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# The State of South Carolina



## Office of the Attorney General

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November 6, 1989

George A. Markert, Assistant Director  
South Carolina Court Administration  
Post Office Box 50447  
Columbia, South Carolina 29250

Dear George:

In a letter to this Office you questioned the practice in some magistrate's courts of drawing more than the required number of jurors and alternates for a trial in anticipation of having an insufficient number of jurors at trial. You stated that the drawing, which is conducted pursuant to Section 22-2-120 of the Code, is done with the consent of all parties.

Section 22-2-80 of the Code provides for the drawing of thirty (30) names as jurors for a magistrate's court jury trial. Section 22-2-90 of the Code states that as to those magistrate's courts which hold terms for jury trials, forty jurors shall be selected to serve one week. Pursuant to Section 22-2-100 of the Code,

(t)he names drawn pursuant to either Section 22-2-80 or Section 22-2-90 shall be placed in a box or hat and individual names randomly drawn out one at a time until six jurors and four alternates are selected... . If for any reason it is impossible to select sufficient jurors and alternates from the names drawn, names shall be randomly drawn from compartment A until sufficient jurors and alternates are selected.

Section 22-2-120 of the Code states

(i)f at the time set for the trial there are not sufficient jurors to proceed for the reason that one or more have failed to attend, or have not been summoned or have been excused or disqualified by the court, additional jurors shall be

selected from the remainder of the thirty names or in the manner as provided in Section 22-2-80 or in the manner as further provided in Section 22-2-100.

Section 22-2-110 of the Code states

(p)arties shall exercise peremptory challenges in advance of the trial date, and only persons selected to serve and alternates shall be summoned for the trial.

It is generally stated that

...irregularities in drawing or summoning a jury do not constitute a ground for a new trial unless they were actually or probably prejudicial to a party. And it has been ruled that failure to comply with statutes prescribing the mode of selecting a jury panel will not constitute ground for setting aside a conviction unless some prejudice to the defendant from a lack of compliance with the provisions of the statute may be inferred from the circumstances.

47 Am. Jr. 2d Jury, Section 177 pp. 768-769. Such is consistent with the statement in State v. Davis, 239 S.C. 280 at 284, 122 S.E. 2d 633 (1961) that

...statutes prescribing the time and manner of drawing jurors are directory, not mandatory, and that irregularity in that regard affords no basis for quashing the venire, absent a showing of prejudice.

See also: 50 C.J.S. Juries, Section 164 p. 891. (provisions regarding the selection of the jury panel are typically construed as directory and should be liberally construed).

Consistent with the understanding that statutory provisions regarding the selection of juries are generally considered to be directory, not mandatory, the procedure described above whereby additional jurors are drawn in anticipation of the required number of jurors not appearing would probably withstand challenge especially where there is no objection prior to trial. As noted, absent a showing of prejudice, typically the failure to comply with statutory provisions regarding the selection of juries will not serve as the basis for setting aside a conviction. Moreover, it is stated that "(i)t is necessary to make timely objection to the selection of jurors contrary to the statutory manner." 47 Am. Jur. 2d Jury,

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Section 178, p. 769. You indicated that the selection of additional jurors in the manner specified is accomplished with the consent of the parties. Such consent should always be obtained if there is any deviation from the statutorily established procedure set forth above.

However, this opinion should not be construed as authorizing blanket disregard of the statutory provisions at issue. While statutory provisions regarding the selection of juries are generally considered directory, it is also stated that noncompliance with such provisions "...is not excused by the mere fact that it is inconvenient to the court to do so or that a compliance will cause a delay in the trial." 50 C.J.S. Juries, Section 164, p. 891. Therefore, if there is a prevailing problem with the present statutory procedures, consideration should be given to amending the statutes rather than continuously disregarding such provisions. I would further note that during this past session of the General Assembly, Section 22-2-195 of the Code was added. Such provision states

(i)n lieu of the manner required by this chapter, jurors for magistrates' courts in a county, at the discretion of the governing body of the county, may be drawn and summoned by computer in the manner the Supreme Court by order directs.

If there is anything further, please advise.

Sincerely,



Charles H. Richardson  
Assistant Attorney General

CHR/nnw

REVIEWED AND APPROVED BY:



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