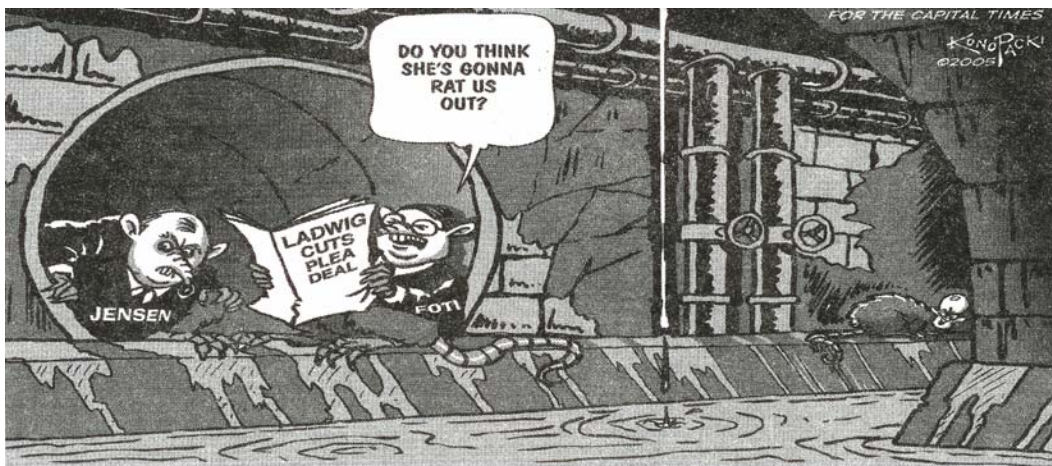


STATE OF WISCONSIN,
Plaintiff,
v.

**DEFENDANTS' BRIEF IN SUPPORT OF
MOTION FOR RECONSIDERATION AND
MOTION FOR CHANGE OF VENIRE**

SCOTT R. JENSEN,
and SHERRY L. SCHULTZ
Defendants.

Case Nos. 02 CF 2453 (Jensen)
02 CF 2455 (Schultz)



THE CAMPAIGN FINANCE SEWER

The Capital Times, Dec. 31, 2005

INTRODUCTION

By any measure, it is clear the media has declared open season on persons charged with an alleged campaign finance violation. Not only have the number of stories on the alleged caucus scandal increased since the sentencing of Senators Burke and Chvala in their unrelated criminal cases, but the prejudicial nature of the stories have magnified. The process expanded again following the entry of pleas to misdemeanor charges by former Representatives Ladwig and Foti.

Few, if any, potential Dane County jurors can be assumed to be free from the prejudicial stories. Few observers could deny that the media is trying to be prejudicial by the choice of

words used in the stories. For example, radio, television and newspapers all use the word “scandal” when referring to the charges. By any definition, “scandal” evokes a strong negative picture. Then, add or modify this word with “widespread” and “corruption” to heighten the affect. The result in a news story versus an editorial is dynamic and unfair.

The Milwaukee Journal/Sentinel, in reporting on the plea of Mr. Foti in a story appearing on January 13, 2006, declared that the defendants, including Mr. Jensen and Ms. Schultz, are part of **“the most widespread Capitol corruption scandal in Wisconsin history.”** (emphasis added) (*See* Exhibit B, 2nd Addendum, Item 4.) If that wasn’t sufficient prejudice, the story adds a conclusion that Ms. Schultz engaged exclusively in fundraising for four years: “On Friday, Foti admitted to padding his payroll with an aide, Sherry Schultz, who did nothing but raise money for Assembly Republicans for almost four years.” What ever happened to the word “alleged”?

The Wisconsin State Journal mixed editorial comment and the writer’s assumptions of fact in a story about Mr. Foti published on January 15, 2006. (*See* Exhibit B, 2nd Addendum, Item 5.) The editorial writer attaches the “guilty” label to these defendants by concluding it is clear the defendants knowingly committed these crimes for their own self-interest. How the writer can reach a conclusion that is part of the legal elements of this case is unknown, particularly when this issue is clearly for the jury to decide. But, as he tells his audience: “. . . it’s clear they knew exactly what they were doing - - wasting the public’s money on self-serving schemes to stay in power.” Since Mr. Foti is said to be Ms. Schultz’s boss, there leaves little doubt that she also must be guilty.

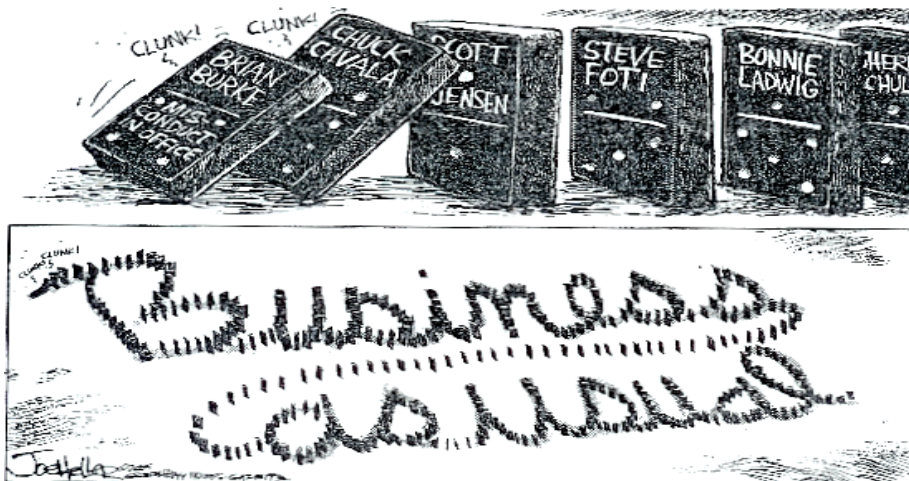
Fairness is absent in both the stories above and in others described below. Rarely in Dane County has the atmosphere been so charged that the statement by one of the characters in Alice In Wonderland becomes so apt: “Sentence first, verdict afterwards.”

ARGUMENT

Two key concerns necessitate the accused's motion for reconsideration and motion for change of venue: (1) the injurious effects of ongoing prejudicial media coverage associating all parties charged in the caucus scandal with one another, especially in light of recent plea deals, and (2) the inadequacy of alternative measures to produce an impartial jury where prejudicial media coverage has been pervasive and repetitive.

I. RECONSIDERATION OF THE CHANGE OF VENUE ORDER IS NECESSARY IN LIGHT OF RECENT EVENTS, WHICH INCREASE COMMUNITY PREJUDICE TOWARD THE ACCUSED.

a. Media Coverage Associating All Parties Charged In The Caucus Scandal With One Another Prejudices The Accused.



The Wisconsin State Journal, Dec. 21, 2005

A bedrock principle of our criminal justice system is that, “guilt or innocence must be determined one defendant at a time without regard to the disposition of charges against others. In a conspiracy trial, which by definition contemplates two or more culpable parties, courts must be especially vigilant to ensure that defendants are not convicted on the theory that guilty ‘birds of a feather are flocked together.’” *United States v. Griffin*, 778 F.2d 707, 710 (11th Cir. 1985) (citing *Krulewitch v. United States*, 336 U.S. 440, 454, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949))

(Jackson, J., concurring). See e.g., *United States v. Austin*, 786 F.2d 986, 991-92 (10th Cir. 1986); *United States v. Baez*, 703 F.2d 453, 455 (10th Cir. 1983); *United States v. Halbert*, 640 F.2d 1000, 1004 (9th Cir. 1981); *United States v. Johnson*, 26 F.3d 669, 677 (7th Cir. 1994). The United States Supreme Court recognized that modern communications compound the negative impact of prejudicial publicity when in *Sheppard v. Maxwell*, Justice Clark explained that “[g]iven the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.” 384 U.S. 333, 363, 86 S.Ct. 1507 (1966) (emphasis added).

In their last supplemental submission to the court, the accused presented evidence supporting their argument that, because all parties charged in the caucus scandal are represented by the media as being tied to the same investigation, prejudicial media coverage of events concerning other defendants in the caucus scandal has adversely affected the accused. On separate dates in October of 2005, Burke and Chvala entered pleas of guilty to charges, which included one count of misconduct in public office.

If the effects of media likening the culpability of the accused to that of Chvala and Burke have been anything less than prejudicial, news of recent plea deals involving actual co-defendants to the accused has been anything but. In December of 2005, Bonnie Ladwig, a former co-defendant of the accused, pleaded guilty to a misdemeanor ethics violation in exchange for her cooperation in the prosecution of the accused. Ladwig’s plea has been disseminated in articles, cartoons, and opinions as being tied not only to the accused’s cases, but also to Burke and Chvala’s guilty pleas. See e.g., Channel3000.com, (“[o]ther legislative figures are set for trial early next year on **charges resulting from the same investigation**”);¹ Wisconsin

¹ *Chvala Sentenced To Jail, Probation: More Trials For Lawmakers Are Ahead*, Channel300.com, Dec. 16, 2005, available at: <http://www.channel3000.com/news/5546351/detail.html> (emphasis added).

State Journal, (“**Tying all of these cases together** is an insatiable thirst for campaign dollars. . . . Jensen and Foti are still fighting their charges . . . **They all deserve to be punished**”)² (emphasis added). Former Representative Steve Foti, yet another former co-defendant of the accused, has since pleaded guilty to a misdemeanor charge as well in exchange for his cooperation in the prosecution of the accused. Accompanying Foti’s plea in the media are assertions that Schultz is guilty as charged. *See e.g.*, Wisconsin State Journal, (“**Schultz would brag about how much money she raised . . . Foti and the rest of his staff knew what Schultz was doing with her time**”).³

Even political watchdogs recognize the significance of this recent wave of convictions. In a recent interview with a Capital Times reporter, Mike McCabe, Executive Director of the Wisconsin Democracy Campaign, explained that although he has been fighting Capitol corruption since 1995, he now believes “there are definite signs that the public is finally waking up and that we may be in the early stages of a ‘throw the bums out’ movement.”⁴ According to McCabe, “political corruption was [recently] cited as often as gas prices when people were asked to name the No. 1 problem facing Wisconsin.” The reason for this sudden shift in attitude toward elected officials? McCabe explained that, “[m]ost people out there – even after the caucus scandal broke, and even after there were criminal charges filed – didn’t really . . . have political corruption on their radar screen But once you get this parade of lawmakers into courtrooms and actually get convictions, it becomes TV news. And, sad to say, that’s when it started getting on the radar. And so that group of people who were completely clueless is shrinking. No question about it.”

² *An agenda for 2006: Purify state politics*, WISCONSIN STATE JOURNAL, Jan. 01, 2006, available at: <http://www.madison.com/wsj/home/opinion/index.php?ntid=66989&ntpid=3> (emphasis added).

³ Scott Milfred, *Good Guy Argument Doesn’t Fly*, WISCONSIN STATE JOURNAL, Opinion, B3, Jan. 15, 2006 (emphasis added).

⁴ Rob Zaleski, *McCabe sees tipping point on horizon in state politics*, THE CAPITAL TIMES, Opinion, Jan. 13, 2006

And so, with Foti's plea, all eyes turn to the next domino to fall, the next to fall in a continuous string of corruption charges, all connected to the same investigation. *See* Channel3000.com, ("**Jensen is the only person charged in the Capitol scandal who hasn't struck a plea deal**");⁵ Wisconsin State Journal, ("**Jensen, the only lawmaker charged in the scandal still in the Legislature**, is scheduled to go on trial Feb. 21 on three felonies and a misdemeanor that he used state workers to campaign for Republicans. **Schultz, who was hired by Foti to raise funds for Assembly Republicans, will be tried alongside Jensen** on a single felony count");⁶ Wisconsin State Journal, ("**The Dane County district attorney notches another Capitol corruption win** with Friday's plea by Steve Foti His **sights are next set on** former GOP Assembly Speaker **Scott Jensen, the last of five** lawmakers who were charged more than three years ago; **Foti's plea makes four guilty pleas thus far** . . . Blanchard will be **under pressure to secure a guilty plea** to a felony or a trial conviction. **Blanchard also scores points with campaign reformers and Dane County constituents** by forcing the issue of whether former Democratic state Sen. Brian Burke, D-Milwaukee, should serve time in jail instead of at home").⁷

News articles masquerading as unbiased factual reports of the caucus scandal further prejudice readers against the accused by failing to make any mention of the fact that many of the supposed illegal acts were in fact legal and contemplated by the state laws. The result of these omissions is that the media has confused two very separate issues: campaign finance reform and illegal conduct. If campaign finance laws are ineffective or lacking in some way, change them.

⁵ *Foti Pleads Guilty To Ethics Violation To Avoid Serious Charges*, Channel3000.com, available at: <http://www.channel3000.com/news/6063681/detail.html> (emphasis added).

⁶ *Foti Pleads Guilty to Misdemeanor*, Madison.com, Jan. 13, 2006, available at: http://www.madison.com/bn/index.php?action=this&bn_id=0-68733 (emphasis added).

⁷ *Wispolitics.com Stock Report: Ups And Downs In Wisconsin Politics*, WISCONSIN STATE JOURNAL, Local, D3, Jan. 15, 2006 (emphasis added).

If individuals break the law, prosecute them. Reporting these two issues as one in the same is misleading and it prejudices the accused in an insidious way.

The end result of all this is that a robust presumption of guilt has been promoted and legitimized by the press—and Dane County residents have embraced it. The manner in which the media has depicted recent plea deals in the scandal, both in so called “unbiased” news articles and in editorialized pieces, has effectively fanned the fires of prejudice against the accused. Not surprisingly, online discussion forums tied directly to articles in the Wisconsin State Journal and the Capital Times are rife with ridicule and scorn for all parties charged in the caucus scandal:

- “This guy [Burke] needs to serve his time in jail to **set an example for all those who follow**.....If I ran for office and knew this was all I'd get.....I'd bend a few laws!!” (*Burke Behind Bars, this is too good to be true*, Madison.com Forum, posted 01-12-2006) (emphasis added)
- “This Blanchard guy may have a future. If this happens [reference made to article Capital Times article, “Blanchard wants Burke behind bars”] this would be the most significant step towards campaign reform in Wisconsin in years. It also could be precedent setting for **the rest of the felons**. Everybody cross their fingers.” (Madison.com Forum, posted 01-12-2006) (emphasis added)
- “**I pray every night that Jensen and Foti get nailed.**” (*Chvala is a criminal*, Madison.com Forum, posted 12-16-2005) (emphasis added)
- “I personally think that **any state legislator or official** who is convicted of any type of corruption should automatically have to serve his/her sentence in SuperMax!! **That'll teach 'em** that making laws and building institutions isn't just politics, that it affects real human beings.” (*Chvala is a criminal*, Madison.com Forum, posted 12-14-2005) (emphasis added)
- “If I had it my way **every politician would be banished** from America, and we'd have farmers, tradesman, and engineers running the country.” (*Chvala is a criminal*, Madison.com Forum, posted 12-15-2005) (emphasis added)
- “I wanna hear the same bitching **when Scott Jensen gets off with probation & fine.**” (*Chvala is a criminal*, Madison.com Forum, posted 12-16-2005) (emphasis added)
- “I think at least 2-5 years might send a message to just about **all of the political scum out there**. I remember when it was an honor to serve the public! Now this is just par for the course! . . . I am so sick of all of this bull!” (*Chvala is a criminal*, Madison.com Forum, posted 12-10-2005) (emphasis added)
- “**These jerks** are in both parties and this crap has been going on for a long time. Chvala, **Burke, Jensen and Foti** just got careless.” (*Chvala is a criminal*, Madison.com Forum, posted 12-10-2005) (emphasis added)
- “This is a recurring theme that pops up over and over. **Politicians in this state** have been able to get away with all sorts of malfeasance over the years because we pretty much have allowed

them to do so.” (*Chvala is a criminal*, Madison.com Forum, posted 12-10-2005) (emphasis added)

- “I think that Jensen and Chvala both got off really light and I am sure Burke will be the same. But **I think all of them should have to spend more than a few months in jail**. This just sends a message to our governing bodies that it’s okay to screw the public and get away with it. **All those people make me sick to my stomach!** And the message to others that justice has a price if you can afford it. I think **they** should face at least 2-5 years in medium security prison!” (*Jail time is a mystery for Burke*, Capital Times Forum, posted 11-30-2005) (emphasis added)
- “**Chvala should be hung by his testicles** on the Capitol Square. All you ‘Chuck’ sympathizers can then claim he is your God and you can have another religious holiday in memory of his ‘persecution.’” (*Chvala should pay back every penny*, Wisconsin State Journal Forum, posted 12-14-2005) (emphasis added)
- “I guess we cannot hang **Ladwig** by her testicles . . . can we?, . . . **3 down, 3 to go.**” (*Chvala should pay back every penny*, Wisconsin State Journal Forum, posted 01-05-2006) (emphasis added)

The online discussion forums are proof positive that “guilty until proven innocent” is the new slogan among Dane County residents.

II. ALTERNATIVE MEASURES TO PRODUCE AN IMPARTIAL JURY ARE INADEQUATE WHERE PREJUDICIAL MEDIA COVERAGE HAS BEEN AS PERVASIVE AND REPETITIVE AS IT HAS WITH THE ACCUSED.

The accused acknowledges that the means by which a defendant may obtain a fair trial before an impartial jury are not limited to change of venue; other solutions include *voir dire* and continuance. *McKissick v. State*, 49 Wis.2d 537, 545, 182 N.W.2d 282 (1971). However, given the cumulative effects of both pervasive and prolonged prejudicial media coverage of the accused, an impartial jury cannot be had by these alternative means. Granting a continuance “in the hope that in the course of time the fires of prejudice will cool” may be an effective measure where prejudicial media coverage on a defendant’s case is expected to fade. *Groppi v. Wisconsin*, 400 U.S., at 510. But where prejudicial media coverage has spanned a period of over three years with no signs of slowing, this measure is wholly inadequate.

Nor may an impartial jury be obtained through *voir dire* or some other measure of jury qualification. As the Court explained in *Groppi v. Wisconsin*, “the exclusion of prospective jurors infected with the prejudice of the community from which they come . . . is not always

adequate to effectuate the constitutional guarantee.” 400 U.S., at 510, (citing *Irvin v. Dowd*, 366 U.S. 717; and generally Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. Cal. L. Rev. 503 (1965)).

Empirical studies by social scientists confirm this assertion. One such study, funded by the National Science Foundation (the “NSF study”) provides direct empirical evidence on the absolute or relative effectiveness of judges’ and attorneys’ *voir dire* challenges as a remedy for prejudicial pretrial publicity. See Norbert Kerr, et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pre-trial Publicity: An Empirical Study*, 40 Am. U.L.Rev. 665 (1991). The NSF study confirms that the process of *voir dire* does not attenuate the biasing effects of pretrial publicity on potential jurors. Specifically, the study demonstrates that:

jurors’ assertions of impartiality or partiality should not be taken simply at face value. Such assertions may indicate very little about the actual degree of juror partiality. Finally and most importantly, our findings suggest that courts should rely less heavily upon *voir dire* as the remedy of choice in high publicity cases, and **make greater use of promising alternative remedies, such as continuances and change of venue or change in venire**. We realize that there are important financial and constitutional considerations, which discourage the use of these alternative remedies, but we think that policymakers need to weigh such considerations against the mounting empirical evidence demonstrating that relatively inexpensive traditional remedies, such as *voir dire*, judicial instructions, and jury deliberation, are not effective.

40 AM. U.L.Rev., at 700-701 (emphasis added). Although jurors’ maintained, “they could disregard the publicity completely and base their verdict solely on the evidence presented in court, . . . publicity-induced bias persisted” despite *voir dire* challenges. 40 Am. U.L. Rev., at 695. Even where questioning of jurors was extensive, publicity which either suggested guilt, or implied guilt by linking the defendant to the criminal activities of others, directly affected potential jurors’ perceptions of the accused in several important ways: defendants were perceived as being guilty more often, negative facts were generally weighed more heavily against defendants during trial, and jurors were more prone to resolve conflicts of credibility against defendants. 40 Am. U.L. Rev. 665.

Publicity that is indirectly related to the crime with which a defendant is charged may even have an impact. 40 Am. U.L. Rev. 665. Surely, then, the more similar the publicized case is to the accused's, the greater the prejudicial effect. In this respect, the implication of guilt attributed to the accused by the media in association with Foti and Ladwig's guilty pleas is palpable; even the most extensive *voir dire* will not adequately uncover hidden negative biases in potential jurors. Chief Justice Marshall once explained that a juror predisposed to fixed opinions of guilt of the accused:

may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which will change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.

United States v. Burr, 25 F. Cas. 49, 50 (Va. Cir. Ct. 1807) (No. 14,692).

III. A CHANGE OF VENIRE IS A VIABLE ALTERNATIVE TO CHANGE OF VENUE WHERE PREJUDICIAL MEDIA COVERAGE HAS BEEN AS PERVASIVE AND REPETITIVE AS IT HAS WITH THE ACCUSED.

One alternative to *voir dire*, continuances, and even to a change of venue, is to secure a change of *venire*. 40 AM. U.L.Rev., at 700-701. Change of *venire* has proven a viable alternative to change of venue in high profile cases in Wisconsin. In 2000, Waukesha County Judge Mark Gempeler denied former Green Bay Packer Mark Chmura a change of venue, and instead granted him a change of *venire* due to concerns that an impartial jury *venire* from Waukesha would not be possible, given that coverage on Chmura's case had been huge.⁸ To ensure that jurors were drawn from an area outside Waukesha County, Judge Gempeler issued an order that jurors be drawn "from outside southeastern Wisconsin, Brown County and the Fox River Valley."⁹

⁸ See Lester Munson, *Everyone loses in Chmura trial*, Sports Illustrated, Nov. 1, 2000.

⁹ *The Chmura Case: A Chronology*, JSONline, available at: http://www.jsonline.com/news/wauk/chmura/chmura_time011501.asp

To preserve a presumption of innocence, a change of venire proves an effective and workable solution to securing a fair and impartial trial and jury for defendants in high profile cases. Like Mark Chmura, coverage of the accused's cases has been extensive. Add to this, recent media coverage associating the accused with fellow lawmakers now convicted in the scandal, recent plea deals of former codefendants turning State's witness against the accused, and direct evidence of community outrage and ridicule of all those charged in the scandal, and you have a recipe for a Sixth Amendment disaster.

CONCLUSION

For all the foregoing reasons, accused respectfully urge the court to reconsider its order and grant their motion for change of venue, or, in the alternative, grant their motion for change of venire and order that a jury venire from outside the Madison.com circulation area be brought to Dane County to ensure that the accused are afforded their constitutional right to a fair and impartial trial.

Dated this ____ day of January 2006.

Respectfully submitted,

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