

State of Wisconsin,

Plaintiff,

v.

Case No. 2008CF000567

Miguel Ayala, and  
Carlos Gonzales,

Defendant.

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**Motion to Suppress Evidence Seized as a Result of a Warrantless Search of the Home of Irene Rodriguez**

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PLEASE TAKE NOTICE that on the 28th day of April, 2008, at 9:30 a.m., or as soon thereafter as counsel may be heard, the above-named defendant will appear before that branch of the Milwaukee County Circuit Court presided over by the Honorable Jeffrey Wagner, and will then and there move the court as follows:

1. For leave of the court to file this motion *instanter*; and
2. To suppress all evidence seized by police as a result of the warrantless search of the residence at 1038 S. 11th St., Milwaukee, Wisconsin on January 29, 2008 where the defendant, Carlos Gonzalez, was arrested. Specifically, Gonzalez seeks to suppress the statement he later gave to police detectives following his arrest; and
3. To compel the state to identify the informant who told the police that he had a conversation with Gonzalez about the incident.

As grounds, the undersigned shows to the court as follows:

4. That there are nearly 1000 pages of discovery in this case. Initially counsel's efforts in this case were devoted to researching and briefing the "dual jury" issue. This was pursuant to the court's order that this issue be resolved early on in the case. After that it was necessary for counsel to listen to many hours of police interrogations.

Counsel only recently completed his review of the written discovery materials. The trial is over four weeks away and this matter is already set for an evidentiary hearing on April 28, 2008. Therefore, permitting Gonzalez to file this motion *instanter* will not delay the matter. Moreover, the issue presented here is a substantial issue of constitutional law.

5. That counsel's review of the discovery materials revealed the existence of the issue that is set forth in this motion.

6. That on January 29, 2008 two individuals went to the District 2 police station and claimed to have information concerning the persons who committed the robbery and homicide that is alleged in the complaint in this case.

7. One of the persons<sup>1</sup> told police that he had a conversation with Gonzalez early in the evening of January 25, 2008 (the night of the incident) in which Gonzalez asked the informant whether he wanted to go on a mission (which the informant took to mean a robbery). The following day the informant was with Gonzalez and he told the informant that he (Gonzalez) had done a robbery the night before. They then checked the internet for any news coverage. They found a photograph of the deceased (Milford) and, according to the informant, Gonzalez said that this was the man they robbed though he was surprised that anyone was killed.

8. Based on this information the police determined that Gonzalez had a girlfriend named Irene Rodriguez. Police went to the home of Irene Rodriguez, where Gonzalez had spent the previous night, and there they encountered Gena Rodriguez in the front yard of the residence. Gena Rodriguez indicated that Gonzalez was in the home. Police knocked on the door and, when there was no answer, they kicked in the door and arrested Gonzalez. The police did not have a warrant to arrest Gonzalez nor did they

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<sup>1</sup> Although the state has made no claim that the person is a confidential informant the name of the person is blacked out in the copy of the discovery materials served on counsel.

have a warrant to search the Rodriguez home.

This motion is further based upon the attached Memorandum of Law.

Dated at Milwaukee, Wisconsin this \_\_\_\_\_ day of April, 2008.

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**Memorandum of Law in Support of Motion to Suppress Evidence Seized as a  
Result of a Warrantless Search of the Home of Irene Rodriguez**

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**Introduction**

The defendant, Carlos Gonzalez ("Gonzalez") is charged with felony murder arising out of an incident that occurred in Milwaukee in the early morning hours of January 26, 2008. Two men robbed a man and two women in a parking lot on Milwaukee's near south side. At the conclusion of the robbery the man was shot and killed while seated in his automobile.

Police began an intensive investigation into the matter. On January 29, 2008 two men appeared at the district two police station and claimed that they had information concerning the identity of the persons who committed the robbery and homicide. One of the informants told police that he was an acquaintance of Gonzalez and that he had done armed robberies with Gonzalez in the past. In the early evening of January 25, 2008 the informant encountered Gonzalez in an alley. Gonzalez was in a car with another man known as "Guerro" (believed to be Miguel Ayala). Gonzalez purportedly asked the informant whether he (the informant) wanted to go on a mission. The informant told police that he understood this to mean an armed robbery. The informant says that he declined the offer.

The following day the informant was with Gonzalez again. Gonzalez told the

informant that he (Gonzalez) and Guerro had done an armed robbery right there in the neighborhood. According to the informant, Gonzalez described robbing a man and two women with Guerro. The two then went on the internet to see whether there was news coverage. The two then saw a victim of Vic Milford (the homicide victim in this case) and Gonzalez exclaimed that this was the man they robbed. According to the informant when Gonzalez learned that Milford had been killed he (Gonzalez) was surprised and angry. Gonzalez was apparently unaware that anyone had been hurt.

Based on this information the police continued their investigation into Gonzalez. They learned that Gonzalez had a girlfriend named Irene Rodriguez. The police went to Rodriguez' home. In the front yard of the residence the police encountered Gena Rodriguez who told them that Gonzalez was, in fact, within the residence. Police knocked on the door and, when they got no answer, they burst through the door. They arrested Gonzalez in the living room of the residence.

Gonzalez was taken to the police station where he was interrogated on three occasions over the course of many hours. Gonzalez made statements implicating himself in the robbery.

As will be set forth in more detail below, Gonzalez was an overnight guest and, therefore, he has standing to challenge the warrantless entry into the Rodriguez home. The warrantless entry was unreasonable because even though the police may have had probable cause to believe that Gonzalez was involved in the Milford incident there were no exigent circumstances that permitted the warrantless entry. Gonzalez' statements to the police were as a direct result of the illegal arrest and, therefore, must be suppressed.

## Argument

### **I. The warrantless entry into the Rodriguez home was unreasonable and, therefore, Gonzalez' statements to the police must be suppressed.**

#### **A. Rodriguez has standing to challenge the entry**

Whether a person has "standing" to challenge a search requires a two-part inquiry as follows:

We analyze the question under the general approach for determining whether a person has a reasonable expectation of privacy in an area where evidence is gathered. Whether a person has a reasonable expectation of privacy depends on (1) whether the individual has exhibited an actual, subjective expectation of privacy in the area inspected and in the item seized, and (2) whether society is willing to recognize such an expectation of privacy as reasonable.

*State v. Thompson*, 222 Wis. 2d 179, 185-86, 585 N.W.2d 905 (Ct. App. 1998) An "overnight guest" is entitled to raise a Fourth Amendment challenge under *Minnesota v. Olson*, 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990).

Here, Gonzalez was an overnight guest in Rodriguez's home. In fact, in his statement to the police he told them that he had spent the previous night there. Therefore, Gonzalez has standing to challenge the warrantless entry in to the Rodriguez home.

#### **B. The warrantless entry was unreasonable**

Warrantless searches "are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions" that are "jealously and carefully drawn." *State v. Boggess*, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983) (citations omitted).

"It is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" *Welsh v. Wisconsin*, 466 U.S. 740, 748, 80 L. Ed. 2d 732, 104 S. Ct. 2091 (1984). A fundamental safeguard against unnecessary invasions into private homes is the Fourth Amendment's warrant requirement, imposed on all governmental agents who seek to enter the home for purposes of search or arrest. *Id.* It is not surprising, then, that the United States Supreme Court has recognized that all warrantless searches and seizures inside a

home are presumptively unreasonable. *Welsh*, 466 U.S. at 748-49.

The police bear a heavy burden when trying to establish an urgent need justifying warrantless searches. *Welsh*, 466 U.S. at 749-50. Before the government may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *Id.* at 750. Four factors have been identified that, when measured against the time needed to obtain a warrant, constitute the exigent circumstances required for a warrantless entry: (1) an arrest made in "hot pursuit"; (2) a threat to the safety of a suspect or others; (3) a risk that evidence would be destroyed; and (4) a likelihood that the suspect would flee. *State v. Smith*, 131 Wis. 2d 220, 229, 388 N.W.2d 601 (1986). There is no "homicide exception" to the exigent circumstances requirement. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) Therefore, the fact that he police were investigating a homicide does not permit the warrantless entry.

Here there simply were no exigent circumstances. The police were not in hot pursuit and they had no reason to believe that Gonzalez posed an immediate threat to the persons within the home. Nothing of the sort was told to them by Gena Rodriguez. There was no specific reason to believe that Gonzalez would flee if the police took the time to obtain a warrant.

Thus, the warrantless entry into the Rodriguez home was patently unreasonable.

### **C. Gonzalez's statements to police were the fruit of the poisonous tree**

At the outset a distinction must be made between statements made which are found to be voluntary for fifth amendment purposes and statements which are the product of a person's "free will" so as to be sufficiently purged of the taint of the unlawful conduct under the fourth amendment. Statements made to the police may be voluntary for fifth amendment purposes, regardless of prior police misconduct, but their voluntariness for fourth amendment purposes is merely a threshold requirement. *Dunaway v. New York*, 47 U.S. U.S.L.W. 4635, 4640 (June 5, 1979); *Brown v. Illinois*, 422 U.S. at 604. Indeed, if the fifth amendment had been violated, the fourth amendment issue would not have to be reached. But Gonzalez does not claim that his

fifth amendment rights were violated. His statements were voluntary for fifth amendment purposes. The issue is whether they were freely given for fourth amendment purposes. Under the fourth amendment, the relevant inquiry is "whether [the] statements were obtained by exploitation of the illegality of [the police conduct]." *Brown v. Illinois*, 422 U.S. at 600. If there is a close causal connection between the illegal conduct and the statements, the statements are inadmissible under the fourth amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640; See *Brown v. Illinois*, 422 U.S. 603-04. To permit the admission of a statement and evidence obtained by police exploitation of their own illegal conduct would destroy the policies and interests of the fourth amendment. *Dunaway v. New York*, 47 U.S.L.W. at 4640-41; *Brown v. Illinois*, 422 U.S. at 602.

Here, although Gonzalez was given the Miranda warning and his statements were "voluntary" for fifth amendment purposes, there is no doubt that the police interrogation was plainly an exploitation of their earlier illegal entry into the Rodriguez home. Thus, the statements must be suppressed.

## **II. The court must compel the state to identify the informant.**

The state possesses a limited privilege to keep confidential the identity of informants. See, Sec. 905.10, Stats. By blacking out the name of the informant in this case the state apparently intends to invoke this privilege. As will be set forth in more detail below, though, the informant is a transactional witness because he made observations about Gonzalez during the relevant period.

Where an informant is a transactional witness the court's discretion is severely limited. In, *State v. Outlaw* 108 Wis.2d 112, 321 N.W.2d 145, 158 (Wis. 1982) the Supreme Court explained:

. . . . [T]he failure upon request to produce evidence or witnesses, whether an informer or not, that may be favorable to an accused where the evidence is relevant to guilt or innocence violates due process. *Brady v. Maryland*, supra 373 U.S. at 86, 83 S.Ct. at 1196. *Outlaw*, therefore, upon demand, had the right, upon the mere



showing that the informer was present at the transaction--especially because identity was the defense--to have a determination of whether or not the informer "may be able to give testimony necessary to a fair determination of the issue of guilt or innocence."

Here, the informant is plainly a transactional witness. Firstly, the informant claims to have been present during the planning phase of the robbery. That is, he claims to have been present in the alley on the night of the robbery, made observations of who was in the car and who was armed, and was recruited to participate.

More important, though, is the fact that on the day following the robbery/homicide the informant had a conversation with Gonzalez and was able to observe Gonzalez's reaction when he (Gonzalez) learned that the victim had been killed. Gonzalez was surprised and angry. This is consistent with Gonzalez's theory of defense that he had withdrawn from the crime prior to any shots being fired.

Thus, the informant is not only a transactional witness but his testimony is helpful to Gonzalez's defense. Therefore, the court must order the state to identify the informant.

Dated at Milwaukee, Wisconsin this \_\_\_\_\_ day of April, 2008.

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