

State of Wisconsin,

Plaintiff,

v.

Case No. 2008CF000567

Miguel Ayala, and  
Carlos Gonzales,

Defendant.

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**Motion for Change of Venue Due to Pretrial Publicity**

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NOW COMES the above-named defendant, by his attorney, Jeffrey W. Jensen, and hereby moves the court as follows:

A. Pursuant to Sec. 971.22, STATS., for a change of venue for the reason that, due to pretrial publicity, a fair jury cannot be impaneled in Milwaukee County; or, in the alternative,

B. Pursuant to Sec. 971.225, STATS., to order that a jury panel be drawn from another county where a fair jury may be found; and,

C. Regardless of whether the venue of the trial is changed or whether a jury from another county is used, pursuant to Sec. 972.12, STATS, to sequester the jurors during the trial in this matter.

This motion is based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2008:

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**Memorandum in Support of Motion for Change of Venue Due to Pretrial Publicity**

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**I. Due to extensive pretrial publicity a fair jury cannot be impaneled in Milwaukee County and, therefore, the court must order a change of venue.**

A motion for change of venue is addressed to the trial court's discretion because the court is in the best position to accurately gauge the extent of pretrial publicity and the effect that it has had on the public. The Court of Appeals, though, has issued opinions guiding the trial court's exercise of discretion. Generally, the court is required to consider the extent and nature of the pretrial publicity, whether the State has participated in the adverse nature of the publicity, and whether it is likely that a fair jury can be selected regardless of the publicity. Here , \*\*\*\*\*

Thus, the court should grant the motion for change of venue.

Motions for change of venue are controlled by statute. Sec. 971.22, STATS., provides:

**971.22 Change of place of trial.**

(1) The defendant may move for a change of the place of trial on the ground that an impartial trial cannot be had in the county. The motion shall be made at arraignment, but it may be made thereafter for cause.

(2) The motion shall be in writing and supported by affidavit which shall state evidentiary facts showing the nature of the prejudice alleged. The district attorney may file counter affidavits.

(3) If the court determines that there exists in the county where the action is pending such prejudice that a fair trial cannot be had, it shall order that the trial be held in any county where an impartial trial can be had. Only one change may be granted under this subsection. The judge who orders the change in the place of trial shall preside at the trial. Preliminary matters prior to trial may be conducted in either county at the discretion of the court. The judge shall determine where the defendant, if he or she is in custody, shall be held and where the record shall be kept. If the criteria under s. 971.225 (1) (a) to (c) exist, the court may proceed under s. 971.225(2).

A court must grant a change of venue whenever the pretrial publicity creates a reasonable likelihood that a fair trial cannot be had. See *Briggs v. State*, 76 Wis. 2d 313, 325, 251 N.W.2d 12 (1977).

In reviewing an order deciding a motion for change of venue due to pretrial publicity, the Court of Appeals in, *State v. Albrecht*, 184 Wis.2d 287, 306, 516 N.W.2d 776 (Ct.App. 1994), wrote that the Court of Appeals will consider:

(1) the inflammatory nature of the publicity, (2) the timing and specificity of the publicity, (3) the degree of care exercised, and the amount of difficulty encountered, in selecting the jury; (4) the extent to which the jurors were familiar with the publicity; (5) the defendant's utilization of peremptory and for cause challenges of jurors; (6) the State's participation in the adverse publicity; (7) the severity of the offense charged; and (8) the nature of the verdict returned.

Attached is a sampling of the pretrial publicity in this matter. The appendix, by no means, purports to be a complete accounting of all pretrial publicity. Rather, it is a sampling of the nature of publicity. The appendix does not set forth the publicity that occurred on television and radio. This will require an evidentiary hearing at which the

relevant audio and video will be presented. Just as significantly, the appendix does not set forth the treatment this case has received by the "bloggers" on the word wide web.

### **A. The timing and specificity of the publicity**

The publicity occurred immediately and it is on-going with every development in the case. Each of the articles sets forth the alleged facts of the armed robbery. Significant to Gonzalez's defense is the media's apparent belief that the shooting occurred when the car alarm sounded.<sup>1</sup>

Even more important, though, are the political implications of this case. On January 27, 2008- the day after the incident- the *Milwaukee Journal-Sentinel* published an article by Thomas Daykin in which Daykin discusses the implications that the homicide will have on Miller Brewing Company's decision to locate its headquarters in Milwaukee. The article recites the "quality of life" is one of the factors that large corporations, such as Miller, consider when making such decisions. Daykin wrote, "[T]he desire for a low crime rate was No. 1 among the quality of life factors, said the survey." Miller Briewing Company offered a reward for the capture of the persons who committed the robbery.

It goes without saying, of course, that Miller Brewing Company is not only a large employer in the Milwaukee area it is a company that is virtually an icon of Milwaukee's identity. Thus, many citizens of Mllwaukee County believe that this crime had broader implications that simply a robbery-murder- it is an attack at the very identity of Milwaukee.

On this point, the *Milwaukee Journal-Sentinel* "Sunday Symposium" sets forth a number of letters to the editor in which citizens express such sentiments as, "If Milwaukee loses Miller, what will happen next? Harley Davidson?" (Jeff Call). Tony Randazzo wrote:

The men accused of murdering Lodewikus "Vic" Milford in Walker's Point were on probation for violent crimes, according to Milwaukee police. One was on probation

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<sup>1</sup> See, for example, the WTMJ article by Jon Byman in which Byman summarizes each of the defendants' confessions and suggests that the shooting occurred "shortly" after the car alarm sounded. This is contrary to the witness accounts in the discovery materials.

for a drug crime, and the other for robbery. If these men had been in prison, where they belong, the senseless murder would not have occurred. When are the judges who give out these intolerable sentences to known gang members - and other repeat offenders - going to be held responsible? A lot of violent crimes would be prevented by violent offenders being put in prison and not back out on the streets after a slap on the wrist. Is this what we call justice now? I think the families of the victims would disagree.

Consequently, the media accountings have been extremely negative. For example, the WTMJ article sets forth that, "The complaint says the shooter laughed about what he did."

**B. The degree of care exercised, and the amount of difficulty encountered, in selecting the jury**

The remaining factors, including this factor, all relate to appellate review of the trial court's discretionary determination of a motion for change of venue. That is, these factors may only be discussed prospectively. The degree of difficulty in selecting a jury, though, is an important factor despite the prospective nature of the discussion.

Firstly, if the court denies Gonzalez's motion for severance, the court will be required to seat not one but two juries (including at least one alternative juror on each jury). This will require the court to provide between twenty-six and twenty-eight jurors who have not been jaded by the extensive publicity this case has received.

Moreover, the method of jury selection should be considered. Where the issue is pretrial publicity each panel member must be examined individually outside the presence of the remaining panel members. This process, alone, will take several days.

**C. The extent to which the jurors were familiar with the publicity**

Again, this factor may only be discussed prospectively; however, given the massive amount of publicity in this case, and given the apparently voracious appetite of the public for news about this case, it is likely that most- if not all- of the prospective

jurors will be familiar with the case.

#### **D. The defendant's utilization of peremptory challenges**

The use of peremptory challenges, alone, is not likely to off-set the prejudice of the pretrial publicity- especially if two juries are being chosen. This factor is directly related to the nature and the extent of the publicity. If publicity is massive and primarily negative then it follows that most, if not all, of the panel members will be affected by it. If this is the case then the statutory peremptory strikes provided to the defendants are insufficient to remove all prejudiced jurors.

#### **E. The State's participation in the adverse publicity**

Gonzalez is unable to establish that the State participated in any unusual manner in the pretrial publicity; however, in any newsworthy case the defendant is faced with the problem that the media recite the allegations of the criminal complaint as though it is fact and the Supreme Court Rules prohibit defense counsel from commenting publicly on the testimony of any particular witness. Thus, in every high publicity case the information is uniformly the State's version of the case.

#### **F. The severity of the offense charged**

Not only is felony murder an extremely serious charge this case has political overtones that affect the public in general. Thus, it is difficult to imagine a more serious offense.

### **II. In the alternative the court should order that a jury panel be draw from another county.**

Sec. 971.225, STATS., provides:

**971.225 Jury from another county.**

(1) In lieu of changing the place of trial under s. 971.22 (3), the court may require

the selection of a jury under sub. (2) if:

(a) The court has decided to sequester the jurors after the commencement of the trial, as provided in s. 972.12;

(b) There are grounds for changing the place of trial under s. 971.22 (1); and

(c) The estimated costs to the county appear to be less using the procedure under this section than using the procedure for holding the trial in another county.

(2) If the court decides to proceed under this section it shall follow the procedure under s. 971.22 until the jury is chosen in the 2nd county. At that time, the proceedings shall return to the original county using the jurors selected in the 2nd county. The original county shall reimburse the 2nd county for all applicable costs under s. 814.22.

Thus, if the court decides to grant Gonzalez's motion for change of venue and his motion to sequester the jury, the court must compare the costs and decide whether to conduct the trial in another county or to simply draw a jury panel from another county.

### **III. The court must sequester the jury**

Sec. 972.12, STATS provides:

**972.12 Sequestration of jurors.** The court may direct that the jurors sworn be kept together or be permitted to separate. The court may appoint an officer of the court to keep the jurors together and to prevent communication between the jurors and others.

Whether to grant a motion to sequester the jury is a matter left to the trial court's discretion. ***State v. Wilson***, 149 Wis.2d 878 440 N.W.2d 534 (1989) There is no case law guiding the court's exercise of discretion in this regard. It is not necessary in this case.

It is a practical certainty that, wherever the jury panel is ultimately drawn from, there will be daily media coverage of the trial. The coverage will be in both the print



media and in the broadcast media.

For these reasons, the court should sequester the jury during the trial of this matter.

### **Conclusion**

The court should order that the place of this trial be changed due to excessive pretrial publicity. The court should then conduct a cost analysis of whether it is preferable to physically relocate the trial to another county or, rather, to merely draw a jury panel from another county. Regardless of whether the place of the trial is changed, the court should sequester the jury during the trial.

Dated at Milwaukee, Wisconsin, this \_\_\_\_\_ day of \_\_\_\_\_, 2008:

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