

1979 WL 43606 (S.C.A.G.)

Office of the Attorney General

State of South Carolina

September 21, 1979

\*1 Honorable J. Fred Spires  
Lexington County Magistrate  
650 Knox Abbott Drive  
Cayce, South Carolina 29033

Dear Judge Spires:

In a letter forwarded to this Office by John Patrick, Assistant Director, S. C. Court Administration, you asked whether it is necessary that you disqualify yourself in cases where a defendant is represented by John Earl Duncan, a Lexington County attorney. In the letter there was enclosed a copy of a Notice of Motion and Motion and an Affidavit submitted by Mr. Duncan on behalf of a defendant he is representing whose case is presently scheduled to be tried in your court. In the affidavit the defendant submits that the charge of venue should be granted because 'she has experienced difficulties dealing with the staff of the Honorable J. Fred Spires, Magistrate of District No. 6 of Lexington County; she is also informed and believes that Mr. Duncan has filed a class action in the District Court of South Carolina which names the above-mentioned Magistrate as a defendant alleging violations of the constitutional rights of the class members and violations of Federal statutory laws; that she is informed and believes that she cannot obtain a fair trial in the Magistrate's Court for District No. 6 of Lexington County.'

Pursuant to [Section 22-3-920, Code of Laws of South Carolina](#), 1976, whenever an 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 papers shall be turned over to the nearest magistrate not disqualified from hearing the cause in the county, who shall proceed to try the case . . . '

In a previous opinion of the Office, 1964 Op. Att'y Gen. No. 1733, p. 222, it was stated that:

'A magistrate must grant a change of venue if the required affidavit is filed with him reasonably promptly after service of the arrest warrant or within a reasonable time after knowledge of the facts upon which the request is based came to the person so moving and if such affidavit sets out sufficient facts to justify the belief that a fair trial cannot be obtained before the magistrate who issued the warrant. Opinions or beliefs of the person making the affidavit are not enough to make it mandatory that venue be changed.'

Such opinion referenced an earlier South Carolina case, [State v. Conckle](#), 64 S.C. 371, 42 S.E. 173, which held that a statement in an affidavit that the affiant does not believe he can obtain a fair trial which does not provide facts sufficient to support such a belief is a mere opinion and will not support a motion for a change of venue.

As to the affidavit filed in support of the defendant in the situation prompting your letter, an evaluation must be made by you as to whether the affidavit contains sufficient facts in support of the defendant's contention that she cannot obtain a fair trial before you. Such a determination must be made by you and it would not be proper for this Office to make that determination. Obviously, in certain situations such as determination is a close question. The South Carolina Supreme Court in a case cited by Mr. Duncan in his motion, [Browning Manufacturing Company v. Brunson](#), 187 S.C. 278, 197 S.E. 311 (1938) was concerned with whether the affidavit submitted to support a motion for a change of venue was

adequate. Such affidavit noted what the affiant characterized as an ill feeling between the deponent and the magistrate before whom the request for a change of venue was being made. The affidavit did reference particularly the factual situation which according to the deponent led to the ill feeling between the magistrate and the deponent. The court in noting that: ‘ . . . in order that our courts should be surrounded by atmosphere of unquestioned impartiality . . . ’ held that in that instance the affidavit was sufficient and the change of venue should have been granted.

\*2 Therefore, in conclusion, whether or not the change of venue should be granted is a matter more properly for your determination and if you feel that the affidavit does in fact set out sufficient facts to justify the deponent's belief that she cannot obtain a fair trial before you, a change should be granted. I am assuming that the affidavit was filed in a reasonably prompt time after the defendant was arrested.

With best wishes, I am

Very truly yours,

Charles H. Richardson  
Assistant Attorney General

1979 WL 43606 (S.C.A.G.)

---

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.