

1975 WL 28901 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

June 6, 1975

**\*1 Re: Magistrates—Change of Venue**

Mr. K. B. Kirven  
Chief of Police  
Post Office Box 411  
Holly Hill, South Carolina 29059

Dear Chief Kirven:

You have requested an opinion of this Office regarding changes of venue in criminal cases in magistrate's court.

As a fundamental proposition, it is provided in Article V, Section 19 of the South Carolina Constitution, as amended, that a change of venue in a criminal case may be made upon a proper showing by either the Defendant or the State, supported by affidavit, that a fair and impartial trial cannot be had in the original place of venue. Specific provision under this constitutional authority has been made by the General Assembly in Section 43-131 of the 1962 Code of Laws, which states:

Whenever in a case in the court of a magistrate . . . the prosecutor or accused in a criminal case shall file with the magistrate issuing the warrant or summons an affidavit to the effect that he does not believe he can obtain a fair trial before the magistrate and setting forth the grounds of such belief, the paper shall be turned over to the nearest magistrate not disqualified from hearing the case in the county, who shall proceed to try the case as if he had issued the warrant or summons. But in counties in which magistrates have separate and exclusive territorial jurisdiction, the change of venue shall be to another magistrate's district in the same county. One such transfer only shall be allowed each party in any case.

If a sufficient affidavit of an inability to obtain a fair and impartial trial has been made in strict compliance with all of the requirements of the section stated above, then it becomes the mandatory duty of the magistrate to change the venue. [State v. Conkle](#), 64 S.C. 371, 42 S.E. 173 (1902). Refusal to grant a motion for change of venue is an error of law and is reviewable only by way of appeal from conviction. [Brown and Parler v. Kolb](#), 92 S.C. 309, 75 S.E. 529 (1912).

However, in determining the sufficiency of the required affidavit, more than a mere opinion must be set forth. The affidavit must set forth substantial grounds for a belief that the party cannot obtain a fair trial. To satisfy this requirement, the grounds upon which a change of venue is requested must be stated with such definiteness and certainty that the court can determine their sufficiency; and if facts are stated on information and belief, the sources of information and the grounds of belief must be stated with particularity and certainty. [State v. Barnett](#), 98 S.C. 422, S.E. 795 (1914).

The motion for change of venue, however, must be filed with the magistrate with reasonable promptness, otherwise, the granting of the motion is not mandatory, even if sufficient grounds are set forth in the affidavit. See Ledbetter on Magistrates, pp. 11-13. What is 'reasonable' is a question to be decided by the magistrate in each case. The general test suggested by this Office is whether under the particular circumstances the person requesting the change of venue has had a reasonable opportunity to make the request previously. If he has such an opportunity and has not done so, without good excuse for the delay, then the magistrate is not required to grant the request. 1964 Op. A. G., No. 1733, p. 222. However, a motion for change of venue is usually considered to be timely if made before the start of trial. Op. A. G. (June 27, 1963).

\*2 If timely made and supported by a sufficient affidavit, the motion for change of venue must be granted by the magistrate. All papers in the case should then be transmitted to the nearest magistrate in the same county who is not similarly disqualified to hear the case. Op. A. G. (May 27, 1963). In counties in which magistrates have separate and exclusive territorial jurisdiction, the change may be made to any other magistrates district in the same county. Id. Since I have been unable to locate any statutory provision conferring separate and exclusive jurisdiction upon magistrates in Orangeburg County, it appears that the nearest magistrate who is not disqualified would be the proper person to receive a case transferred under Section 43-131.

If any further assistance is required, please do not hesitate to contact us.

Very truly yours,

Richard P. Wilson  
Assistant Attorney General

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