

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH I

MANITOWOC COUNTY

STATE OF WISCONSIN,

Plaintiff,

MANITOWOC COUNTY  
STATE OF WISCONSIN  
**FILED**

MEMORANDUM OF STATE  
OF WISCONSIN REGARDING  
DEFENDANT'S MOTION FOR  
CHANGE OF VENUE

vs.

JUL 31 2006

STEVEN A. AVERY,

Defendant.

CLERK OF CIRCUIT COURT

Case No. 05-CF-381

**BACKGROUND**

On January 17, 2006, the defendant (through his attorneys Erik Loy and Craig Johnson) entered a not guilty plea at the arraignment, and also moved the Court for a change of venue, anticipating that the "final" decision on whether the defendant wished a jury from outside of Manitowoc County would be made sometime prior to trial.

When substitute counsel became involved in the case, and at the urging of the trial court, Attorney Strang informed the Court in correspondence dated April 12, 2006, that "Mr. Avery does not withdraw his motion for change of venue." In what has become a common admonition, Mr. Strang indicated that his client hoped to be able to withdraw the motion for change of venue before trial and suggested a delay in the proceedings.

Mr. Strang was successful in convincing the Court that an extension of motions was prudent, and requested the Court "allow the defense until June 16 to state decisively whether it prefers a Manitowoc County jury or wishes a jury from a distant county (see defendant's Motion to Extend, paragraph 10(f), dated April 21, 2006) (emphasis added). The Court granted the defense request, presumably accepting Attorney Strang's representation that some decisive change of venue position would be forthcoming.

Instead, in correspondence dated June 15, 2006, Attorney Strang placed conditions upon the defendant's request for change of venue, requesting the Court first rule on the

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defense motion to dismiss and motion for continuance. As if those conditions were not enough to require the trial court “guess” as to whether the defendant wished a change of venue, the defense now seeks to request a jury from another county if, and only if, the Court relinquishes its statutory authority to require the selection of a jury from another county, and have the matter tried in Manitowoc (under the authority of § 971.225, Wis. Stats).

Stated another way, the defendant seeks to “conditionally waive” his right to be tried by a Manitowoc County jury, and somehow feels empowered to require the Court to ignore its statutory mandate under § 971.225.

The State argues that the Court (and State, for that matter) once again are forced to guess at the defendant’s position regarding change of venue; is the defendant asking for a change of venue or not?

The State has urged the trial court require the defendant to indicate unequivocally whether he is requesting a change of venue (and waiving his right to be tried with a Manitowoc County jury) or not. The State takes this final opportunity to urge the Court submit that very question to the defense before deciding this issue.

### **CONDITIONAL WAIVER OF CONSTITUTIONAL RIGHTS**

In correspondence dated July 14, 2006, Attorney Strang claims that the defendant has an absolute right to “conditionally waive” a constitutional right, providing some examples that bear little resemblance to this Court’s required analysis.

Obviously, the State concedes that it is the defendant’s right alone to request change of venue; it is similarly the defendant’s right alone to waive his constitutionally protected right to be tried by a Manitowoc County jury. The State argues, however, that the defense is in no

position, legally or practically, to impose conditions or restrictions upon that waiver, should it occur.

As an example, should a defendant waive his right to silence (and choose not to invoke his Fifth Amendment rights against self-incrimination at trial), and take the witness stand and testify at trial, a defendant could not condition that waiver requiring that the State not cross-examine him, or not ask him any hard questions. Either you waive your Fifth Amendment rights at trial or you don't!

Interestingly, a defendant in Minnesota attempted to invoke a "conditional waiver" of his Fifth Amendment rights to testify at trial, after which the Minnesota Supreme Court commented on that attempt. In its concurring opinion, the Court wrote: "I am not aware of any case law that would allow a defendant . . . to make a conditional waiver of his Fifth Amendment rights, testify to his version of the facts, and then seek to reinstate his Fifth Amendment rights if the attempt to suppress evidence is successful on appeal." State v. Jones, 678 N.W.2d 1, 26 (Minn., 2004).

Other absurd examples of conditional waiver come to mind, including a defendant agreeing to waive his right to trial and plead guilty, only if the judge promises a specific disposition. Either the defendant waives his right to trial or he doesn't!

### **FORUM SHOPPING**

Attempts by criminal defendants to select a jury from one county over another is often referred to as "forum shopping."

In a Mississippi homicide prosecution against a defendant named Simon, the defendant moved for change of venue, which was granted by the Court. After the Court selected the county in which the case would be tried, Simon attempted to have the trial

returned to the original county, as he believed the jury panel would be more “favorable” to the defense there. In recognizing that Simon was engaging in “forum shopping” (a tactic apparently not limited to the State of Mississippi), the Mississippi Supreme Court noted that it appeared [the defendant] wanted the best of both worlds, and found that he could not move the case from the new county to the old county, after his “successful” change of venue. See Simon v. State, 688 So.2d 791, 806 (Miss., 1997).

According to Attorney Strang in correspondence to this trial court, Mr. Avery “interposes conditions precedent to his waiver of his constitutional right” and if unacceptable to the Court, the defense invites the Court to reject those conditions, and require Avery to try the case in Manitowoc County, with a Manitowoc County jury.

What if Mr. Avery told the Court that he would accept a change of venue if, and only if, the trial were held in Polk County? Does the defense believe it would be empowered to eliminate the Court’s statutory authority on deciding the manner in which change of venue would be accomplished there? If not, it should be clear to all parties involved that after a motion for change of venue is presented (and presumably after a Court agrees that change of venue is necessary), it is the Court’s responsibility to select the county from which a jury will be selected (§ 971.22), and thereafter decide whether the selected jury should remain, or be transported to the original county for trial (§ 971.225).

#### **STATE’S POSITION (FIRST PREFERENCE)**

Should the Court agree that the factors requiring change of venue have been established by the defense (a position the State at this time does not concede, and which will address in the alternative later), the State argues that the Court should grant the defendant’s

request for change of the place of trial, select a jury, and physically try the matter in Calumet County, Wisconsin.

The only reason provided by the defense to object to the jury being impaneled and trial held in Manitowoc County is the oversight which may occur by the jury from members of the Manitowoc County Sheriff's Department. As no such concerns or complaints have been lodged by the defendant against Calumet County authorities, there should be no objection to oversight of the jury, and the trial itself being held, at the Calumet County Courthouse.

In correspondence dated February 1, 2006, this writer suggested to the Court that the physical place of trial could occur in Calumet County, setting forth 11 specific reasons for that suggestion (including the defendant being physically housed at the Calumet County Jail; lower law enforcement costs to both Manitowoc and Calumet Counties regarding security and transport; convenience for counsel; support staff availability; defense attorney space available; physical space for witnesses, family members and media; availability of media technology; physical size and technological amenities of court facilities; court space and judicial chambers; proximity to physical evidence; and jury facilities within the City of Chilton). Those factors remain as applicable today as they did on February 1.

#### **HALBACH FAMILY'S CONCERN TO REMOTE LOCATION OF TRIAL**

Attached to this memorandum is an affidavit of Tim Halbach, a representative of the Halbach family, setting forth specific hardship which the victim's family would endure should this Court move the physical location of the trial to a remote county. Victims in Wisconsin have constitutionally protected rights, which include the right to attend court proceedings, the right to have their interests considered when the Court decides whether to grant a continuance, and a right to speedy disposition of their case (§ 950.04(1v), Wis. Stats.).

The Wisconsin legislature intends that victims in Wisconsin have their rights protected as vigorously as those of criminal defendants (see § 950.01, Wis. Stats.).

Obviously, should a change of venue occur, and the Court decide the best approach would be to move the entire trial to some remote location in Wisconsin, the victim's right to attend the proceedings would be seriously jeopardized. The State argues that the cost to the county (as considered in § 971.225(1)(c)) may also include costs that the victim's family must absorb upon moving such a large and lengthy trial to a far-away location.

The State further argues that should Calumet County be selected as the place of trial, the Court may decide not to sequester jurors during this six-week trial (as contemplated in § 972.12) and allow jurors the opportunity to enjoy a relatively "normal" life during their important jury service.

Finally, if the Court grants the defendant's request to move the place of trial (in this instance to Calumet County), the defendant would be precluded from further "forum shopping," as the request for change of venue can only occur one time, pursuant to § 971.22(3), Wis. Stats.

#### **STATE'S SECOND PREFERENCE**

Should the Court reject the State's invitation to move the place of trial to Calumet County, and further reject the defendant's claim of a right to impose conditions on his waiver of constitutional right to be tried by a Manitowoc County jury, the State requests the Court grant the defendant's motion for change of venue (§ 971.22), however, order selection of a jury from another county, and physically try the matter in Manitowoc County (pursuant to § 971.225).

The State has already argued the victim's right to attend trial, which applies equally to this suggestion. The Court is already in possession of estimated costs to Manitowoc County should this trial be held in Manitowoc versus some remote Wisconsin county, and it should be crystal clear that the estimated costs to Manitowoc County would be far less using the procedure set forth in § 971.225, rather than moving the entire trial to a remote county.

The State asks the Court consider the number of witnesses required to travel, transport of physical evidence, citizens who wish to attend the trial (from both the victim and defendant's side of the case), and other logistical costs, both financial and practical, which would certainly surface should this trial be moved to another location.

As previously stated, the State argues that it is the Court vested with the sole authority to consider the relative costs associated with selecting a jury and sequestering them in Manitowoc County (pursuant to § 972.12) rather than requiring the defendant, court personnel, counsel, support staff, witnesses and other necessary parties travel to the trial's location.

### **STATE'S THIRD PREFERENCE**

Should the Court agree with the defense that Mr. Avery can place upon this Court conditions on his waiver of right to be tried in Manitowoc County, the State urges the Court accept Mr. Strang's invitation to "reject one or more of Mr. Avery's conditions, and deny the conditional waiver of the right to trial in the vicinage." The trial therefore would occur in Manitowoc County, with a Manitowoc County jury.

The victims' right to attend the proceedings would still be ensured under this procedure. The Court could hereafter decide whether sequestration of the jurors would be

required under § 972.12; a discussion more appropriately conducted after the jury questionnaire process has been engaged.

Although the defense suggests this as a discretionary option for the Court, the State encourages the Court consider those factors relevant to the decision to change venue, and make specific findings of fact that a change in the place of trial is not required (nor established by materials submitted by the defense).

### **CHANGE OF VENUE NOT REQUIRED**

As set forth in State v. Fonte, 281 Wis. 2d 654 (2005), factors to be considered by the Court regarding change of venue include:

1. The inflammatory nature of the publicity.
2. The timing and specificity of the publicity.
3. Difficulty in selecting a jury.
4. The extend to which jurors are familiar with the publicity.
5. The defendant's use of preemptory challenges.
6. The State's participation in any adverse publicity.
7. The severity of the offense.
8. The nature of the verdict.

Although many factors may only be determined at the time jury selection is attempted, use of a specific jury questionnaire should assist the Court in making appropriate findings.

The State argues that the nature of the publicity, to date, has mostly been objective, factual and non-editorial reporting which may inform jurors, but which has not been intended to create bias or prejudice. The State recognizes that the sensational facts of this case have caused intense media attention, and that the defendant's degree of "celebrity" obtained prior to November, 2005 has contributed to public interest. The State argues that local media has taken great care to report both sides of this case, and has not engaged in "rabble rousing" or attempts to influence public opinion.



The State argues that media attention occurred more during the early stages of the investigative and charging process, which will be almost one year before the jury trial commences. Although difficult to predict future publicity, the Court can note care taken by the attorneys in this case to insulate possible jurors from inadmissible evidence, and restraint used in making any public comments.

Each party will be granted preemptory challenges; the severity of the offense will certainly be considered in granting challenges, for cause.

Finally, the Court may wish to note the State's compliance with SCR 20:3.6 in generally limiting comments about the case to those facts contained in public documents (the Criminal Complaint), and that the State has refrained from making any public comment since the announcement of criminal charges against Steven Avery and Brendan Dassey. The Court may recognize the difficulty in satisfying the public's right to information in such a high profile case, and consider the care taken to insulate potential jurors from prejudicial information, of the type likely to form opinions regarding the guilt or innocence of the accused. The Court may also wish to note the State's efforts to remind potential jurors of a suspect's presumption of innocence before dissemination of publicly available information.

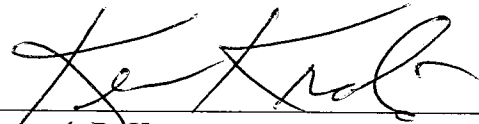
For the above-stated reasons, the State argues that should the Court believe a Manitowoc jury is appropriate to hear this matter, ample evidence exists for the Court to make specific findings that change of venue is not required.

### CONCLUSION

Should the Court conclude the defendant is, in fact, requesting a change of venue, the State asks the Court:

1. Grant the change of venue and order the trial to be held in Calumet County, with a Calumet County jury;
2. Grant the defendant's motion for change of venue, select a jury from a remote county, and try the case with a sequestered jury in Manitowoc County;
3. Grant the defendant's invitation for the Court to reject his conditional waiver and try the case in Manitowoc County;
4. Make specific findings of fact, and conclusions of law, demonstrating the defendant's failure to have established the requirement of a change of venue.

Respectfully submitted this 21<sup>st</sup> day of July, 2006.



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