

Chapter 11

Venue

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Venue is the “territory, such as a country or other political subdivision, over which a trial court has jurisdiction.” BLACK’S LAW DICTIONARY 1695 (9th ed. 2009). This chapter covers the following issues concerning venue. Section 11.1 summarizes the statutes governing the location of proper venue. Section 11.2 addresses challenges to improper venue. Section 11.3 discusses motions to change venue. Section 11.4 covers alternative remedies if a motion to change venue is denied.

11.1 Location of Proper Venue

A. Distinction between Jurisdiction and Venue

Venue concerns the issue of the proper place or county in which to try a case, while jurisdiction concerns the more fundamental question of whether a particular court has the authority to try a defendant. *See State v. Carter*, 96 N.C. App. 611 (1989) (discussing

distinction between jurisdiction and venue); *State v. Bolt*, 81 N.C. App. 133 (1986) (same). Improper venue does not deprive the court of jurisdiction. *See Carter*, 96 N.C. App. at 613 (trial court has jurisdiction despite technically improper venue); *accord State v. Pulley*, 180 N.C. App. 54 (2006).

The practical significance of this distinction is that improper venue is a waivable error, while lack of jurisdiction is not waivable. Thus, if an indictment or other pleading fails to identify, or incorrectly alleges the county of an offense, the defendant must timely move to dismiss on the ground of improper venue, or he or she waives the right to do so. *See infra* § 11.2, Challenging Improper Venue.

B. Superior Court Proceedings

Trials. Venue for misdemeanor appeals lies in the county where the district court misdemeanor trial was held. *See* N.C. GEN. STAT. § 15A-131(d) (hereinafter G.S.). Venue for felony trials lies in the county where the charged offense occurred. *See* G.S. 15A-131(c).

G.S. 15A-131(c) includes special venue provisions for felony offenses committed within a municipality that is the seat of a superior court and whose corporate limits extend into more than one county. This special provision appears to apply only to High Point, North Carolina.

Probable cause hearings. Venue for probable cause hearings is in the county where the offense allegedly occurred (subject to the special rule for High Point described above under Trials). *See* G.S. 15A-131(c).

Indictments. Venue to indict exists concurrently with trial venue. *See* G.S. 15A-628(b); G.S. 15A-631. Thus, indictments should be returned by a grand jury from the county where the charged offense occurred.

Before 1986, the place for the return of an indictment was a matter of jurisdiction; the grand jury only had jurisdiction to indict for offenses that occurred within the county where the grand jury sat. *See State v. Randolph*, 312 N.C. 198 (1984). However, the legislature has since amended the law, which now states that the place for return of indictment (or presentment) is a matter of venue only. *See* G.S. 15A-631; *State v. Carter*, 96 N.C. App. 611 (1989) (if indictment is otherwise valid, it is not void for improper venue). Thus, the issue of venue is waived if the defendant does not timely challenge it. *See* G.S. 15A-952(b)(5), (e); *see also* G.S. 15-155.

Pretrial proceedings. Venue for pretrial proceedings in superior court is proper in the entire judicial district of the alleged offense, rather than being restricted to the county of the offense. *See* G.S. 15A-131(b).

Initial appearance. The initial appearance before a magistrate may be held anywhere in the state. *See* G.S. 7A-273(7).

Probation. Discussion of proceedings to modify or revoke probation is beyond the scope of this manual. The pertinent venue and jurisdiction statutes for probation proceedings are: G.S. 15A-1345(d) (preliminary hearing on probation violation); G.S. 15A-1344 (probation violation hearing); G.S. 15A-1342(a1) (violation of probation pursuant to deferred prosecution); G.S. 90-96 (violation of probation pursuant to conditional discharge); G.S. 15A-1344(a1) (violation of probation in drug treatment and therapeutic court case); *see also* G.S. 7A-271(e) (violation of probation pursuant to guilty plea in district court to Class H or I felony).

C. District Court Proceedings

Misdemeanor trials. Venue for trials of misdemeanor cases and other cases “within the original jurisdiction of the district court” lies in the county where the offense allegedly occurred. *See* G.S. 15A-131(a). Under G.S. 15A-131(d), venue for misdemeanors that are appealed to superior court lies in the county where the case was first tried. A defendant can move to dismiss for improper venue on trial de novo in superior court as long as he or she did not stipulate to venue or expressly waive the right to contest venue in the district court proceeding with the benefit of counsel. *See* G.S. 15A-135.

Infractions. Venue for infractions lies in “any county where any act or omission constituting part of the alleged infraction occurred.” *See* G.S. 15A-1112.

Pretrial proceedings. Venue for pretrial proceedings in district court is in the county where the offense allegedly occurred. *See* G.S. 15A-131(a).

Initial appearance. The initial appearance before a magistrate may be held anywhere in the state. *See* G.S. 7A-273(7).

Probation. Discussion of proceedings to modify or revoke probation is beyond the scope of this manual. The pertinent venue and jurisdiction statutes for probation proceedings are: G.S. 15A-1345(d) (preliminary hearing on probation violation); G.S. 15A-1344 (probation violation hearing); G.S. 15A-1342(a1) (violation of probation pursuant to deferred prosecution); G.S. 90-96 (violation of probation pursuant to conditional discharge); G.S. 15A-1344(a1) (violation of probation in drug treatment and therapeutic court case); *see also* G.S. 7A-271(e) (violation of probation pursuant to guilty plea in district court to Class H or I felony).

D. Concurrent Venue

General rules. There are three general rules governing concurrent venue.

- An offense is considered to have occurred in a county if any act or omission that is part of the offense took place there. Any such county is a proper venue to try that offense. *See* G.S. 15A-131(e); G.S. 15A-132(a); *State v. Perry*, 159 N.C. App. 30 (2003) (venue for practicing medicine without a license and involuntary manslaughter proper in Buncombe county even though the face-to-face visits where the defendant

impersonated a doctor occurred in another county; defendant telephoned victim, and victim died, in Buncombe county).

- When charged offenses are joinable under G.S. 15A-926, any county that is a proper venue for one joinable offense has concurrent venue for all. *See* G.S. 15A-132(b).
- When an offense takes place in multiple counties, all those counties have concurrent venue until one county initiates a prosecution. The first county to initiate a prosecution by issuing process obtains exclusive venue. *See* G.S. 15A-132(c); *State v. Carter*, 96 N.C. App. 611 (1989) (where Wake and Franklin counties had concurrent venue, trial proper in Wake County because defendant first indicted there); *see also State v. Vines*, 317 N.C. 242 (1986) (where Ashe County returned “no true bill” it did not institute charges; thus, Buncombe County could initiate subsequent prosecution); *State v. Paige*, 316 N.C. 630 (1986) (county that has obtained exclusive venue by being first to file charges against defendant lost exclusive venue when charges dismissed).

Specific statutes. In addition to the above general rules, concurrent venue also is addressed in several statutes, including:

- G.S. 15-129 (offenses on waters dividing counties): Where an offense occurs on a waterway that marks the boundary of two counties, venue is proper in either of the two bordering counties. *See State v. Bullard*, 312 N.C. 129 (1984) (venue proper in either Bladen or Sampson County where offense occurred at least in part on the bridge over river that divides the two counties).
- G.S. 15-130; G.S. 15-133 (assault in one county, death in another): Venue for homicide is proper either in the county where the assault occurred or the county where the victim died.
- G.S. 15A-136 (sex offenses in which defendant is alleged to have transported victim): Venue is proper in any county where the transportation was offered, solicited, or took place.
- G.S. 14-7 (accessory after the fact): Venue to try an accessory after the fact is proper in any county where the principal could be prosecuted or in the county where the defendant committed acts that form the basis of the charge of accessory after the fact.
- G.S. 14-71 (receiving stolen goods): Venue is proper in any county where the thief could be prosecuted or in any county where the defendant possessed the stolen goods. *See State v. Haywood*, 297 N.C. 686 (1979) (venue for receiving stolen goods proper in Guilford County where the defendant was in possession of the stolen goods there; State had no burden to show that the defendant received the goods in Guilford County).
- G.S. 14-71.1 (possession of stolen goods): Venue is proper in any county where the thief could be prosecuted or in any county in which the defendant possessed the property. *See State v. Brown*, 85 N.C. App. 583 (1987) (stating rule).
- G.S. 14-113.6A (obtaining property or services by false or fraudulent use of credit device or other means): Venue is proper in the county where the telephone call or other communication was initiated or where it was received.
- G.S. 14-113.21 (identity theft): Venue is proper in any county where the victim resides, where the defendant resides, or where any part of the identity theft took

- place, or in any other county instrumental to the completion of the offense, regardless of whether the defendant was ever actually present in that county.
- G.S. 14-113.33 (Telephone Records Privacy Protection Act): Venue is proper in any county where the customer resides, where the defendant resides, or where any part of the offense took place, or in any other county instrumental to the completion of the offense, regardless of whether the defendant was ever present in that county.
 - G.S. 14-118.13 (mortgage fraud): Venue is proper in any county where the property to be mortgaged is located, where any act was committed in furtherance of the violation, where any defendant had control or possession of proceeds of a violation, where any closing occurred, or where any document containing a deliberate misrepresentation is filed with the registrar of deeds or with the Division of Motor Vehicles.
 - G.S. 14-378 (bribery in athletic contests): Venue is proper in any county where the bribe was offered or accepted or where the relevant athletic contest occurred.
 - G.S. 143-116 (stealing from state institutions in violation of G.S. 143-114 and G.S. 143-115): Venue is proper in Wake County, where such offenses are deemed to have occurred.
 - G.S. 163-278.27 (excessive campaign contributions): Exclusive venue lies in the county where the offender resides. *See State v. Bolt*, 81 N.C. App. 133 (1986) (stating rule).
 - No specific statute (conspiracy): The courts have held that venue for conspiracy to commit an offense is proper in the county in which the agreement was formed or in any county in which an overt act was done by any of the conspirators in furtherance of the plan. *See State v. Louchheim*, 296 N.C. 314 (1979) (stating rule); *State v. Davis*, 203 N.C. 13 (1932) (to same effect).

11.2 Challenging Improper Venue

A. Dismissal for Improper Venue

G.S. 15A-924(a)(3) requires all pleadings to state the county in which the offense occurred. The county named determines the proper venue. If the county is omitted in the pleading, counsel may either file a motion to dismiss the indictment or seek a bill of particulars identifying the county of the alleged offense. If a county is alleged in the pleading but it is not a proper venue because the offense took place elsewhere, counsel may file a motion to dismiss the indictment on the ground of improper venue. *See* G.S. 15A-952(b)(5); G.S. 15A-952(e).

In either instance there is no double jeopardy bar to retrying a defendant whose case has been dismissed for improper venue before trial. Thus, the State generally will be permitted to refile charges in the proper venue following dismissal. However, a successful challenge to venue may facilitate a favorable plea bargain or other disposition of a case.

B. Facially Deficient Pleading

Sometimes an indictment or other pleading will contain allegations about venue that are invalid on their face. For instance, in *State v. Carter*, 96 N.C. App. 611 (1989), a Wake County indictment for drug trafficking alleged that the defendant had sold cocaine in Franklin County. Recognizing that the proper venue for prosecuting drug transactions that occurred in Franklin County was Franklin County, *Carter* held that Wake County was an improper venue for the trafficking charge; however, the court affirmed the conviction because the defendant failed to timely move to dismiss for improper venue.

A related error occurred in *State v. Bolt*, 81 N.C. App. 133 (1986). In *Bolt*, the venue allegations in the indictment were invalid as a matter of law. The defendant in that case resided in Wilson County and allegedly sent illegal campaign contributions to a candidate in Wake County. Wake County prosecuted the case, returning an indictment alleging a violation of the election laws in Wake County. The Court of Appeals upheld the Wake County trial court's dismissal of the case on the ground that the statute that was violated, G.S. 163-278.27, provided for exclusive venue for excessive campaign contributions in the county where the offender resided. *Bolt* demonstrates the importance of checking the substantive statute creating a particular offense for venue provisions.

The proper procedure for objecting to a facially invalid pleading is to file a motion to dismiss the indictment on the ground of improper venue at or before arraignment. *See* G.S. 15A-952(b)(5), (c), (e). If counsel does not request arraignment, such a motion must be filed within 21 days of the return of an indictment. G.S. 15A-952(c).

C. Factually Inaccurate Allegations

Generally. A more common problem with venue is where the pleading is facially valid but factually inaccurate—that is, it alleges that the criminal conduct occurred in the county where the prosecution is initiated, but the criminal conduct actually occurred elsewhere. For instance, your client may be indicted in Durham County for a Durham County breaking-and-entering, but through your investigation you discover that the property is located across the Orange County line. Here again, if the defendant fails to file a pretrial motion to dismiss the indictment for improper venue, he or she may be deemed to have waived the objection. *See* G.S. 15A-952(b)(5), (e).

Burden of proof. Once the defendant has raised the issue of venue, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county alleged in the indictment. *See State v. Bullard*, 312 N.C. 129 (1984) (if defendant moves to dismiss for improper venue, State has burden to prove that offense occurred in county alleged in indictment); *State v. Louchheim*, 296 N.C. 314 (1979) (State must prove *location* of charged offense, not that crime actually occurred). The trial court rules on this issue rather than the jury. *See State v. Louchheim*, 36 N.C. App. 271, 280 (1978) (questions of venue must be resolved before jury empanelment), *aff'd*, 296 N.C. 314 (1979). In this respect, challenges to venue differ from challenges to territorial

jurisdiction, where the factual question of whether the crime occurred in North Carolina is a jury question. *See supra* § 10.2, Territorial Jurisdiction.

Variance between pleading and proof at trial. Sometimes the discrepancy between the venue allegations in the indictment and the actual location of the crime will not become apparent until during trial. Although usually a criminal defendant must object to improper venue before trial or suffer waiver, several federal cases have held that the waiver rule does not apply where the problem with venue does not become apparent until during presentation of the evidence. *See United States v. Melia*, 741 F.2d 70 (4th Cir. 1984) (court declines to apply waiver rule where improper venue not apparent until evidence adduced at trial); *United States v. Black Cloud*, 590 F.2d 270 (8th Cir. 1979) (indictment specifically alleged that defendant received firearm in North Dakota; thus, when proof at trial was otherwise, his motion at close of evidence to dismiss for improper venue was timely); *United States v. Gross*, 276 F.2d 816 (2d Cir. 1960) (where lack of venue not apparent on face of the indictment, issue was not waived where the defendant objected to improper venue at the close of all evidence).

In dicta, the North Carolina Court of Appeals has declined to follow this line of authority. *See State v. Brown*, 85 N.C. App. 583 (1987) (venue waived if not raised pretrial even if issue arises from variance between pleading and proof). However, *Brown* suggests that a motion to dismiss on the ground of variance between the pleadings and the State's proof may be granted if the allegations about the place of the crime were material or they affected the defendant's ability to defend against the charge. *See also State v. Spencer*, 187 N.C. App. 605 (2007) (to same effect).

In light of these decisions, if you believe the allegation of venue is factually inaccurate and do not want the case heard in the venue alleged, move to dismiss before trial in accordance with the timelines in G.S. 15A-952(c), discussed below in subsection D. If the problem with venue is not apparent until the presentation of evidence at trial, move to dismiss at the close of the State's evidence and again at the close of all the evidence, and advance any arguments about why the variance between pleading and proof is material and requires dismissal. *See Brown*, 85 N.C. App. at 588 (indicating when dismissal may be appropriate for variance).

D. Waiver

Explicit waiver of right to proper venue. The defendant may waive the right to venue in the statutorily mandated locale by filing a motion to change venue under G.S. 15A-957 or by entering into a written stipulation with the prosecutor to change venue pursuant to G.S. 15A-133.

Implicit waiver of right to proper venue. Challenges to venue are subject to the time limits of G.S. 15A-952(c). If the defendant requests arraignment (which must be in writing), a motion challenging venue must be made at or before the time of arraignment. If counsel does not request arraignment, such a motion must be filed within 21 days of the return of an indictment.

If the defendant fails to move to dismiss for improper venue the issue is considered waived. *See* G.S. 15A-135 (“Allegations of venue in any criminal pleading become conclusive in the absence of a timely motion to dismiss for improper venue under G.S. 15A-952.”); *State v. Haywood*, 297 N.C. 686 (1979) (motion to dismiss for improper venue must be timely). Moreover, the court’s authority to excuse a late motion to dismiss for improper venue is restricted by G.S. 15A-952(e), which states that the trial court may grant relief from any waiver for an untimely motion “except failure to move to dismiss for improper venue.”

No waiver for trial de novo. G.S. 15A-135 permits a defendant to “move to dismiss for improper venue upon trial de novo in superior court, provided he did not in the district court with benefit of counsel stipulate venue or expressly waive his right to contest venue.”

Waiver by certain guilty pleas. Under G.S. 15A-1011(c), a defendant may enter a plea of guilty to offenses charged in several judicial districts at once if certain procedural rules are followed. A plea in one county to an offense charged in another constitutes a waiver of venue. A superior court judge may accept a plea under this statute even though the case is within the exclusive original jurisdiction of the district court. A district court judge may accept pleas under this statute in cases within the original jurisdiction of the district court or in cases within the concurrent jurisdiction of the district and superior courts under G.S. 7A-272(c) (authorizing district courts to accept guilty pleas to Class H and I felonies).

11.3 Change of Venue

A. Methods for Changing Venue

Motion. A defendant may obtain a change of venue by filing a motion to change venue pursuant to G.S. 15A-957. This motion must allege that there exists such great prejudice in the county where the prosecution was initiated that the defendant would be unable to receive a fair trial. A motion requesting a change of venue must be filed at or before arraignment if the defendant has filed a written request for arraignment or, if arraignment is waived, within 21 days of the return of the indictment. *See* G.S. 15A-952(b), (c); *State v. Walters*, 357 N.C. 68 (2003) (motion for change of venue had to be filed before trial pursuant to G.S. 15A-952 unless trial court, in its discretion, permitted it to be filed at a later time).

Stipulation. A defendant also may obtain a change of venue by entering into a stipulation with the prosecutor pursuant to G.S. 15A-133. The defendant, the prosecutor, and the prosecutor into whose district the case is to be transferred must sign a stipulation under G.S. 15A-133. The stipulation must state which portion of the proceedings will be held in the alternative venue.

Practice note: A defendant who is charged with offenses in multiple districts and plans to enter a plea of guilty to all of the charges may find it advantageous to have all of the cases transferred to one county for disposition. In this way, the defendant avoids receiving additional prior record level points as he or she moves from one district to another for sentencing. Also, the defendant avoids incurring multiple costs of court and other administrative fees. The defendant may receive a better disposition and have a better chance of receiving concurrent sentences by accepting responsibility for multiple offenses at one court setting. Contact the defendant's attorney in the other county to determine the feasibility of this approach.

Inherent authority of the court. Although there is no explicit statutory authority for the court on its own motion to order a change of venue, the N.C. appellate courts have held that the court has the inherent authority to do so. *State v. Barfield*, 298 N.C. 306 (1979), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

Transfer of venue on motion of the State. Similarly, while there is no explicit statutory authority for it, the N.C. appellate courts have held that the trial court has the authority to order a change of venue on motion of the State where the interests of justice require it. *See State v. Griffin*, 136 N.C. App. 531 (2000) (venue transferred on motion of the State owing to physical limitations of courthouse and number of pending murder cases in the county); *State v. Chandler*, 324 N.C. 172 (1989) (the defendant's right to be tried in place of crime and the community's right to see justice done are important considerations, although they must yield if change of venue is necessary to obtain fair and impartial jury).

Special venire. Either the defendant or the State may move for a special venire of jurors from another county. Also, the court on its own motion may order a special venire. *See infra* § 11.4A, Special Venire.

B. Strategic Considerations in Seeking to Change Venue

In deciding whether to seek a change of venue, counsel should consider:

- *The extent of bias in the community against the defendant.* Assessing the degree of bias in the community requires determining the extent of pretrial publicity, the content of the publicity, the size and diversity of the population of the county, and the effect of word-of-mouth communication.
- *The likely location of the new venue.* Particularly where a change in venue will radically affect the demographics of the jury pool, such as a change in venue from an urban area to a rural one, consider whether the new venue will be more or less favorable to the defendant. For further discussion, see *infra* 11.3D, Location of New Venue.
- *The time and resources involving in bringing the motion.* As discussed further in subsection C., below, a successful motion to change venue may require a considerable investment of time and other resources. Often, the defense team will have to conduct a statistically significant sampling of the district's population and

retain an expert statistician to interpret the sample. Counsel therefore must weigh the cost and effort involved in bringing a change of venue motion against the likelihood of success.

- *Other potential negative effects on the defense.* Consider whether moving the trial will affect the availability of defense witnesses or the ability of the defendant's family to attend the trial or sentencing proceeding.

C. Demonstrating Need for Change of Venue

Constitutional basis. The U.S. Supreme Court has held that exposure of the jury to excessive and prejudicial news coverage may violate due process. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966) (holding that extensive media coverage denied defendant due process right to fair trial); *see also State v. Jerrett*, 309 N.C. 239 (1983) (due process requires that defendant be tried by jury free from outside influences). Any motion under G.S. 15A-957 should allege that failure to change venue would deny the defendant his or her due process rights under the Fourteenth Amendment.

Statutory standard. The standard for ruling on a change of venue motion is whether, due to pretrial publicity, it is reasonably likely that the defendant will not receive a fair trial. *See G.S. 15A-957; State v. King*, 326 N.C. 662 (1990); *State v. Jerrett*, 309 N.C. 239 (1983) (defense motion for change of venue should be granted whenever the defendant establishes that it is reasonably likely that jurors will base their verdict on pretrial information). The burden is on the defendant to show that pretrial publicity will deprive him or her of a fair trial. *See State v. Dobbins*, 306 N.C. 342 (1982) (defense has burden of proof on issue).

Factors. The court may consider the following factors in ruling on a defendant's motion to change venue:

- the nature of the pretrial publicity, and whether it was neutral or inflammatory;
- the length of time between the publicity and the trial;
- the size and diversity of the community where the crime occurred; and
- answers to voir dire questions by prospective jurors.

See State v. Wallace, 351 N.C. 481 (2000).

Evidentiary support. The following may be useful sources of evidence for a pretrial hearing on a change of venue motion:

- Media accounts of the crime in local newspapers or in broadcasts on radio or television. Counsel should highlight prejudicial or misleading assertions of fact in the media accounts.
- Data from the media sources on their distribution or viewing rates in the county.
- Affidavits or live testimony from credible people in the community who regularly have significant amounts of contact with the public. Such people might include journalists, clerks of court, or members of the sheriff's department.

- Statistically significant polls or surveys on public knowledge of and opinions about the crime and the defendant. Counsel will probably have to retain an expert to conduct and interpret such polls.

Voir dire of jurors. North Carolina courts have held that jurors' answers to voir dire questions are the best evidence of community bias. *See State v. Jaynes*, 342 N.C. 249 (1995); *State v. Madric*, 328 N.C. 223 (1991). Thus, if a pretrial motion to change venue is denied, counsel should try to establish the existence of widespread juror bias during voir dire and renew the motion at that time. Counsel should question jurors about:

- their personal acquaintance with either the defendants or the victims,
- information the juror may have acquired about the case by word of mouth,
- information the juror may have acquired about the case through media sources,
- any opinion or impression the juror formed as a result of the information, and
- the effect the information and resulting opinion would likely have on their deliberations.

It is ultimately the judge's decision, not the juror's, whether the juror can be fair. *See Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (conviction set aside despite jurors' statements that they could render impartial verdict; court held that defendant was entitled to be tried in "an atmosphere undisturbed by so huge a wave of public passion"), *superseded by statute in part on other grounds as stated in Casey v. Moore*, 386 F.3d 896 (9th Cir. 2004); *Marshall v. United States*, 360 U.S. 310 (1959) (per curiam) (setting aside conviction where news accounts exposed jurors to inadmissible evidence, despite jurors' statements on voir dire that they would decide the case only on the evidence on the record and not be influenced by news articles). Avoid asking jurors whether they can set aside their prior knowledge and be fair—almost anyone asked that question would respond affirmatively. Instead, ask the jurors questions that will draw out whether their prior knowledge or opinions will influence how they assess the credibility of particular witnesses, the weight to be given to particular evidence, or whether the State has proved the charges.

The trial judge is likely to have the last word on whether a juror can be fair. The U.S. Supreme Court has said that appellate courts should resist second-guessing the trial judge's determination of juror impartiality because the trial judge personally observes voir dire and is in the best position to evaluate potential jurors. *See, e.g., Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896, 2918 (2010) (upholding federal district court's denial of transfer of venue and explaining that appellate courts should primarily rely on the trial court's judgment on the effect of pretrial publicity on jurors).

Establishing prejudice. To obtain a change of venue in the trial court, or to obtain relief on appeal if the motion is denied, a defendant must show prejudice to his or her case. The N.C. appellate courts have used two different prejudice standards in reviewing venue issues. Under the first and most often-used standard, a defendant must show "specific prejudice" by demonstrating that "jurors with prior knowledge decided [the defendant's] case, that [the defendant] exhausted his peremptory challenges, and that a juror

objectionable to [the defendant] sat on the jury.” *State v. Billings*, 348 N.C. 169, 177 (1998); *accord State v. Bonnett*, 348 N.C. 417, 428 (1998). Note that this prejudice standard requires a defendant to do more than bring a pretrial motion to change venue. Counsel also must:

1. voir dire prospective jurors on their prior knowledge of the case;
2. renew the motion to change venue based on jurors’ responses to voir dire questions; and
3. if the renewed motion is denied, exhaust the defense’s peremptory challenges and express dissatisfaction with a seated juror in order to preserve the issue for appellate review. (For further discussion of the importance of exhausting peremptory challenges to preserve challenges to the jury, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.1G (Preserving Denial of Challenges to the Panel) and § 25.4C (Preserving Denial of Cause Challenges) (UNC School of Government, 2d ed. 2012).)

The N.C. appellate courts have not always required a defendant to show that a biased juror sat on the jury to show prejudice from the denial of a change of venue motion. Sometimes they have applied a second, general prejudice standard. The North Carolina Supreme Court has stated, “where the totality of the circumstances reveals that an entire county’s population is ‘infected’ with prejudice against a defendant, the defendant has fulfilled his burden of showing that he could not receive a fair trial in that county even though he has not shown specific identifiable prejudice.” *Billings*, 348 N.C. at 177; *see also State v. Jerrett*, 309 N.C. 239 (1983) (applying more general prejudice standard to hold that defendant could not receive fair trial in Alleghany County, where population was small and community was very close-knit). Evidence of general prejudice against the defendant should be developed at a pretrial hearing. If the pretrial hearing does not result in a favorable decision, then counsel should continue to develop evidence of the need for a change of venue during jury selection and renew the motion at that time.

Appellate review. The decision to change venue lies within the sound discretion of the trial court and will be reversed only for abuse of discretion. *See State v. Bonnett*, 348 N.C. 417 (1998); *State v. Barnes*, 345 N.C. 184 (1997); *State v. Ridgeway*, 185 N.C. App. 423 (2007); *see also Skilling v. United States*, ___ U.S. ___, 130 S. Ct. 2896 (2010) (upholding federal district court’s denial of transfer of venue). The trial court is not required to make findings of fact in support of an order to change venue, but the North Carolina Court of Appeals has indicated that it is the better practice to do so. *State v. Griffin*, 136 N.C. App. 531 (2000).

D. Location of New Venue

When you move to change venue, it is helpful to have an alternative, or a set of acceptable alternative venues, in mind.

Possible counties. G.S. 15A-957 provides that if the court grants a change of venue motion it must transfer the case to another county within the same judicial district, as defined in G.S. 7A-60, or to a county in an adjoining district. If the parties stipulate to a

change of venue under G.S. 15A-133, the parties may transfer the case to any county as long as they obtain the written consent of the prosecutor from the receiving county. While it is not statutorily required, counsel should also get the defendant's attorney from the receiving county, if the defendant already has one, to sign the stipulation to transfer venue.

Demographic similarity. Under the Sixth Amendment to the United States Constitution and article I, sections 24 and 26 of the North Carolina Constitution, a criminal defendant is entitled to a jury venire drawn from a fair cross-section of the community where the offense occurred. *See, e.g., Duren v. Missouri*, 439 U.S. 357 (1979); *State v. Bowman*, 349 N.C. 459 (1998). The U.S. Supreme Court has yet to decide whether a change of venue to a county that is demographically dissimilar to the county where the offense occurred violates the fair cross-section requirement. *See Mallett v. Missouri*, 494 U.S. 1009 (1990) (two of the three justices dissenting from denial of certiorari would have reached this issue). Counsel should rely on the fair cross-section requirement in requesting a change of venue to a demographically similar county. You are not bound by the statutory limitations of G.S. 15A-957 if the parties stipulate to a change of venue. For further discussion of the fair cross-section requirement, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.1A (Fair Cross-Section Requirement) (UNC School of Government, 2d ed. 2012).

Reach of relevant media coverage. If the media sources that created the bias against your client cover neighboring counties, you should inform the court at any evidentiary hearing of the reach of the media sources and request a change of venue outside that area. Also, check the local media sources in the new venue to ensure that a comparable crime has not recently been the subject of media attention in that county. For example, if you are defending someone in a home invasion case, make sure that the local newspaper in the new venue has not just run a series on the terror of home invasions.

11.4. Alternative Relief

A. Special Venire

In response to a defendant's motion for a change of venue, or on its own motion, the court may order a special venire of jurors from a neighboring county to be brought into the county where the crime occurred. *See* G.S. 15A-957; G.S. 15A-958; *State v. Golphin*, 352 N.C. 364 (2000) (trial judge had authority to order a special venire from Johnston County for a trial in Cumberland County); *see also* 2 NORTH CAROLINA DEFENDER MANUAL § 25.1F (Supplemental Jurors from Outside the County) (UNC School of Government, 2d ed. 2012).

Practice note: Try to avoid special venires. As a general rule, special venires are not a favorable alternative for defendants. Jurors may view the inconvenience of being transported to another county as the defendant's fault. In addition, bus trips or van rides from county to county provide opportunities for improper contact among jurors.

B. Individual Voir Dire

In capital cases, the trial court may in its discretion permit individual voir dire of jurors. *See* G.S. 15A-1214(j). Although there is no explicit statutory authority to do so in noncapital cases, cases indicate that the court has the inherent authority to permit individual voir dire where it would be necessary to select a fair and impartial jury. *See State v. Abbott*, 320 N.C. 475 (1987) (in noncapital case, trial court allowed individual voir dire as alternative to change of venue); *State v. Burke*, 342 N.C. 113 (1995) (in noncapital murder case, court states that decision whether to grant individual voir dire is within trial court's discretion). Further, the trial court's duty to oversee jury selection almost certainly implies that it has the authority to order individual voir dire (or partial individual voir dire) if necessary to select an impartial jury. *Cf. State v. Barfield*, 298 N.C. 306 (1979) (court has inherent authority to order change of venue in interests of justice), *disavowed in part on other grounds by State v. Johnson*, 317 N.C. 193 (1986).

Counsel may also seek partial individual voir dire, where jurors are questioned individually only about sensitive topics, such as jurors' exposure to pretrial publicity and pre-formed opinions about the case.

For a further discussion of individual voir dire, see 2 NORTH CAROLINA DEFENDER MANUAL § 25.3G (Right to Individual Voir Dire) (UNC School of Government, 2d ed. 2012).

C. Continuance

If a motion for a change of venue is unsuccessful, counsel might consider requesting a continuance. Over time, media interest in the crime may decline and the influence of prejudicial coverage may dissipate. A continuance may be a good remedy where some other event is creating increased media interest in your client's story. For example, an attorney representing a defendant charged with a capital crime sought a continuance beyond the time when a local person was to be executed because the pending execution created a great deal of media interest in all of the county's death penalty cases.