MAGISTRATE COURTS: **In a misdemeanor case pending before a magistrate court, the State, through the prosecuting attorney, is entitled to file a motion to disqualify the magistrate on the ground of prejudice against the State.**

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Honorable John E. Downs
Prosecuting Attorney of Buchanan County
St. Joseph, Missouri

Dear Sir:

Your recent request for an official opinion has been assigned to me to answer. You thus state your opinion request:

> "As you know, there are two Magistrates in Buchanan County. The question now arises whether or not the Prosecuting Attorney, having filed a misdemeanor, may come before the Magistrate before whom such misdemeanor was filed and seek a disqualification of the Magistrate by reason of his prejudice in the case.
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> "I have considered, with reference to this question, the following cases: State vs. Mitts, 29 S.W. (2d) 125; State vs. Slate, 214 S.W. 85; In re Bedard, 17 S.W. 693 and 22 C. J. S. 306. I have also considered the report of the proposed Rules of Criminal Procedure for the courts of Missouri, drafted as of March 28, 1951, Page 11.
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> "It is my view that the Prosecuting Attorney may seek to disqualify the Magistrate in a County of the Second Class by reason of prejudice for the reason that with only two Magistrates available, and the defendant clearly having such a right, the State would be irrecoverably committed to trial before the Magistrate before whom such a case is filed, even though the fact of prejudice is learned after filing."

We would first direct your attention to Section 543.220, RSMo 1949, which states:

> "All proceedings upon the trial of misdemeanors before magistrate shall be governed by the practice in criminal cases in circuit courts, so far as the same may be applicable, and in respect to which no provision is made by statute; provided, no instructions or declarations of law shall be given by the magistrate."
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> (Underscoring ours.)

We call particular attention to the underlined portion of the above section, which states that all proceedings upon the trial of misdemeanors before a magistrate shall be governed by the practice in criminal cases in circuit courts so far as such practice is applicable,""and in respect to which no provision is made by statute."

Following the directorate of Section 543.220, supra, we must therefore see whether there is any statutory enactment in regard to the trial of misdemeanors before magistrates regarding the disqualification of a magistrate in whose court a misdemeanor information has been filed, by reason of the prejudice of the magistrate, upon motion by the State. We are unable to find any such statute. Therefore, under the authority of Section 543.220, quoted above, we feel that we may now consider criminal procedure in circuit courts to determine whether there is any procedure there which is applicable to your problem.

And here we would direct your attention to Section 545.660, RSMo 1949, which states:

> "When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases:
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> "(1) When the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or,
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> "(2) When the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or,
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> "(3) When the judge is in anywise interested or prejudiced, or shall have been counsel in the cause; or,

> "(4) When the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial."

The meaning of this section was thoroughly considered by the Missouri Supreme Court, en banc, in the case of State ex rel. McAllister vs. Slate, 214 S.W. 85, in an opinion rendered June 14, 1919. (We will note here that Section 545.660, RSMo 1949, quoted above, is identical with Section 5198, R.S.Mo. 1909, which the court construed in the McAllister case.)

The McAllister case was an original proceeding in prohibition, whereby it was sought to prohibit respondent, as Judge of the Circuit Court of Cole County, from taking further jurisdiction in the trial of a case in which the State of Missouri was plaintiff and John W. Scott was defendant, the said Scott being charged with embezzlement and grand larceny.

Some time prior to the date of trial, by order of the Governor, an Assistant Attorney General, together with special counsel for the State, entered their appearance to assist in the prosecution of this case. On the date of the trial, counsel for the State announced ready for trial. At this point, the opinion states, l.c. 86:

> "* * * Thereafter, but prior to the impaneling of the trial jury for the trial of the case, said Howell and Ewing became possessed, it is alleged, of information and knowledge of the existence of prejudice on the part of the respondent against the state of Missouri. The state thereupon, through its counsel, withdrew its announcement of ready for trial, and, having first obtained leave of court in that behalf, filed a formal, verified motion alleging the disqualification and incompetence of respondent to sit in the trial of the case of State v. Scott, on account of the alleged prejudice of said respondent against the state. Thereupon, on the ground of this alleged disqualification of respondent, the state moved that respondent proceed in accordance with the provisions of Sec. 5201, Rev. Stat. 1909. The latter section makes provision for the calling in of a special judge to sit in the trial of any criminal case wherein the regular judge is disqualified.

> "This motion being overruled, relator made the allegations therein and the fact of overruling such motion the grounds of application for our writ. In the petition for our writ relator avers that respondent is prejudiced against the state in said case of State v. Scott, and by reason thereof that he is incompetent to hear and determine said case, and prays that we issue our writ of prohibition to prohibit respondent from taking further proceedings in, or holding further jurisdiction therein, and from taking further cognizance of, said case.
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> "Our preliminary rule was, as above stated, issued, and for return thereto respondent admits all of the allegations of said petition except the fact of his prejudice in any degree in favor of the said Scott, or against the State of Missouri, which fact of prejudice he categorically denied. * * *"

The Court stated the question which was before it by virtue of the preceding facts as follows, l.c. 89:

> "* * * The question of law is: Can a trial judge, absent his own voluntary disqualification, lose jurisdiction of a criminal case because of his interest or prejudice therein against the state? * * *"

In answering this question, the Court stated, l.c. 89, 90, 91:

> "* * * We agree with the conclusion of law upon this point of our learned commissioner and are constrained upon both reason and authority to hold the affirmative of the question stated."
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> "* * * Section 5198 read at the time the matters and things here under discussion transpired, and now reads, thus:
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> "'When any indictment or criminal prosecution shall be pending in any circuit court or

criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: First, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or, second, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him by blood or marriage; or, third, when the judge is in any wise interested or prejudiced, or shall have been counsel in the cause; or, fourth, when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to, or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial.'"

* * * * *

"'It is contended by respondent's learned counsel that the terms and provisions of Sec. 5198 are applicable only to the defendant and that a circuit judge in a criminal prosecution cannot be disqualified at the instance of the state. We do not agree with this interpretation of the section. The language of the section is general, and there is nothing stated expressly or impliedly that limits the first three subdivisions of the section to applications on behalf of a defendant. It is remembered that the fourth subdivision expressly relates to application upon the part of the defendant. That subdivision provides, "when the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial," that the regular judge shall be disqualified. This section, it will be noticed, is especially liberal in favor of the defendant, and provides that the regular judge shall not sit when two reputable persons not of kin or of counsel and the defendant himself will make an affidavit that the judge will not afford him a fair trial.

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> "'The fact that the fourth section is by express provision applicable to the defendant, and that the other subdivisions do not mention the defendant, strengthens the conclusion that the first three subdivisions of the section are general provisions enumerating causes which shall disqualify a judge at the instance of either the state or the defendant. * * *'"

The judgment in the case was that the preliminary writ of prohibition against the circuit judge be made absolute.

The question which we have to answer is whether the State can do this in the case of a magistrate before whom a misdemeanor case is pending.

Here, we again call attention to Section 543.220, quoted above. We have previously found that "no provision is made by statute" for the disqualification of a magistrate on the ground of prejudice, by the State. We are therefore of the opinion that the State would be entitled to file a motion asking, on the ground of prejudice, that a magistrate before whom a misdemeanor case was pending, be disqualified.

CONCLUSION

It is the opinion of this department that in a misdemeanor case pending before a magistrate, the State, through the prosecuting attorney, is entitled to file a motion to disqualify the magistrate on the ground of prejudice against the State.

Respectfully submitted,

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APPROVED:

J. E. TAYLOR
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