

1978 S.C. Op. Atty. Gen. 48 (S.C.A.G.), 1978 S.C. Op. Atty. Gen. No. 78-30, 1978 WL 22514

Office of the Attorney General

State of South Carolina

Opinion No. 78-30

February 16, 1978

*1 TO: Mr. Neal Forney
Assistant Director
South Carolina Court Administration

QUESTION:

May the number of jurors in a criminal case tried in the magistrate court be less than six jurors if this reduced number is agreed to by the prosecutor and the defendant?

AUTHORITIES:

Section 22-3-770, 1976 Code of Laws of South Carolina;

Section 22-3-780, 1976 Code of Laws of South Carolina;

[State v. Worthy](#), 239 S.C. 449, 123 S.E.2d 835 (1962);

1953 Op. A.G., May 27, 1953, p. 145;

47 AM.JUR.2d, Jury, Section 128;

93 A.L.R.2d 420;

7A South Carolina Digest, Criminal Law, Key No. 1137.

DISCUSSION:

You have asked whether the number of jurors in a criminal case tried in a magistrate court may be less than six jurors if the reduced number is agreed to by the prosecutor and the defendant. It is our opinion that it may.

Section 22-3-770 of the 1976 Code states 'every person arrested and brought before a magistrate, charged with an offense within his jurisdiction, shall be entitled on demand to a trial by jury which shall be selected as provided in Section 22-3-780.'

Section 22-3-780 prescribes the general procedure for selecting jurors in the magistrate courts and provides, in essence, that the jury shall consist of six members. That statute also prescribes the permissible method for filling vacancies on the jury.

Under the provisions of the above-referenced statutes, either the prosecution or defense in a criminal case may insist upon the full number of jurors being present and impaneled, in which event the deficiency must be filled by the court

either through agreement of the parties or in the statutorily prescribed manner. However, just as a defendant may waive his right to a jury trial altogether, he may also waive his right to have six jurors hear his case. Having consented to a jury of less than six, he would be bound by the verdict they render. 1953 Op. A.G., May 27, 1953, p. 145; and see, 47 AM.JUR.2d, Jury, Section 128; 93 A.L.R.2d 420. Furthermore, having consented to a jury of less than the number prescribed by law, the defendant would not be heard to complain on appeal of error which his own conduct induced. State v. Worthy, 239 S.C. 449, 123 S.E.2d 835 (1962); and see generally cases collected at 7A South Carolina Digest, Criminal Law, Key No. 1137.

CONCLUSION:

Therefore, it is the opinion of this Office that the number of jurors in a criminal case tried in a magistrate court may be less than six jurors if the reduced number is agreed to by the prosecutor and the defendant.

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