Alabama Rules of Criminal Procedure

Rule 10. Change of place of trial.

Rule 10.1. Change of place of trial.

(a) GROUNDS. In any criminal case prosecuted by indictment or on appeal for trial de novo in which a jury is demanded, the defendant shall be entitled to a change of the place of trial to the nearest county free from prejudice if a fair and impartial trial and an unbiased verdict cannot be had for any reason. The court may change the place of trial in any criminal case if trial in the original county poses a clear and present danger to the defendant from mob violence.

(b) BURDEN OF PROOF. The burden is upon the defendant to show to the reasonable satisfaction of the court that a fair and impartial trial and an unbiased verdict cannot be reasonably expected in the county in which the defendant is to be tried.

(c) PROCEDURE. A motion for change of place of trial shall be made on oath and at the earliest opportunity prior to trial.

(d) PRESENCE OF DEFENDANT AT HEARING. If the defendant is in confinement, he may request in the motion for change of place of trial that the motion be heard and determined without the defendant's personal presence in court. Such request may be accepted by the court as the defendant's waiver of the right to be present at the hearing on the motion.

Committee Comments

Rule 10.1(a) complies with Alabama constitutional provisions, statutes, and case law.

Art. I, § 6, Alabama Constitution of 1901, provides in pertinent part:

> "[B]ut the legislature may, by a general law, provide for a change of venue *at the instance of the defendant* in all prosecutions by indictment, and such change of venue, *on application of the defendant*, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time of the application for the change of venue, the defendant is imprisoned in jail or some legal place of confinement." (Emphasis supplied.)

Ala.Code 1975, § 15-2-20, sets forth the legislative enactment:

> "(a) Any person charged with an indictable offense may have his trial removed to another county, on making application to the court, setting

forth specifically the reasons why he cannot have a fair and impartial trial in the county in which the indictment is found. The application must be sworn to by him and must be made as early as practicable before the trial, or it may be made after conviction, upon a new trial being granted.

"(b) The refusal of such application may, after final judgment, be reviewed and revised on appeal, and the supreme court or court of criminal appeals shall reverse and remand or enter such judgment on the applications as it may deem right without any presumption in favor of the judgment or ruling of the lower court on such application.

"(c) If the defendant is in confinement, the application may be heard and determined without the personal presence of the defendant in court."

Case law makes it absolutely clear that the state may not request a change of venue, nor may the state achieve a change of venue by indirect means. *Ex parte Lancaster*, 206 Ala. 60, 89 So. 721 (1921); *Johnson v. State*, 26 Ala.App. 476, 162 So. 553 (1935).

The language "an unbiased verdict" tracks the language used by the Alabama Supreme Court in *Baker v. State*, 209 Ala. 142, 144, 95 So. 467 (1923).

Ala.Code 1975, § 15-2-21 provides:

"On his own motion, a trial judge may, with the consent of the defendant, direct and order a change of venue as is authorized in section 15-2-20 whenever, in his judgment there is danger of mob violence, and it is advisable to have a military guard to protect the defendant from mob violence."

The right to request a change of venue applies to all prosecutions by indictment. The United States Supreme Court held in *Groppi v. Wisconsin*, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971), that a state which categorically prevents a change of venue for a jury trial in a criminal case, regardless of the extent of local prejudice against the defendant, solely on the ground that the crime with which the defendant is charged is a misdemeanor, violates the right to trial by an impartial jury guaranteed by the Fourteenth Amendment. Thus, in misdemeanor cases triable initially in district court without a jury, if the charge is that the judge is partial or biased, the remedy is a motion for recusal, but if the charge is danger from mob violence, a change of place of trial might lie from district court. Then, if on trial de novo upon appeal and demand for a trial by jury in circuit court, the question of juror bias comes into issue, a change of venue would again be the proper remedy.

Rule 10.1(b) conforms to Alabama case law which, in every instance when a defendant requests a change of venue for whatever cause, including pretrial

publicity, requires that there exists such prejudice in the community as makes it reasonably certain that a fair and impartial trial cannot be had. *Baker v. State*, 209 Ala. 142, 95 So. 467 (1923); *Patton v. State*, 246 Ala. 639, 21 So.2d 844 (1945); *Acoff v. State*, 50 Ala.App. 206, 278 So.2d 210 (1973).

Whether a motion for change of venue should be granted is a matter addressed to the sound discretion of the trial court. *Mathis v. State*, 280 Ala. 16, 189 So.2d 564 (1966); *Cobern v. State*, 273 Ala. 547, 142 So.2d 869 (1962); *State v. Ware*, 10 Ala. 814 (1846).

Rule 10.1(d) provides an exception to Rule 9.1(b)(1)(i), which requires the presence of the defendant in order to waive the right to be present. In the situation contemplated, due to fear of mob violence, a defendant may wish to stay in the safety of jail until the motion is heard.