

State of Wisconsin,

Plaintiff,

v.

Case No. 2008CF000567

Miguel Ayala, and  
Carlos Gonzales,

Defendant.

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**Motion for Severance and Memorandum in Opposition to State's Motion for Dual  
Juries**

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Now comes the above-named defendant, Carlos Gonzales, by his attorney,  
Jeffrey W. Jensen, and hereby moves the court as follows:

1. For severance from the defendant Miguel Ayala.

This motion is based upon the attached Memorandum of Law.

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

Law Offices of Jeffrey W. Jensen  
Attorneys for the Defendant

By: \_\_\_\_\_  
Jeffrey W. Jensen  
State Bar No. 01012529

633 W. Wisconsin Ave.  
Suite 1515  
Milwaukee, WI 53203

414.224.9484  
www.jensendefense.com

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**Memorandum in Opposition to State's Motion for Dual Juries**

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**Introduction**

The charges in this case arise out of an incident that occurred in Milwaukee on January 26, 2006. Three women and a man had left a night club on Milwaukee's south side when they were approached by two men. One of the men (believed to be the defendant Miguel Ayala) had a gun and demanded money from the man, Vic Milford ("Milford"). The other robber (believed to be the defendant, Carlos Gonzalez) stood by apparently as a look-out. During the course of the robbery Milford's car alarm went off. Some time after the alarm sounded two shots were fired and Milford was killed.

The defendants in this case are charged, respectively, with three counts of armed robbery and first degree intentional homicide (Ayala) and with felony murder (Gonzalez). Each of the defendants was interrogated by the police and made inculpatory admissions. The State concedes that this amounts to a so-called "Bruton" problem because one defendant's confession cannot be offered against the co-defendant. See, *Bruton v. United States*, 391 U.S. 123 (1968) In this situation severance is mandatory.<sup>1</sup>

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<sup>1</sup> Sec. 971.12(3), Stats., provides, in part, that, "The district attorney shall advise the court prior to trial if the district attorney intends to use the statement of a codefendant which implicates another defendant in the crime charged. Thereupon, the judge shall grant a severance as to any such defendant."

Rather than sever the defendants, though, the court has ordered that the matter be tried before "dual juries". Wisconsin has approved of the use of dual juries where the only factor requiring severance is the Bruton problem. Courts have referred to this as "partial severance".<sup>2</sup>

Gonzalez, though, for the reasons set forth below, seeks *full* severance. Partial severance addresses the Bruton problem; however, Ayala and Gonzalez are likely to present antagonistic defenses to the charges relating to the shooting of Milford. Ayala will argue that he was startled by the car alarm and recklessly fired the fatal shot (i.e. he never formed the intent to kill). Gonzalez, on the other hand, will present evidence that he was startled by the car alarm and ran away from the scene. The evidence in the case suggests that the shots were not fired until nearly two minutes after the car alarm sounded. Thus, the defendants' defenses are antagonistic because they cannot both be true.

## **Argument**

### **I. The "Bruton problem" is not the only prejudice that Gonzalez suffers because of joinder- only full severance will insure Gonzales a fair trial.**

The court may try defendants together when they are charged with the same offenses arising out of the same transactions and provable by the same evidence. *Haldane v. State*, 85 Wis. 2d 182, 189, 270 N.W.2d 75, 78 (1978). Relief from prejudicial joinder of defendants is governed by Sec. 971.12(3), Stats. That section provides:

If it appears that a defendant or the state is prejudiced by a joinder of crimes or of defendants in a complaint, information or indictment or by such joinder for trial together, the court may order separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

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<sup>2</sup> See, e.g., *United States v. Hayes*, 676 F.2d 1359, 1366 (11th Cir. 1982); *United States v. Rowan*, 518 F.2d 685, 689 (6th Cir. 1975); *United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir. 1972); *Hedlund v. Sheldon*, 173 Ariz. 143, 840 P.2d 1008, 1009 (Ariz. 1992); *People v. Cummings*, 4 Cal. 4th 1233, 850 P.2d 1, 35 (Cal. 1993); *People v. Hana*, 447 Mich. 325, 524 N.W.2d 682, 693 (Mich. 1994); *People v. Ricardo B.*, 73 N.Y.2d 228, 535 N.E.2d 1336, 1338, 538 N.Y.S.2d 796 (N.Y. 1989).

The question of severance is within the trial court's discretion and will not be reversed absent a misuse of discretion. *Haldane*, 85 Wis. 2d at 189, 270 N.W.2d at 78. Consolidation of defendants avoids repetitious litigation and promotes the speedy administration of justice; however, if a joint trial would be unduly prejudicial to the interests of the defendants, administrative efficiency must yield to the mandates of due process. *Id.* at 189, 270 N.W.2d at 79.

At the outset it must be emphasized that Migual Ayala ("Ayala") and Carlos Gonzalez ("Gonzalez") are *not* charged with the same offense. Rather, Ayala is charged with three counts of armed robbery and first degree intentional homicide. Gonzalez, on the other hand, is charged with felony murder. Gonzalez must concede, though, that the charges arise out of the same incident and, therefore, the defendants are properly joined in the first instance. For the reasons set forth below, though, Gonzalez is unfairly prejudiced by joinder because the defendants have antagonistic defenses. Partial several (i.e. dual juries) cannot alleviate the prejudice. Therefore, the court should grant full severance.

**A. Although approved of by the appellate courts the trial court has little guidance in deciding when to use dual juries.**

In, *State v. Avery*, 215 Wis. 2d 45, 571 N.W.2d 907 (Ct. App. 1997) the court of appeals determined that a trial court may conduct simultaneous trials of two defendants before two juries in order to "'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial,'" *id.* at 51, provided that the court take precautions to exclude the jury of one defendant from the court during the presentation of evidence inadmissible as to that defendant," *id.* Unfortunately, the court of appeals offered no real guidance as to how, short of hearing all the testimony, the trial court should go about determining, ahead of time, what evidence is admissible as to each defendant.

Where the only issue raised by the parties is the so-called Bruton problem the analysis is somewhat simpler. To be sure, there is a Bruton problem in this case. However, where numerous other reasons for severance exist the the pretrial analysis of

whether partial severance will grant each defendant a fair trial is made exceedingly more complicated.

### **B. Gonzalez and Ayala are likely to present antagonistic defenses.**

The court must order severance of defendants where it appears that the defendants are likely to present antagonistic defenses. Although at this point it is difficult for Gonzalez to predict with any certainty the defense that Ayala will present it seems likely that Ayala will defend the charge of first degree intentional homicide by arguing to the jury that he never formed the intent to kill.<sup>3</sup> Gonzalez, on the other hand, intends to argue that he withdrew from any conspiracy to commit armed robbery with Ayala *well before* Ayala decided to shoot Millford. The defenses are antagonistic in this sense: Ayala will be forced to argue that the sounding of the car alarm startled him and caused him to fire the fatal shot (i.e. he never formed the intent to kill). Gonzalez though, will present evidence that when the car alarm went off he (Gonzalez) ran away from the scene. According to witnesses at the scene, the car alarm rang for over a minute and was already off by the time the shot was fired. Thus, if Ayala succeeds in his defense, Gonzalez must, by necessity fail. Likewise, if Gonzalez succeeds in his defense Ayala will as a matter of course fail.

Where the defendants intend to advance conflicting or antagonistic defenses, due process requires severance. *Haldane*, 85 Wis. 2d at 189, 270 N.W.2d at 79. Defenses are mutually antagonistic if the acceptance of the core of one party's defense precludes acquittal of the other party. *United States v. Zipperstein*, 601 F.2d 281, 285 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980).

The appellate courts have further recognized that, as a matter of law, no reasonable jury could conclude that felony murder<sup>4</sup> is not the natural and probable consequence of brandishing a firearm during a robbery. *See, e.g., State v. Oimen*, 184

<sup>3</sup> The most likely "explanation" for Ayala firing the fatal shot is that he was startled by the car alarm that went off.

<sup>4</sup> Sec. 940.03, Stats., provides, "**Felony murder.** Whoever causes the death of another human being while committing or attempting to commit a crime specified in s. 940.19, 940.195, 940.20, 940.201, 940.203, 940.225 (1) or (2) (a), 940.30, 940.31, 943.02, 943.10 (2), 943.23 (1g), or 943.32 (2) may be imprisoned for not more than 15 years in excess of the maximum term of imprisonment provided by law for that crime or attempt."

Wis. 2d 423, 441, 516 N.W.2d 399 (1994) (death is a natural and probable consequence of the felony of armed robbery). Thus, to convict Gonzalez of felony murder the state need only prove beyond a reasonable doubt that Gonzalez was a party to the crime of Ayala's armed robberies. A person is a party to the crime if he acts either as an aider and abettor or if he is part of conspiracy to commit the crime.

Although it is not known precisely what defense Ayala will present this much is known: All evidence suggests that Ayala was the person who fired the fatal shot.

Ayala is charged with first degree intentional homicide. A conviction for that crime carries a mandatory life sentence. Thus, it seems reasonable that Ayala will present the defense that he is not guilty of first degree intentional homicide because he never formed the intent to kill. That is, Ayala will admit to committing the armed robberies but seek to be convicted of a lesser-included offense of first degree reckless homicide or second degree reckless homicide so as to avoid the mandatory life sentence..

Specifically, Ayala will argue that during the course of the armed robbery Milford's car alarm went off and started Ayala. This prompted him to fire the fatal shot without ever forming the intent to kill.

Gonzalez, on the other hand, will present evidence that once the car alarm went off he ran away from the scene. This is consistent with testimony at the preliminary hearing. Moreover, Vanessa Crawford, who was a victim of the armed robbery, told the police that the car alarm rang for nearly a minute, it then went off, and Crawford thought to herself that the ordeal had ended. According to Crawford it was only then that he heard the shots. Crawford's testimony is consistent with what other witnesses at the scene told police. If this is true, Gonzalez completely withdrew from the conspiracy to commit armed robbery prior to Ayala shooting the victim.

A person may *withdraw* from a conspiracy if he changes his mind- for example, where the purpose of the conspiracy changes. On this point the jury may be instructed that,

You must also consider whether the defendant withdrew from the conspiracy before the crime was committed.

A person withdraws if he voluntarily changes his mind, no longer desires that the crime be committed, and notifies the other parties concerned of the withdrawal within a reasonable period of time before the commission of the crime so as to allow the others also to withdraw.

A person who withdraws from a conspiracy is not held accountable for the acts of the others and cannot be convicted of any crime committed by the others after timely notice of withdrawal.

Wis. JI-Criminal 412.

If the jury were to accept the core of Ayala's defense- that he did shoot the victim but that he was started by the car alarm and never formed the intent to kill- that would for all practical matters preclude the acquittal of Gonzalez. That is, under Ayala's version of the facts the shot was fired at about the same time that Gonzalez decided to withdraw.

### **Conclusion**

For these reasons the partial severance offered by dual juries is insufficient to eliminate the unfair prejudice against Gonzalez caused by joinder of the defendants. There, the court should order severance of defendants.

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

Law Offices of Jeffrey W. Jensen  
Attorneys for the Defendant

By: \_\_\_\_\_

Jeffrey W. Jensen  
State Bar No. 01012529

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