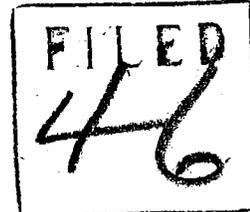


SUPREME COURT RULE 26.01: In those cases in magistrate court wherein the defendant pleads not guilty and waives his right to trial by jury, the magistrate should obtain a written waiver in accordance with Supreme Court Rule 26.01.

April 20, 1959



Honorable William G. Johnson  
Prosecuting Attorney  
Morgan County  
Versailles, Missouri

Dear Sir:

On January 16, 1959 you wrote to this department as follows:

"The question has been raised in a case now pending in our Court that under Rule 26.01 of the Supreme Court, it is necessary for a Magistrate to obtain a written waiver of jury in any case in which a plea of not guilty is entered and that without such waiver the Court has no power to proceed with the trial."

On February 4, 1959 we advised you "that it is our invariable practice not to render opinions on matters which are in litigation as you state this matter to be."

Subsequently, we received from you a letter dated February 24, 1959, which reads as follows:

"In my letter to you dated January 13, 1959 I indicated that a question had been raised concerning the interpretation of Supreme Court Rule 2601 which was pending in our Court. The question is not pending in any Court in our county and my statement that it was is erroneous. The question is whether a Magistrate should obtain a written waiver of a right to a trial by jury when the defendant pleads not guilty and is willing to have the Court hear the evidence instead of a jury.

"It seems to me that if the rule is given its literal meaning, then every case before a Magistrate on a plea of not guilty where the

Honorable William G. Johnson

Court finds the defendant guilty is subject to a proceeding to set aside the verdict if a written waiver was not entered into by the defendant and the Prosecuting Attorney with the advice and consent of the Magistrate.

"May I hear from you at your earliest convenience as to your interpretation of this rule because our area will soon be visited by many tourists and the case load in the Magistrate Court will be tremendous and if it is necessary to have a written waiver we want to make it part of our procedure and routine."

Since you now state that the matter of your inquiry is not presently in litigation, we will be glad to render our opinion regarding it. This opinion is predicated upon the assumption that the cases in question are misdemeanor cases. Sections (a) and (b) of Supreme Court Rule 26.01, which is the subject of your inquiry, read:

"(a) All issues of fact in any criminal case shall be tried by a jury to be selected, summoned and returned in the manner prescribed by law, unless trial by jury be waived as provided in this Rule.

"(b) The defendant may, with the assent of the court, waive a trial by jury and submit the trial of any criminal case to the court, whose findings shall have the force and effect of the verdict of a jury. Such waiver and assent shall be in writing, signed by the defendant and the judge, and filed of record."

It will be noted that (a) above states that "All issues of fact in any criminal case \* \* \*." Certainly the cases to which you have reference, tried before a magistrate, are criminal cases. It would, therefore, appear that criminal cases tried in magistrate courts come within the purview of Rule 26.01.

We are further inclined to this opinion by Supreme Court Rule 36.01, which reads:

"These Rules govern the procedure in all criminal proceedings in all courts of the State of Missouri having jurisdiction of criminal proceedings."

Honorable William G. Johnson

It would appear to us that the above is decisive of this matter and that, therefore, a written waiver is required under the circumstances set forth by you.

CONCLUSION

It is the opinion of this department that in those cases in magistrate court wherein the defendant pleads not guilty and waives his right to trial by jury that the magistrate should obtain a written waiver in accordance with Supreme Court Rule 26.01.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Hugh P. Williamson.

Very truly yours,

John M. Dalton  
Attorney General

HPW:hw