

[CAPTION]

VERIFIED MOTION FOR CHANGE OF JUDGE (Bias or Prejudice)

The Defendant, by counsel, respectfully requests this Court for a change of judge pursuant to the due process clause of the Fourteenth Amendment to the U.S. Constitution, Criminal Rule 12, I.C. 35-36-5-2, Rule 13, and [insert local rule, if applicable]. In support of the Motion, counsel states the following:

1. The Defendant entered a plea of not guilty in the above-captioned cause on [insert date].
2. Because less than thirty days have elapsed since the initial hearing, this motion is timely filed pursuant to Indiana Rule of Criminal Procedure 12.
3. An affidavit in support of this motion by [CHOOSE ONE: the Attorney of record OR the Defendant] is attached and is incorporated by reference as Exhibit A.
4. The facts and the reasons for the belief that such bias or prejudice exist set forth in the affidavit support a rational inference of bias or prejudice of this Court.
5. Freedom of a tribunal from bias or prejudice is a central element of substantive due process of the Federal Constitution. Harrison v. McBride, 458 F.3d 362 (7th Cir. 2005) (citing U.S. v. Sciuto, 531 F.2d 842 (7th Cir. 1976)).
6. The Honorable [insert judge] should be disqualified and a special judge appointed.

WHEREFORE, the Defendant, by counsel, respectfully requests that this Court to grant the Change of Judge, recuse himself, and to [set forth applicable procedure] so that a special judge may be appointed in this matter, and for all other relief just and proper in the premises.

(Signature of attorney)

VERIFICATION

I affirm, under the penalties for perjury, that the foregoing representations are true.

(Signature of attorney)


REFERENCES

CASEBANK B.7.b; B.7.c

Indiana Rule of Criminal Procedure 12 (a change of judge motion must be filed along with an affidavit stating that the facts and reasons for the belief that the judge has a personal bias or prejudice exist, and 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”).


Indiana Rule of Criminal Procedure 13 (setting forth the procedure for selecting a special judge).


Indiana Rule of Trial Procedure 79(C) (“A judge shall disqualify and recuse 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; is known by the judge to have an interest that could be substantially affected by the proceeding; or (4) is otherwise associate with the pending litigation in such fashion as to require disqualification in accordance with Canon 3(E) of the Code of Judicial Conduct”). NOTE: Although T.R. 79 sets for the procedure for selecting a special judge after recusal, so does Criminal Rule 13. Being that Criminal Rule 21 specifies that the Rules of Criminal Procedure apply over the Rule of Trial Procedure; the procedure set forth in Criminal Rule 13 shall apply where there is a conflict.



I.C. 35-35-3-3(d) (in a misdemeanor case in which a plea agreement has been rejected and a change of judge motion is filed within ten (10) days of the rejections, the motion shall be granted). But see State ex rel. Jeffers v. Lawrence Circuit Ct. [467 N.E.2d 741](#)  (Ind. 1984).


Ind. Post-conviction Rule 1(4) (b) (can request change of judge showing personal bias or prejudice within then days of filing of post-conviction relief petition).


CASE LAW


Everling v. State, [929 N.E.2d 1281](#)  (Ind. 2010) (evidentiary rulings, uneven tolerance for late filings and trial judge’s comments to defense counsel showed actual bias and prejudice requiring reversal of three Class A felony convictions for child molesting and two Class B felony convictions for sexual misconduct with a minor).


Hollingsworth v. State, [928 N.E.2d 201](#)  (Ind. 2010) (judge’s comments during bench trial showed he was not impartial, objective, open minded and “patient, dignified and courteous to litigants” as required by Ind. Judicial Canons 2, 2.2 (comment 1), and 2.8(b)).


Voss v. State, [856 N.E.2d 1211](#)  (Ind. 2006) (State’s CR 12 (b) change of judge motion and affidavit alleging the judge was biased against the State due to the judge’s position on the death penalty did not support a finding of a rational inference of bias in this death penalty case; expressly disapproving of language in Broome v. State, [687 N.E.2d 590](#)  (Ind.Ct.App. 1997), that a presiding judge may temporarily refer the case to another judge, Court held that it was 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).



Azania v. State, [778 N.E.2d 1253](#)  (Ind. 2002) (same standard of review applies to post-conviction motions for change of judge under Post-conviction Rule 1(4)(b); both Rule 12 and P-C.R. 1 require change of judge if affidavits support rational inference of bias or prejudice).


Bell v. State, [655 N.E.2d 129](#)  (Ind. 1995) (where judge had privately visited and provided legal research to the Defendant's alleged co-conspirator, and shortly thereafter, co-conspirator was granted use immunity for his testimony against the Defendant and the judge recused himself from co-conspirator's case, judge should have granted change of judge; Judicial Canon 3(B)(8) specifically prohibits trial judge from engaging in ex parte communications related to a case unless purely related to scheduling, administrative, or emergency issues).


Bradberry v. State, [311 N.E.2d 437](#)  (Ind.Ct.App. 1974) (a hearing must be held or opportunity must be given to the Defendant to present additional evidence in support of a verified motion for change of venue from county or from judge, even though it may be second or subsequent verified motion for change of venue).


Cook v. State, [612 N.E.2d 1085](#)  (Ind.Ct.App. 1993) (judge presumed unbiased and unprejudiced, and a defendant seeking to rebut such presumption must establish from judge's conduct actual bias or prejudice that places the defendant in jeopardy; such bias or prejudice exists only where there is an undisputed claim or where the judge has expressed an opinion on the merits of pending controversy).



Clemens v. State, [610 N.E.2d 236](#)  (Ind. 1993) (no bias or prejudice is established by mere fact that the Defendant has appeared before judge previously).


French v. State, [754 N.E.2d 9](#)  (Ind.Ct.App. 2001) (the judge's comments about the Defendant simply went beyond expressing frustration to displaying a high degree of antagonism so as to make fair judgment virtually impossible). See also Thakkar v. State, [644 N.E.2d 609](#)  (Ind.Ct.App. 1994).


Hobbs v. State, [451 N.E.2d 356](#)  (Ind.Ct.App. 1983) (a motion merely stating that the Defendant believes a judge is biased and prejudiced against him fails to comply with statutory requirements).

Hicks v. State, [510 N.E.2d 676](#)  (Ind. 1987) (when a cause is remanded for a new trial, application for change of judge must be filed not later than ten days after party has knowledge that cause is ready to be set for trial).

In re T.H., [810 N.E.2d 348](#)  (Ind.Ct.App. 2004) (the trial court properly denied the Defendant's motion for change of judge, because the Defendant failed to file an affidavit showing cause for her motion; I.C. 31-32-1-1 provides that a change of judge may be granted in delinquency proceeding only for good cause shown by affidavit filed at least twenty-four hours before fact-finding hearing; T.R. 76, which does not require filing affidavit showing cause for change, is inapplicable to juvenile delinquency proceedings).

State ex rel. Jeffers v. Lawrence Circuit Ct., [467 N.E.2d 741](#)  (Ind. 1984) (to the extent that I.C. 35-35-3-3(d) allegedly conflicts with Criminal Rule 12 which provides that a change of judge is discretionary and not mandatory, Criminal Rule 12 controls). See also Stidham v. Clark County Ct., [523 N.E.2d 429](#)  (Ind. 1988).

Taylor v. State, [587 N.E.2d 1293](#)  (Ind. 1982) (adverse rulings and findings by trial judge are not sufficient reasons to believe that the judge has personal bias or prejudice per se).

Franklin v. McCaughtry, [398 F.3d 955](#)  (7th Cir. 2005) ("where a judge has a direct personal, substantial, or pecuniary interest [in the outcome of a case], due process is violated").

NOTE

TIME LIMITS - C.R.12

"An application for a change of judge or change of venue from the county shall be filed within thirty [30] days from the initial hearing. Provided, that where a cause is remanded for a new trial by the Supreme Court, such application must be filed not later than thirty [30] days after the defendant first appears in person before the trial court following remand.

Provided, however, that 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, he may file the application, which shall be verified by the party himself specifically alleging when the cause was first discovered, how it was discovered, the facts showing the case 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."