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# Jury Trial in Minnesota--Right or Obligation

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## Comment: Jury Trial in Minnesota—Right or Obligation?

Defendant, a black adult male, confessed to killing a white teenaged girl<sup>1</sup> and was charged with first degree murder.<sup>2</sup> Before trial, defense counsel, alleging that prejudicial pretrial publicity and community racial bias precluded a fair jury trial for defendant in the overwhelmingly white county of venue, moved for a waiver of jury trial or, in the alternative, a change of venue.<sup>3</sup> The motions were denied and defendant was convicted of murder in the first degree. On appeal from the denial of waiver,<sup>4</sup> the Supreme Court of Minnesota, with three of its nine justices not participating, affirmed, *holding* that MINNESOTA STATUTES § 631.01<sup>5</sup> does not grant defendants an absolute right to waive jury trial and that the trial court did not abuse its discretion in denying the motion. Two justices dissented from the latter holding, and their views were adopted by a third, although he concurred in the decision.<sup>6</sup> *State v. Kilburn*, 231 N.W.2d 61 (Minn. 1975).

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1. After an abortive sexual encounter, defendant, fearing allegations of rape, became enraged and struck the victim with a tire jack.

2. Despite defendant's confession, the case proceeded to trial on the question whether defendant had the requisite intent for murder in the first degree.

3. Defendant expressly consented to the motion. See Brief for Appellant at 12, *State v. Kilburn*, 231 N.W.2d 61 (Minn. 1975).

4. The denial of the motion for a change of venue was not appealed.

5. MINNESOTA STATUTES § 631.01 provided in pertinent part:

Except where defendant waives a jury trial, every issue of fact shall be tried by a jury of the county in which the indictment was found or information filed . . . . If the defendant shall waive a jury trial, such waiver shall be in writing signed by him in open court after he has been arraigned and has had opportunity to consult with counsel and shall be filed with the clerk. Such waiver may be withdrawn by the defendant at any time before the commencement of the trial.

6. 231 N.W.2d 61, 67 (Otis, J., dissenting); *id.* at 71 (Rogosheske, J., dissenting). The views of the dissenters "as to the general principles of law involved" were shared by Justice MacLaughlin. *Id.* at 66 (concurring opinion). He concurred in the result only on the ground that "it appears from the record and the statement made by the trial attorney for defendant that defendant received a fair trial; there was little prejudicial pretrial publicity shown; and it appears that the result was just." *Id.* Thus, since three of the court's nine justices did not participate, the court was split 3-3 on the questions of law that are the subject of this Comment, and it is just as likely that future decisions will reflect the

Although *Kilburn* raised the waiver issue under section 631.01, the opposing opinions of the justices on the issue of the trial court's discretion to deny a motion for waiver foreshadow a similar split concerning the proper construction of the waiver provisions of rule 26 of the new Minnesota Rules of Criminal Procedure,<sup>7</sup> which became effective shortly after the *Kilburn* decision. Inasmuch as each of the opposing viewpoints in *Kilburn* was adopted by three justices, it remains an open question as to which view will prevail when the whole court faces the issue under the new rule. This implication of the case can best be examined, however, after a discussion of the court's treatment of section 631.01.

*Kilburn* is the first Minnesota case to hold that section 631.01 does not create an absolute right to waiver of a jury trial, but the unanimous decision on that point came as no surprise. Four years earlier, in *Gaulke v. State*,<sup>8</sup> the court had reached the same conclusion in extended dictum. In that case it held that defendant's claim of a right to waiver based on section 631.01 could not be asserted by petition for post-conviction relief; but the court went on to offer "an expression of [its] views concerning waiver of a jury trial in criminal cases . . . [for the] assistance [of] the bench and bar."<sup>9</sup> Those views were: (1) In light of antecedent case law<sup>10</sup> section 631.01 could be presumed not to have been intended to create an absolute right to waiver.<sup>11</sup> (2) The fate of a motion for waiver should depend, as

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dissenters' point of view as that they will reflect the position espoused in the opinion for the court. For the sake of convenience, however, the latter position will be referred to herein as that of the court in *Kilburn*, or of the *Kilburn* case.

7. MINNESOTA STATUTES § 631.01 was superceded by rule 26. See *In re Proposed Rules of Criminal Procedure*, Order of the Supreme Court of Minnesota, 299 Minn. (unnumbered page) (1974).

8. 289 Minn. 354, 184 N.W.2d 599 (1971).

9. *Id.* at 359, 184 N.W.2d at 602.

10. Case law allowed an accused to waive jury trial only "within such time limits as the trial court, exercising a sound discretion in behalf of those before it, may permit." *Id.* (quoting *State v. Sackett*, 39 Minn. 69, 72, 38 N.W. 773, 775 (1888)).

11. The court also mentioned the "historical antecedents of our [state] constitution" as a reason for doubting that section 631.01 was intended to create an absolute right to waiver, but it did not elaborate on this point. *Id.* The conclusion that section 631.01 does not create an absolute right to waiver assumes, of course, that the Minnesota Constitution does not grant such a right. Article 1, section 4 of the latter provides:

The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in contro-

it did before enactment of section 631.01, on the trial court's exercise of sound discretion. (3) Denial of a motion for waiver would be based on sound discretion where "the court was not satisfied that the application was defendant's informed and intelligent act."<sup>12</sup> (4) Denial would not be a sound exercise of discretion where defendant demonstrated prejudicial pretrial publicity or that the conduct of his defense would be inhibited by the presence of a jury,<sup>13</sup> or where denial was based merely on the trial court's desire to avoid deciding a disagreeable case.<sup>14</sup>

For the most part, the opinion in *Kilburn* simply reiterated these points and applied them to the facts of the case:

[N]o evidence was produced that passions were aroused or that any prejudice would result to deny the availability of impartial jurors. . . . There was no showing of pretrial publicity or prejudice, and, as indicated by defense counsel, no showing of prejudice during the trial or by the jury's actions. The court was not trying to avoid a disagreeable case, as indicated above by . . . denial of the motion [on the ground that defendant's interests would best be served by a jury trial].<sup>15</sup>

The waiver provisions of rule 26 can be read as incorporating the rules enunciated in *Gaulke* and *Kilburn*. There are two such provisions, one general and one specific, applicable only to cases involving claims of prejudicial pretrial publicity. The former provision simply provides that a defendant who has been advised of his right to a jury trial and had an opportunity to consult with counsel may, *with the approval of the court*, waive jury

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versy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law . . . .

The court in *Gaulke* concluded, in effect, that section 631.01 prescribes the manner for waiver without abrogating the case-law rule that waiver is conditional upon approval of the court.

In denying an absolute right to waiver, the Minnesota court is in accord with the majority of state courts. There are, however, three different forms of conditional waiver: 1) Minnesota and 17 other states require the consent of the court; 2) 11 require the consent of the prosecution; 3) nine states follow FED. R. CRIM. P. 23(a), which requires the consent of both the court and the prosecution. Only six states hold that waiver is a right of the defendant. Six states do not allow waiver under any circumstances. See Note, *Constitutional Law: Criminal Procedure: Waiver of Jury Trial: Singer v. United States*, 51 CORNELL L.Q. 339, 342-44 (1966) [hereinafter cited as *Waiver of Jury Trial*]; Annot., 51 A.L.R.2d 1346 (1957).

12. 289 Minn. at 360, 184 N.W.2d at 602.

13. In *Gaulke* defendant had asserted that his trial counsel, who had died by the time of the appeal, "conducted only perfunctory cross-examination of the young [rape] victim and the state's medical witness because 'we didn't dare to put any pressure on the girl because we would get the jury against us if we did.'" *Id.*

14. *Id.* at 360-61, 184 N.W.2d at 603.

15. 231 N.W.2d at 65.

trial "in writing or orally upon the record in open court."<sup>16</sup> The latter provision, in contrast, grants an absolute right to a knowing and voluntary waiver where "there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial."<sup>17</sup>

This latter provision, like its analogue in *Kilburn*<sup>18</sup> and *Gaulke*,<sup>19</sup> is designed to safeguard the defendant's right to a fair trial. In *Singer v. United States*,<sup>20</sup> the United States Supreme Court, though rejecting the assertion that due process and the right to a fair trial create a general, unconditional right to waiver of a jury trial,<sup>21</sup> intimated that there might be circumstances where denial of defendant's request for waiver would deprive him of his right to a fair trial:

Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" or some other factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case . . . .<sup>22</sup>

This same concern for fairness underlies the Minnesota court's position in *Gaulke*, *Kilburn*, and the new rule<sup>23</sup> that the right to waiver is absolute where there is a showing of prejudicial pre-trial publicity.

It will be observed, however, that *Kilburn* and *Gaulke* further suggest that denial of a request for waiver might be an

16. The defendant, with the approval of the court may waive jury trial provided he does so personally in writing or orally upon the record in open court, after being advised by the court of his right to trial by jury and after having had an opportunity to consult with counsel.

MINN. R. CRIM. P. 26.01 (1) (2) (a).

17. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

*Id.* 26.01 (1) (2) (b).

18. See text accompanying note 15 *supra*.

19. See text accompanying note 13 *supra*.

20. 380 U.S. 24 (1964).

21. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge [as is done by FED. R. CRIM. P. 23(a)] when, if either refuses to consent, the result is simply . . . an impartial trial by jury.

*Id.* at 36.

22. *Id.* at 37-38.

23. See notes 18-19 *supra* and accompanying text.

abuse of the trial court's discretion—that is, the right to waiver might be absolute—where jury prejudice is due to factors other than pretrial publicity, such as inherent racial bias.<sup>24</sup> Obviously, a fair trial is as much denied by jury prejudice resulting from inherent racial bias as by jury prejudice resulting from prejudicial pretrial publicity.<sup>25</sup> As is indicated below,<sup>26</sup> whether the new rule grants an absolute right to waiver where jury prejudice is due to factors other than pretrial publicity depends on how the general provision of the rule is interpreted.

If the court chose to do so, it could easily interpret the new waiver provisions consistently with the reasoning of the *Kilburn* decision. Applied to *Kilburn* itself, for instance, such an interpretation would lead to the conclusion that because *Kilburn* made “no showing of pretrial publicity or prejudice,”<sup>27</sup> he had no right to waiver under the second of the two provisions; and because the trial judge denied *Kilburn*'s motion on the rationale that jury trial would be in *Kilburn*'s best interests,<sup>28</sup> he did not abuse the discretion vested in him, consistently with prior case law, by the first provision. Indeed it seems likely that this is precisely how the court will interpret the new provisions if it adheres to the views espoused by the three justices who joined in the opinion of the court in *Kilburn*. However, as indicated above,<sup>29</sup> it is equally likely that a majority of the court will reject those views and accept those of the dissenters. And, as the remainder of this discussion endeavors to demonstrate, the latter result would be preferable.

The argument in favor of the *Kilburn* dissent proceeds from several basic premises. First, the state has little, if any, legitimate interest in requiring jury trial of a criminal defendant who

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24. See text accompanying notes 13 and 15 *supra*. The refusal of the *Kilburn* court to conclude that, given the facts of the case and the overwhelmingly white population of the county of the crime and trial, the mere fact of the defendant's race was sufficient evidence of the likelihood of a prejudiced jury is criticized in text accompanying notes 53-57 *infra*, in the context of a discussion of the proper interpretation of the new waiver provisions.

25. The opinion in *Singer v. United States*, 380 U.S. 24 (1964), suggests as much. It speaks generally of the possibility that “‘passion, prejudice . . . public feeling’ or some other factor may render impossible or unlikely an impartial trial by jury.” *Id.* at 37-38; see text accompanying note 22 *supra*.

26. See text accompanying notes 56-60 *infra*.

27. *State v. Kilburn*, 231 N.W. 61, 65 (Minn. 1975); see text accompanying note 15 *supra*.

28. See text accompanying note 15 *supra*.

29. See note 6 *supra*, and text accompanying notes 6-8.

knowingly chooses a court trial.<sup>30</sup> Second, as the Supreme Court has said, "trial by jury has its weaknesses and the potential for misuse."<sup>31</sup> Third, these weaknesses and possible abuses are not necessarily removed by the devices traditionally available for that purpose: *voir dire*,<sup>32</sup> change of venue,<sup>33</sup> and continuance of trial.<sup>34</sup> Recognition of these premises would seem to logically lead to the conclusion that the criminal defendant should always have an unconditional right to waive jury trial. Although that conclusion has been rejected as a general constitutional proposition by the Supreme Court<sup>35</sup> and by most state supreme courts under their constitutions,<sup>36</sup> the persuasive logic underlying it

30. See *State v. Spegal*, 5 Ill. 2d 211, 125 N.E.2d 468 (1955); Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 248 (1956).

31. *Singer v. United States*, 380 U.S. 24, 35 (1964). The most obvious weakness is that relevant in the present context: jury prejudice, whether as a result of pretrial publicity or general community attitudes.

32. The success of *voir dire* depends upon the existence of a panel containing a high proportion of unprejudiced prospective jurors, from which the defense, with its limited number of challenges, can ferret out the few prejudiced members. If most or all of the panel members are prejudiced, *voir dire* becomes inadequate. See Note, *The Right to an Impartial Federal Jury in the Event of Prejudicial Pretrial Publicity*, 53 COLUM. L. REV. 651, 654-55 (1953). Moreover, *voir dire* can never be effective unless the defense can perform the difficult task of detecting concealed or unconscious bias. See *id.* See also Sue, Smith, & Gilbert, *Biasing Effects of Pretrial Publicity on Judicial Decisions*, 2 J. CRIM. JUSTICE 163, 164 (1974); Note, *Selection of Jurors by Voir Dire Examination and Challenge*, 58 YALE L.J. 638 (1949).

33. Obviously, change of venue does not protect the defendant when there is no alternative place of trial where the jurors are less likely to be prejudiced than those in the original forum. Limitation of alternative venues to the state in which prosecution began and the pervasiveness of the modern mass media tend to increase the frequency of such situations. The problem is greatly exacerbated where the source of the prejudice is, for practical purposes, intrinsic to the case—as in *Kilburn*, where the black defendant had admitted the sexually related homicide of a white girl in an almost all white county of an overwhelmingly white state.

34. Continuance does not solve the problem of jury prejudice caused by the circumstances of the case. See note 33 *supra*.

The basic inadequacy of *voir dire*, change of venue, and continuances to protect the defendant's right to a fair trial is aggravated by the fact that, because the trial judge is supposed to be in a uniquely favorable position to assess the attitudes of potential jurors, Note, *The Right to an Impartial Federal Jury in the Event of Prejudicial Pretrial Publicity*, 53 COLUM. L. REV. 651, 655 n.19 (1953), appellate courts are reluctant to reverse denials of motions for these devices. See, e.g., *State v. Krampotich*, 282 Minn. 182, 163 N.W.2d 772 (1968); *State v. Ellis*, 271 Minn. 345, 136 N.W.2d 384 (1965). Indeed, *Kilburn* itself is exemplary of such deference to the trial judge.

35. See notes 20-22 *supra* and accompanying text.

36. See note 11 *supra*.

should nonetheless inform judicial interpretation of the rules, either statutory or common-law, that regulate waiver of jury trial. It is, after all, somewhat ironic that the right to jury trial<sup>37</sup>—the hard-won right to be judged by one's peers and, ultimately, by their moral standards rather than by an officer of the state sworn to apply its laws—should become a yoke that the defendant can remove only with the state's permission.<sup>38</sup>

The decision in *Kilburn*, and thus one possible interpretation of the new rule,<sup>39</sup> attributes too little importance to these premises. In the first place, it operates on the assumption that the state has an interest in requiring a jury trial. Paradoxically, that interest is that jury trial is in the defendant's "best interest."<sup>40</sup> It was with a view to "the [best] interest of the Defendant" that the trial court in *Kilburn* denied the motion for waiver;<sup>41</sup> and it was that ground for denial that the supreme court approved as indicating that the trial court was not merely avoiding decision of a disagreeable case.<sup>42</sup>

Neither the trial court nor the supreme court indicated why a jury trial was in defendant's best interest; given the circumstances of the case, their conclusion seems dubious,<sup>43</sup> unless one assumes that defendants are always better off being tried by a jury. However, even where there are plausible grounds for concluding that a jury trial would aid a defendant, it is improper for a court to deny a motion for waiver on that

37. Article 1, section 6 of the Minnesota Constitution guarantees the right to jury trial "in all criminal prosecutions." The term "all criminal prosecutions" includes prosecutions for all "crime," which is defined by MINNESOTA STATUTES § 609.02(1) to mean "conduct . . . prohibited by statute and for which the actor may be sentenced to imprisonment with or without a fine." *Peterson v. Peterson*, 278 Minn. 275, 153 N.W.2d 825 (1967); *State v. Ketterer*, 248 Minn. 173, 79 N.W.2d 136 (1956). The defendant's right to jury trial for offenses punishable by more than six-months' imprisonment is also guaranteed by the sixth and fourteenth amendments to the federal Constitution. *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

38. See Hall, *Has the State a Right to Trial by Jury in Criminal Cases?*, 18 A.B.A.J. 226, 227 (1932). The few references to jury trial at the constitutional convention were general statements that the right was intended to protect the accused from government oppression. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 101, 221-22 (M. Farrand ed. 1911).

39. See notes 27-28 *supra* and accompanying text.

40. See notes 41-42 *infra* and accompanying text.

41. *State v. Kilburn*, 231 N.W.2d 61, 63 (Minn. 1975).

42. *Id.* at 65; see text accompanying note 15 *supra*.

43. See text accompanying notes 53-56 *infra*.



basis.<sup>44</sup> The decision whether a waiver is advisable is a matter of strategy, and as such it should rest exclusively in the hands of the defendant and his attorney.<sup>45</sup>

In Minnesota, the notion that defendant's best interests may be served by compelling him to undergo jury trial developed circuitously. The trial judge's conclusion in *Kilburn* to that effect was inspired by language in an earlier Minnesota supreme court decision, *State v. Boyce*.<sup>46</sup> In that case the high court, reviewing a conviction following an error-free court trial, remanded on the ground that the record raised grave doubt as to defendant's guilt. In so doing, the court suggested that the defendant would be wise to accept a jury trial on remand.<sup>47</sup> The reason for the suggestion—which was only that—was the court's concern that in a second court trial the judge might "suffer from a subconscious reluctance to . . . second-guess [the] colleague" who had first tried the case.<sup>48</sup>

The advice in *Boyce* was based on a plausible concern, yet it was not couched as a directive to the trial court to deny a waiver motion; indeed the fact that the court offered the advice implied that the trial court might well grant such a motion. In *Kilburn*, however, the trial judge concluded, without explanation, that "[i]n line with *States versus Boyce* I'm inclined to agree with the County attorney that in this situation I think the interest of the Defendant would best be served by a jury trial."<sup>49</sup> And the supreme court approved his denial on that ground.<sup>50</sup> So by this curiously circuitous route, the supreme court's well-considered advice to one defendant that he accept a jury trial became general authority for a trial court, aided by the prosecuting attorney, to reject a defendant's strategy and substitute its own on his behalf. If *Kilburn* is followed in interpreting the

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44. See *State v. Kilburn*, 231 N.W.2d 61, 67 (1975) (Otis, J., dissenting).

45. *Id.*; see ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1975).

46. 284 Minn. 242, 170 N.W.2d 104 (1969).

47. *Id.* at 261, 170 N.W.2d at 116.

48. *State v. Kilburn*, 231 N.W.2d 61, 68 (Minn. 1975) (Otis, J., dissenting).

49. *Id.* at 63 (majority opinion). Presumably the judge did not mean that he himself might be subconsciously prejudiced against the defendant. Thus the statement must be taken to mean that the judge understood *Boyce* to say either that jury trials are generally in the defendant's best interests, or that the trial judge ought in each case to determine which type of trial would best serve the defendant.

50. See note 42 *supra* and accompanying text.

new rules regarding waiver,<sup>51</sup> such action by a trial judge will stand unless it can be shown that he or she ignored evidence demonstrating pretrial dissemination of material potentially prejudicial to the defendant.<sup>52</sup>

In the *Kilburn* case itself, the untoward effects of making the trial court the arbiter of the defendant's trial strategy were exacerbated, because the trial judge failed to attribute any merit to the defendant's convincing assertion that because of his color, the facts of the case, and the overwhelmingly white composition of the local population, his right to an impartial trial was jeopardized absent a waiver. As one of the dissenting supreme court justices observed:

This is a classic case where . . . prejudice against a defendant, whatever his race, color, or ethnic background, is inevitable. The killing of a 15-year-old white girl by an adult black in the course of a sexual encounter is the most inflammatory and volatile set of circumstances imaginable. . . . In all of Anoka County, the record indicates there are only a handful of blacks.<sup>53</sup>

Under these circumstances, surely the justice was correct in concluding that "[i]n the absence of the court's articulating any purpose for a jury trial other than his belief 'that the Supreme Court feels the interests of the Defendant are best served by a trial to a jury,' . . . it was the court's duty to try the matter without a jury."<sup>54</sup> Yet the opinion for the court, though not attempting to contradict the dissenter's characterization of the circumstances, affirmed the trial court's action on the ground, among others,<sup>55</sup> "that no evidence was produced that passions were aroused or that any prejudice would result to deny the availability of impartial jurors."<sup>56</sup>

One must question whether this demand for more evidence of prejudice than is inherent in the facts of the case and the racial composition of the community is realistic, and whether such a standard adequately safeguards the defendant's right to a fair trial. It is true that not all whites would be prejudiced against a black who had confessed to sexually assaulting and kill-

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51. That is, if the views of the three justices who joined in the opinion for the court are followed. See note 6 *supra*.

52. See MINN. R. CRIM. P. 26.01 (1) (2) (b), *quoted in* note 17 *supra*.

53. 231 N.W.2d at 69 (Otis, J., dissenting). The views of this dissenter are further elaborated in note 58 *infra*.

54. 231 N.W.2d at 69 (Otis, J., dissenting).

55. Other grounds were the absence of prejudicial pretrial publicity and the fact that the trial judge thought he was acting in the defendant's best interests. See text accompanying note 15 *supra*.

56. 231 N.W.2d at 65; text accompanying note 15 *supra*.

ing an innocent white girl. But given the substantial likelihood that many in any white community would be, the virtual impossibility of proving who or how numerous they would be, and the lack of any apparent state interest in requiring a defendant to be tried by a possibly prejudiced jury, is it not an unnecessary reduction of the likelihood of a fair trial to deny the accused's motion for waiver on the ground that he hasn't adequately proved prejudice?

In terms of its relationship to the waiver provisions of the new rules, the preceding analysis of the court's decision in *Kilburn* concerns only the general provision allowing waiver with the court's approval.<sup>57</sup> The analysis indicates that the interpretation of that provision foreshadowed by the court's approach to *Kilburn* is improper. It usurps the defendant's right to conduct his own defense with the assistance of counsel; it fails to ensure that the judge's decision as to the form of trial will be in the defendant's best interests; and in some cases it imperils the defendant's right to a fair trial. What is required, then, is an interpretation of the general waiver provision that does not recognize a state interest in determining the defendant's best interests regarding the form of trial, that presumes that the defendant's opinion as to the dictates of those interests is correct, and that provides for meaningful appellate review of whatever other state interests a trial court offers to support a denial of a motion for waiver. Such an interpretation might be phrased as follows:

*The trial judge should grant any knowing and voluntary motion for waiver unless he can advance sound countervailing reasons for not doing so; the judge must not usurp the defendant's right to conduct his own defense with the assistance of counsel.*

This suggested interpretation would seem to be implicit in the opinions of the two dissenting and the one concurring justice in *Kilburn*,<sup>58</sup> and thus of half of the justices who considered

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57. MINN. R. CRIM. P. 26.01 (1) (2) (a), *quoted in* note 16 *supra*.

58. 231 N.W.2d at 66-67 (MacLaughlin, J., concurring); *id.* at 67-71 (Otis, J., dissenting); *id.* at 71 (Rogosheske, J., dissenting). Justice Otis wrote an extended dissenting opinion with which Justices MacLaughlin and Rogosheske expressed general agreement. Judge Otis argued that the case involved "the most inflammatory and volatile set of circumstances imaginable," 231 N.W.2d at 69; text accompanying note 53 *supra*, and that those circumstances would render jury prejudice "inevitable." He concluded that the trial court's refusal to grant waiver, without offering any compelling reasons for a court trial, was therefore an abuse of discretion. He did not suggest any reasons that might support a denial of waiver, nor did Justice MacLaughlin or Justice Rogo-

the case.<sup>59</sup> Moreover, such an interpretation has been applied by the New York Court of Appeals to a statutory provision similar to section 631.01.<sup>60</sup>

It should be observed that none of the Minnesota or New York judges sharing this viewpoint has suggested an example of a legitimate state interest that a trial court might offer in support of a denial of a motion for waiver. This is not surprising, for apart from distrust of its own judges the state has no apparent interest in requiring a defendant to stand a jury trial. And distrust of judges while it may be cause for finding better ones is not a persuasive reason for denial of waiver. Thus, if the suggested interpretation is followed, proper trial court denials will be rare or nonexistent under the new Minnesota waiver provisions. This result would be consistent with the principle that the right to jury trial is intended to protect the defendant's interests in our system of justice.<sup>61</sup> Moreover, it would safeguard

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sheske. Justice Otis did state that in determining that defendant's "best interests" required a jury trial, the court "was preempting the exclusive function of a defense counsel in advising what trial tactics would be most beneficial to defendant." 231 N.W.2d at 67; see note 44 *supra* and accompanying text. Justice Otis did not explicitly assert, but did intimate, that defendant's right to a fair trial had been violated. After initially stating that there were "compelling reasons" why the trial court should have decided defendant's guilt or innocence without a jury, 231 N.W.2d at 67, he later quoted the following passage from the Supreme Court's opinion in *Singer v. United States*, 380 U.S. 24, 37 (1964):

[T]here might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial.

231 N.W.2d at 70. For a discussion of *Singer*, see text accompanying notes 20-22 *supra*.

Although Justice Otis did not express any general view on the proper standard to govern trial court rulings on motions for waiver, the reasoning of his opinion supports the interpretation of the general waiver provision of the new rule suggested here.

59. See note 6 *supra* and accompanying text.

60. *People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 229 N.E.2d 419, 282 N.Y.S.2d 729 (1967). The court stated:

[T]he requirement of judicial approval is designed to insure that the defendant's waiver is a knowing and intelligent one and that the discretion of the Trial Judge to deny a defendant's request to waive a jury trial is limited to those cases in which some "compelling ground arising out of the attainment of the ends of justice" requires that the request be denied.

*Id.* at 300-01, 229 N.E.2d at 421, 282 N.Y.S.2d at 731-32. The court did not suggest any reasons that might compel a denial of defendant's request. See also *People v. Spegal*, 5 Ill. 2d 211, 221, 125 N.E.2d 468, 473 (1955).

61. See MINN. R. CRIM. P. 26.01(1)(2)(a), Comments; ABA STANDARDS FOR CRIMINAL JUSTICE, TRIAL BY JURY § 1.2(b) (Approved Draft, 1968).

the defendant's right to a fair trial in those cases, such as *Kilburn*, where jury prejudice due to factors other than pretrial publicity is an obvious possibility, but incapable of demonstration by ordinary means of proof.

The second provision of the waiver rule reflects recognition, based on the decision of the United States Supreme Court in *Singer v. United States*,<sup>62</sup> that where prejudicial pretrial publicity precludes selection of an impartial jury, denial of a motion for waiver would deprive defendant of his right to a fair trial.<sup>63</sup> This provision will, of course, be of importance only if the interpretation of the general provision offered above is not adopted and the rule of *Kilburn* prevails instead.<sup>64</sup> If *Kilburn* prevails, the crucial question in applying the prejudicial publicity provision will be how, as a practical matter, to demonstrate to the court that "there is reason to believe that, as a result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial."<sup>65</sup>

At the outset, it should be noted that this provision does not require any "reason to believe" that the "dissemination" of "material" has actually had a prejudicial effect in the community. The wisdom of the rule is its recognition that such an effect is extremely difficult to document, and that the defendant's interests are adequately protected only if it is assumed that the dissemination of prejudicial material does in fact create prejudice.<sup>66</sup>

The language of the provision certainly suggests that the evidence of prejudicial pretrial publicity need not be strong in order to create an absolute right to waiver. "Reason to believe" is a very lenient standard for judicial decisionmaking, and the other crucial terms, "potentially" and "likelihood," are consistent with such a standard. Moreover, since the state has little, if any, interest in requiring a jury trial,<sup>67</sup> the burden of proof on the defendant as to the degree or likelihood of existing or potential prejudice should not be great.

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62. 380 U.S. 24 (1964).

63. See notes 18-23 *supra* and accompanying text.

64. See notes 15 and 24 *supra* and accompanying text.

65. MINN. R. CRIM. P. 26.01(1) (2) (b).

66. An analogous recognition should have led the *Kilburn* court to hold that, given the "inflammatory and volatile set of circumstances" involved in the case, 231 N.W.2d at 69 (Otis, J., dissenting), the defendant's motion for a waiver of jury trial should have been granted. See text accompanying notes 56-57 *supra*.

67. See text accompanying notes 60-61 *supra*.

For these reasons, the absolute right to waiver created by the new rule should be found whenever the defendant has produced—or the trial judge has otherwise become aware of—evidence of generally publicized material that *might*, given the character of the community and the circumstances of the case, prejudice potential members of a jury.

Because there was no evidence in *Kilburn* of pretrial publicity prejudicial to the defendant, the court did not have to consider the amount of such evidence necessary to support a right to waiver. Therefore, the *Kilburn* decision poses no obstacle to an appropriate interpretation of the second provision of the waiver rule.

In sum, the new Minnesota rule regarding waiver of jury trial by a criminal defendant has, in effect, received two opposing interpretations in *State v. Kilburn*. *Kilburn* suggests that if the views of the three justices who prevailed in that case are supported by at least two of the justices who did not participate in the decision, the provision of the rule that generally subjects waivers to the approval of the trial court will be read to grant the trial court broad discretion to deny a motion for waiver on the ground that jury trial would be in the best interests of the defendant, except where the motion is based on allegations of prejudicial pretrial publicity. As the dissenters and one of the concurring justices in *Kilburn* recognized, however, this interpretation allows the trial court to usurp the defendant's right to determine a crucial aspect of the conduct of his own defense, and exacerbates this problem by failing to provide a check on the soundness of the judge's determination of what the defendant's interests require. Moreover, where the potential for jury prejudice inheres in the very circumstances of the case, as in *Kilburn*, this interpretation may impair the defendant's right to a fair trial. A better interpretation would require the trial court to grant a motion for waiver if it could not support a denial with cogent reasons other than its understanding of the dictates of the defendant's interests. This approach would respect the defendant's right to conduct his own defense with the assistance of counsel, recognize that the right to jury trial exists for the defendant's benefit—not the state's, and preserve the defendant's right to a fair trial. If the dissenters' views are adopted by two undecided justices, this latter approach will prevail.

Because there was no evidence of prejudicial pretrial publicity in *Kilburn*, the decision casts little light on how the Minnesota court will interpret the second, special provision of

the new rule. If the view of the dissent prevails as to the proper interpretation of the general provision, the prejudicial pretrial publicity provision will be of minor importance. If the view of the majority prevails as to the general provision, it will be important to determine how much evidence of prejudicial pretrial publicity the defendant must produce in order to gain an absolute right to waiver. In either case, the answer should be that very little is required, for, again, the state has little or no interest in trying defendants before a jury, and the likelihood that defendants will receive a fair trial is reduced by any amount of potentially prejudicial publicity.