

SUBSTITUTION OF JUDGE

725 ILCS 5/114-5

AUTOMATIC WITHIN 10 DAYS

(a) Within 10 days after a cause involving only one defendant has been placed on the trial call of a judge the defendant may move the court in writing for a substitution of that judge on the ground that such judge is so prejudiced against him that he cannot receive a fair trial. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The defendant may name only one judge as prejudiced, pursuant to this subsection; provided, however, that in a case in which the offense charged is a Class X felony or may be punished by death or life imprisonment, the defendant may name two judges as prejudiced.

(b) Within 24 hours after a motion is made for substitution of judge in a cause with multiple defendants each defendant shall have the right to move in accordance with subsection (a) of this Section for a substitution of one judge. The total number of judges named as prejudiced by all defendants shall not exceed the total number of defendants. The first motion for substitution of judge in a cause with multiple defendants shall be made within 10 days after the cause has been placed on the trial call of a judge.

(c) Within 10 days after a cause has been placed on the trial call of a judge the State may move the court in writing for a substitution of that judge on the ground that such judge is prejudiced against the State. Upon the filing of such a motion the court shall proceed no further in the cause but shall transfer it to another judge not named in the motion. The State may name only one judge as prejudiced, pursuant to this subsection.

AFTER 10 DAYS

(d) In addition to the provisions of subsections (a), (b) and (c) of this Section the State or any defendant may move at any time for substitution of judge for cause, supported by affidavit. Upon the filing of such motion a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion; provided, however, that the judge named in the motion need not testify, but may submit an affidavit if the judge wishes. If the motion is allowed, the case shall be assigned to a judge not named in the motion. If the motion is denied the case shall be assigned back to the judge named in the motion.

The case law requires the party requesting substitution for cause to first meet initial threshold requirements by alleging sufficient grounds, if taken as true, that would justify granting a substitution for cause.

A defendant who seeks a substitution of judge for cause bears the burden of establishing actual prejudice

Prejudice is defined as “ ‘animosity, hostility, ill will, or distrust towards this defendant.’ ”

People v. Klein, 2015 IL App (3d) 130052, ¶ 85, 40 N.E.3d 720, 736

It is defendant's burden to establish actual prejudice. Klein, 2015 IL App (3d) “To meet this burden, the defendant must establish ‘animosity, hostility, ill will, or distrust towards this defendant.’ ”

People v. Patterson, 192 Ill. 2d 93, 131 (2000) (quoting Vance, 76 Ill. 2d at 181).

725 ILCS 5/114–5(d) of the Code of Criminal Procedure provides for the substitution of a judge for cause.

A defendant has no absolute right to a substitution of a judge for cause.

It is the defendant's burden to establish actual prejudice.

The defendant must show that bias or prejudice stemmed from an extrajudicial source and that the bias produced an opinion on the merits by the judge that was based on other than what the judge had learned from his participation in the case.

A trial judge is in the best position to determine whether he has become prejudiced.

People v. Hayden, 338 Ill. App. 3d 298, 309, 788 N.E.2d 106, 116 (2003)

MUST BE FILED AT EARLIEST PRACTICAL MOMENT

Defendant's final argument on appeal is that the trial court erred in denying his motion for substitution of judge for cause after the appearance of judicial impropriety was raised by the evidence. We disagree.

While it is true that a motion for substitution of judge should be given a liberal rather than strict interpretation, it is also true that the petition for such a change must be filed at the earliest practical moment before the judge has ruled upon a substantive issue in the case

To hold otherwise would permit a defendant to “shop” for a judge more favorably disposed to the defendant.

Here defendant filed his motion after pleading guilty and after having been sentenced on the murder charge in accordance with his plea agreement. As such, defendant's motion was untimely.

More importantly, defendant failed to show any prejudice would result if his motion were not granted. In other words, defendant did not show the alleged bias of the judge stemmed from an extra-judicial source resulting in an opinion on the merits on some basis other than what the judge learned from participating in the case.

People v. Algee, 228 Ill. App. 3d 401, 406–07, 591 N.E.2d 1001, 1005 (1992)

AFFIDAVIT REQUIREMENT of (d)

While defendant apparently concedes that his written motion for substitution of judge was not in compliance with the requirements of section 114–5(a), he does assert that pursuant to section 114–5(c) he was entitled to a hearing on his allegation that he could not receive a fair trial because the trial judge, having presided over the trial of a co-offender, was familiar with and “had a hostile predilection” toward the evidentiary matters to be presented at his trial.

While it is true that section 114–5 is to be construed liberally, the right to substitution is not absolute, and in order to avail himself thereof, a defendant must comply with the applicable statutory provisions —one of which, as noted above, is that under section 114–5(c) a motion for substitution for cause must be supported by affidavit

People v. Clay, 124 Ill. App. 3d 140, 145–47, 463 N.E.2d 929, 935 (1984)

Section 114-5(d) alternatively allows a party to file a motion for substitution of judge for cause outside of those first 10 days but requires an affidavit and states that “a hearing shall be conducted as soon as possible after its filing by a judge not named in the motion.” 725 ILCS 5/114-5(d) (

People v. Rogatchev, 2026 IL App (4th) 241165, ¶ 60, appeal denied, No. 132901, 2026 WL 1486961 (Ill. May 27, 2026)

Defendant urges us to liberally construe section 114–5(d) and ignore the affidavit requirement. While we agree the statute is to be liberally construed, it should not be interpreted so as to contravene its express provisions.

Even in the absence of an affidavit, a verified motion has been held to constitute sufficient compliance with section 114–5(d).

However, defendant's motion was not verified.

People v. Flynn, 341 Ill. App. 3d 813, 824, 792 N.E.2d 527, 537 (2003)

<p>PREJUDICE MUST BE STEMMED FROM AN EXTRAJUDICIAL SOURCE</p>

To be disqualifying, the alleged bias or prejudice of a trial judge must be shown to have stemmed from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case. (Emphasis added.) (People v. Massarella (1979), 80 Ill.App.3d 552, 565, 36 Ill.Dec. 16, 400 N.E.2d 436, cert. denied (1981), 449 U.S. 1077, 101 S.Ct. 855, 66 L.Ed.2d 799.) The defendant fails to argue or point to any facts from which it could be concluded that the trial judge below had formed an opinion on the merits of the proceeding on any basis other than the evidence which was presented at the revocation hearing. That the judge conducted the hearing dispassionately and in an atmosphere of fairness and objectivity is borne out by the report of proceedings.

People v. Butler, 137 Ill. App. 3d 704, 720–21, 484 N.E.2d 921, 933 (1985)

“[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible.”

Liteky v. United States, 510 U.S. 540, 555 (1994)
Supreme Court held:

In order to trigger the right to a hearing before another judge on the question of whether substitution for cause is warranted in a civil case pursuant to section 2–1001(a)(3), the request must be made by petition, the petition must set forth the specific cause for substitution, and the petition must be verified by affidavit. 735 ILCS 5/2–1001(a)(3)(ii) (West 2006). **The requirements in criminal cases are similar.** See 725 ILCS 5/114–5(d) (West 2006).

In the case before us, Bailey's request for substitution satisfies only the first of these three requirements. It was made by petition. The remaining requirements were not met. The petition was not verified by affidavit, and it did not adequately allege cause for substitution.

To meet the statute's threshold requirements, a petition for substitution must allege grounds that, if true, would justify granting substitution for cause.

Where bias or prejudice is invoked as the basis for seeking substitution, it must normally stem from an extrajudicial source, i.e., from a source other than from what the judge learned from her participation in the case before her. A judge's previous rulings almost never constitute a valid basis for a claim of judicial bias or partiality.

In re Est. of Wilson, 238 Ill. 2d 519, 553–54, 939 N.E.2d 426, 447 (2010)

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People v. Hayden, 338 Ill. App. 3d 298, 309, 788 N.E.2d 106, 116 (2003)

THE MOTION IS NOT “SELF-EXECUTING”

People v. Brusaw, 2023 IL 128474, November 30, 2023.

The issue here was whether a motion for substitution of judge brought pursuant to section 114-5(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-5(a)) is subject to the commonlaw rule holding that, when a motion is filed in the trial court but never ruled on, it is presumed to have been abandoned or waived by the movant.

HOLING: A section 114-5(a) motion is subject to the common-law rule that it will be presumed abandoned if the movant does not secure a ruling on the motion. This is because it is not an automatic or a self-executing action that requires no further attention from a movant. The Court further reasoned that it would make little sense to exempt a 114-5(a) motion from the rule of abandonment or waiver because it would incentivize a defendant to deliberately build error into the record by knowingly allowing the motion for substitution to remain unaddressed and then raising the absence of any ruling on the motion as grounds for reversal on appeal, which, the Court concluded, could not have been the intention of the legislature.