

HABEAS CORPUS AD TESTIFICANDUM: A circuit court has power to issue and may only keep said prisoner as long as necessary for such to testify.

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July 15, 1935



Hon. J. M. Sanders, Warden
Missouri State Penitentiary
Jefferson City, Missouri

Dear Sir:

This is to acknowledge your letter dated July 8, 1935, as follows:

"On May 31st, 1934 Harry Newbold, Deputy Sheriff of St. Louis County, Missouri, delivered to me a Writ of Habeas Corpus Ad Testificandum, with reference to the above named party.

The writ was issued out of Judge Robert W. McElhinney's Court, Division # 4 of St. Louis County, demanding me to deliver to the Sheriff of St. Louis County the body of the above mentioned, Edna Booker, to be delivered in the Circuit Court, in and for the County and State aforesaid, at Clayton, Missouri on the 7th day of June, 1934 at 9 A.M., then and there to testify to the best of her knowledge and belief in Case entitled Bart Davitt, et al.

It is my understanding Rosegrant and Cecil McDonald, two of the defendants in the case have been tried, each receiving a prison sentence. The case against two other defendants, Bart Davitt and Mrs. Nellie Muench is still pending and the said Edna Booker is still retained by the Sheriff of St. Louis County.

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The question has arisen as to whether or not that I should request her return, pending the date of trial of the other defendants.

Please advise me whether I have any authority to demand her return to prison, pending the date of trial of the other defendants."

We assume that Edna Booker, number 36619, was a witness for the State and was taken from your custody under and by virtue of Section 3618 R. S. Missouri 1929, which reads as follows:

"Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf; and whenever any convict, confined in the penitentiary, shall be considered an important witness in behalf of the state, upon any criminal prosecution against any other convict, by the attorney-general or prosecuting attorney conducting the same, it shall be the duty of the court, or judge thereof in vacation, in which the prosecution is pending, to grant, upon the affidavit of such attorney-general or prosecuting attorney, a writ of habeas corpus, for the purpose of bringing such person before the proper court to testify upon such prosecution; such convict may be examined, and shall be considered a competent witness against any fellow convict for any offense actually committed whilst in prison, and whilst the witness shall have been confined in the penitentiary."

In Ex parte Marmaduke 91 Mo. 228, the Supreme Court of Missouri, in a divided opinion, said, page 238:

"Compulsory process, for a witness, signifies and means a process that will compel the attendance of such witness - a process that will bring a witness into court who refuses to come without it."

The facts in the instant case being that Edna Booker was confined in the penitentiary, hence, she could not attend and testify as a witness without being taken from her confinement and by process of court. The dissenting opinion of Judge Sherwood, page 250, in the Marmaduke case, supra, points out the purpose of a writ of habeas corpus ad testificandum, having the following to say:

"The writ of habeas corpus ad testificandum is a very ancient one, and was grantable at the discretion of the courts at common law. It was a process whereby the attendance of witnesses was compelled, and it was employed to bring the witness before the court, whether in custody awaiting trial, or when undergoing sentence. (cases cited) * * * * *
And there are instances where the state courts have issued the writ in question, where the witness was in custody or undergoing sentence. The instances of the issuance of such a writ are not frequent in the state courts, but whenever they occur, or are referred to, they distinctly recognize the principle, and the undoubted right of a defendant in a criminal case to have it enforced. (cases cited) * * * * *"

Corpus Juris, Vol. 29, page 6, has the following to say concerning habeas corpus:

"The writ of habeas corpus is a writ directed to the person detaining another, commanding him to produce

the body of the prisoner at a designated time and place, with the day and cause of his caption and detention to do, submit to, and receive whatsoever the court or judge awarding the writ shall consider in that behalf. The name is derived from the significant words which it contained when the writs issued by the English courts were in the Latin language. There are several varieties of this writ, * * * * *."

The writ of habeas corpus ad testificandum is for the purpose of bringing a witness before a court for the purpose of testifying in said cause and for no other purpose. Ex parte Marmaduke, supra.

We conclude that the Circuit Court of St. Louis County had a right to issue a writ of habeas corpus ad testificandum, commanding you to produce said prisoner to testify in a cause pending in said court. We note that this writ was served on you and you delivered said prisoner on the 7th day of June, 1934, and to date she has not been returned to your custody. It is our further opinion that the court does not have a right to obtain custody of a person under your jurisdiction, by writ of habeas corpus ad testificandum, and retain said custody indefinitely, but, that the court may compel a witness confined in the penitentiary to be delivered for the purpose of testifying and when the purpose for which said prisoner was delivered has been completed, then said prisoner is to be returned to your custody to be dealt with according to law, that is, for the purpose of serving out the sentence imposed upon said prisoner.

It is our opinion, that if the sheriff will not voluntarily relinquish the custody of said person to you that you should file a motion in the circuit court, setting out the facts, and ask that the sheriff be commanded to deliver possession and custody of said prisoner and if said court will not so direct the sheriff, then it is our further opinion that you may apply for a writ

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of habeas corpus, the purpose of which is to regain custody of the person so that the sentence imposed upon such may be complied with. State ex rel. v. Rudolph 17 S. W. (2nd) 932.

A circuit court, by writ of habeas corpus ad testificandum, may obtain jurisdiction and custody of a person confined in the penitentiary, and if said court could retain such custody or control for an indefinite period, then it could be that a prisoner would never have to serve the sentence imposed as such would be held in the county jail or by order of the circuit court.

Yours very truly,

James L. HornBostel
Assistant Attorney General

APPROVED:

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JLH:LC