

COSTS: Supplemental costs bill in a criminal case.

June 24, 1935.

Hon. Gilbert Barlow,
Prosecuting Attorney of
Harrison County,
Bethany, Missouri.



Dear Sir:

A request for an opinion has been received from you under date of June 12, 1935, such request being in the following terms:

"In May or June, 1933 the case of the State of Missouri vs. Deryll Billyard was prosecuted and tried in Harrison County, Missouri for murder and acquitted. On June 29, fee bill was sent to the State of Missouri in payment and the claim was paid August 11, 1933.

During the trial a writ of Habeas corpus ad testificandum by the Circuit Court and Sheriff W. H. Webb and one guard was sent to Jefferson City to bring back to testify in the case. They brought back Red Shepard, confined in the penitentiary for life in connection with this case, and George Craver, confined in the penitentiary for life, convicted in another murder case. They were all confined in the County Jail at the same time. Mr. Webb and guard brought them up and took them back. Webb, the Sheriff's claim of \$89.20 was afterwards paid through the County Court. Leland McCollum, the guard, one trip -- \$44.60 has not been paid. The claim was filed in the County Court for the May term and I advised the County Court that this claim should have been paid as other costs in the case and that the claim of W. H. Webb, Sheriff, should have been paid as other costs in the case. I do not know why these items of costs were not entered in the fee bill theretofore sent in. I was not Prosecuting Attorney at that time.

I think that the Sheriff's bill of \$89.20 was erroneously paid by the County and should have been taxed as cost in the case with the fee bill. Could the County be reimbursed for that erroneous payment and Leland McCollum, the guard, be paid by a supplement fee bill made out and

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sent to the State? Please advise me and if necessary I will have the clerk make up an additional fee bill."

I

WRIT OF HABEAS CORPUS AD TESTIFICANDUM

R. S. Missouri, 1929, Section 1745, provides as follows:

"Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record, or public body authorized to examine witnesses, to issue a writ of habeas corpus, for the purpose of bringing before such court or public body any person who may be detained in jail or prison, within the state, for any cause, except a sentence for felony, to be examined as a witness in such suit or proceeding, on behalf of the applicant."

In the case of *Ex Parte Mermaduke*, 91 Mo. 228, 4 S.W. 91 (1886), the court held that a Circuit Court had no jurisdiction to issue a writ of habeas corpus ad testificandum for the purpose of securing the attendance of a witness in the State Penitentiary under a sentence for felony. The court said:

"The power of the legislature to provide that all persons convicted of felony shall forever be disqualified, is undisputed, and, inasmuch as the greater includes the less, their power to provide that such persons shall not, for the time they are undergoing sentence of imprisonment in the penitentiary, be taken therefrom into the various courts of the state, logically follows and is equally indisputable, and said section 4931 does nothing more than this." 91 Mo. 241.

However, in the case of *State ex rel. Rudolph v. Ryan*, 327 Mo. 728, 38 S.W. (2d) 717 (1931) that case was overruled, and the Supreme Court in referring to Section 1745 said:

"If by this section it was intended to limit the use of the writ, the section is, to that extent, unconstitutional. As stated, the Constitution authorizes circuit courts to issue the writ. It follows that the Legislature is without authority to limit its use."
327 Mo. 731.

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Thus, under the present state of the law, a Circuit Court does have the power to issue such a writ for the purpose of compelling the attendance of a witness who is serving in the State Penitentiary under a felony sentence, and if such a writ is issued by the Circuit Court, the cost, legally computed, of securing the attendance of a witness under such a writ, would be as much a part of the costs of the case as any other fees.

II

LIABILITY FOR COSTS

"In all capital cases, and those in which imprisonment in the penitentiary is the sole punishment for the offense, if the defendant is acquitted, the costs shall be paid by the state;" R. S. Missouri, 1929, Sec. 3828.

III

SUPPLEMENTAL BILL OF COSTS PREVIOUSLY OMITTED

R. S. Missouri, 1929, Section 3844, provides as follows:

"When the clerk shall send a bill of costs to the state auditor or county court, as provided in the next preceding section, he shall expressly state in his certificate that he has not at any previous time certified or sent a copy of the same bill, or part thereof, for payment: Provided, that if the clerk shall, by oversight or mistake, fail to include any costs properly chargeable against the state or county in any fee bill, he may make out and present, as hereinbefore provided for making out bills of costs, a supplemental bill for the costs so omitted: Provided, that the clerk shall in no case charge or receive any fee or fees whatsoever for the issuance of such supplemental fee bill."

Thus, a supplemental costs bill certified to the State Auditor for payment by the Judge and Prosecuting Attorney, in compliance with Section 3844, can be used to secure payment from the State Auditor of costs omitted from the original bill of costs by oversight or mistake. Such a supplemental costs bill must be exhibited to the State Auditor within two years after the final determination of the prosecution, as they are claims against the State within the meaning of R. S. Missouri, 1929, Section 11416, and under the rul-

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ing of the Supreme Court of Missouri in the case of State ex rel. Johnson v. Draper, 48 Mo.56 (1871), in which the court denied a writ of mandamus against the State Auditor to pay supplemental costs bills exhibited to him over two years after the close of the cases in which such costs were taxed. The court in the course of its opinion said:

"It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this class of claims from the operation of the statute. The language is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period." 48 Mo. 58.

If the acquittal in your case was in May or June, 1935, it may be too late to secure payment from the State Auditor, as the two years may have elapsed since the case terminated. However, if the claim can be presented within two years, since the State is required by statute to pay the costs in a case of the kind under consideration, it would seem that the costs in the supplemental bill should include all legitimate costs which the State has not yet paid, and if the County has already advanced part of such costs to the Sheriff, the County will not be obliged to pay such Sheriff again such amount, but would be reimbursed for its advance.

In conclusion, it is our opinion that all costs authorized by statute which are incurred in a criminal-capital prosecution in which there is an acquittal, are payable by the State, and where a part of such costs is omitted by oversight or mistake from the original bill of costs paid by the State Auditor, a supplemental bill of costs, if certified in the manner provided in R. S. Missouri, 1929, Section 3844, may be presented to the State Auditor for payment, but must be presented within two years after the final determination of the prosecution.

Very truly yours,

EDWARD H. MILLER
Assistant Attorney General

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.