

Opinion No. 53-5686

February 20, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. E. C. Serna Attorney at Law P. O. Box 973 Silver City, New Mexico

{*79} This is in reply to your letter of February 16, 1953, in which you request an opinion, first as to whether or not a complaining witness can demand a jury trial in case where a jury trial is waived by a defendant, and second whether or not the State of New Mexico has a right to demand a jury trial in a justice of the peace court.

Concerning your first question as to whether or not a complaining witness in a criminal case, where the charge is assault and battery can demand a jury trial and is entitled to same, I call your attention to the fact that the complaining witness in a criminal case like the one of assault and battery before a justice of the peace, is not a party. The defendant is an interested party and also the state. There is no statutory law or provision in the Constitution that provides that a complaining witness is entitled to a trial by jury.

Concerning your second question as to whether or not the State of New Mexico can demand trial by jury in a justice of the peace court where the charge is assault and battery, I should like to call your attention to the case of State vs. Shroyler, 49 N.M. 196, a criminal case affirmed by the Supreme Court on the question of waiver of trial by jury in a preliminary hearing, the court said:

"* * * that while the right to jury trial in such cases might be waived, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. * * *"

Under the opinion of this case, a defendant or defendants may waive trial by jury but said waiver can not be accepted unless it is consented to by the State. It is therefore the opinion of this office that although the above case was a felony case, the same rule may well apply to a criminal case of a misdemeanor nature. In both felony and misdemeanor cases the defendant or defendants are given the right to demand a jury and if a waiver of a jury must be acquiesced in by the State in a felony case, I see no reason why the same rule would not apply to a misdemeanor case.

I hope that this answers fully the questions you have in mind.

By: Special Asst. Dist. Atty.