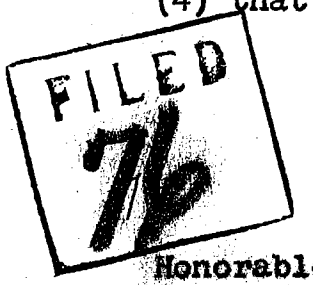
PROSECUTING ATTORNEY: We are of the opinion that (1) it is not the duty
MAGISTRATE JUDGE: of the prosecuting attorney to represent a com-
PEACE BOND: plainant in a peace bond proceeding; (2) a magistrate judge may continue a matter in order to allow time for the securing of witnesses, a jury and procurement of counsel for defendant; (3) the magistrate court does not have authority to require a defendant after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing; (4) that the defendant may waive trial by jury in a peace bond proceeding.



April 14, 1959

Honorable Raymond R. Roberts
Prosecuting Attorney
St. Francois County
Court House
Farmington, Missouri

Dear Mr.Roberts:

We are in receipt of your recent letter in which you ask us for an official opinion on the following matters:

"(1) In proceedings upon a complaint filed in the Magistrate Court to compel a recognizance, is it the duty of the Prosecuting Attorney to pursue this matter or is that a matter for the attorney for the individual involved, prior to the actual commission of an offense for which the recognizance would be forfeited?

(2) May the Magistrate Judge continue this matter over in order to allow time for the securing of witnesses, a jury, the procurement of counsel for the defendant, etc.?

(3) If so, is it necessary to commit the defendant to jail pending the hearing? or may the Magistrate allow him to post a bond or to go free until the hearing can be had?

(4) May the six man jury be waived in such a matter and the matter submitted to the Magistrate?"

For the sake of simplicity, we will endeavor to answer each question in chronological order.

Section 542.010, et. seq., RSMo 1949, sets forth the proceedings to be followed by a magistrate upon a complaint being filed that some person has threatened or is about to commit some offense against the complainant or his property.

At first blush, this procedure would appear to be a criminal proceeding. It is found under the heading "criminal procedure" in our Missouri statutes, 1949. Provision is made for the issuance of a warrant and mention is made in Section 542.040, supra, of the defendant being found "guilty."

In the case of Ex parte Chambers, 290 S.W. 103, the Springfield Court of Appeals had under consideration the 1919 Missouri statutes relating to peace bonds. Of course, there have been some amendments to our current statutes but we believe this case is applicable in interpreting our present statutes, Section 542.010, et. seq., supra, and we quote from pages 104-105, paragraph [3-6], of the opinion where the Court said:

> "These proceedings, to require petitioner to give a peace bond, were commenced in the justice court, affirmed on appeal to the circuit court, and again affirmed on appeal to this court. We are of the opinion, therefore, that the payment of costs in this case is governed by the provisions of section 3757, which simply directs judgment for costs against defendant upon affirmance of the conviction. * * * The costs for which defendant may be liable is one thing, and the manner in which the collection thereof may be enforced is another. <u>The intent of the Legislature to authorize imprisonment for costs in a proceeding not strictly criminal should clearly appear.</u> *** " (Emphasis supplied.)

In view of the Chambers case, supra, it is evident that the procedure to procure a peace bond is not "strictly a criminal" proceeding. We, therefore, direct your attention to Section 56.060, RSMo 1949, where we quote, in part, the duties of a prosecuting attorney:

> "The prosecuting attorneys shall commence and prosecute all civil and criminal actions in

> their respective counties in which the county or state may be concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county; *** ."

We have been unable to find a Missouri case discussing the particular point raised in your first question. We are of the belief, however, after examining the statutes and the Chambers case, that it is not the duty of the prosecuting attorney under these circumstances to procure a peace bond for a complainant. This appears to us to be the reasonable interpretation of the aforementioned statutes.

In reference to question (2), Section 542.040, supra, reads as follows:

> "Upon such person being brought before such magistrate, the magistrate shall summon all witnesses which either party may require, and cause the matters charged in the complaint to be inquired into by a jury of six competent citizens. If the jury find that there is good reason to fear the commission of the offense charged, then they shall render a verdict of guilty against the defendant, and the magistrate thereupon shall require the defendant to enter into a recognizance in such sum, not exceeding one thousand dollars, as he shall direct, with one or more sufficient sureties, conditioned that the defendant will keep the peace toward the people of the state, and particularly toward the complainant, for such time as shall be specified in said recognizance, which shall be not less than three months nor more than one year from the date thereof; and the defendant shall be liable for costs as in other cases of conviction."

Obviously, the above quoted procedure statute on peace bonds is wholly silent on the subject of continuances and no mention of continuances can be found within the statutes pertaining to peace bonds.

We, therefore, direct your attention to Section 517.570, RSMo 1949, which sets forth magistrate court procedure on continuances as follows:

> "Magistrate may continue trial to another day.--Upon the return day, if a jury be required or if the magistrate be actually engaged in other official business or in any case when it shall be necessary, the magistrate may continue the trial to another day without the consent of either party. (L. 1945 p. 765 § 81)"

In this regard, see also Section 517.590, RSMo 1949.

We are of the opinion that even though there is no specific authorization under Section 542.010, et. seq., supra, for a continuance, a continuance may be granted under authority of Section 517.570, supra. Our position in this regard seems to us to be reasonable. The defendant should have the right to employ counsel to represent him and the Court may need time to summon a jury. A Court, therefore, should have the power to grant a continuance and we are of the belief that Section 517.570, supra, authorizes such action.

In answer to question (3), we know of no authority authorizing the magistrate after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing.

The procedure authorized under Section 542.010, et. seq., supra, is based on the fact that an offense has "not" been committed but is only "threatened." There is no authority to be found within this section which authorizes posting of a recognizance or commitment to jail in lieu thereof.

In the case of Calhoun vs. Grey, 131 S.W. 478, l.c. 481, the Court discussed recognizances and accepted the following definition of a recognizance:

> " *** It is well understood that a 'recognizance' is an obligation of record, entered into before a court, or other duly authorized officer, conditioned to do some act required by law which is therein specified.

> 2 Blackstone, Comm. 341; Bouvier's Law Dictionary; Pace v. State, 25 Miss. 54; State v. Walker, 56 N. H. 176, 178. *** "

It is evident from the above definition of a recognizance that a recognizance is given on condition that some "act required by law" will be performed and that said act is specified therein. As stated above, the statutes governing appeace bond proceeding does not mention a recognizance shall be given in case of continuances. We have been unable to find any statutory authority wherein a duty is placed on the defendant in case of continuance in a peace bond proceeding. Therefore, we conclude no recognizance or power to commit is authorized in this type of proceeding.

Your last question pertaining to whether the defendant may waive trial by jury is answered, we believe, by Section 510.190, RSMo 1949, which reads, in part, as follows:

> "1. The right of trial by jury as declared by the constitution or as given by a statute shall be preserved to the parties inviolate. In particular, any issue as to whether a release, composition, or discharge of plaintiff's original claim was fraudulently or otherwise wrongfully procured shall be tried by jury unless waived.
>
> 2. Parties shall be deemed to have waived trial by jury
>
> (1) By failing to appear at the trial;
>
> (2) By filing with the clerk written consent in person or by attorney;
>
> (3) By oral consent in court, entered on the minutes;
>
> (4) By entering into trial before the court without objection."

Section 542.010, et. seq., supra, does not mention whether a defendant in a peace bond proceeding may waive trial by jury. We

are of the opinion, however, that the defendant may waive trial by jury in view of Section 510.190, supra, which we have quoted above.

CONCLUSION

Under the circumstances mentioned in your letter, we are of the opinion that (1) it is not the duty of the prosecuting attorney to represent a complainant in a peace bond proceeding; (2) a magistrate judge may continue a matter in order to allow time for the securing of witnesses, a jury and a procurement of counsel for the defendant; (3) the magistrate court does not have authority to require a defendant after granting a continuance to require the defendant to post bond or in lieu thereof commit him to jail pending the hearing; and (4) that the defendant may waive trial by jury in a peace bond proceeding.

The foregoing opinion, which I hereby approve, was prepared by my assistant, J. Burleigh Arnold.

Yours very truly,

John M. Dalton
Attorney General

JBA:cm