appellate Court establishing a Judicial Recall Rules Committee. In February 1998, I was assured by Mr. Grittner that this committee would determine grounds for recalling a judge. On July 15, 1998, I reviewed court file number CO-98-261 and discovered that it did not contain any report from the committee which had been established by the Court.



7-15-1998
Date

Warren Higgins

Subscribed and sworn to before me this 15th day of July 1998.



Notary Public