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CHAPTER FIVE

CHANGE OF JUDGE / CHANGE OF VENUE

I. CHANGE OF JUDGE

A defendant, like any other litigant, has the right to a fair trial before an unbiased tribunal. Everling v. State, 929 N.E.2d 1281 (Ind. 2010). "When facts arise that suggest that a judge is or may be biased against a party or its counsel - or in favor of its adversary - litigants ordinarily have the right to seek the disqualification of that judge." Flamm, *Judicial Disqualification*, §1.6 (Banks & Jordan Co. 2007). An attorney for a party whose interests may be prejudiced may have not only a right, but the duty, to timely seek judicial disqualification. Id. "Because judicial disqualification motions can disrupt the orderly functioning of the judicial system as well as undermine public confidence in the judiciary as a whole, judges who have been made the object of such motions usually take them quite seriously. Appellate courts, moreover, tend to view judicial disqualification inquiries as both difficult and distasteful." Id.

A case assignment system that allows the State to "forum shop" among a county's courts to file charges in the trial court of its choice violates a defendant's right to an impartial judge. Harris v. State, 963 N.E.2d 505 (Ind. 2012); Gracia v. State, 976 N.E.2d 85 (Ind. Ct. App. 2012), *trans. denied*.

A. SOURCES OF THE RIGHT TO AN UNBIASED JUDGE

When seeking a recusal or disqualification of a judge, raise all available grounds, including CR 12(B); Code of Judicial Conduct, Canon 2.11; Ind. Code § 35-36-5-2; and (most importantly) federal due process.

1. Federal Due Process

Every criminal defendant has a federal due process right to an unbiased judge under the 5th and 14th Amendments to the U.S. Constitution. Freedom of a tribunal from bias or prejudice is the central element of substantive due process under the 5th Amendment. Rippo v. Baker, 137 S. Ct. 905, 907 (2017); U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976); Flamm, Judicial Disqualification, §2.5, n.1 (Banks & Jordan Co. 2007). Cf. Caperton v. A.T. Massey Coal, et. al, 556 U.S. 868 (2009) ("most matters relating to judicial disqualification do not rise to a constitutional level").

At the trial level and every stage thereafter, cite the 5th and 14th Amendments to the U.S. Constitution and federal cases, including Rippo v. Baker, 137 S.Ct. 905, 907 (2017); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-07 (2015); Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005); In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510, 532 (1927); Offutt v. U.S., 348 U.S. 11, 14 (1954); Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005); and Bracy v. Gramley, 520 U.S. 899, 905 (1997).

"Where the judge has a direct, personal, substantial, or pecuniary interest [in the outcome of a case], due process is violated." Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005), *citing* Bracy v. Gramley, 520 U.S. 899, 905 (1997) and numerous other cases and authorities. See also Caperton v. A.T. Massey Coal, et. al, 556 U.S. 868 (2009).

The federal constitution trumps other law, but many Indiana appellate cases affirming trial court decisions denying a change of judge do not mention federal due process. The federal due process right to an unbiased judge provides greater protection than many Indiana cases:

> "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'has no actual bias.'" Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825 (1986). Recusal is required when, objectively speaking, 'the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.' Withrow v. Larkin, 421 U. S. 35, 47 (1975) and Rippo v. Baker, 137 S. Ct. 905, 907 (2017).
>
> > Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) ('The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias' (internal quotation marks omitted)).

> "Due process guarantees 'an absence of actual bias' on the part of a judge. In re Murchison, 349 U. S. 133, 136 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias." Caperton v. A. T. Massey Coal Co., 556 U. S., 868, 881 (2016). Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See Murchison, 349 U. S. 133, 136-37 (1955). This objective risk of bias is reflected in the due process maxim that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." Id. at 136.

> "Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused, denies the latter due process of law. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005); In re Murchison, 349 U.S. 133 (1955), *citing* Tumey v. Ohio, 273 U.S. 510, 532 (1927); Offutt v. U.S., 348 U.S. 11, 14 (1954).

> A defendant "can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal grounds, or by simply labeling the claim 'federal.'" Howell v. Mississippi, 125 S. Ct. 856, 858-59 (2005), *citing* Baldwin v. Reese, 541 U.S. 27, 32 (2004). "Passing invocations of 'due process' that fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment do not meet [the U.S. Supreme Court's] minimal requirement that it must be clear that a federal

claim was presented." Howell v. Mississippi, 125 S. Ct. 856, 859 n.2 (2005).

PRACTICE POINTER: To preserve a federal due process claim for later review by state or federal courts, always cite the relevant part of the U.S. Constitution and, if possible, the U.S. Supreme Court opinion that established or recognized the right. Relying on a state court case without *citing* U.S. Supreme Court precedent is dangerous. *Citing* a state case, which cites an earlier state case, which in turn cites an earlier case that merely notes that a question 'takes on constitutional proportions' is not sufficient to preserve a federal constitutional claim. Howell v. Mississippi, 125 S. Ct. 856, 858-59 (2005) ("petitioner's daisy chain--which depends upon a case that was cited by one of the cases that was *cited* by one of the cases that petitioner cited--is too lengthy to meet this Court's standards for proper presentation of a federal claim.") For change of judge motions, cite federal due process and the 5th and 14th Amendments.

2. Indiana Criminal Rule 12

Criminal Rule 12 nominally governs motions for change of judge. Motions for change of judge should comply with CR 12 to the extent possible but should also cite federal due process (as noted above) and the Code of Judicial Conduct (as noted below). Do not rely solely on Indiana case law and CR 12 in a change of judge motion because many Indiana cases on change of judge do not reflect the correct test under the federal constitution. See Rippo v. Baker, 137 S. Ct. 905, 907 (2017); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016); Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005).

Indiana Criminal Rule 12(B) provides for a change of judge in limited circumstances: a party must "timely file an affidavit that the judge has a personal bias or prejudice against the state or defendant."

Change of Judge - Felony and Misdemeanor Cases. In felony and misdemeanor cases, the state or defendant may request a change of judge for bias or prejudice. The party shall timely file an affidavit that the judge has a personal bias or prejudice against the state or defendant. The affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice. (Emphasis added).

a. Bias or Prejudice

Read literally, CR 12(B) requires only a showing that the facts support a rational inference of bias or prejudice. However, CR 12(B) does not provide for change of judge for any other reason than personal bias or prejudice against a party. Federal due process and the Code of Judicial Conduct may require judicial disqualification in more cases, including when a judge is biased *in favor of* a party, or where the judge has an interest in the outcome of the case. **Do not rely exclusively on CR 12 when seeking a change of judge.**

The text of CR 12 mandates a change of judge if the facts in the affidavit support a rational inference of bias or prejudice; undisputed proof of actual bias is not required *by the text of the rule.* Many Indiana cases have stated that a conviction will not be reversed except upon a showing of "actual bias," or "actual personal bias."

Cook v. State, 612 N.E.2d 1085 (Ind. Ct. App. 1993) ("actual bias").

Hoover v. State, 582 N.E.2d 403, 410 (Ind. Ct. App. 1991) ("actual personal bias).

Smith v. State, 535 N.E.2d 1155 (Ind. 1989) ("actual bias").

Wallace v. State, 486 N.E.2d 445 (Ind. 1985) (just "bias" but applies definition of "actual bias" to "bias").

However, Rippo v. Baker, 137 S. Ct. 905, 907 (2017); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016); and Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) call all of these Indiana cases into question.

Rippo and Williams call these cases into question because both say that the decision to recuse should be based on an objective standard, not a subjective, "actual bias" standard:

> "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'has no actual bias.'" Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825 (2016) ('The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias' (internal quotation marks omitted))." Rippo v. Baker, 137 S. Ct. 905, 907 (2017).

Thus, the inquiry is *objective*, that is, whether the average judge is likely to be neutral or whether there is an unconstitutional potential for bias.

b. Request to Recuse Must be Requested Through Criminal 12, Not Judicial Canons

If a CR 12 motion is procedurally defaulted, the movant cannot revive the request to recuse through the Judicial Canons. See Mathews v. State, 64 N.E.3d 1250 (Ind. Ct. App. 2016) (Where defendant procedurally defaulted his CR 12 request, he could not seek the same relief under the authority of Judicial Canon 2.11; the judicial canons are enforced by the judge himself, and ultimately by the Indiana Supreme Court, if necessary; the canons are not procedural vehicles for parties engaged in litigation to seek relief already available under CR 12).

c. Timing of Motion

Pursuant to Indiana Criminal Rule 12(D)(1), a motion for a change of judge must be filed within thirty days of the initial hearing or within thirty days after the defendant first appears before the trial court following remand from court of appeals.

However, if a party first obtains knowledge of the cause for change of judge after the time limit in Indiana Criminal Rule 12(D)(1) has expired, the party may file a motion under Indiana Criminal Rule 12(D)(2).

The distinction here is important, because motions under Indiana Criminal Rule 12(D)(1) are reviewed under the clearly erroneous standard, while motions under Indiana Criminal Rule 12(D)(2) are reviewed only for abuse of discretion. Miller v. State, 106 N.E.3d 1067, 1076 (Ind. Ct. App. 2018).

d. Bias or Prejudice Abuse of Discretion

A judge is presumed not to be biased or prejudiced against a party. Garland v. State, 788 N.E.2d 425, 433 (Ind. 2003). A judge's exposure to evidence through judicial sources is not sufficient to establish bias by itself. Id. The mere fact that a defendant has appeared before a certain judge in prior cases does not establish the existence of bias or prejudice. Lasley v. State, 510 N.E.2d 1340, 1341 (Ind. 1987). Thus, a defendant cannot merely assert prejudice on the grounds that the judge has ruled against him in a prior proceeding, but must be established from personal, individual attacks on a defendant's character, or otherwise. Id.

3. Ind. Judicial Conduct Canon 2, Rule 2.11

The Indiana Code of Judicial Conduct, Canon 2, Rule 2.11 (formerly Canon 3(E), requires a biased or interested judge to disqualify himself without the necessity of a motion from a party.

Compare CR 12(B) with Canon 2, Rule 2.11 of the Indiana Code of Judicial Conduct:

(A) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(1) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.

(2) the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party.

(b) acting as a lawyer in the proceeding;

(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or

(d) likely to be a material witness in the proceeding.

(3) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding that could be substantially affected by the proceeding.

(4) [Reserved]

(5) The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.

(6) The judge:

(a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;

(b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;

(c) was a material witness concerning the matter; or

(d) previously presided as a judge over the matter in another court.

(B) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic partner and minor children residing in the judge's household. (Emphasis added).

As written, Canon 2.11 does not require **actual bias.** Canon 2.11 requires recusal from any proceeding in which the judge's **impartiality might reasonably be questioned.** As written, these rules do not require a party seeking a change of judge to allege and prove actual bias or to attack the judge's integrity, because "actual bias" is not at issue - only **the appearance of bias** is. This is consistent with the rule described in Murchison and Offutt, which "may sometimes bar trial by judges who have no actual bias."

When a judge is actually biased, the due process clause requires disqualification as a matter of federal constitutional law. Where a party can demonstrate the appearance of bias but cannot prove actual bias, disqualification is still required by Canon 2.11. Authorities are split on whether federal due process requires disqualification for the appearance of bias without proof of actual bias. Flamm, *Judicial Disqualification*, §2.3.3 (Banks & Jordan Co. 2007). For this reason, always *cite* both federal due process and Canon 2, Rule 2.11 in motions to disqualify the judge.

"The test under [the Canon] is whether an objective person, knowledgeable of all the circumstances, would have a reasonable basis for doubting the judge's impartiality. The question is not whether the judge's impartiality is impaired in fact, but whether there exists a reasonable basis for questioning a judge's impartiality." Tyson v. State, 622 N.E.2d 457, 459 (Ind. 1993) (opinion of Chief Justice Shepard, recusing himself from consideration of a petition for transfer). See Rippo v. Baker, 137 S. Ct. 905, 907 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016); "The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." Williams, 136 S. Ct. at 1905 (internal quotation marks omitted)).

"The question is not whether I personally believe I have been impartial. Rather, it is whether a 'reasonable person aware of all the circumstances' would question my impartiality... One court has observed 'disqualification of a judge is mandated whenever a significant minority of the lay community could reasonably question the court's impartiality.'" In re Wilkins, 780 N.E.2d 842, (opinion of Justice Rucker, recusing himself from consideration of a petition for rehearing in a disciplinary case). See Rippo v. Baker, 137 S. Ct. 905, 907 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016).

4. Statutes - cases on remand after reversal on appeal

Ind. Code § 35-36-5-2 provides for a change of judge if the judge is biased, prejudiced, related to a party in the case, has a conflict of interest, and for other reasons:

> The defendant and the state may obtain a change of judge if the judge:
>
> (1) is biased or prejudiced against the moving party and that [sic] the moving party cannot obtain a fair trial before the judge;
> (2) is related by blood or marriage to any party to the cause;
> (3) is unable to properly perform the functions of his office because of mental or physical disabilities;
> (4) is disqualified by reason of any conflict of interest; or
> (5) should be disqualified for any other cause.
>
> A motion made under this section must be verified or [accompanied] by an affidavit specifically stating facts showing that at least one (1) of these causes exists. The motion must be filed within the time limitations specified in Indiana Rules of Criminal Procedure.

Where a procedural statute conflicts with a court rule, the rule governs. State ex rel. Gaston v. Gibson Circuit Court, 462 N.E.2d 1049, 1051 (Ind. 1984). Therefore, do not rely exclusively on Ind. Code § 35-36-5-2 in a motion for change of judge.

Ind. Code § 35-36-5-1, providing for an automatic change of judge in criminal cases, has been *overruled* by Criminal Rule 12. See Wilcoxen v. State, 619 N.E.2d 574 (Ind. 1993).

Ind. Code § 34-35-4-2 provides that either party may move for a change of judge when a conviction is reversed on appeal and a new trial ordered, or after the state unsuccessfully appeals the grant of a new trial by the trial court. "The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." Garland v. State, 788 N.E.2d 425, 432 (Ind. 2003) and CR 12(B).

B. ISSUES

1. Judge's belief that they can be fair is not controlling

"A judge who has substantial doubts about his ability to maintain impartiality and the appearance of impartiality should not hesitate to recuse himself, as long as another judge is available to hear the matter." Flamm, *Judicial Disqualification*, §5.6.1 (Banks & Jordan Co. 2007). The converse is not necessarily true; "the judge's actual state of mind or lack of partiality is generally considered beside the point because a judge who is convinced of his own impartiality, as well as the purity of his motives, may nonetheless act in a manner that would lead a reasonable person to believe he is biased." Id.

The issue is not whether the judge believes himself to be impartial, but whether a reasonable person aware of all the circumstances would question the judge's impartiality. In re Wilkins, 780 N.E.2d 842 (Ind. 2003).

> Compare Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective

matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

Compare In re Dixon, 994 N.E.2d 1129 (Ind. 2013) (objective test is the proper standard for evaluating whether an attorney made a statement "with reckless disregard as to its truth or falsity under Rule Prof. Cond. 8.2(a) concerning the qualifications or integrity of a judge).

2. Timing of motion and waiver of the right

Delaying a motion for change of judge for tactical advantage may waive the right. See, e.g., Wood v. McEwen, 644 F.2d 797 (9th Cir. 1981). "Delay in seeking a judge's disqualification can be fatal." Flamm, *Judicial Disqualification*, §18.1 (Banks & Jordan Co. 2007).

Criminal Rule 12(D) (1) and 12(D) (2) set time limits for motions for change of judge. If the motion is made on subsequently discovered grounds, CR 12(D) (2) requires the party seeking a change of judge to show why the additional evidence could not have been discovered by the exercise of due diligence and provides that "the ruling of the court may be reviewed only for abuse of discretion" (although, as noted below, the "abuse of discretion" standard is problematic). Canon 2.11 does not contain a time limit, but it is concerned with the conduct of the judge and may not give a defendant an enforceable right.

If it becomes necessary to file a motion for change of judge outside the CR 12(D)-time limits, make the best possible showing of cause for the belated filing under CR 12(D)(2), and also argue that Canon 2.11 and federal due process require disqualification.

Disqualification of trial judge must be seasonably raised. Singleton v. State, 364 N.E.2d 1041 (Ind. Ct. App. 1977).

Thacker v. State, 563 N.E.2d 1307 (Ind. Ct. App. 1990) (defendant immediately appealed post-conviction judge's decision to disqualify himself and then to vacate his prior decision that granted defendant's petition for post-conviction relief). See also Ehrlich v. Thayer, 686 N.E.2d 916 (Ind. Ct. App. 1997) and Pope v. Pope, 701 N.E.2d 587 (Ind. Ct. App. 1998).

Stein v. State, 166 Ind. App. 133, 334 N.E.2d 698 (1975) ("If a complaining party sits idly by and awaits the outcome of the proceedings after receiving knowledge of [facts that require] a trial judge's disqualification, or after the circumstances or law creates a presumption of such knowledge, he will be held to have waived the disqualification and consented to trial by the judge presiding").

See also, Annotation, 27 ALR4th 597 - *Waiver or Loss of Right to Disqualify Judge by Participation in Proceeding*.

a. CR 12(D) time limits

CR 12(D) sets time limits for filing motions for change of judge or change of venue. Indiana Trial Rule 79(B) imposes a duty on the parties "to promptly advise the court of an application or motion for change of judge." TR 79(B). The Trial Rules apply to criminal proceedings so far as they are not in conflict with any specific criminal rule. CR 21.

b. 30-day rule: CR 12(D) (1)

An application for a change of judge or change of venue from the county shall be filed within thirty (30) days of the initial hearing. Provided, that where a cause is remanded for a new trial by the court on appeal, such application must be filed not later than thirty (30) days after the defendant first appears in person before the trial court following remand. CR 12(D) (1).

c. Belated Motion: CR 12(D) (2)

Failure to state specific facts in support of a belated motion is grounds for denying the motion.

Criminal Rule 12(D)(2) provides:

Subsequently Discovered Grounds. If the applicant first obtains knowledge of the cause for change of venue from the judge or from the county after the time above limited, the applicant may file the application, which shall be verified by the party specifically alleging when the cause was first discovered, how it was discovered, the facts showing the cause for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten (10) days, and after a hearing on the motion, the ruling of the court may be reviewed only for abuse of discretion.

Smith v. State, 477 N.E.2d 857 (Ind. 1985) (defendant did not move for change of judge until sentencing hearing and motion failed to provide specific factual and explanatory statement for belated motion).

Hape v. State, 903 N.E.2d 977 (Ind. Ct. App. 2009) (denial of motion for change of judge filed after trial not clearly erroneous when defendant failed to allege when he first heard of grounds for change of judge and why they could not have been discovered earlier).

d. Delaying a change of judge motion for tactical advantage

Courts have frowned on efforts to delay a change of judge motion for tactical advantage.

Counsel may not lie in wait, raising the recusal issue only after learning the Court's ruling on the merits. Tyson v. State, 622 N.E.2d 457, 460 (Ind. 1993).

In re Wilkins, 780 N.E.2d 842 (Ind. 2003) (counsel moved for a justice to participate in the decision whether to grant rehearing in a disciplinary case, but then recuse himself from actual reconsideration on the merits. As Justice Rucker wrote: "[Wilkins] does not seek my immediate disqualification. Rather, [Wilkins] wants me to remain a part of these proceedings long enough to vote on his petition for rehearing and only then cease further participation in this case." After criticizing Wilkins' "lack of timeliness" as "troubling," Justice Rucker did recuse himself, but "effective immediately, declining [Wilkins'] request to consider first his petition for rehearing now pending before this Court.").

Ben-Yisrayl v. State, 908 N.E.2d 1223 (Ind. Ct. App. 2009) (where defendant waited

1.5 years to raise change of judge issue, he waived his claim).

e. Request to Recuse Must be Requested Through Criminal 12, Not Judicial Canons

If a CR 12 motion is procedurally defaulted, the movant cannot revive the request to recuse through the Judicial Canons. See Mathews v. State, 64 N.E.3d 1250 (Ind. Ct. App. 2016) (where defendant procedurally defaulted his CR 12 request, he could not seek the same relief under the authority of Judicial Canon 2.11; the judicial canons are enforced by the judge himself, and ultimately by the Indiana Supreme Court, if necessary; the canons are not procedural vehicles for parties engaged in litigation to seek relief already available under CR 12).

PRACTICE POINTER: While drafting a motion for change of judge based on allegations of bias calls for extra care, especially in light of Wilkins, *supra*, the Indiana Supreme Court has held that attorney discipline for such a motion is inappropriate as long as counsel grounds his or her motion in a full recitation of facts and cogent reasoning. See In re Dixon, 994 N.E.2d 1129 (Ind. 2013) (distinguishing Wilkins, Court noted that counsel supported his charges against judge with a lengthy recitation of facts in support of his motion for recusal; also, Respondent's statements are relevant to, and required for relief sought).

3. Affidavit & sufficiency

a. Overcoming the presumption that a judge is unbiased and unprejudiced

Indiana law presumes that a judge is unbiased and unprejudiced. Garland v. State, 788 N.E.2d 425, 433 (Ind. 2003) and Lasley v. State, 510 N.E.2d 1340, 1341 (Ind. 1987). This is consistent with U.S. Supreme Court precedent: "The general presumption is that judges are honest, upright individuals and thus that they rise above biasing influences." Franklin v. McCaughtry, 398 F.3d 955, 959 (7th Cir. 2005), *citing* Tumey v. Ohio, 273 U.S. 510, 532 (1927). The presumption is rebuttable. Franklin v. McCaughtry, 398 F.3d 955, 960 (7th Cir. 2005).

Voss v. State, 856 N.E.2d 1211 (Ind. 2006) (State's motion for change of judge based on judge's position on the death penalty did not support a rational inference of bias; Court did not find such demonstrated in judge's three rulings finding death penalty unconstitutional which were later reversed because each was supported by reasonable legal argument, nor in judge's comments in a newspaper about the death penalty because nothing in the judge's comments suggested that he could not set aside his personal beliefs and follow the law. Neither did fact that judge represented three death penalty defendants prior to becoming a judge create an inference of bias).

b. Actual bias versus the appearance of bias

Sometimes "the influence is so strong we may presume actual bias," Franklin v. McCaughtry, 398 F.3d 955, 960 (7th Cir. 2005); and "in rare cases there may even be evidence of actual bias." Id. (*citing* Bracy v. Gramley, 520 U.S. at 905). However, federal due process is violated when a judge presides in a case that would offer the average man a temptation to forget the burden of proof required to convict or would lead him not to hold the balance nice, clean, and true between the state and the accused. Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) (*citing* Tumey v. Ohio, 273 U.S. at 532). Cf. Walberg v. Israel, 766 F.2d 1071, 1077 (7th Cir. 1985). See also Rippo v.

Baker, 137 S. Ct. 905, 907 (2017); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016).

When a judge is actually biased, federal due process requires disqualification, but under some circumstances, disqualification is required even where "actual bias" has not been established. Rippo v. Baker, 137 S. Ct. 905, 907 (2017) and Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016). Rippo and Williams state that in many situations, an objective standard should guide recusal decision, not a subjective, "actual bias" standard:

> "Under our precedents, the Due Process Clause may sometimes demand recusal even when a judge "'has no actual bias.'" Aetna Life Ins. Co. v. Lavoie, 475 U. S. 813, 825, 106 S. Ct. 1580 (1986).
>
> > Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted))." Rippo v. Baker, 137 S. Ct. 905, 907 (2017).

Where a party can demonstrate the appearance of bias but cannot prove actual bias, disqualification is required by Canon 3(E). Authorities disagree on whether federal due process requires disqualification for the appearance of bias without proof of actual bias. Flamm, *Judicial Disqualification*, §5.1 et seq. (Banks & Jordan Co. 2007). The 7th Circuit has stated that federal due process would require disqualification for the appearance of bias.

> Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) (*dicta*, because the habeas petitioner established actual bias by the trial judge).
>
> Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005) (Wisconsin common law test for denial of the federal due process right to an unbiased judge was "contrary to clearly established federal law" because both actual bias and the appearance of bias violate due process. Harmless error analysis is irrelevant where there is a structural error; habeas relief granted).

c. "Undisputed evidence" should not be required

Some Indiana cases have stated that the presumption that a judge is unbiased and unprejudiced can only be overcome where there is an "undisputed claim" or where the judge has expressed an opinion on the merits of the case. See, e.g., Cook v. State, 612 N.E.2d 1085 (Ind. Ct. App. 1993); Resnover v. State, 507 N.E.2d 1382 (Ind. 1987); Hoover v. State, 582 N.E.2d 403, 410 (Ind. Ct. App. 1991); Smith v. State, 535 N.E.2d 1155 (Ind. 1989); Lasley v. State, 510 N.E.2d 1340 (Ind. 1987); Wallace v. State, 486 N.E.2d 445 (Ind. 1985). These cases trace back to Pollard v. State, 250 N.E.2d 748, 753 (Ind. 1969), where the court said that "we can only conclude that one such compelling reason [for a change of judge] would be an undisputed allegation of bias or prejudice on the part of the trier of the facts." Pollard listed "undisputed bias or prejudice" as one example of a reason for a change of judge, but the Wallace opinion cited Pollard for the proposition that "undisputed bias or prejudice" was the **only** reason for a change of judge.

The rule as restated in Wallace is inconsistent with federal due process. See Rippo v. Baker, 137 S. Ct. 905, 907 (2017); Williams v. Pennsylvania, 136 S. Ct. 1899, 1905-06 (2016); Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005).

d. "Direct evidence" of bias should not be required

A petitioner may prove disqualifying bias by offering "either direct evidence or a 'possible temptation so severe that we might presume an actual, substantial incentive to be biased.'" Franklin v. McCaughtry, 398 F.3d at 960, *citing* Del Vecchio v. Illinois Dep't of Corr., 31 F.3d 1363, 1380 (7th Cir. 1994). "Possible temptation" could include many things other than the judge's conduct, and direct evidence is not required.

Some Indiana cases have stated that the judge's bias must be shown by the judge's conduct in order to warrant a change of judge. See Hoover v. State, 582 N.E.2d 403 (Ind. Ct. App. 1991), That requirement is contrary to clearly established U.S. Supreme Court precedent. "A petitioner may rely on circumstantial evidence to prove the necessary bias." Bracy v. Schomig, 286 F.3d 406, 411-12 (7th Cir. 2002). And in any case "where the judge has a direct, personal, substantial, or pecuniary interest" in the outcome, due process is violated no matter how the judge conducts himself during the trial. Bracy v. Gramley, 520 U.S. 899, 905 (1997).

> Caperton v. A.T. Massey Coal, et. al, 556 U.S. 868 (2009) (it was unconstitutional for a state supreme court justice to sit on a case involving the financial interests of a major donor to the judge's election campaign; recusal required where "probability of actual bias" is too high).

e. Recusal is not discretionary

A motion for change of judge is neither automatic nor discretionary. In considering a motion for change of judge, the trial judge is required to examine the affidavit, treat the facts recited in the affidavit as true, and determine whether the facts support a rational inference of bias or prejudice. Garland v. State, 788 N.E.2d 425, 432 (Ind. 2003).

4. When a hearing is required

a. Recusal without hearing when affidavit shows sufficient facts

"When a disqualification motion is legally sufficient, there is no need for an open court proceeding on the disqualification issue where the complaining party's position on disqualification can be adequately presented through pleadings and affidavits." Flamm, *Judicial Disqualification*, §17.7 (Banks & Jordan Co. 2007).

PRACTICE POINTER: Sometimes, evidence to support a claim of judicial bias, interest or prejudice may exist, but in a form that cannot be reduced to an affidavit. For example, counsel may believe that a witness reluctant to sign an affidavit would, if subpoenaed for a hearing, testify truthfully in support of a motion for recusal. In that case, make the best showing possible in the affidavit, outlining the additional evidence that will be presented, and argue that federal due process requires a hearing. Avoid the necessity of a hearing by including sufficient facts in the motion and affidavit to require disqualification without a hearing, if possible.

b. Hearing not required when affidavit insufficient to show bias

"A judicial disqualification motion or affidavit that sets forth no facts but merely accuses a judge of bias is legally insufficient to necessitate even a hearing on the motion." Flamm, *Judicial Disqualification*, §17.7 (Banks & Jordan Co. 2007) and Hickman v. State, 537 N.E.2d 64, 66 (Ind. Ct. App. 1989).

c. Hearing: when motion has arguable merit

(1) Who presides

It is improper for the trial court to appoint another judge to rule on the Criminal Rule 12(B) motion or his appearance of impartiality under the Judicial Canons. This determination must be made by the sitting judge. Voss v. State, 856 N.E.2d 1211 (Ind. 2006).

(2) Waiver

Failure to object to presiding judge generally waives error. Gray v. State, 450 N.E.2d 125, 126 (Ind. Ct. App. 1983) (issue of whether trial judge erred by presiding over hearing regarding his own bias and prejudice was waived by failure to object).

5. Statutes providing peremptory change of judge

Ind. Code § 35-36-5-1, providing for an automatic change of judge in criminal cases, has been *overruled* by Criminal Rule 12. See Wilcoxen v. State, 619 N.E.2d 574 (Ind. 1993).

a. Rejected pleas in misdemeanor cases

There is no automatic right to a change of judge when a misdemeanor plea agreement is rejected by the court. Ind. Code § 35-35-3-3(d), which purports to create a right to a change of judge when the trial court rejects a plea agreement in a misdemeanor case, is subject to CR 12. State ex rel. Stidham v. County Court of Clark County, 523 N.E.2d 429 (Ind. 1988).

Compare Williams v. State, 86 N.E.3d 185 (Ind. Ct. App. 2017) (rejecting plea did not demonstrate trial court bias).

b. On remand after appeal

Ind. Code § 34-35-4-2 provides that either party may move for a change of judge when a conviction is reversed on appeal and a new trial ordered, or after the state unsuccessfully appeals the grant of a new trial by the trial court. "The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." Garland v. State, 788 N.E.2d 425, 432 (Ind. 2003) and CR 12(B).

C. APPELLATE REVIEW / MAKING A RECORD

1. A biased tribunal cannot be harmless error

A biased tribunal always deprives the accused of a substantial right. Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 1797, 138 L.Ed.2d 97 (1997), Gomez v. U.S., 490 U.S. 858, 876,

109 S. Ct. 2237 (1989).

Judicial bias is one of the narrow classes of constitutional violations that implicate structural error. Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir. 1995). Structural errors render a criminal trial fundamentally unfair and are not subject to harmless error analysis. Arizona v. Fulminante, 499 U.S. 279, 111 S. Ct. 1246 (1991).

Nonetheless, Indiana appellate courts have often applied harmless error analysis to appeals from denials of change of judge.

> Perry v. State, 585 N.E.2d 715 (Ind. 1992) (bias or prejudice on the part of the judge must place the defendant in jeopardy before a conviction will be reversed).

However, under the governing decisions of the U.S. Supreme Court, judicial bias is a structural error and harmless error analysis is irrelevant.

> Franklin v. McCaughtry, 398 F.3d 955 (7th Cir. 2005) (habeas relief granted; harmless error analysis is irrelevant where there is a structural error).

2. Indiana's occasional use of "abuse of discretion" standard criticized

Canon 2, Rule 2.11 and Criminal Rule 12(B) use mandatory, not discretionary language ("a judge shall disqualify himself...") but the Indiana appellate courts have often applied the abuse of discretion standard to trial judges' decisions not to recuse. The Indiana courts have stated that an "abuse of discretion only occurs when there is 'an undisputed claim of prejudice' or when 'the trial court expresses an opinion on the merits of the controversy.'" Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) (quoting Harrison v. State, 644 N.E.2d 1243, 1249 (Ind. 1995)). Federal due process protections are "indisputably … much broader" than that. Id. In Harrison v. State, the Indiana Supreme Court "employed an unreasonable view of the applicable federal standard as established by the Supreme Court of the United States" by holding that federal due process "is satisfied as long as there is no 'undisputed claim of prejudice' or an expression by the trial court of 'an opinion on the merits of the controversy.'" Id.

A motion for change of judge is neither automatic nor discretionary. In considering a motion for change of judge, the trial judge is required to examine the affidavit, treat the facts recited in the affidavit as true, and determine whether the facts support a rational inference of bias or prejudice. Garland v. State, 788 N.E.2d 425, 432 (Ind. 2003) (the ruling on a motion for change of judge is reviewed under the clearly erroneous standard).

3. After appeal

Ind. Code § 34-35-4-2 provides that either party may move for a change of judge when a conviction is reversed on appeal and a new trial ordered, or after the state unsuccessfully appeals the grant of a new trial by the trial court. "The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice." Garland v. State, 788 N.E.2d 425, 432 (Ind. 2003); see also CR 12(B).

D. POST-CONVICTION PROCEEDINGS

Ind. Rule PC 1 §4(b) provides for change of judge. The provisions are neither automatic nor

discretionary. Previously, the rule had been viewed as providing an automatic change of judge. Jackson v. State, 643 N.E.2d 905, 907 (Ind. Ct. App. 1994), *citing* State ex rel. Rondon v. Lake Superior Court, 569 N.E.2d 635 (Ind. 1991) and Tucker v. State, 581 N.E.2d 455 (Ind. Ct. App. 1991).

1. Test

"The rule requires the judge to examine the affidavit, treat the historical facts recited in the affidavit as true, and determine whether these facts support a rational inference of bias or prejudice." State ex rel. Whitehead v. Madison County Circuit Court, 626 N.E.2d 802, 803 (Ind. 1993).

Jackson v. State, 643 N.E.2d 905 (Ind. Ct. App. 1994) (defendant asserted belief that post-conviction court judge was biased against him because judge had previously been chief probation officer who signed petition to revoke defendant's probation; post-conviction court did not err in denying motion for change of judge, juvenile probation revocation unrelated to present conviction).

2. Cite Federal Case Law, and Raise Federal Due Process

"The structure and substance of this rule are similar to methods used in the federal courts, and counsel may find federal case law helpful in approaching requests for a change of judge under Indiana Post-Conviction Rule 1." State ex rel. Whitehead v. Madison County Circuit Court, 626 N.E.2d 802 (Ind. 1993).

Spangler v. Sears, Roebuck & Co., 759 F. Supp. 1327 (S.D. Ind. 1991) (judge should recuse if fully informed objective observer would entertain significant doubt that justice would be done if judge continued to serve).

Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias" (internal quotation marks omitted)).

United States v. Holland, 655 F.2d 44 (5th Cir. 1981) (remarks at trial may show personal prejudice).

J.F. Edwards Constr. v. Anderson Safeway Guard Rail, 542 F.2d 1318 (7th Cir. 1976) (only personal bias, not general or judicial bias is disqualifying).

Cf.

In re Int'l Business Machs., 618 F.2d 923 (2d Cir. 1980) (earlier adverse rulings do not require disqualification).

United States v. Phillips, 664 F.2d 971 (5th Cir.) (remarks critical of party or lawyer ordinarily not sufficient), *overruled on other grounds* 956 F.2d 1309 (1992).

United States v. Sibla, 624 F.2d 864 (9th Cir. 1980) (conclusory affidavit insufficient).

E. SELECTION OF SPECIAL JUDGE - B.7.c

1. CR 13 - Case Reassignment and Special Judges

Criminal Rule 13 governs reassignment of the case and appointment of special judges where change of judge is granted under CR 12(B), or an order of disqualification or recusal is entered in the case. See CR 13(A).

a. Appointment by Supreme Court

If no judge is available under the local rule, or the circumstances otherwise warrant, a trial court may request the Indiana Supreme Court to appoint a special judge. CR 13(D).

2. Authority to Enter Final Judgment

Ind. Const. Art. 7, § 1 requires that judicial acts be performed only by judges. Only a duly elected or appointed judge of the court or a duly appointed judge *pro tempore* or special judge may enter an appealable final judgment, including a criminal sentence. When a court official who is not a duly elected or appointed judge of the court purports to make a final order or judgment, that decision is a nullity. Floyd v. State, 650 N.E.2d 28, 29-30 (Ind. 1994).

3. Duration of Service

A special judge serves for duration of the case. Boushehry v. State, 622 N.E.2d 212 (Ind. Ct. App. 1993), *aff'd on reh'g* 626 N.E.2d 497, *ovverruled on other grounds* by Floyd v. State, 650 N.E.2d 28 (Ind. 1994).

4. Failure to Follow Procedures and Waiver

Reversible error for failure to follow prescribed procedure for selection of special judge.

> Floyd v. State, 650 N.E.2d 28 (Ind. 1994) ("we strongly disapprove of anything but strict compliance with the rules for appointment of both judges *pro tempore* and special judges, and we will not hesitate to dismiss appeals or even find reversible error where an appellant, after properly preserving the error, demonstrates that a purported final appealable order was entered by a court officer other than a duly elected or appointed judge").
>
> Skipper v. State, 525 N.E.2d 334 (Ind. 1988) (improper appointment of special judge, in that no panel was submitted to parties for striking, was not reversible error where defendant's only objection was that he wished to be tried before regularly presiding judge, and there was no evidence of any prejudice on part of special judge).

However, error waived where defendant aware of the irregularity and does not object. Bivins v. State, 485 N.E.2d 89, 92 (Ind. 1985).

F. SPECIFIC PROBLEMS

1. Prior Representation of Defendant

Judge's prior representation of defendant in unrelated criminal matter does not mandate

reversal of conviction absent showing of actual prejudice. Hammond v. State, 594 N.E.2d 509 (Ind. Ct. App. 1992), *trans. denied.*

Harden v. State, 538 N.E.2d 244 (Ind. Ct. App. 1989) (judge's prior representation of defendant on unrelated criminal matter did not require reversal without showing of prejudice).

Matthews v. State, 978 N.E.2d 438 (Ind. Ct. App. 2012) (fact that judge had represented defendant on prior unrelated substance offenses that served as basis for defendant's HSO did not require mistrial in guilt/innocence phase of underlying offense to HSO; judge's recusal from HSO phase of trial was sufficient).

2. Previous Service as Prosecutor

Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a defendant's case; specifically, where current Pennsylvania Supreme Court Chief Justice was considering defendant's post-conviction appeal, when thirty years earlier Chief Justice made the decision to seek \death penalty against defendant).

Abney v. State, 79 N.E.3d 942 (Ind. Ct. App. 2017) (unnecessary for judge to recuse himself, even though elected prosecutor served on his campaign committee, because prosecutor had yet to take any action on behalf of judge, and his role on committee was not significant). See also Cheek v. State, 79 N.E.3d 388 (Ind. Ct. App. 2017) (companion case to Abney).

Jackson v. State, 33 N.E.3d 1173 (Ind. Ct. App. 2015) (no need to change judge who had served as prosecutor in prior case State used to support habitual offender charge because Defendant did not contest the existence and validity of the predicate conviction), *summarily aff'd by* 50 N.E.3d 767 (Ind. 2016).

Patterson v. State, 926 N.E.2d 90 (Ind. Ct. App. 2010) (trial counsel was ineffective for failing to move for change of judge where the judge had participated in proceedings as prosecuting attorney by signing information charging defendant and participating in probable cause hearing).

Rankin v. State, 563 N.E.2d 533 (Ind. 1990) (trial court's denial of motion for change of judge during habitual offender proceedings was not error, notwithstanding fact that trial judge had signed information charging earlier felony when judge served as prosecuting attorney; neither party intended to call judge as witness regarding identity or factual proof of convictions).

Gunter v. State, 605 N.E.2d 1209 (Ind. Ct. App. 1993) (even though trial judge had been prosecutor when defendant committed felonies State intended to use in HO phase, trial judge erred in disqualifying himself and appointing special judge for HO phase; although law contemplates same judge will preside throughout criminal trial, error was not sufficiently prejudicial to require reversal).

Dishman v. State, 525 N.E.2d 284 (Ind. 1988) (defendant was not entitled to change of judge in robbery prosecution, even though presiding judge had been prosecuting attorney immediately before assuming the bench and had prosecuted defendant in two cases which

formed basis for habitual offender charge; defendant had withdrawn prior request for change of judge, stating that he knew of no bias or prejudice on part of judge).

3. Named as Defendant in Lawsuit Brought by Defendant

Terry v. State, 602 N.E.2d 535 (Ind. Ct. App. 1992) (there is no per se rule requiring judges to recuse themselves whenever they are sued by defendant).

4. Actions Against Co-Defendant

Carter v. State, 451 N.E.2d 639 (Ind. 1983) (that co-defendant received heavy sentence from judge is insufficient basis for bias or prejudice).

5. Comments Relating to Defendant

Gary v. State, 471 N.E.2d 695 (Ind. 1984) (judge's comments at sentencing in prior proceeding, to the effect that "limited incarceration hasn't done you any good at all," and "At the rate you're going, you're going to spend the rest of your life in jail" were not sufficiently biased or prejudiced to require change of judge).

Newville v. State, 566 N.E.2d 567 (Ind. Ct. App. 1991) (judge was not biased against defendant on ground that court's statement that "you never have had anything for a defense" indicated that judge predetermined defendant's guilt; statement made prior to second trial was referring to defendant's lack of defense in first trial which ended in mistrial, so that court was not stating opinion as to whether defendant was guilty of charges in second trial).

Ware v. State, 560 N.E.2d 536 (Ind. Ct. App. 1990) (trial judge's allegedly sarcastic comments during bench trial, including "I want to see how creative this is," did not demonstrate that judge improperly made premature resolution of credibility of defendant's defense and his guilt before evidence was complete, nor did judge abandon his "neutrality role" in questioning defense witnesses).

6. Comments/Rulings Demonstrating Lack of Impartiality

Everling v. State, 929 N.E.2d 1281 (Ind. 2010) (evidentiary rulings, uneven tolerance for late filings and comments to defense counsel showed actual bias and prejudice).

In re J.K., 30 N.E.3d 695 (Ind. 2015) (the right to an impartial judge is no less vital in a CHINS case than any other proceeding; here, Court reversed CHINS adjudication where trial court's comments deprived Father of a fair tribunal and coerced his admission that his daughter was a CHINS).

7. Former Prosecutors

Trial judge must disqualify himself from a proceeding in which he has actively served as an attorney for one of the parties regardless of whether actual bias or prejudice exists.

> Williams v. Pennsylvania, 136 S. Ct. 1899 (2016) (14th Amendment's Due Process Clause requires a judge to recuse himself where, previously, he was "significantly and personally" involved as a prosecutor in a critical decision in a defendant's case; specifically, where the current Pennsylvania Supreme Court Chief Justice was

considering defendant's post-conviction appeal, when thirty years earlier the Chief Justice made the decision to seek the death penalty against defendant).

Calvert v. State, 498 N.E.2d 105 (Ind. Ct. App. 1986) (judge had represented State on two prior occasions, had obtained order for handwriting sample from defendant that was admitted into evidence. Recusal is required under Canon 3(C) (1), ABA Code of Judicial Conduct, where judge has appeared as attorney for one of the parties to the litigation).

A judge may not sit in a case where he has had a role as attorney for one of the parties. State ex rel. Wright v. Morgan County Court, 451 N.E.2d 316 (Ind. 1983).

Hammond v. State, 594 N.E.2d 509 (Ind. Ct. App. 1992) (judge's prior representation of defendant in unrelated criminal matter does not mandate reversal of conviction absent showing of actual prejudice).

Matthews v. State, 978 N.E.2d 438 (Ind. Ct. App. 2012) (the fact that judge had represented defendant on one of his prior unrelated substance offenses that served as the basis for defendant's HSO did not require mistrial in guilt/innocence phase of underlying offense to the HSO; judge's recusal from the HSO phase of the trial was sufficient).

8. Relationship With Prosecutor

Daugherty v. State, 466 N.E.2d 46 (Ind. Ct. App. 1984) (judge's act of seeking compensation for special prosecutor, and mandating appropriation of funds when County Council failed to pay special prosecutor, did not go to merits of case or hinder defense; defendant did not show judge was not impartial or that fair trial was not received).

9. Relationship With Defense Counsel

Mere "strained relationship" between judge and defense counsel is insufficient. Gray v. State, 450 N.E.2d 125 (Ind. Ct. App. 1983).

Pollard v. State, 250 N.E.2d 748 (Ind. 1969) (judge's show of displeasure with defense attorney over counsel's failure to inform court of continuance request and act of raising defendant's bail on same day was not sufficient to show bias and prejudice).

10. Relationship to Alleged Victim

The Code of Judicial Conduct, Canon 2, Rule 2.11(A)(2), requires a judge to disqualify herself if:

(1) the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

(a) a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party;
(b) acting as a lawyer in the proceeding;
(c) a person who has more than a de minimis interest that could be substantially affected by the proceeding; or
(d) likely to be a material witness in the proceeding.

Harrison v. McBride, 428 F.3d 652 (7th Cir. 2005) (before her death, victim had told police that she was being followed, that she feared for her life, and that she had information about the trial judge being present during illegal drug activity at a residence in the county; the allegations created a conflict of interest for the trial judge and the judge's conduct and statements in response demonstrated a personal interest in protecting his name).

Hobson v. State, 471 N.E.2d 281 (Ind. 1984) (that victim was employed as a security officer in judge's courtroom for a 20-hour period and had no contact with the judge does not establish cause for change of judge).

Bixler v. State, 471 N.E.2d 1093 (Ind. 1984) (relationship with victim's family insufficient basis for finding bias), *cert. denied.* 474 U.S. 834.

11. Relationship to Defendant

Matter of Johanningsmeier, 103 N.E.3d 633 (Ind. 2018) (Court publicly reprimanded Knox Superior Court judge for reinstating close friend's suspended driver's license and suggesting deputy prosecutor dismiss case).

12. Change of Special Judge

Where bias or prejudice is established, change of judge is available even as to special judges.

State ex rel. Neal v. Hamilton Circuit Court, 249 Ind. 102, 230 N.E.2d 775 (1967) (relator filed verified motion for a change of judge with affidavits establishing an undisputed case of prejudice; no counter affidavit filed. Regardless of a statute or rule, court stated relator entitled to change of judge).

13. Personal Knowledge from Extrajudicial Sources

Knowledge obtained from a source outside the criminal proceeding, which resembles ex parte communications with potential litigants, requires that a judge recuse himself.

Stivers v. Knox County Department of Public Welfare, 482 N.E.2d 748 (Ind. Ct. App. 1985) (judge participating in "child protection" team must recuse himself from later CHINS proceeding arising out of one of cases discussed in team meetings).

Austin v. State, 528 N.E.2d 792 (Ind. Ct. App. 1988) (judge's failure to disclose *ex parte* communications from private citizens, where charge was distribution of obscene material, did not constitute reversible error because only the trial judge was competent to decide the impact of such communications, if any, on the judge).

Andrews v. State, 505 N.E.2d 815 (Ind. Ct. App. 1987) (judge's consultation with other judges and agencies about admissibility of evidence concerning write-in votes in prosecution for recklessly remaining in voting booth longer than one minute did not require recusal where constitutionality of prohibition against write-in votes was not issue in case).

Smith v. State, 497 N.E.2d 601 (Ind. Ct. App. 1986) (judge's wife's participation as member of Child Protection Team does not disqualify him from serving as judge at trial,

in the absence of showing of bias, prejudice or manifest partiality. Ordinary procedural rules, including waiver rules, govern).

14. Party to Proceedings

Disqualification and recusal of presiding judge shall be certified to the Indiana Supreme Court for appointment of a special judge whenever the judge, the judge's spouse, a person within the third degree of relationship to either of them, the spouse of such a person, or a person residing in the judge's household:

(1) is a party to the proceeding, or an officer, director, or trustee of a party;
(2) is acting as a lawyer in the proceeding;
(3) is known by the judge to have an interest that could be substantially affected by the proceeding; or
(4) is associated with the pending litigation in such fashion as to require disqualification under the Code of Judicial Conduct or otherwise.

See TR 79(C).

However, the general rule requiring recusal of the judge cannot be used to obtain a change of judge where it is not otherwise necessary. Courts will make exceptions where a moving party initiates a claim against a judge to secure a change of judge, or to frustrate the administration of justice.

In the Matter of the Appointment of a Special Judge in the Wabash Circuit Court, 500 N.E.2d 751 (Ind. 1986) (making sitting judge party to proceeding will not disqualify judge if purpose of naming judge was to evade court's jurisdiction).

15. Administrative *Ex Parte* Communication

Mahrdt v. State, 629 N.E.2d 244, 249 (Ind. Ct. App.1994) (judge's *ex parte* communication with sheriff's office concerned scheduling of inspection of blood alcohol machine in sheriff's custody could reasonably be viewed as administrative and did not create appearance of impropriety).

Inman v. State, 4 N.E.3d 190 (Ind. 2014) (State's *ex parte* submission of exhibit log was only of administrative value to trial court and thus did not require change of judge).

16. Rescinding Recusal

Once judge disqualifies himself from a case, he cannot thereafter reinstate himself without revoking or setting aside his prior order of disqualification and cannot attempt to rescind that disqualification and reinstate himself unless it affirmatively appears that valid grounds for such reinstatement exist. Wilson v. State, 521 N.E.2d 363 (Ind. Ct. App. 1988).

Thacker v. State, 563 N.E.2d 1307 (Ind. Ct. App. 1990) (post-conviction judge may not set aside his own prior decision granting relief in a case after recusing himself).

Ehrlich v. Thayer, 686 N.E.2d 916 (Ind. Ct. App. 1997) (judge may not simultaneously recuse himself and set aside summary judgment; case remanded to the special judge, who has authority to rule on the motion to set aside the summary judgment).

Pope by Smith v. Pope, 701 N.E.2d 587 (Ind. Ct. App. 1998) (judge who recused himself was without power to appoint judge *pro tem* to sit on a case for fifteen minutes for sole purpose of signing orders; proper procedure after disqualification is for a special judge to be selected under T.R. 79).

17. Spouse's Involvement in Coalition Against Domestic Violence

Allen v. State, 737 N.E.2d 741 (Ind. 2000) (no bias shown in domestic violence case where judge's wife was president of County Coalition Against Domestic Violence, and judge had publicly spoken against domestic violence).

18. Recusal Not Required where Judge Reveals "Humanity"

Smith v. State, 718 N.E.2d 794, 802 (Ind. Ct. App. 1999) (Court rejected claim that judge should have recused herself from sentencing where, before sentencing, she expressed that tragic consequences of neglect of dependent charge affected her not only as lawyer but as a human, but that she would still follow the law in imposing sentence; judge "simply revealed her humanity, a quality which each member of the judiciary and bar should respect").

G. JUDGES *PRO TEMPORE* - MAGISTRATES AND MASTERS

1. Judges *Pro Tempore*

Judge *pro tempore* acts during the absence of the regular judge and exercises all powers of regular judge during his appointment. Survance v. State, 465 N.E.2d 1076 (Ind. 1984).

Appellate courts will determine a trial judge's appointment status by examining the record, not by the judge's self-description.

Ringham v. State, 768 N.E.2d 893 (Ind. 2002) (statute giving defendant the right to have the elected judge and not a magistrate preside over Marion County trial did not apply to judge *pro tempore*; elected judge's findings of fact that trial judge was validly appointed *pro tempore* were clearly correct, although he described himself as a "magistrate").

a. Appointed by Supreme Court - CR 14

When it is made to appear to the Indiana Supreme Court that the judge of any court having criminal jurisdiction is unable because of physical or mental infirmity to perform the duties of his office, Indiana Supreme Court may appoint a judge *pro tempore* to serve as sole judge of the court for the duration of such infirmity.

When any judge of a court having criminal jurisdiction fails, refuses, or neglects to perform the duties of his office without good cause, the court shall order judge to perform his duties or in the alternative show cause why a judge, judge *pro tempore*, or commissioner should not be appointed to complete the performance of the judge's duties. The judge is entitled to 10 days' prior notice that the petition is to be presented to the Supreme Court. CR 14.

Following the proper procedure in appointing judges *pro tempore* is a matter of utmost importance and sloppy practice will not be tolerated. Floyd v. State, 650 N.E.2d 28 (Ind. 1994).

b. Authority and Term

A judge *pro tempore* is appointed for a specified term to preside over the entire court for that specified term. Skipper v. State, 525 N.E.2d 334 (Ind. 1988).

Only duly elected or appointed judge of court or duly appointed judge *pro tempore* or special judge may enter appealable final judgment, including a criminal sentence. When court official who is not duly elected or appointed judge of court purports to make a final order or judgment, that decision is a nullity. Floyd v. State, 650 N.E.2d 28 (Ind. 1994).

c. Enter Sentence After Term of Appointment Expired

A judge *pro tempore* has authority to make decisions and rule on matters following expiration of appointment. Floyd v. State, 650 N.E.2d 28 (Ind. 1994); State ex rel. Hodshire v. Bingham, 33 N.E.2d 771(Ins. 1941); and TR 63(A).

2. Master/Magistrate

"Master" includes attorney, referee, auditor, examiner, commissioner, and assessor. TR 53(A). A magistrate must be admitted to the practice of law in Indiana and may not be engaged in the practice of law while holding the office of magistrate. Ind. Code § 33-23-5-2 and Ind. Code § 33-23-5-3.

A "master commissioner" has same powers and duties as a magistrate. Dearman v. State, 632 N.E.2d 1156, 1158 (Ind. Ct. App. 1994). Each trial court with the concurrence of the Supreme Court may appoint a special master in a case pending therein. TR 53(A).

Under Ind. Code § 33-23-5-8.5, a magistrate has the same powers as a judge, except for "the power of judicial mandate." See Ind. Code § 33-23-5-8.

H. CHALLENGING AUTHORITY TO ENTER FINAL APPEALABLE ORDER

Dismissal of appeal is proper only after reviewing court has ascertained:

(1) challenge to authority of a court officer to enter a final appealable order has been properly preserved for the instant appeal, and

(2) court officer did not have such authority.

1. Must Have Properly Preserved Objection

Failure of party to object at trial to authority of court officer to enter final appealable order waives issue for appeal. Floyd v. State, 650 N.E.2d 28 (Ind. 1994).

2. Record Must Disclose No Validly Appointed Judge

A court officer not validly appointed does not have authority to enter a final judgment. If the record does not disclose whether a valid appointment was made, proper appointment papers should be certified in accordance with Indiana Appellate Rule 32 (formerly Ind. App. Rule 7.2(C)). Floyd v. State, 650 N.E.2d 28 (Ind. 1994).

II. CHANGE OF VENUE FROM COUNTY

See Part II.B for a discussion of the procedural issues in a change of venue. See IPDC Pretrial Manual, Chapter 5 § III, *below*, for a discussion of the right to a change of venue due to adverse pretrial publicity.

A. VENUE REQUIREMENT GENERALLY

The Indiana Constitution, Article 1, Section 13 provides the accused "the right to a public trial, by an impartial jury, in the county in which the offense shall have been committed..."

1. Venue Statute Prescribes Location of Trial; Does Not Confer Jurisdiction

Venue defines the particular county or district in a state in which a criminal prosecution must be brought. Bledsoe v. Indiana, 223 Ind. 675, 678, 64 N.E.2d 160, 161 (1945).

Venue statutes and rules do not confer jurisdiction but rather prescribe location at which trial proceedings are to occur from among courts empowered to exercise jurisdiction. Venue statute applies only to those cases properly subject to state's criminal jurisdiction. Benham v. State, 637 N.E.2d 133, 137 (Ind. 1994).

2. State Must Prove Venue in criminal cases

Venue is not element of criminal offense, but it is essential fact which must be proved by State in same manner as essential elements of crime as defined by legislature. Strickland v. State, 217 Ind. 588, 594, 29 N.E.2d 950, 952 (1940); Small v. State, 226 Ind. 38, 42, 77 N.E.2d 578, 580 (1948); Williams v. State, 634 N.E.2d 849 (Ind. Ct. App. 1994).

There is no constitutional or statutory requirement for the State to prove venue in CHINS proceedings. See Br.B. v. State, 139 N.E.3d 1066, 1072 (Ind. Ct. App. 2019) ("…a CHINS proceeding *may* be commenced (and tried) in a county where the child resides, the act occurred, or the condition exists, but it does not *have* to be") (emphasis in original).

a. Defendant May Challenge Venue in Pretrial Motion

Ind. Code § 35-32-2-5(a) permits the defendant to challenge the venue of a prosecution at any time before the verdict, including in a pretrial motion. Wurster v. State, 715 N.E.2d 341 (Ind. 1999).

> Neff v. State, 915 N.E.2d 1026 (Ind. Ct. App. 2009) (Wurster (above) suggests it is preferable for defendants to challenge venue before trial, with the result of a successful challenge being transferred to the proper county, not dismissal of charges), *reh'g granted*, 922 N.E.2d 44.

b. Burden of Proof

The State must prove venue in a criminal case by a preponderance of the evidence, and circumstantial evidence may be sufficient to establish proper venue. Evans v. State, 571 N.E.2d 1231 (Ind. 1991); Wurster v. State, 715 N.E.2d 341 (Ind. 1999); Peek v. State, 454 N.E.2d 450 (Ind. Ct. App. 1983).

Perry v. State, 78 N.E.3d 1, 11 (Ind. Ct. App. 2017) (where Court had already reversed four convictions on sufficiency of evidence grounds, it would have been compelled to reverse defendant's convictions based on insufficient evidence of venue: "The State presented virtually no probative evidence that [defendant] committed the offenses alleged in Counts 1 through 4, and it presented even less evidence regarding where those alleged offenses occurred").

Neff v. State, 915 N.E.2d 1026 (Ind. Ct. App. 2009) (in child solicitation prosecution, State failed to prove proper venue in Hamilton County, since all of the internet chats occurred between defendant at his computer in Madison County and a woman, who was in Georgia, posing as a twelve-year-old living in Hamilton County; defendant completed act of child solicitation over computer, not in Hamilton County where he had planned to meet girl and was apprehended), *reh'g granted*, 922 N.E.2d 44.

Shields v. State, 490 N.E.2d 292 (Ind. 1986) (testimony that help was given victim in Hobart Township, and that Lake County police responded was adequate to show venue in Lake County).

Boze v. State, 514 N.E.2d 275 (Ind. 1987) (altercation, and involvement of local county police, ambulance and hospital personnel satisfy State's burden).

Currin v. State, 497 N.E.2d 1045 (Ind. 1986) (circumstantial evidence, showing participation of county police and coroner was adequate in itself to show proper venue).

c. Judgment on the Evidence May Bar Retrial

It is unclear whether Defendant may be retried after the State fails to prove venue at trial.

Williams v. State, 634 N.E.2d 849, 853 (Ind. Ct. App. 1994) (TR 50 judgments on evidence entered pursuant to defendant's motion on grounds State had failed to prove venue were "acquittals," and further prosecution would violate principles of double jeopardy).

But see:

Neff v. State, 915 N.E.2d 1026 (Ind. Ct. App. 2009) (disagreeing with Williams, court held that failure to prove venue is similar to a trial error and does not bar retrial in the proper county), *reh'g granted*, 922 N.E.2d 44.

NOTE: State has met its burden of establishing venue in criminal case if facts and circumstances of case permit jury to infer that crime occurred in given county, Norcutt v. State, 633 N.E.2d 270 (Ind. Ct. App. 1994), or if substantial evidence is presented to establish that the county in which the offense was committed cannot be readily determined, Navaretta v. State, 726 N.E.2d 787 (Ind. 2000).

3. Venue in County Where Offense Committed

Venue is generally in the county where the offense was committed. Ind. Code § 35-32-2-1(a) and Indiana Constitution, Article 1 § 13(a).

Weaver v. State, 583 N.E.2d 136 (Ind. 1991) (criminal defendant has a constitutional and statutory right to be tried in state and county in which crime was committed. U.S. Const. Art. III, §2; U.S. Const. Amendment VI; Ind. Const. Art. I, §13).

4. Exceptions

a. Victim and Offender in Separate Counties

If victim and offender are in separate counties at time of commission of offense, then trial may be in either county. Ind. Code § 35-32-2-1(b).

Bryant v. State, 41 N.E.3d 1031 (Ind. Ct. App. 2015) (rejecting claim that in proving venue, Ind. Code § 35-32-2-1(b) required the State to show that defendant *knew* the victims were situated in Wells County; the statute requires only that the State prove that the victims were, in fact, situated in Wells County).

b. Murder

Venue is proper in county where death occurred, body was found, or cause of death was inflicted. Ind. Code § 35-32-2-1(c).

Weaver v. State, 583 N.E.2d 136 (Ind. 1991) (murder trial was properly venued in county where body was found, even though indictment allegedly incorrectly stated that murder took place in that county).

c. County boundaries and uncertain locales

Indiana Code § 35-32-2-1(i) provides:

> If an offense is committed on a public highway (as defined in Ind. Code § 9-25-2-4) that runs on and along a common boundary shared by two (2) or more counties, the trial may be held in any county sharing the common boundary.

The Indiana Supreme Court has upheld this statute under Article 1, Section 13 of the Indiana Constitution. Baugh v. State, 801 N.E.2d 629 (Ind. 2004).

For offenses committed at or near common boundaries shared by two or more counties, when it cannot be readily determined in which county the offense was committed, the trial may be held in any county sharing the common boundary. Ind. Code § 35-32-2-1(h); see also Navaretta v. State, 726 N.E.2d 787 (Ind. 2000).

Eberle v. State, 942 N.E.2d 848 (Ind. Ct. App. 2011) (because Lawrenceburg, where defendant resided, is on banks of the Ohio River - a common boundary shared by Ohio and Dearborn Counties - his trial could properly be held in any county sharing the common boundary pursuant to Ind. Code § 35-32-2-1(h)).

Jones v. State, 967 N.E.2d 549 (Ind. Ct. App. 2012) (State proved by preponderance of evidence that proper venue was in Marion County where both victims testified, they were at their homes in Marion County when defendant phoned them).

d. Interstate and inter-county crimes

In any county where act was committed in furtherance of the offense if:

(1) it can't readily be determined where crime occurred, Ind. Code § 35-32-2-1-(d) and Navaretta v. State, 726 N.E.2d 787 (Ind. 2000); or

(2) if crime is commenced in Indiana and completed out of state, or vice versa. Ind. Code § 35-32-2-1(e) and (f).

Davis v. State, 520 N.E.2d 1271 (Ind. 1988) (venue of rape charge in county in which victim was forced into defendant's car was proper, even though physical acts of rape occurred in different county, as rape was part of continuous chain of integrally related events which began in county of prosecution with criminal confinement of victim).

Koch v. State, 952 N.E.2d 359 (Ind. Ct. App. 2011) (Indiana had jurisdiction over battery and robbery which occurred in New Mexico because they were part of a continuing transaction with the kidnapping that occurred in Indiana).

On jurisdictional challenges to changes relating to interstate crimes, see also IPDC Pretrial Manual, Chapter 9 § II.K.

Compare An-Hung Yao v. State, 975 N.E.2d 1273 (Ind. 2012) and concept of "territorial jurisdiction" (a person may be convicted under Indiana law of an offense if either the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana; where defendants ran a Texas company that made toy guns and allegedly counterfeited trademarks of similar guns made by an Indiana company, State needed to show defendants exerted some sort of control over trademarks in Indiana).

e. Use of Internet or Computer Network

Where an offense is committed outside Indiana by use of electronic communication upon an Indiana resident, "trial may be held in the county where the victim resides at the time of the offense." Ind. Code § 35-32-2-1(k).

Eberle v. State, 942 N.E.2d 848 (Ind. Ct. App. 2011) (defendant, who lived in Dearborn County, was properly convicted of intimidation, stalking and harassment in Ohio County, even though victim was in Florence, Kentucky when defendant made five or six calls to her cell phone; under Ind. Code § 35-32-2-1(k), venue was proper in Ohio County, where victim resided, and crime was committed by electronic communication).

Peacock v. State, 126 N.E.3d 892 (Ind. Ct. App. 2019) (State presented sufficient circumstantial evidence from which the jury could have determined that the defendant sent threatening text messages to his DCS case manager while in Indiana because the text messages were sent shortly after his CHINS hearing that was in Indiana; also, the case manager testified she received the messages while she was living and working in Marion County).

f. Theft, Conversion, Receiving Stolen Property

Anywhere where the person exerted unauthorized control over the property; received, retained, or disposed of property. Ind. Code § 35-32-2-2.

Lashbrook v. State, 550 N.E.2d 772 (Ind. Ct. App. 1990) (proper venue of prosecution for conversion was in county where defendant first obtained money from "investors" in pyramid promotional scheme as defendant's control over money was unauthorized at outset).

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (evidence that forged and stolen check of paralegal's employer was found in his possession in county in which paralegal worked established venue of that county in prosecution for forgery and theft).

Clark v. State, 124 N.E.3d 1284 (Ind. Ct. App. 2019) (proper venue for theft prosecution in Hamilton County where defendant rented lawnmower from victim in Hamilton County for one day but sold it in Marion County the next day).

g. Kidnapping, Criminal Confinement, Interference of Custody

Any county in which the victim has traveled or has been confined during course of the offense. Ind. Code § 35-32-2-3(a).

See also Ind. Code § 35-32-2-3(b) (when custody order violated, venue for a person who commits offense of criminal confinement or interference with custody is in county in which child was removed, taken, concealed, or detained).

h. Aiding and Abetting/Conspiracy

If a person in a county engages in conduct sufficient to constitute aiding, inducing, or causing an offense committed in another county, he may be tried for the offense in either county. Ind. Code § 35-32-2-4(a).

Wherever agreement was reached, or overt act in furtherance of agreement was performed. Ind. Code § 35-32-2-4(b).

Gregory v. State, 524 N.E.2d 275 (Ind. 1988) (conspiracy to commit theft properly brought in county of store where attempted fraudulent transaction was made).

i. Attempt

Wherever substantial step towards commission of underlying crime occurred, or county where the underlying crime was to have been completed. Ind. Code § 35-32-2-4(c).

Kindred v. State, 540 N.E.2d 1161 (Ind. 1989) (statute on venue in prosecution for attempt to commit crime does not give defendant any right to be tried in a particular county).

j. Single Chain of Events

When various acts which comprise, crime are part of a single, continuous chain of events, charge may be brought either in county where the acts began or county where acts ended.

Osborne v. State, 426 N.E.2d 20 (Ind. 1981) (kidnappings and theft were part of one continuous chain of events that were integrally related).

Sells v. State, 130 N.E.3d 1158 (Ind. Ct. App. 2019) (a woman drove from Rush County to another county to purchase drugs from the defendant. On her return to Rush County, police stopped the woman for an improper lane change in Franklin County. When stopped by police, the woman ingested the drugs she had just purchased and later died of an overdose. Court held that venue for dealing and conspiracy to deal methamphetamine charges was proved because the conspiracy to deal and purchasing of drugs was a single chain of events and the drug purchaser drove through Franklin County, which was enough to establish venue).

Kuchel v. State, 570 N.E.2d 910 (Ind. 1991) (venue in Marshall County was supported by evidence that, after making an abusive telephone call to victim in which he threatened her parents, defendant picked her up at her parents' home in Marshall County and then drove her to Starke County where their altercation commenced, thus showing that the Starke County offenses were part of a continuous chain of events beginning in Marshall County).

Andrews v. State, 529 N.E.2d 360 (Ind. Ct. App. 1988) (venue proper in county where defendant formed criminal intent to commit act of molesting his daughter).

k. False Affidavit

Wurster v. State, 715 N.E.2d 341 (Ind. 1999) (proper venue for filing false affidavit with Bureau of Motor Vehicles is county where office at which affidavit was filed is located; Marion County does not become a proper venue merely because the local BMV office routinely sends affidavit to central BMV office in Marion County for processing).

Cf.

State v. Moles, 166 Ind. App. 632, 337 N.E.2d 543 (1975) (proper venue for making false Indiana state income tax return is Marion County; under Indiana law taxpayer does not "make" return until the return is filed with Department of Revenue; taxpayers are required to mail their returns directly to office in Marion County).

l. Omission to Act

If crime charged is an omission to act, venue of offense is county where act should have been performed. Gilmour v. State, 230 Ind. 454, 104 N.E.2d 127 (1952); Kahn v. State, 493 N.E.2d 790 (Ind. Ct. App. 1986).

m. Securities Fraud

Kahn v. State, 493 N.E.2d 790 (Ind. Ct. App. 1986) (venue for prosecuting securities fraud, corrupt business influence, sale of unregistered securities, and sale of securities by unregistered agent was properly lodged in county that contained corporate defendant's offices, place of doing business, place of mailing securities and newsletters, and place for registering securities).

n. Identity Deception

A person who commits the offense of identity deception or synthetic identity deception may be tried in a county in which the victim resides, or the person obtains, possesses, transfers, or uses the information used to commit the offense. Ind. Code § 35-32-2-6.

5. Transfer if Venue Improperly Laid

When it appears at any time before verdict or finding, that prosecution was brought in an improper county, court shall order [transfer of the cause to] a court with jurisdiction over the offense in the proper county. Ind. Code § 35-32-2-5(a); Wurster v. State, 715 N.E.2d 341 (Ind. 1999).

B. CHANGE OF VENUE - PROCEDURAL MATTERS

1. Basics

a. Verification

Motion for change of venue must be verified or the issue is not properly before the court. Carter v. State, 451 N.E.2d 639 (Ind. 1983). Denial of motion without hearing is justified if motion is not properly verified.

Chapman v. State, 556 N.E.2d 927 (Ind. 1990) (motion for change of venue was properly denied, where motion was not verified or accompanied by affidavit setting forth facts in support of statutory bases for change).

Jones v. State, 517 N.E.2d 405 (Ind. 1988) (affirmation of truth must be made under penalty of perjury).

Tabor v. State, 461 N.E.2d 118 (Ind. 1984) (failure of defendant to verify motion for change of venue from county justified denial of motion).

But see French v. State, 754 N.E.2d 9 (Ind. Ct. App. 2001) (State waived argument regarding lack of verification by failing to object and proceeding to hearing on merits below and sustaining court's denial on lack of verification would elevate form over substance when sworn testimony was presented at hearing).

b. Who May File Motion

Indiana Criminal Rule 12(A) allows the prosecuting attorney or a defendant to file for change of venue but requires the moving party to set forth "facts in support of the constitutional or statutory basis or bases for the change." The Indiana Constitution, Article 1 § 13(a) gives a defendant the right to be tried in the county in which the offense was committed. Ind. Code § 35-36-6-1(a) permits the defendant, but not the prosecutor, to request a change of venue.

PRACTICE POINTER: Although Criminal Rule 12(A) would allow the prosecutor to move for a change of venue, a defendant who does not want a change of venue should be able to prevent it for several reasons. First, the Indiana Constitution, Article 1, § 13(a) gives a defendant the right to be tried in the county in which the offense was committed. Second, CR 12(A) requires a party to set forth the "constitutional or statutory basis" for the change of venue, and no statute provides for the State to take a change of venue from the county of filing. See Ind. Code § 35-36-6-1; Blume v. State, 189 N.E.2d 568 (Ind. 1963). Finally, because the State determines the county in which a case is filed, it should not need to take a change of venue.

Co-defendants' motions are binding on the defendant - change of venue for one of two or more jointly charged defendants is a change of venue for all, in the absence of showing of prejudice by defendant. State ex rel. Banks v. Hamilton Superior Court, 261 Ind. 426, 304 N.E.2d 776 (1973).

State v. Perkins, 483 N.E.2d 1379 (Ind. 1985) (defendant failed to show prejudice from change of venue, even though his counsel did not participate in selection of county after second defendant's motion for change of venue was granted).

c. Where Available

Change of venue is available in criminal actions and proceedings to enforce a statute defining an infraction. CR 12(A).

d. Court's Ruling on Motion

The trial court has discretion to deny motions for change of venue. Bauer v. State, 456 N.E.2d 414 (Ind. 1983); Hare v. State, 467 N.E.2d 7 (Ind. 1984).

(1) Required Analysis

Trial court may not act arbitrarily in deciding whether to grant a change of venue from the county based upon prejudicial pretrial publicity. Court should consider right of news media to fairly and accurately report news, right of defendant to fair trial before impartial tribunal, and rights of citizens to fully comprehend and analyze the portent and direction of administration of court system. Jarver v. State, 265 Ind. 525, 356 N.E.2d 215 (1976).

Bauer v. State, 456 N.E.2d 414 (Ind. 1983) (trial court has duty to balance rights of news media, defendant, and citizens as it determines right to change of venue).

(2) Postponing Ruling Until After *Voir Dire*

Trial court has discretion to postpone ruling on motion for change of venue until after voir dire rather than making immediate factual determination based on record presented. Lindsey v. State, 485 N.E.2d 102 (Ind. 1985), *on reh'g* 491 N.E.2d 191; Davidson v. State, 580 N.E.2d 238 (Ind. 1991).

2. Time Limits

a. Ten Days After Not Guilty Plea

Application for change of venue from the county shall be filed within thirty days of the initial hearing. CR 12(D)(1) (effective January 1, 2013).

The opposing party may file counter-affidavits within ten days. CR 12(A).

b. Late Discovery Extends 10-Day Rule

If the applicant first obtains knowledge of the cause for change of venue after the specified period, applicant may file the verified application specifically alleging when and how the cause for motion was first discovered and why cause could not have been previously discovered by exercise of due diligence. CR 12(D)(2).

Johnson v. State, 472 N.E.2d 892 (Ind. 1985) (denial of untimely motion for change of venue was not error where defendant failed to state when cause for the motion was first discovered, how it was discovered, or why it could not have been discovered before).

Epps v. State, 267 Ind. 177, 369 N.E.2d 404 (1977) (no error in overruling motion without a hearing where defendant filed motion for change of venue ten months after his arraignment and motion failed to comply with CR 12).

3. Hearing Required

When a motion for change of venue is filed, the court shall hold a hearing on the motion. Ind. Code § 35-36-6-1(b). Hearing must be held, or opportunity given to defendant to present additional evidence in support of verified motion for change of venue.

Hickman v. State, 537 N.E.2d 64 (Ind. Ct. App. 1989) (CR 12 requires only that a hearing date be set in order to trigger the notice to an opposing party of the opportunity to seek discovery and/or submit counter affidavits; evidentiary hearing is not required in every case in which a motion for change of venue is properly before court, e.g., where allegations are factually insufficient).

a. Not Required if Motion Defective - CR 12

It is reversible error for court to refuse to hold hearing on motion, except where motion is defective. Epps v. State, 267 Ind. 177, 369 N.E.2d 404 (1977); Knight v. State, 156 Ind. App. 395, 296 N.E.2d 892 (1973).

Everroad v. State, 570 N.E.2d 38 (Ind. Ct. App. 1991) (motion for change of venue failed to comply with requirements of CR 12, and thus, defendants were not entitled to hearing on motion, where motion stated neither how alleged cause for change of venue came to defendants' attention nor why it could not have been discovered before by exercise of due diligence and failed to allege specific facts surrounding alleged cause), *abrogated in part on other grounds,* 590 N.E.2d 567.

Gibson v. State, 518 N.E.2d 1132 (Ind. Ct. App. 1988) (defendant who specifically

alleged by verified motion for change of venue that he could not get fair trial in county because of prejudicial news coverage, and who did not file his motion within ten days after he entered his plea of innocence because his injuries and medical treatment prevented him from learning of allegedly prejudicial material, should have been afforded hearing, notwithstanding State's contention that denial of hearing was harmless because voir dire record demonstrated that jury had not in fact been prejudiced by news coverage).

C. SUCCESSIVE APPLICATIONS

1. Hearing Requirement

Hearing or opportunity to present additional evidence must be given even where defendant properly files a second motion for change of venue from the county, although hearing need not be a formal hearing. Bradberry v. State, 160 Ind. App. 202, 311 N.E.2d 437 (1974).

Linder v. State, 456 N.E.2d 400 (Ind. 1983) (second motion for change of venue based on news stories postdating first hearings; no error in denying motion without hearing where defendant had been given opportunity to present articles and judge polled jury).

2. Conflict Whether Successive Changes of Venue Permissible

Ind. Code § 35-36-6-1 says that only one (1) change of venue from the county may be granted.

A trial judge in his discretion should grant additional change of venue if an adequate showing of bias and prejudice has been made.

Burton v. State, 260 Ind. 94, 292 N.E.2d 790 (1973), *overruled on other grounds,* Smith v. State, 689 N.E.2d 1238, 1247 n.11 (Ind. 1997) (fourth grant properly denied where showing of bias or prejudice was inadequate).

D. CHOOSING A NEW VENUE

1. Effect of Agreement by Parties

When a change of venue is granted, if within three days from the granting of the motion, the parties agree in open court upon the county to which the case will be transferred, the court shall transfer the action to that county. CR 12(G).

2. No Agreement by Parties

In the absence of an agreement the court shall within two days submit to the parties a written list of all the counties adjoining the county from which the venue is changed. The judge has the right to eliminate any county or counties from the list if it appears that the defendant could not receive a fair and impartial trial there, and to substitute another county or counties. CR 12(G).

James v. State, 613 N.E.2d 15 (Ind. 1993) (decision to add non-adjoining counties to panel of receiving counties in connection with defendant's motion for change of venue is within trial court's discretion).

State ex rel. Mock v. Warrick Circuit Court, 183 N.E. 2d 202 (Ind. 1962) (judge is not required to grant change to neighboring county).

3. Procedure for Striking

Within seven days or within such time as is fixed by the court (not later than 14 days after the court submits the list), the parties shall each alternatively strike off the names of such counties. The party filing the motion strikes first and the cause shall be sent to the county not stricken. CR 12(G).

4. Failure to Strike by Moving Party

If a moving party fails to strike within said time, he shall not be entitled to a change and the court shall resume general jurisdiction. CR 12(G).

McDaniel v. State, 375 N.E.2d 228 (Ind. 1978) (defendant waived his right to change of venue by failing to strike from list of counties submitted after judge decided to limit change of venue to the counties contiguous to county which homicide occurred).

5. Failure to Strike by Non-Moving Party

If non-moving party fails to strike, clerk shall strike for that party. CR 12(G).

III. PREJUDICE AND PRETRIAL PUBLICITY

A. IN GENERAL

The right to an impartial jury, under the 6th Amendment to the Federal Constitution and Article 1, Section 13 of the Indiana Constitution, is at the heart of a motion for change of venue. "A juror's verdict must be impartial regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. In essence the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors." Ward v. State, 810 N.E.2d 1042 (Ind. 2004) (citations and internal quotations omitted).

Defendant may request a change of venue by filing a verified motion alleging that bias or prejudice against the defendant exists in that county. CR 12(B) and Ind. Code § 35-36-6-1(a). CR 12 takes precedence over conflicting provisions of Ind. Code § 35-36-6-1. See State ex rel. Gaston v. Gibson Circuit Court, 462 N.E.2d 1049 (Ind. 1984).

PRACTICE POINTER: If the trial court denies a pretrial motion for change of venue due to adverse publicity, be alert for signs of bias and prejudice during voir dire and try to develop challenges for cause against specific jurors. Renew the motion for change of venue if voir dire reveals additional evidence of bias and prejudice by members of the venire.

1. Burden of Proof

Defendant bears the burden of showing that community prejudice exists which would prevent his obtaining a fair trial in that community. Clemens v. State, 610 N.E.2d 236 (Ind. 1993).

Underhill v. State, 428 N.E.2d 759 (Ind. 1981) (burden rests with the accused to establish either the high probability or existence of such widespread bias in the community that an

impartial jury cannot be obtained).

Tabor v. State, 461 N.E.2d 118 (Ind. 1984) (defendant must demonstrate that adverse publicity made potential jurors unable to set aside their preconceived notions of guilt and to render verdict based upon evidence only).

2. Required Showing

The defendant must be given the opportunity to make the required showing. Failure to grant a hearing when the defendant has made a proper verified motion is an abuse of discretion requiring reversal. Gibson v. State, 518 N.E.2d 1132 (Ind. Ct. App. 1988).

a. Buildup of Prejudice

Defendant alleging prejudicial pretrial publicity must establish a clear and convincing buildup of prejudice against him throughout the community.

Ward v. State, 810 N.E.2d 1042 (Ind. 2004) (defendant met burden of showing community prejudice where juror questionnaires reflected "deep and bitter hostility," over 65% of prospective jurors said they had formed a belief on defendant's guilt, 80% said they had knowledge of the case, and six of twelve jurors who were seated expressed belief in defendant's guilt).

Brown v. State, 563 N.E.2d 103 (Ind. 1990) (presumption that juror's voir dire is truthful is overcome by showing of general atmosphere of prejudice throughout community).

b. Prejudicial Publicity

Prejudicial publicity is that which contains either inflammatory material not admissible at trial or misstatements or distortions of the evidence. Evans v. State, 563 N.E.2d 1251 (Ind. 1990), *abrogated in part on other grounds,* 598 N.E.2d 516; Moore v. State, 515 N.E.2d 1099 (Ind. 1987).

Davis v. State, 487 N.E.2d 817 (Ind. 1986) (media coverage of murder did not create such widespread bias throughout county so that impartial jury could not be found where media reports were pointedly factual).

c. Inability to Put Prejudice Aside and Render Verdict Based on Evidence

The issue is not whether a prospective juror has heard of defendant's connection with the crime, but whether the juror has a preconceived notion of guilt as a result.

Even if jurors have preconceived notions, if the judge is convinced, they will put them aside and render a verdict on the evidence, then change of venue will not be granted. Slone v. State, 496 N.E.2d 401 (Ind. 1986); Hopkins v. State, 582 N.E.2d 345 (Ind. 1991).

The defendant has the burden of producing sufficient evidence of community bias or prejudice to convince the trial court that he could not receive a fair trial in that county. Blacknell v. State, 502 N.E.2d 899 (Ind. 1987).

Ward v. State, 810 N.E.2d 1042, 1050 (Ind. 2004) (even if defendant had not made sufficient showing of community prejudice, new trial in capital case was required where one juror said she thought defendant was guilty and admitted "I don't know" when asked if she was willing to base decision solely on evidence presented at trial).

Johnson v. State, 472 N.E.2d 892 (Ind. 1985) (even if potential jurors had been exposed to pretrial publicity concerning defendants' case, that alone was insufficient to establish local prejudice warranting change of venue, absent additional demonstration that jurors were unable to set aside any preconceived notions they may have had).

Myers v. State, 887 N.E.2d 170 (Ind. Ct. App. 2008) (although defendant proved prejudicial pretrial publicity, he failed to prove that jurors were prejudiced by publicity; no empaneled juror expressed uncertainty about his or her ability to set aside an opinion of guilt).

Nix v. State, 158 N.E.3d 795 (Ind. Ct. App. 2020) (denial of change of venue affirmed despite juror's post-trial comments indicating knowledge of defendant's criminal history).

3. Judge's Role

Court's role is to weigh evidence of potential community bias and assess the credibility of jurors during voir dire examination in determining whether a defendant could receive a fair trial. Gillie v. State, 465 N.E.2d 1380 (Ind. 1984). The trial court is in the best position to evaluate the jurors' testimony. Jackson v. State, 925 N.E.2d 369 (Ind. 2010).

Brown v. State, 563 N.E.2d 103 (Ind. 1990) (even assuming that defendant showed adverse publicity prior to trial, trial court properly denied defendant's motion for change of venue where record showed that jurors who were selected stated that they were able to set aside any preconceived notions of guilt and were able to render decision based only upon evidence; allegation that many prospective jurors knew attempted murder victim, prosecutor and defense counsel was insufficient).

Bauer v. State, 456 N.E.2d 414 (Ind. 1983) (no abuse of discretion in denying motion for change of venue, where defendant offered no evidence of bias or prejudice except photostatic copies of some articles and argued presumption of prejudice based upon use of name "silver compact car rapist" over 18-month period, contending that name was burned into subconscious of residents of county to point that they could not detach that name from their mental processes; trial judge was meticulous in conducting his questioning of prospective jurors. Actual proof of community bias or prejudice required. Mere knowledge of crime not enough).

Baniszewski v. State, 256 Ind. 1, 261 N.E.2d 359 (1970) (court found strong case for change of venue taking into consideration nature of the charge, penalty, and totality of the incident surrounding the crime. Newspaper headlines included "courtroom jammed as torture trial opens;" "slain girl's parents in courtroom;" "sickening case details told." Sheppard v. Maxwell, 384 U.S. 333 (1966), *cited* for comparison).

4. Additional Reading

For a discussion on issues involving prejudicial publicity and balancing the increasingly conflicting demands of a fair trial and a free press, see ABA Standards for Criminal Justice, Fair Trial and Free Press, Third Ed., 1992.

See also October 1994 issue of *Indiana Defender* and BNA Criminal Practice Manual, 121:801.

B. GATHERING EVIDENCE OF PREJUDICIAL PRETRIAL PUBLICITY

The best "how-to" guide in this area is *Jurywork-Systematic Techniques*, by NJP Litigation Consulting (2011-12, West). It includes a chapter on change of venue, gathering data on pretrial motions on jury bias, and procedures for content analysis of media coverage, and for collecting community witness statements.

Investigation and review of whether there was prejudicial publicity should include the following:

1. News Reports

Copies of the offending articles or tapes of broadcasts are needed to show they were inflammatory, false, misleading, or contained inadmissible and incriminating evidence. A close analysis of the news report's content is important to show the report's likely prejudicial effects. See *Jurywork-Systematic Techniques*, by NJP Litigation Consulting (2011-12, West).

News report content analysis will be necessary to overcome the frequent criticism that the amount of reporting on the crime isn't what is at issue but whether it is prejudicial. Slone v. State, 496 N.E.2d 401 (Ind. 1986). Analysis of recurring patterns of word usage in descriptions of the incident, your client and/or the victim will go far to showing news coverage created prejudice against your client.

2. Circulation and Audience Share Figures

Obtain a general idea of the percentage of county residents affected by the publicity.

> Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417 (1963) (defense relied on television reports of audience shares to graphically document the reach of prejudicial publicity).

PRACTICE POINTER: TV and radio stations usually have data on their audience share, and newspapers generally keep circulation records by county. The State keeps county-by-county population figures, which are broken down by race.

3. Statistical Surveys

Surveys may be convincing and useful in establishing the existence of bias in the general population. Experts are useful in designing and conducting such a survey. Surveys alone are not sufficient to show that prejudice infects the particular jury venire, but they are persuasive.

> Kappos v. State, 465 N.E.2d 1092 (Ind. 1984) (statistical survey conducted by defendant, wherein 82% of population sample indicated they knew of his case and, out of 82%, 50% indicated they believed defendant was guilty and no one expressed opinion of his

innocence, did not demonstrate pattern of deep and bitter prejudice present throughout community sufficient to warrant change of venue in murder by hire prosecution).

4. Community Witness Statements

In some cases, other trial lawyers have been used to express opinion on whether defendant could obtain an impartial jury. Ashby v. State, 486 N.E.2d 469 (Ind. 1985).

Public officials, clergy, doctors, bartenders, barbers, mail carriers, beauticians and store owners qualify because of their frequent contact with the public. Their observations could be introduced either by affidavit or testimony.

5. Other Counties

If prejudicial pretrial publicity has extended beyond the county where charges are filed, defense counsel should attempt to demonstrate which alternative counties are unacceptable and to demonstrate the appropriateness of county or counties which defense counsel suggests.

6. Voir Dire

Voir dire is a critical stage in showing the prevalence of prejudice, and that its effects are unavoidable. Appellate courts often reject claims of abuse of discretion where prejudicial effects on the members of the venire are not shown. Appellate courts have not overruled trial court denials of change of venue where courts show care in conducting voir dire, even where attitudes toward the defendant have been prejudiced by news reports. Slone v. State, 496 N.E.2d 401 (Ind. 1986).

Ashby v. State, 486 N.E.2d 469 (Ind. 1985) (30 minutes allotted to parties to conduct additional voir dire gave ample opportunity to delve into possible racial prejudice among jurors).

C. RACIAL PREJUDICE

1. Indiana Law

Motions alleging racial bias as a basis for a change of venue have been difficult to prove.

James v. State, 613 N.E.2d 15 (Ind. 1993) (defendant argued he was entitled to change of venue to a county with a minority population of higher than 1%; when parties do not agree on county, CR 12 states that court shall submit list of adjoining counties to parties for striking; trial court has discretion to add non-adjoining counties to panel of receiving counties; nothing in the record suggests that the trial court's decision to follow the mandates of Criminal Rule 12 demonstrated purposeful discrimination or systematic exclusion of African-Americans from juries).

Ashby v. State, 486 N.E.2d 469 (Ind. 1985) (no showing that jurors were not able to put aside their prejudices in black-on-white rape, even where burned cross and skinned raccoon were placed on the jail house lawn).

Carter v. State, 451 N.E.2d 639 (Ind. 1983) (defendant's various motions for change of venue refer generally to prejudicial news coverage and fact that county had few black

people residing in it. No showing that jurors were aware of particulars of case or of opinions expressed in the press; nor did defendant exhaust peremptory challenges).

Trevino v. State, 428 N.E.2d 263 (Ind. Ct. App. 1981) (Mexican American defendant in county with minority population of less than 1% presented no evidence to show community bias or prejudice).

2. U.S. Supreme Court

Although a defendant has no right to have a jury that includes members of his race, religion, sex, ethnic background, etc., the cases below signal that challenges to jury venires based on prejudice should and will be given scrutiny by State and Federal courts. Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986).

Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 1717 (1986) (equal protection clause guarantees defendant that the State will not exclude members of his race from jury venire on account of race).

Vasquez v. Hillery, 474 U.S. 254, 106 S. Ct. 617 (1986) (automatic reversal where blacks are systematically excluded from grand jury).

Turner v. Murray, 476 U.S. 28, 106 S. Ct. 1683 (1986) (defendant accused of interracial capital offense is entitled to have prospective jurors informed of race of victim and questioned on issue of racial bias).

J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994) (Batson rule forbids exclusion of prospective jurors based on gender as well as race).

D. APPELLATE REVIEW - PREJUDICIAL PRETRIAL PUBLICITY

1. Standard of Review

Appellate courts will review the denial of a motion for change of venue for an abuse of discretion. An abuse of discretion does not occur where voir dire reveals that the seated panel was able to set aside preconceived notions of guilt and render a verdict based solely on the evidence. The defendant must demonstrate the existence of two distinct elements: (1) prejudicial pretrial publicity and (2) the inability of jurors to render an impartial verdict. Ward v. State, 810 N.E.2d 1042 (Ind. 2004).

PRACTICE POINTER: The two-part test described in Ward v. State is constitutionally suspect; proof that prejudicial pretrial publicity existed should not be required in all cases. A juror who is unable to render an impartial verdict should not be empaneled, regardless of the reason for the partiality. See, e.g., Dye v. State, 784 N.E.2d 469 (Ind. 2003). The Court appeared to back away from the first part of the test later in the Ward opinion: "[E]ven if Ward ['s criminal history] had not been reported, we nonetheless would be confronted with the question of whether jurors were able to render an impartial verdict." Ward v. State, 810 N.E.2d 1042 (Ind. 2004).

Barnes v. State, 435 N.E.2d 235 (Ind. 1982) (not an abuse of discretion to deny change of venue, even though defendant established prima facie basis for granting the change and the evidence was uncontroverted).

Evans v. State, 563 N.E.2d 1251 (Ind. 1990) (to establish abuse of discretion based upon prejudicial pretrial publicity, appellant must demonstrate both prejudicial pretrial publicity and juror inability to render an impartial verdict on the evidence), *overruled in part on other grounds*, 598 N.E.2d 516.

2. Preserving Error - Prejudicial Pretrial Publicity

To preserve error if a change of venue motion is denied, counsel should:

(1) Submit Verified Motion. Carter v. State, 451 N.E.2d 639 (Ind. 1983).

(2) Submit Motion Within thirty days of trial. CR 12(D)(1).

(3) Include Transcript of Voir Dire Examination with Record of Proceedings.

(4) Exhaust Peremptory Challenges. See U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774 (2000); Reinbold v. State, 555 N.E.2d 463 (Ind. 1990) (*overruled in part on other grounds by* Wright v. State, 658 N.E.2d 563 (Ind. 1995); Bixler v. State, 471 N.E.2d 1093 (Ind. 1984).

(5) Assert All Rights Relating to Questioning Prospective Jurors on Areas of Prejudice

(6) Challenge Jurors for Cause. Morris v. State, 266 Ind. 473, 364 N.E.2d 132 (1977).

(7) Not Accept the Jury.

Brewer v. State, 271 Ind. 122, 390 N.E.2d 648 (1979) (when defendant fails to raise question of possible community bias by challenging jurors either for cause or peremptorily, and defendant accepts the jury, no question is presented on appeal to the court on this issue).

(8) Show Prejudice Despite Diligent Assertion of Rights.

Bauer v. State, 456 N.E.2d 414 (Ind. 1983) (show that, despite defendant's best efforts, at least one juror infected with prejudice due to pretrial publicity was left on the jury). See also U.S. v. Martinez-Salazar, 528 U.S. 304, 120 S. Ct. 774 (2000).

(9) Move for Mistrial.

Jackson v. State, 925 N.E.2d 369 (Ind. 2010) (trial court is not required to admonish jury or attempt other curative measures before declaring mistrial for publicity; here, although five jurors claimed they were not influenced by newspaper article that ran on same day jury was sworn quoting a letter defendant wrote to prosecutor, trial court was in best position to evaluate jurors' testimony and did not abuse discretion in granting State's motion for mistrial).

E. ALTERNATIVE REMEDIES FOR PREJUDICIAL PRETRIAL PUBLICITY

1. Imported Juries

a. Statutory Authorization

Ind. Code § 35-36-6-11 (formerly Ind. Code § 34-2-9-2) expressly authorizes selection of jurors from other counties in cases where murder, a Level 1 felony, or a Level 2 felony are charged. The statute requires the jury in its entirety to be selected from the residents of the other county.

Kirby v. State, 481 N.E.2d 372, 374 (Ind. 1985) (language of Ind. Code § 34-2-9-2 [now Ind. Code § 35-36-6-11] does not suggest this mechanism was designed to select only a portion of the jury).

PRACTICE POINTER: Although statute only provides for importing juries in murder and Class A felony cases, the trial court has discretion to implement this procedure in other cases. It is recommended that a change of venire be sought in the alternative to change of venue. Drawing the venire from another county is less expensive, less disruptive to the court, and therefore easier to obtain than a change of venue. See *Use of Imported Juries Gains in Popularity*, 68 ABA J. 668 (1982).

2. Test Jury

The objective of a test jury is to determine whether prejudicial publicity exists and, if so, the extent to which it has influenced prospective jurors. A trial court is neither obligated nor prohibited from granting a request for a test jury to quantify community bias.

Burdine v. State, 515 N.E.2d 1085, 1091, 1092 (Ind. 1987) (trial courts may consider evidence from an objective group of community residents summoned to the court as a "test jury"; denial of defendant's motion for change of venue due to pretrial publicity was supported by evidence that no "test jurors" were aware of allegedly prejudicial articles referring to defendant as suspect in series of burglaries, and jury was not selected until months after publication of articles), *superseded in part on other grounds by* Indiana Rules of Evidence*, as recognized by* Joyner v. State, 678 N.E.2d 386, 389 (Ind. 1997).

Clemens v. State, 610 N.E.2d 236 (Ind. 1993) (defendant did not show that he was harmed by failure to conduct test jury to quantify community bias in support of his motion for change of venue and, in absence of showing of prejudice on part of seated jurors, trial court did not abuse its discretion in denying motion for test jury).