APPOINTMENT OF ATTORNEY:
preliminary hearing:

There is no obligation upon the part of a magistrate to appoint an attorney on behalf of an indigent defendant for a preliminary hearing on a felony charge.

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April 19, 1954

Honorable Douglas W. Greene
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Sir:

Your recent request for an official opinion reads as follows:

"The attorneys of this county have become very vexed at the interpretation of the Rules of Criminal Procedure as interpreted by the Judges of our Magistrate Courts here, relative to the appointment of attorneys for indigent criminal defendants.

"Our Magistrates take the position that attorneys are to be appointed by the Magistrate Judge at the time that the defendant's bond is set and prior to the preliminary hearing. The lawyers contend that this places a double burden on them in having to go through a preliminary as well as a circuit court trial, and that it also makes it necessary for them to be called on to act as counsel much more frequently than would normally be the practice.

"Supreme Court Rule 29.01 states, in part, that if any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel and to appoint counsel for him, if he is unable to employ counsel. Rule 25.04 states that arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge, and calling on him to plead thereto. As a Magistrate cannot, under any circumstances, accept a plea to a

> felony charge, it would seem to me that Rule 29.01 means that it shall be the duty of the Circuit Court, after the defendant is bound over, to appoint counsel for indigent defendants.
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> "I believe that my interpretation of these rules is correct, since sub-section (b) of Rule 29.01 indicates that where the defendant in a felony case appears at arraignment without counsel, a court reporter should record all proceedings, and there are no court reporters in Magistrate Court."

Supreme Court Rule 29.01 sets forth the time when, in a criminal proceeding, and the circumstances under which, the court will appoint an attorney to represent a person accused of crime. That rule reads:

> "(a) In every criminal prosecution in any court of this State, the accused shall have the right to appear and defend the same in person and by counsel. If any person charged with the commission of a felony appears upon arraignment without counsel, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. If the defendant so requests, and if it appears that the defendant is unable to employ counsel, it shall be the duty of the court to appoint counsel to represent him. If, after being informed as to his rights, the defendant indicates his desire to proceed without the benefit of counsel, and the court finds that he has intelligently waived his right to have counsel, the court shall have no duty to appoint counsel unless it appears to the court that, because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant. Counsel so appointed shall be allowed a reasonable time in which to prepare the defense. They shall serve without compensation unless counsel so appointed shall be associated with a Public Defender Bureau or Committee which employs or

> retains lawyers whose services are available, without charge, to indigent persons accused of the commission of a crime, or unless provisions are made by public authority to compensate counsel.
>
> "(b) In every case where the defendant in a felony case appears upon arraignment without counsel, the reporter of the court shall record accurately all proceedings taken by the court under the provisions of this Rule, and, in the event counsel is not appointed by the court, the court reporter shall prepare a transcript of such proceedings, shall certify to the correctness thereof, and such transcript shall be filed with the other papers in the case, but the failure of the court reporter to comply with the provisions hereof shall not be indicative that the court has failed to observe the requirements of this Rule."

It will be noted that the court is not required to appoint an attorney, until the defendant is "arraigned". "Arraignment" is thus defined in Supreme Court Rule 25.04, which reads:

> "Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. A defendant may plead not guilty or guilty. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge. If a defendant refuses to plead or pleads equivocally, or if the court refuses to accept a plea of guilty, of if a defendant corporation fails to appear, the court shall enter a plea of not guilty. If a defendant is tried as if he had been arraigned and entered a plea of not guilty, the failure of the record to show arraignment, and the entry of such plea shall not constitute reversible error."

It seems clear that "arraignment" is not the appearance before a magistrate for a preliminary examination, but the appearance after the defendant is bound over before the circuit court.

It will be noted by Supreme Court Rule 25.04, supra, that "arraignment" consists, first, of reading the indictment or information to the defendant.

Supreme Court Rule 23.02 states that "no information charging the commission of a felony shall be filed against a person unless the accused shall first have been afforded the right of a preliminary examination before a magistrate.* * *"

All of the above would seem to clearly indicate that there was no obligation on the part of a magistrate to appoint an attorney for an indigent defendant at a preliminary hearing. In this regard the Missouri Supreme Court, in the case of Skiba v. Kaiser, 178 S.W.(2) 373, at l.c. 374, stated:

> "Petitioner first contends that the judgment and sentence of the trial court is illegal because he was not furnished an attorney at his preliminary hearing. We have recently ruled adversely to petitioner's contention in the case of Lambus v. Kaiser, Mo. Sup., 176 S.W. 2d 494, 497. In that case, we said, 'It has long been established by our decisions that a preliminary examination may be waived and is now so provided by statute. If the accused pleads and goes to trial without calling the court's attention to the State's failure to accord him such examination, he is held to waive it.' The record shows that the petitioner, by affirmative action, waived the preliminary examination. If he had had counsel at that time, the magistrate would have been required to send for him if requested. (See Section 3867, R.S.Mo.1939, Mo.R.S.A.) but there is no constitutional provision, statute, or decision in this State requiring the justice to appoint counsel for prisoner at a preliminary examination."

In the case of State v. Graves, 182 S.W.(2) 46, at l.c. 51 et seq., the court stated:

> "The justice of the peace testified he did read the complaint to the appellant, and that appellant said he knew what a preliminary hearing was, and had had one before. He said it meant he would be taken to the circuit court and furnished with a lawyer; and if he didn't have any money to pay for it the court would pay for it. The justice further testified appellant was told he could have an attorney then and there if he wanted one. The

prosecuting attorney testified he handed the complaint to the appellant at the hearing and signed it in his presence; that the justice read it to him; and that the conversation with appellant occurred substantially as testified to by the justice of the peace.

"The only authority cited by appellant on this point is Sutorius v. Mayor, Div. 1, 350 Mo. 1235, 170 S.W. 2d 387, 398 (24), 171 S.W.2d 69, which announces the principle that a waiver is the voluntary relinquishment of a known existing legal right. In other words his contention is based on the theory that he did not know his rights. We think the trial court's ruling can and should be sustained on the ground that the evidence shows appellant did know his rights and what he was doing. But it is further to be remembered that a preliminary hearing under Sec's. 3857, 3873, does not put the accused on trial for the commission of the offense charged; but merely inquires whether there is probable cause for believing a felony has been committed and that the accused is guilty thereof - this for the purpose of binding him over for trial or committing him to jail in event he fails to give sufficient bail, if the required facts are found and the offense is bailable. In other words, the statutes are merely in aid of the arrest and detention of the accused, not of his conviction. This court en banc has recently held that our Constitution and statutes do not require the justice of the peace to appoint counsel for the accused at such hearings. Skiba v. Kaiser, Mo. Sup., 178 S.W.2d 373, 374 (2). This assignment is overruled."

CONCLUSION.

It is the opinion of this department that there is no obligation upon the part of a magistrate to appoint an attorney on behalf of an indigent defendant for a preliminary hearing on a felony charge.

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

Very truly yours,

HPW/ld

JOHN M. DALTON
Attorney General