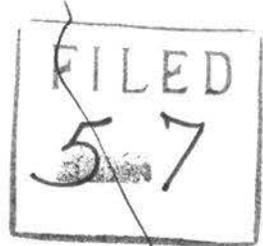


TRIAL AND PANEL:  
MAGISTRATE JURIES:

Magistrate may obtain jury panel from county panel or by summons. Jury should be twelve in number unless less number agreed upon. Panel should consist of twenty-four.

March 28, 1949



Mr. W. V. Mayse  
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Dear Sir:

This office is in receipt of your recent request for an official opinion. Your request is embodied in two questions, the first of which I quote herewith: "Under the new Magistrate Act, as I understand it, it is necessary that our county empanel one hundred and fifty magistrate jurors once a year to select juries from that panel for magistrate cases. Does this apply in criminal cases, or may the court order the sheriff to summons a jury in each individual criminal case?"

Your first question, quoted above, is in reality two questions, the first of which is in regard to the manner in which magistrate jurors are selected. In answer to this we would call your attention to Volume 1, Laws of Missouri 1947, page 248, which states:

Section 1. "Within thirty days after this act becomes effective and thereafter as often as may be necessary to supply juries to the magistrate courts of the county, and at least once each year on or before the first day of May, the county court shall select names of not less than four hundred persons having all of the qualifications of jurors; and in selecting such names the court shall select such number of persons from each township as the population of such township bears to the population of the entire county. No person shall be selected who has served on any grand, petit or magistrate jury within one year from the time of making the selection. The names and addresses of the persons selected from each township shall be written

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on separate slips of paper of the same kind and size and placed in a box with a sliding lid and thoroughly mixed."

Section 2. "The county court, after consultation with the magistrate or magistrates of the county, shall estimate the total number of jurors that may be required by all such magistrate courts for a period of not less than three months nor more than twelve months, but in no case shall such number be less than 144. The number of jurors to be drawn from each township in the county shall bear the same ratio to the total number of jurors to be selected as the population of the township bears to the total population of the county."

Section 3. "(a) The clerk of the county court, so situated as to be unable to see the names on such slips, shall publicly in the presence of the county court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names required from such township, and in the same manner shall continue to draw names from each of the remaining townships until he shall have drawn the total number of names determined by the county court. The names so drawn shall be recorded and numbered in the order fixed by the county court so as to insure that each panel of twenty-four jurors shall include, as nearly as practicable, persons from all parts of the county.

"(b) The clerk of the county court shall send by United States mail to each person whose name has been selected in accordance with this act a notice reciting that such person has been selected for jury service in the magistrate court and that he will be further notified by the court requiring such service of the date when such service will be required.

"(c) Provided, however, that in counties now containing or which may hereafter contain over 200,000 inhabitants and less than 700,000 inhabitants, the Board of Jury Commissioners shall select the jurors to serve in the Magistrate Courts from the regular Circuit court jury wheel and under the same method

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and procedure as Circuit Court jurors are selected; and said jurors shall be summoned in the same manner as Circuit Court jurors are summoned."

Section 4. "Upon the request of any magistrate or magistrate court, the clerk of the county court shall certify to the magistrate the first twenty-four names appearing on the jury list established under this act, and upon such certification he shall strike from the list the names so certified, and shall proceed in like manner upon each subsequent request."

Section 5. "In all counties wherein by law grand and petit jurors are selected by a board of jury commissioners, such board of jury commissioners and the clerk thereof shall perform the duties hereby imposed on the county court and county clerk and shall proceed in the manner herein prescribed."

You will note that the last quoted section (Section 5) states that in all counties wherein by law grand and petit jurors are selected by a board of jury commissioners, that such board shall perform the work of selecting magistrate court jurors which Section 1, quoted above, imposes upon the county court. This board of jury commissioners in 3rd and 4th class counties is composed as is set forth in Section 704a, page 275, Vol. 2, Laws Missouri 1947, which section states:

"In each county of the third and fourth class the clerk of the circuit court and the judges of the county court together with the circuit judge as provided in Section 13394, Revised Statutes of Missouri, 1939, a majority of whom shall constitute a quorum for the transaction of business, shall constitute a board of jury commissioners for their respective counties. The clerk of the circuit court of such counties shall be ex-officio clerk of the board of jury commissioners, and his duty shall be to assist the board in the performance of the clerical part of their work, and such clerk shall perform such other duties and services as may be required of him by the board or any member thereof, with respect to the things to be done by the board of jury commissioners, as provided by law. The time, place and manner of meetings of the board, and rules for performing its duties shall be fixed by the board."

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It will be seen therefore that in counties of the 3rd and 4th class (which includes your county) the board of jury commissioners selects the magistrate jury panels, and not the county court.

The above quoted sections, 1 through 5, Laws of 1947, Vol. 1, P. 248-249, and Section 704a, Laws 1945, Vol. 2, P. 275, set out a method which may be followed for getting jury panels in both civil and criminal cases for magistrate courts.

We now direct your attention to Section 15a, Laws 1947, Vol. 1, P. 251, which states:

"In any county now or hereafter having a population of less than 70,000 inhabitants, the magistrate or magistrates may, by order of record, direct that jurors be selected by issuing a summons to the sheriff or other officer ordering him to summons the appropriate number of jurors. In such event, each juror summoned shall receive one dollar per day for every day he may actually serve as such, and five cents for every mile he may necessarily travel going from his place of residence to the place where the trial is held, and such fees and expenses shall be taxed as costs in the particular case tried. In the event that the magistrate or magistrates make the order herein provided for, the order shall have the effect of suspending the provisions of this act in the selection of the general county panel and the selection of jurors thereunder; and such provisions shall remain suspended until such order is rescinded."

From the above it will be seen that a magistrate judge may, if he so desires, obtain a jury panel for civil and/or criminal cases, by directing that jury panels be selected by issuing a summons to the sheriff ordering him to summons the appropriate number of jurors. In an official opinion rendered by this office on September 5, 1947, on this point, this office held: "This department is of the opinion that when the magistrate makes the order for selecting and summoning a jury as provided in Section 15a of S.B. 107, that Sections 1 through 8, inclusive, (of S.B. 107), which provide for the selection of the general county panel and summoning the jurors thereunder, are suspended \* \* \*." The plain meaning of all this would appear to be that a magistrate in 3rd and 4th class counties may get his jury panel from the panel selected by the board of jury commissioners in all magistrate court cases, both civil and criminal;

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or he may get all of his jury panels for both civil and criminal cases by ordering the sheriff to bring in the needed number of jurors wherever he can get them, thus obtaining what is generally called a "pick-up jury"; or he may use both of the above described methods, using each as much or as little as he chooses in both civil and criminal cases; or he may use the regular panel selected by the board of jury commissioners for civil cases, and the "pick-up" method for criminal cases; or the other way around.

We do believe, however, that it is mandatory upon the board of jury commissioners in 3rd and 4th class counties to select the county panel for magistrate courts inasmuch as Section 1, Laws 1947, Vol. 1, Laws 1947, Vol. 1, P. 248, stated: "Within thirty days after this act becomes effective and thereafter as often as may be necessary to supply juries to the magistrate courts of the county, and at least once each year on or before the first day of May the county court shall select names of not less than four-hundred persons having all the qualifications of jurors; and in selecting such names the court shall select such number of persons from each township as the population of such township bears to the population of the entire county.\* \* \*" It would seem plain therefore that this county panel for magistrate court's use must be selected although the magistrate judge may not use any of it.

Your second question is: "In misdemeanor cases, under the new magistrate court act, may defendants insist on a twelve-man jury to be selected from a panel of eighteen in the absence of any agreement of a lesser number by defense counsel and prosecuting attorney?"

The second question, like your first, is in reality two questions, the first of which is: "May a defendant, on trial in a magistrate court charged with a misdemeanor, insist on a jury of twelve, in the absence of any agreement between the prosecuting attorney and the counsel for the defendant, for a lesser number?"

In regard to the above we call your attention to Section 21, Laws of 1945, page 755, which in this connection states:

"All jury trials before a magistrate shall be by a jury of twelve persons, unless a less number shall be agreed upon, but not less than six."

This section has reference to criminal (misdemeanor) cases. We call your further attention to Section 98, Laws of Missouri 1945, page 794, which states:

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"Before the magistrate shall commence an investigation of the merits of the cause, by an examination of the witnesses or the hearing of any other testimony, either party may demand that the cause be tried by a jury, which jury shall be composed of twelve good and lawful persons having the qualifications of jurors in the circuit court, unless the parties shall agree on a less number, in which case the jury shall consist of the number agreed upon, not less than six."

This above partially quoted section has reference to both civil and criminal cases. From the above it will be seen that a defendant in magistrate court in both civil and criminal cases may have a jury composed of twelve persons, unless his lawyer and the prosecuting attorney or the attorney for the plaintiff, as the case may be, agree upon a less number, which shall not be less than six.

The second part of your second question (rephrased by us) is: "What shall be the size of the jury panel in the case of a twelve-man jury, and what shall be its size in the case of a six-man jury."

In regard to this we would call your attention to Section 99, Laws of Missouri 145, page 794, which states:

"The magistrate shall issue a summons directed to the sheriff or other officer provided by law, commanding him to summon eighteen, or six more than the parties may have agreed upon, good and lawful persons of the county, qualified to serve as jurors in the circuit court of the said county, who shall be nowise of kin to either party, nor interested in the suit, to appear before such magistrate at a time and place named therein to make a jury for the trial of the action between the parties named in the summons." (Underscoring ours.)

You will note that this section calls for a panel of eighteen persons when there is to be a twelve-man jury, and a panel of twelve if, by agreement, the jury is to be six in number. However, this Section 99 was repealed by the Laws of 1947, Vol. 1, P. 248, and the repealing act and the sections enacted under it do not explicitly state the number to be on the magistrate jury panel. However, Section 3 of this above-mentioned repealing act, Laws of Missouri 1947, Vol. 1, P. 248, which relates to the selection of the county magistrate jury panel, states in part:

"The names so drawn (for the county panel) shall

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be recorded and numbered in the order fixed by the county court (now the board of jury commissioners in third and fourth class counties) so as to insure that each panel of twenty-four jurors, shall include, as nearly as practicable, persons from all parts of the county."

From the above it would appear to be the plain intent of Section 3 that in all magistrate court jury cases, both civil and criminal, the jury panel should number twenty-four, whether the jury is to be twelve in number or six. Furthermore, there is nothing to indicate that if the magistrate does not obtain his jury panel from the county panel provided by the board of jury commissioners, but obtains his panel by the procedure designated in Section 15(a), Laws of Missouri 1947, Vol. 1, p. 251, that he may legally use a less number than twenty-four on his panel.

We would call your further attention to Section 705, Mo. R.S.A., which states:

"The county court of each county at a term thereof not less than thirty days before the commencement of the circuit court or other court having civil and criminal jurisdiction, or civil or criminal jurisdiction, shall select names of not less than four hundred persons having all requisite qualifications of jurors; and the court in selecting such names shall select, as near as practicable, the same number from each township in the county according to the relative population, and shall determine how many petit jurors and alternate petit jurors shall be selected from each township in said county and the names of such persons and the township from which they are selected shall be written on separate slips of paper of the same size and kind and all the names so selected from any one township shall be placed in a box with a sliding lid to be provided for that purpose and thoroughly mixed." (Underscoring ours.)

Your attention is further directed to Section 706, Mo. R.S.A., which states:

"The clerk of the county court so situated, as to be unable to see the names on such slips shall, publicly, in the presence of said court and in open court, proceed to draw out names separately and singly from one township until he gets the number of names

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required from such township for petit jurors and an equal number as alternate jurors to serve on petit juries if summoned; and in the same manner shall continue to draw names from each of the remaining townships, separately and singly, until he shall have drawn the names of twenty-four persons who shall serve as petit jurors at the next ensuing term of said court for which said petit jurors are drawn, and the names of twenty-four persons to be designated as alternate petit jurors, the names of said alternate petit jurors to be recorded and numbered consecutively from one to twenty-four, inclusive, in the order in which they are drawn: Provided, that in all cases where the county court shall fail to select such jurors and alternates according to the provisions of articles 1 and 4 of this chapter the sheriff of the county shall summon such petit jurors from the several townships in the county, according to their respective populations, as nearly as may be, and not less than ten days before the first day of the term of the court for which such jurors are summoned; and the sheriff when ordered by the court demanding such jury shall summon petit jurors during such term from the bystanders, after the list of alternate petit jurors has been exhausted; and provided further, that no person shall be summoned as such standing juror twice within the period of one year in any court of record." (Underscoring ours.)

#### CONCLUSION

It is the conclusion of this department that it is the duty of the board of jury commissioners in third and fourth class counties to select, at least once each year, a county jury panel for magistrate courts, which panel shall number not less than one hundred and forty-four qualified jurors.

It is our further conclusion that the magistrate may draw upon this panel for juries in both civil and criminal cases; or in either civil or criminal cases; or that he may not use this jury panel at all, but may order the sheriff to bring in the needed number of jurors wherever he can get them, to compose a jury panel for both criminal and civil cases.

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It is our further conclusion that in lieu of an agreement between both plaintiff and defendant, in the trial of a case in magistrate court, for a jury of less in number than twelve, but not less than six, that juries in magistrate courts in both civil and criminal cases shall be twelve in number.

Respectfully submitted,

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APPROVED:

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