FELONIES: If it be impractical to conduct an
PRELIMINARY EXAMINATIONS: immediate preliminary examination in
CONTINUANCES: felony cases, Supreme Court Rule 23.06 provides that an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."

December 1, 1955

Honorable Rufe Scott
Prosecuting Attorney
Stone County
Galena, Missouri

Dear Sir:

This is in compliance with your request for an opinion of this office in your letter dated November 18, 1955, which letter is as follows:

> "Please advise me as to whether or not a magistrate may adjourn an examination of a prisoner on application of the prosecuting attorney on the date set for the preliminary, it being the tenth day after the arrest?
>
> "Section 544.320, R. S. 1949 provides that the examination may be adjourned from time to time not exceeding 10 days at one time.
>
> "In the instant case the magistrate set the time for the preliminary ten days from the date of the arrest and the prosecuting attorney asked for a continuance. The magistrate discharged the prisoner on the grounds that he could not continue the case except on the application of the prisoner.
>
> "Please advise me as to this question of law and I will appreciate your opinion as to this statute, very much. Thanking you, I am,"

Section 544.320 RSMo 1949, to which you refer, is as follows:

> "A magistrate may adjourn an examination of a prisoner pending before himself, from time to time as occasion requires,

> not exceeding ten days at one time, and to the same or any different place in the county, as he deems necessary; and for the purpose of enabling the prisoner to procure the attendance of witnesses, or for other good and sufficient cause shown by said prisoner, said magistrate shall allow such an adjournment on the motion of the prisoner. In the meantime, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized, in a sum and with sureties to the satisfaction of the magistrate, for his appearance, before such magistrate or before any magistrate who may be authorized to hear the matter, for such further examination, and not to depart without leave of said court, and for want of such recognizance he shall be committed."

Section 5, Article V of the Missouri Constitution gives the Supreme Court the right to establish rules of practice and procedure for all courts. Said Section 5 is as follows:

> "Section 5. Rules of practice and procedure--duty of supreme court--power of legislature.-- The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Pursuant to the authority granted by Section 5, Article V of the Constitution, the Supreme Court of Missouri, on April 14, 1952, adopted Rules of Criminal Procedure for the courts of Missouri. The above rules became effective on January 1, 1953. One

of the said Rules of Criminal Procedure so adopted by the court and effective at this time is Rule 23.06, which is as follows:

> "If it be impractical to conduct an immediate preliminary examination, the examination may be postponed to a later date and an examination of the accused may be adjourned from time to time as the occasion requires, not to exceed ten days at one time, and said adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause. If the offense charged is bailable and the accused has not previously been admitted to bail, the accused shall be admitted to bail as provided in these Rules. Otherwise, he shall be committed by an order under the hand of the magistrate for further examination upon a future day to be named in the order."
>
> (Emphasis ours.)

Said Rule 23.06 deals with and relates to the same subject matter which is contained in said Section 544.320. Supreme Court Rules of Criminal Procedure which became effective January 1, 1953 supersede the criminal procedure statutes which relate to the same subject matter. State v. Garrett, 282 SW2d 441, 444(5). Said Rule 23.06, therefore, supersedes said Section 544.320.

You will note that Supreme Court Rule 23.06 provides that if it be impractical to conduct an immediate preliminary examination in felony cases, an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."

Conclusion.

It is therefore our conclusion that if it be impractical to conduct an immediate preliminary examination in felony cases, an "adjournment shall be allowed either to the prosecution or to the accused for the purpose of procuring the attendance of material witnesses, and for any other good and sufficient cause."

Honorable Rufe Scott

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Mr. Grover C. Huston.

Yours very truly,

John M. Dalton
Attorney General

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