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November 4, 1959  
Opinion No. 59-149

REQUESTED BY: Honorable William S. Porter,  
State Legislator

OPINION BY: WADE CHURCH, The Attorney General

QUESTION: May an Indian who resides on the reservation be excluded from being called as a juror on the basis that the Court might not have jurisdiction to enforce the subpoena for appearance?

CONCLUSION: No.

The question as to whether or not an Indian who resides on a reservation is qualified to serve as a juror was decided in the affirmative in Denison v. State, 34 Ariz. 144, 268 P. 617. There the issue was whether or not the Indian juror had the qualifications as are presently found in A.R.S. §21-201. Although the case did not discuss the issue of going on the reservation with authority to enforce a subpoena for appearance, the brief of appellant does discuss the fact that one may go on the reservation only with permission.

Provision for subpoenaing a jury is provided in A.R.S. §21-331, as follows:

"Superior Court jury

A. As soon as the sheriff receives the copy of the list of jurors and a copy of the order as provided by §21-316, he shall summon the persons named therein to attend the court, by giving written notice to each by registered mail. . . .

B. Persons who do not respond by return receipt shall be summoned by the sheriff by giving personal notice to each, or by leaving a written notice at his place of residence with some person over sixteen years of age residing therein.

\* \* \*"

Authority to enforce the subpoena is found in A.R.S. §21-334:

"Failure of juror to attend; punishment

A juror summoned who wilfully and without reasonable excuse fails to attend may be attached as for a direct contempt of court and be compelled to attend, and a fine not exceeding one hundred dollars may be imposed

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by the court for nonattendance upon the superior court, and a fine not exceeding ten dollars may be imposed for nonattendance upon any other court."

By reason of the authority cited in Application Denetclaw, 83 Ariz. 299, 320 P.2d. 697, the court would not have jurisdiction to punish an Indian who was served on the reservation for failure to appear.

While it is true that the law does not presume that a court will do a needless thing, if an Indian on the reservation is served, and he does in fact appear, the action has not been needless. A.R.S. §21-334, which provides for punishment for the failure of juror to attend, does not require that a juror who fails to appear be fined; it merely gives the court authority to impose a fine when there is a willful and unreasonable failure to attend.

Article 1, Chapter 3, of Title 21 of the Arizona Revised Statutes (A.R.S. §21-301 to §21-304) provides that the board of supervisors shall order that a list be made of all persons qualified to serve as jurors and makes an unauthorized alteration of the jury list a felony. It therefore appears there is no discretion given to any officer to decide whether or not it is proper to subpoena a reservation Indian once his name has been placed on the list and drawn.

There are numerous United States Supreme Court cases holding that, although a citizen does not have the right to be tried by a jury which includes persons from his ethnic group or race, he does have the right to have a jury which has not been systematically drawn so as to exclude all members of his class, Hernandez v. Texas, 347 U.S. 475, Reece v. Georgia, 350 U.S. 85. It therefore appears that such an exclusion of jurors would be contrary to the "due process clause" of the Fourteenth Amendment in a trial involving an Indian.

There have been numerous federal civil right bills passed by Congress, one of which appears pertinent is herein cited:

"18 U.S.C. §243. Exclusion of jurors on account of race or color.

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000."

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It is the conclusion of the Attorney General that the American Indian may not be excluded from serving on juries on the basis that the court could not enforce a subpoena to appear if served on the reservation.

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