11.3 Change of Venue

A. Methods for Changing Venue
B. Strategic Considerations in Seeking to Change Venue
C. Demonstrating Need for Change of Venue
D. Location of New Venue

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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)(5), (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. Supreme Court has acknowledged that the superior court has "the inherent authority" to do so. *State v. Barfield*, 298 N.C. 306, 320 (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, 184 (1989) ("the defendant's right to be tried in place of crime and the citizen's right to see justice done in their own community 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 and potential benefit of having the motion granted.
- *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); s*ee also State v. Jerrett*, 309 N.C. 239, 251 (1983) (due process requires that defendant be tried by jury "free from outside influences"). Negative press coverage alone is not enough to violate due process. "Pretrial publicity, even

pervasive, adverse publicity does not inevitably lead to an unfair trial." *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 554 (1976). On the other hand, in cases involving excessive, inflammatory pretrial publicity, prejudice to the defendant may be presumed without regard to actual juror bias. *Skilling v. United States*, 561 U.S. 358, 380 (2010) (observing that "a conviction obtained in a trial atmosphere that [was] utterly corrupted by press coverage" could not stand (citation omitted)).

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 to the U.S. Constitution and under article I, section 19 of the North Carolina Constitution (the "law of the land" clause).

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.
- Data on the size and diversity of the community.

Voir dire of jurors. North Carolina courts have held that jurors' answers to voir dire questions are "the best and most reliable evidence" of community bias. *See State v. Jaynes*, 342 N.C. 249, 264 (1995), *quoting State v. Madric*, 328 N.C. 223, 228 (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 the defendants, the victims, and witnesses,
- information the juror may have acquired about the case by word of mouth,
- information the juror may have acquired about the case through both traditional and social 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 about significant life experiences analogous to relevant issues in the case. These questions will draw out whether jurors' 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*, 561 U.S. 358, 386 (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 normally 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 and identifiable 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 (July 2018)).

In cases of extreme pretrial publicity, however, specific or actual juror bias need not be shown. Prejudice in such cases may be presumed without the need to show actual juror bias. The North Carolina Supreme Court has recognized, "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*, 561 U.S. 358 (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 prosecutorial 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) (Marshall, J., dissenting) (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 (July 2018); RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 6.3, Fair Cross-Section Challenges (Sep. 2014).

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.