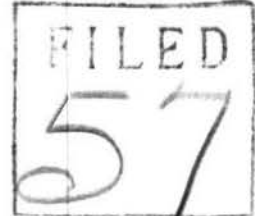


CRIMINAL LAW: Negroes cannot be barred from county jury panel by conspiracy or scheme without subjecting the jury panel to a motion to quash.

December 4, 1939

Hon. G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri



Dear Sir:

We are in receipt of your request for an opinion, under date of November 29th, 1939, which reads as follows:

"The circuit court is now the jury commissioner under the 1939 session acts, Judge Sevier requested the names and addresses of the juror in the boxes from the different townships of this county, in not less than 400 names. The county court requested the clerk to prepare and send in the names in the boxes, the talesmen from which the county court has been selecting the jurymen. They advise with me about the qualifications of several people. The question was raised by my office concerning the qualified negro talesmen that should be put in the boxes of the different townships as talesmen. It was my opinion that under the decision of the Supreme Court in 111 S.W. (2) 110, State vs Logan, which is based upon the Scottsboro cases by the Supreme Court of the United States that these qualified and competent negroes should

not be excluded as talesmen. The facts are that out of the list prepared there are no negroes in the boxes as talesman. There are about 400 negroes in this county and many are qualified and competent persons to serve as jurors, yet they are not put in the township boxes in the townships where they live. As a matter of fact that in the history of Morgan County no negro ever did serve on the jury. They are not in the jury boxes as talesmen and they have no chance to ever be called as jurymen either on grand or petit juries. They are left out, deliberately, excluded systematically excluded and denied the equal rights and the equal protection of the laws.

"Rarely, rarely, does a negro ever have to stand trial in Morgan County, either in a criminal or civil cases. The last one tried was in 1931. The county court wants to know if they have to put negro jurymen in these boxes as talesmen although there are negroes up for trial in the circuit court? They wanted to know if negroes should be on the regular juries and sit in on the trial of the rights of other people? They want to know what the county courts are doing in the other counties of this state? Do these negroes have to be on the juries when no negro legal rights are involved?"

Section 11772, Laws of Missouri, 1939, page 679, reads as follows:

"In all counties in this state which now constitute, or may hereafter constitute,

a separate judicial circuit with only one judge of the circuit court therein, the judge of such circuit court is hereby constituted a jury commissioner, whose duties as such commissioner shall be to assist the county court to prepare jury lists and to draw names as provided for in Sections 8754 and 8755, Revised Statutes 1929. Each such jury commissioner shall, as compensation for his services as jury commissioner solely, as provided in this section, receive a salary of twelve hundred dollars per annum, said salary to be paid by the county in equal monthly installments. In all judicial circuits in this State which circuits are constituted of two or more counties the circuit judge is hereby constituted a jury commissioner charged with the powers and duties herein prescribed, and for the performance of said duties he shall receive a salary of \$1300.00, per annum, to be paid in equal monthly installments out of the State Treasury."

This section amended Section 11772, R. S. Mo., 1929, to the effect that it also applies to judicial circuits consisting of more than one county and one court.

Section 8754 R. S. Mo., 1929, reads as follows:

"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 popu-

lation, 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."

It will be noticed under this section that the county court of each county shall select names from each township according to the relative population of the township to the population of the county. It will also be noticed under this section that the names selected are placed upon a separate slip of paper of the same size and placed in a box with a sliding lid.

According to the information furnished us in your request, none of the names furnished the county court is that of a negro. You also further say that in the history of Morgan County no negro has ever served on a jury, for the reason that no names [of negroes have been placed in the jury boxes.

Section 8755 R. S. Mo., 1929, reads as follows:

"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 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 3 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."

Under this section the clerk of the county court draws out the names separately and singly from one township until he gets the number of names required from such township for jury panels. If none of the townships turn in names of negroes, it would be impossible for a negro to be placed upon the county jury panel.

In the case of *Norris v. Alabama*, 294 U. S. 587, 55 Supreme Court 579, 79 L. E. 1074, the court said:

"In 1930, the total population of Jackson County, where the indictment was found, was 36,881, of whom 2688 were negroes. The male population over twenty-one years

of age numbered 8801, and of these 666 were negroes.

"The qualifications of jurors were thus prescribed by the state statute (Ala. Code, 1923, sec. 8603): 'The jury commission shall place on the jury roll and in the jury box the names of all male citizens of the county who are generally reputed to be honest and intelligent men, and are esteemed in the community for their integrity, good character and sound judgment, but no person must be selected who is under twenty-one or over sixty-five years of age, or, who is an habitual drunkard, or who, being afflicted with a permanent disease or physical weakness is unfit to discharge the duties of a juror, or who cannot

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*read English, or who has ever been convicted of any offense involving moral turpitude. If a person cannot read English and has all the other qualifications prescribed herein and is a freeholder or householder, his name may be placed on the jury roll and in the jury box.' See Gen. Acts (Ala.) 1931, No. 47, p. 59."

The court in the same case further said: (l.c.1080).

"We are of the opinion that the evidence required a different result from that reached in the state court. We think that the evidence that for a generation or longer no negro had been called for service on any jury in Jackson County, that there were negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of

the requisite age but that no names of negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate consideration of the qualifications of negroes, established the discrimination which the Constitution forbids. The motion to quash the indictment upon that ground should have been granted."

Also, in the case of State v. Logan, 126 S. W. 256, 1.c. 258, the court said:

"The legal issue involved is one of discrimination against and not one of a chance to have negroes on the jury. Upon the first appeal the cause was remanded because of discrimination against negroes for jury service; but Ellison, J., speaking to the instant issue, said (341 Mo. loc. cit. 1172(3), 111 S. W. 2d loc. cit. 114 (4): 'It is not the law that the appellant was absolutely entitled to have negroes on the jury that tried him, or even on the panel from which that jury was drawn. It may happen that no negroes (or members of any other particular class of our citizens) will be on the regular panel for a given term of court, or on the special venire for a particular case. If that occur in due course and good faith because of the ratio of white to negro population, or because of actual disqualifications, pure chance or the like, it is within the law; but if the defendant be deprived by design of the chance of having negroes on the jury which is to try him, the Federal Constitution may be invoked. The fact that no negroes were drawn in the particular case is not conclusive against the State; and the fact that negroes might

not have been drawn in due course is not conclusive against the defendant.'

"The panel of thirty was selected from forty-one talesmen. Six of the forty-one were negroes; of which number four disqualified for cause. Appellant's real complaint is against the exercise by the State of its six statutory peremptory challenges in striking the names of the two negroes from the jury list and thereby depriving appellant of an opportunity to have negroes on the trial jury. The record contains no showing of discrimination."

CONCLUSION

Under the above authorities it is the opinion of this department that if no negroes' names are placed in the county jury wheel, as provided under Section 8754, supra, by reason of a conspiracy, or common scheme to prevent the placing of the names of negroes in the county jury wheel, any panel drawn therefrom in a criminal case would be subject to a motion to quash which should be sustained. We are not holding that a negro must be upon the panel in any particular case, but we are holding that some negroes should be placed in the panel county jury box in the same proportion as the negro population bears to the white population, so that there is a chance that a negro may be drawn on a jury panel.

This opinion is rendered in compliance with the holding of the United States Supreme Court and the Supreme Court of the State of Missouri, as here-

Hon. G. Logan Marr

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December 4, 1939

inabove set out.

Respectfully submitted,

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APPROVED:

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(Acting) Attorney General

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