CRIMINAL LAW -
PRELIMINARY EXAMINATION - A minor over the age of 17 years has the right to personally waive preliminary examination where he is charged with a felony.

January 2, 1942

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

Dear Sir:

We are in receipt of your request for an opinion from this Department, which request reads as follows:

> "The defendant in a criminal case is charged with a felony. He is over 17, and under the age of 19 years. He is a many times offender in order states. He has virtually admitted that he committed the burglary and larceny of which he is charged. He came before the justice of the peace, and in the presence of all stated that he did not need a lawyer at present, and he said that he would waive his preliminary examination. He was given the complaint and he did waive the preliminary examination. The sheriff, the justice and myself informed him of the nature and purpose of a preliminary examination on the felony charge.
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> "The question has been raised in this case and in another case, wherein, a local attorney raised the legal question that a minor could not waive a preliminary examination. The law is that the justice does not have any power to appoint an attorney for a minor who does not have any funds to hire a lawyer in a preliminary examination.
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> "I want to know if it is necessary to hold a preliminary examination, on a case involving a felony and a minor, even though the

> minor wants to waive his preliminary examination? Is there anything in the Mo. law that makes such a waiver illegal?"

Section 3893 R. S. Missouri, 1939, provides in part, as follows:

> " * * Provided, a preliminary examination shall in no case be required where same is waived by the person charged with the crime, or in any case where an information has been substituted for an indictment as authorized by section 3953."

It will be noted from reading this section that the above proviso provides that the person charged with the crime may waive the preliminary examination.

In the case of State v. Pippey, 71 S. W. (2d) 719, l.c. 721, Pars. 5-7, the court said:

> "* * A preliminary examination is not jurisdictional in the sense that the circuit court is without jurisdiction to try the cause unless and until such examination has been accorded the accused. Buckley v. Hall, 215 Mo. 93, 114 S. W. 954. It is well settled that the accused may waive it and if he pleads and goes to trial without calling the court's attention by timely motion or plea in abatement to the state's failure to accord him a preliminary, he does waive it. And such allegation in a motion to quash or plea in abatement does not prove itself. It must be proved and the evidence offered in support thereof with the court's rulings and the exceptions thereto can only be preserved for review by bill of exceptions. * * * "

In the case of State v. Langford, 240 S. W. 167, l.c. 169, Pars. 4-6, the court said:

> "It is evident from these rulings that the effect of the plea of the general issue is the same whether made before the justice or in the trial court. There is even more reason why this plea may be regarded as more effective before the examining tribunal than before the trial court. Before the former, the determination of the guilt or innocence of the accused not being in question, a plea in regard thereto is not required, and has no proper place in the proceeding, but, if voluntarily entered, it cannot be otherwise construed than as an admission by the accused of the probable grounds for the proceeding for the purpose of the case. It was so held in State v. Ritty, 23 Ohio St. 562, in which one brought before a justice of the peace for a preliminary examination was held, notwithstanding he pleaded not guilty, to have waived an examination of witnesses to sustain the charge, and to have submitted to be bound over without the examination. This holding was on the ground that a plea of not guilty in a case of this kind is analogous to the plea of nolo contendere at common law, and, like a demurrer, admits the charge for the purpose of the case. * * * "

In the case of State v. Pugh, 15 Mo. 349, l. c. 350, the court quoted with approval the following procedure:

> "* * The defendant being called upon to plead to the indictment, stood mute, and the court had the plea of not guilty entered for the defendant. * * * "

In the case of State v. Ancell, 333 Mo. 26, l. c. 33, 34, the court said:

> " * * Preliminary examinations are governed by statute and we must look to our statutes for the defendant's right thereto and for the procedure. * * * * * * * * * * * *
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> "In a preliminary examination the examining magistrate does not act in the capacity of a court. He does not determine the question of the guilt or innocence of the accused. His conclusion is in no sense a judgment. (State ex rel. Board of Education v. Hast, 209 Mo. 708, 728 et seq., 108 S. W. 563; State v. Flannery, supra; State v. Nichols, supra.) * * * "

It will be noted from the reading of the case of State v. Rutledge, 13 S. W. (2d) 1061, l. c. 1067, that the defendant, a seventeen year old boy, waived the preliminary examination, for the court said:

> "* * * The case originated in the latter court, where, after waiver of a preliminary examination, relator was called to answer the charge of robbery in the first degree, preferred against him by information duly filed by the circuit attorney. * * * "

It will be further noted from a reading of the Rutledge case, at l. c. 1066, the court said:

> " * * * When a child who has passed his seventeenth birthday is brought before a court of general criminal jurisdiction, charged with having committed a criminal offense while under 17 years of age, that court may determine whether he should be dealt with

> as a delinquent, or prosecuted under the general law, and, if it decides that he should be proceeded against as a delinquent, order the cause transferred to the juvenile court. But a court of general criminal jurisdiction is wholly without jurisdiction in cases in which a child under 17 years of age is charged with the violation of criminal law; without jurisdiction to even determine which course should be pursued with respect to such child."

When this case is read in connection with the case of State v. Walker, 34 S. W. (2d) 124, wherein the court said:(l.c.28)

> "In this case no petition alleging the relator to be a delinquent child, to be tried as such, was filed in the circuit court; so it was not necessary for the judge to exercise the discretion mentioned in the closing part of 1136, but the accused was taken directly to the circuit court as provided in section 1141.
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> "That part of section 1136, while authorizing the court to dismiss a petition alleging the child to be delinquent and entertain a prosecution under the general law, necessarily implies that, if the proceeding is begun under the general law, the court has authority to proceed with the case under that law."

It will be observed from the reading of Section 3893, supra, together with the cases cited, that preliminary examinations are governed by statute solely, and, in the absence of any exception, where the defendant is a minor, we are constrained to the view that a defendant may personally waive a preliminary examination. We do not find that the

statutes make any provision for the appointment of an attorney for a minor when he appears before the magistrate in a preliminary hearing.

CONCLUSION

Therefore, we are of the opinion, that the proceedings in the case outlined in the opinion request, having been under the general law, the defendant, even though he be of the age of nineteen, has the right to waive the preliminary examination under Section 3893, supra, and the fact that he was not represented by counsel, makes no difference, and, under the statute he is to be considered as any other defendant, and his minority affords him no special privilege.

Respectfully submitted

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APPROVED:

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