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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN ex rel.
SCOTT R. JENSEN,
Petitioner,

v.

Appeal No. 2008AP551-W

CIRCUIT COURT OF DANE COUNTY,
WISCONSIN, and THE HONORABLE
DAVID T. FLANAGAN,
Respondents.

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2008AP552-LV

SCOTT R. JENSEN,
Defendant-Appellant.

**COMBINED RESPONSE OF RESPONDENTS AND PLAINTIFF-
RESPONDENT TO PETITION FOR SUPERVISORY WRIT
AND PETITION FOR LEAVE TO APPEAL NONFINAL ORDER**

INTRODUCTION

On March 5, 2008, Defendant-Petitioner Scott R. Jensen filed a petition for a supervisory writ directed at the Circuit Court for Dane County

and the Honorable David T. Flanagan in Dane County Case No. 2002-CF-2453. By the same document, and in the alternative, Jensen filed a petition for leave to appeal a nonfinal, pretrial order, as described more fully below.

On March 11, 2006, a Dane County jury found Jensen guilty of three felony counts of misconduct in public office, party to a crime, contrary to Wis. Stat. §§ 946.12(3) and 939.05 (2001-02), and one misdemeanor count of intentional misuse of public position for private gain, party to a crime, contrary to Wis. Stat. §§ 19.45(2) and 939.05 (2001-02). *See State v. Jensen*, 2007 WI App 256, ¶ 1, ___ Wis. 2d ___, 743 N.W.2d 468; *see also State v. Jensen*, 2004 WI App 89, ¶ 1, 272 Wis. 2d 707, 681 N.W.2d 230.

Jensen pursued a direct appeal from the three felony convictions (but not the misdemeanor conviction), and by decision of November 8, 2007, the court of appeals reversed the felony convictions and remanded for a new trial. *See Jensen*, 2007 WI App 256, ¶ 1 & n.2.

In advance of the retrial, Jensen moved for a change of venue from Dane County Circuit Court to Waukesha County Circuit Court, pursuant to Wis. Stat. § 971.19(12), on the ground that he resides in Waukesha County and represented that county in public office at the time of the charged

crimes (*see* Jensen's petition at 2, 5). By order of February 21, 2008, Judge Flanagan denied Jensen's motion to change venue.

Both Jensen's petition for a supervisory writ and his petition for leave to appeal challenge the venue order and seek to accomplish the same thing: a pretrial appellate determination that proper venue for the retrial of Jensen's criminal case is Waukesha County rather than Dane County.

For the reasons that follow, Respondents Circuit Court of Dane County and Judge David T. Flanagan and Plaintiff-Respondent State of Wisconsin (together referred to hereafter as "the State") respectfully oppose the petition for supervisory writ, but join Jensen's request for pretrial appellate determination of the venue issue on interlocutory review. In conjunction, the State respectfully requests the opportunity for full sequential briefing of the issue, in accordance with Wis. Stat. § (Rule) 809.50(3).

RESPONSE TO PETITION FOR SUPERVISORY WRIT

ISSUANCE OF A SUPERVISORY WRIT IS NOT WARRANTED.

A. Governing criteria.

“A supervisory writ is a blending of the writ of mandamus and the writ of prohibition.” *State ex rel. Dressler v. Circuit Court for Racine County, Branch 1*, 163 Wis. 2d 622, 630, 472 N.W.2d 532 (Ct. App. 1991).

Importantly, a “petition for a writ of supervision is not a substitute for an appeal,” and a supervisory writ “is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency.”

Dressler, 163 Wis. 2d at 630. This means:

The petition for a supervisory writ will not be issued unless: (1) an appeal is an utterly inadequate remedy; (2) the duty of the circuit court is *plain*; (3) its refusal to act within the line of such duty or its intent to act in violation of such duty is *clear*; (4) the results of the circuit court’s action must not only be prejudicial but must involve extraordinary hardship; and, (5) the request for relief was made promptly and speedily.

Id. (emphasis in original); *see also Law Enforcement Standards Board v. Village of Lyndon Station*, 101 Wis. 2d 472, 493-94, 305 N.W.2d 89 (1981) (mandamus); *State ex rel. Prentice v. County Court, Milwaukee County*, 70 Wis. 2d 230, 233-35, 234 N.W.2d 283 (1975) (prohibition).

Issuance of a supervisory writ rests in the appellate court’s discretion. *See Dressler*, 163 Wis. 2d at 630.

B. Application.

In the present case, issuance of a supervisory writ is not warranted for any or all of the first four criteria outlined above in *Dressler*.

First, as discussed below in the State's response to the petition for leave to appeal, interlocutory review (with full sequential appellate briefing) is an adequate mechanism for resolving Jensen's claim of improper venue.

Second, the determination of proper venue is a debatable legal question due to perceived ambiguities in the language and application of the newly enacted Wis. Stat. § 971.19(12). In short, Judge Flanagan "was [not] under a plain legal duty to honor [Jensen's] request" for venue in Waukesha County. *State ex rel. Oman v. Hunkins*, 120 Wis. 2d 86, 91, 352 N.W.2d 220 (Ct. App. 1984) (brackets and emphasis added).

Third, and relatedly, Judge Flanagan's decision not to transfer venue from Dane County to Waukesha County was not a "clear" refusal to act in accordance with a plain legal duty, *Dressler*, 163 Wis. 2d at 630, as opposed to being an interpretation of the language of Wis. Stat. § 971.19(12) – a legal question on which reasonable minds could differ.

Fourth, because the venue issue is properly resolved before Jensen's retrial by interlocutory review, as discussed below, Jensen can demonstrate no "extraordinary hardship" if the petition for a supervisory writ is denied. *Dressler*, 163 Wis. 2d at 630.

RESPONSE TO PETITION FOR LEAVE TO APPEAL

THE STATE AGREES WITH JENSEN THAT INTERLOCUTORY REVIEW IS WARRANTED.

A. Governing criteria.

Interlocutory review is warranted if it would: "(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2); *see also* Wis. Stat. § (Rule) 809.50(1)(c).

A fourth, implicit consideration is "whether the petition for leave to appeal shows a substantial likelihood of success on the merits." Michael S. Heffernan, *Appellate Practice and Procedure in Wisconsin* § 9.4 at ch. 9, page 3 (Nov. 2006).

B. Application.

All three of the statutory criteria for interlocutory review have been met with respect to the pretrial issue of whether proper venue for retrial is Dane County under Wis. Stat. § 971.19(1), because that is the county where the three charged felonies allegedly “w[ere] committed,” or whether proper venue is Waukesha County under Wis. Stat. § 971.19(12), because that is the county where Jensen “reside[d]” at the time of the alleged crimes.

First, interlocutory review would “clarify further proceedings in the litigation.” Wis. Stat. § 808.03(2).

Although “venue” is not an element of a criminal charge, the State must prove venue beyond a reasonable doubt at trial. *See, e.g., State v. Anderson*, 2005 WI 54, ¶ 22 n.5, 280 Wis. 2d 104, 695 N.W.2d 731. In the present case, therefore, it is important to know *before trial* which of the following aspects of venue the State must prove at trial:

- that the charged crimes occurred in Dane County, under Wis. Stat. § 971.19(1); or
- that Jensen resided in Waukesha County, under Wis. Stat. § 971.19(12) – presumably referring to the time of the alleged criminal conduct, but possibly open to question; or

- perhaps even both of these aspects of venue.

Insufficient proof of “venue” at trial could necessitate yet another retrial.

See State v. Wiedenfeld, 229 Wis. 563, 569, 282 N.W. 621 (1938).

Second, interlocutory review would “[p]rotect” both Jensen and the State from “substantial . . . injury” if Judge Flanagan ultimately was found to be wrong in his determination of venue in Dane County. Wis. Stat. § 808.03(2).

It appears in Wisconsin that venue in the wrong county in a criminal case (over the defendant’s objection) also cannot be harmless error. *See Wheeler v. State*, 24 Wis. 52, 54 (1869); *State v. Mendoza*, 80 Wis. 2d 122, 140, 145, 258 N.W.2d 260 (1977). By raising the venue issue before trial, Jensen presumably has preserved it for appellate review were he convicted after a trial. *See State v. Corey J.G.*, 215 Wis. 2d 395, 405-07, 572 N.W.2d 845 (1998). The State does not relish the prospect of yet a third trial due to improper venue when the issue could be resolved definitively by pretrial appellate review.

Third, interlocutory review would “[c]larify an issue of general importance in the administration of justice.” Wis. Stat. § 808.03(2).

The provision on venue that Jensen seeks to invoke – Wis. Stat. § 971.19(12) – has not yet been addressed by Wisconsin’s appellate courts, having become effective January 10, 2008.¹ Section 971.19(12) provides:

(12) Except as provided in s. 971.223, in an action for a violation of chs. 5 to 12, subch. III of ch. 13, or subch. III of ch. 19, or for a violation of any other law arising from or in relation to the official functions of the subject of the investigation or any matter that involves elections, ethics, or lobbying regulation under subch. [sic, chs.] 5 to 12, subch. III of ch. 13, or subch. III or ch. 19 a defendant who is a resident of this state shall be tried in circuit court for the county where the defendant resides. For purposes of this subsection, a person other than a natural person resides within a county if the person’s principal place of operation is located within that county.

In turn, Wis. Stat. § 971.223(1) allows a defendant who is a Wisconsin resident and who is being criminally prosecuted for one of the violations enumerated in sec. 971.19(12) to “move to change the place of trial to the county where the offense was committed.”

A provision like Wis. Stat. § 971.19(12) that links venue in a criminal case to the residence of the defendant is novel to Wisconsin law and may very well be novel to American jurisprudence.

¹Section 971.19(12) was created by 2007 Wisconsin Act 1, sec. 205. Pursuant to 2007 Wisconsin Act 1, sec. 211, the effective date for this new venue provision was the “initiation date specified in section 209(1).” Pursuant to 2007 Wisconsin Act 1, sec. 209(1), the “initiation date” was “the 31st day beginning after the date on which the government accountability board has given final approval to the hiring of individuals to initially fill the positions of legal counsel to the board, administrator of the ethics and accountability division of the board, and administrator of the elections division of the board.” That “final approval” occurred on December 10, 2007.

This new venue provision was part of the legislation that created a “government accountability board” responsible for “the administration of chs. 5 to 12, other laws relating to elections and election campaigns, subch. III of ch. 13, and subch. III of ch. 19.” 2007 Wisconsin Act 1, sec. 3 (amending Wis. Stat. § 5.05(1) (intro.)).

Determining which venue provision applies to a prosecution for misconduct in public office under Wis. Stat. § 946.12 that has been brought by a district attorney for the county in which the crime allegedly was committed is of statewide importance and remains so until Wisconsin’s appellate courts definitively resolve it.

A close comparison between Judge Flanagan’s pretrial order and Jensen’s petition for leave to appeal reflects the existence of substantial questions concerning the proper interpretation of the new venue provision set forth in Wis. Stat. § 971.19(12).

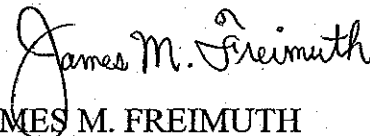
CONCLUSION

For the reasons set forth, the Circuit Court of Dane County and Judge David T. Flanagan respectfully oppose the petition for a supervisory writ. Further, in view of the substantial questions presented and the importance to both parties in the underlying criminal case of eliminating the risk of yet a third trial due to improper venue, the State respectfully joins Jensen's request for pretrial appellate determination of the venue issue on interlocutory review. In conjunction, the State respectfully requests full sequential briefing of the issue, in accordance with Wis. Stat. § 809.50(3).

Dated at Madison, Wisconsin: March 20, 2008.

Respectfully submitted,

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CERTIFICATION

I certify that this response meets the form and length requirements of Rule 809.50(2) and (4) and Rule 809.51(2) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the response is 2,027 words.



JAMES M. FREIMUTH