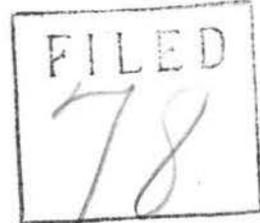


HABEAS CORPUS -
PENAL INSTITUTIONS -

Writ served on person in custody must deliver
the body and may be reimbursed by Legislative
appropriation for necessary expenses.

December 28, 1937

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



Dear Warden:

We acknowledge receipt of your request for an opinion dated November 9, 1937, which reads as follows:

"A writ of habeas corpus ad testificandum was issued by Hon. Robert L. Gideon, Judge of the Circuit Court of Ozark County, Missouri, directed to the undersigned as Warden of the Missouri State Penitentiary, and commanding that Ernestine Howell, an inmate of this institution, be brought before the said judge of the said circuit court on November 8, 1937, there to testify in the case of the State of Missouri vs. Ralph Taylor and Floyd Taylor, defendants in said Court, on the part of the defendants.

"No fees or expenses incident to the transportation, safekeeping and return of the prisoner was offered. In this instance, as well as all other instances of like character, a written opinion from your office as to whether necessary fees or expenses can be required before complying with the order of the Court. Would the rule laid down by you in this instance apply in cases where the witness is required by the State? If compliance with the order of the Court is to be carried out under any circumstance, from what source should the necessary fees and expenses come?"

As to the jurisdiction over one convicted of a crime and admitted to the Penitentiary, Section 8316, Laws of Mo. 1933, page 327, provides:

"There is hereby created and established a department to be known as the Department of Penal Institutions, by which name it shall have perpetual succession, with the right to complain and defend in all courts; and to adopt and use a common seal and alter the same at pleasure. The Department of Penal Institutions shall be under the control and management of a Commission composed of three members, not more than two of whom shall belong to the same political party, who shall be known as Commissioners of the Department of Penal Institutions, and who shall have and exercise the powers, and perform the duties and functions in this article provided, and as otherwise authorized by law. The commissioners of the department of penal institutions shall reside in Jefferson City and devote their entire time to the duties of their respective offices. Said department of penal institutions shall have and exercise control and jurisdiction over all penal institutions in this state supported in whole or in part by the direct appropriation of money out of the state treasury, and more particularly over the Missouri reformatory at Boonville, the state industrial home for girls at Chillicothe, the state industrial home for negro girls at Tipton, the intermediate reformatory at Jefferson City and the state penitentiary and prison at Jefferson City, together with all real estate, buildings, machinery and personal property belonging to or used by, or in connection with, said penal institutions, or any thereof."

Section 8319, Laws of Mo. 1933, page 328, provides:

"The director of penal institutions shall receive an annual salary of not more than thirty-six hundred dollars, and such railroad fare and other traveling expenses as may be incurred while traveling in the discharge of official duty. Each member of the commission of the department of penal institutions, other than the chairman thereof,

shall have and receive an annual salary of not more than thirty-two hundred dollars, and in addition thereto shall be reimbursed for all railroad fare and other expenses incurred while traveling in the discharge of official duty."

Section 8338, R. S. Mo. 1929, relating to custody of prisoners, provides:

"The State prison board shall, subject to law, have the exclusive government, regulation and control of the Missouri state penitentiary, the Missouri reformatory, the industrial home for girls, the industrial home for negro girls and of all other penal or reformatory institutions hereafter created and of all persons who now are or who hereafter shall be legally sentenced to either of the institutions hereinabove mentioned or referred to and who shall be committed to the custody of said board, and said board shall make and enforce such by-laws, rules and regulations as they from time to time deem necessary and proper in the management of all institutions or persons now or hereafter legally committed to said board, and shall be vested with and possessed of all other powers and duties necessary and proper to enable it to carry out fully and effectually all the purposes of this article. Said board shall employ and at all times control a warden, deputy warden, superintendent of industries, superintendents, matrons, physicians, chaplains, trade foremen, turnkeys and guards, and all other officers and employes as the board may, under law, from time to time deem necessary and proper for the efficient administration of said board."

Section 655, R. S. Mo. 1929 provides in part:

" ** eighth, when a statute requires an act to be done, which by law, an agent or deputy as well may do as the principal, such requisition shall be satisfied by the performance of such act by an authorized agent or deputy; ** "

As to the right of a defendant charged with a crime to have legal process for a witness, Article II, Section 22, Missouri Constitution, provides:

"In criminal prosecutions the accused shall have the right *** to have process to compel the attendance of witnesses in his behalf ***."

Section 1752, R. S. Mo. 1929, provides:

"Any person who has been convicted of a criminal offense is, notwithstanding, a competent witness, but the conviction may be proved to affect his credibility, either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

Section 3618, R. S. Mo. 1929, provides in part:

"Every person indicted or prosecuted for a criminal offense shall be entitled to subpoenas and compulsory process for witnesses in his behalf; *** "

In *Ex parte Marmaduke*, 91 Mo. 228, l.c. 238; 4 S. W. 91, the Supreme Court said, construing the above constitutional provision:

"Compulsory process, for a witness, signifies and means the process that will compel the attendance of such witness."

In the same case but in the dissenting opinion, the purpose of habeas corpus ad testificandum, is discussed at page 250, and Judge Sherwood said:

"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. *** 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."

46 C. J. page 1018, Section 246, reads:

"The right of an officer to compensation for expenses incurred by him in the performance of an official duty must be found in a provision of the constitution or a statute conferring it either directly or by necessary implication, *** "

46 C. J. page 1035, Section 301, reads:

"The duties of a public office include those lying fairly within its scope, those essential to the accomplishment of the main purpose for which the office was created, and those which, although incidental and collateral, serve to promote the accomplishment of the principal purposes. Public officials take their offices cum onere with all responsibilities attached, and in accepting office impliedly contract to perform the duties thereof. ** "

CONCLUSION

From the above quoted statutes, we see that custody of inmates in penal institutions is primarily in the department of penal institutions, subject to the rules and regulations of the Commissioners as they deem necessary and proper in the management of said penal institutions, and persons legally committed therein. We also see that the Commissioners are entitled to reimbursement for rail-

road fare and other expenses incurred while traveling in the discharge of official duty. We see also that the Commissioners have power to employ and control a Warden and other persons whom they deem necessary, under the law, to assist in administering as their agents some of the legal duties imposed on the Missouri penal institutions.

Where the duty has been delegated to the Warden of the Penitentiary, by the Commissioners, to assume general custody over the prisoners confined in the Penitentiary, then the inconvenience of answering a writ of habeas corpus directed to said Warden is apparent. The writ of habeas corpus ad testificandum is no exception. Pursuant to the Missouri statutes and the Marmaduke case, above set out, one committed to the Penitentiary is yet a competent witness, and one charged with a crime has the constitutional right to compulsory process for his witnesses, even where they be convicts. By statute the state has this same right to compel attendance of a convict as a witness. (See Section 3618, R. S. Mo. 1929). The available remedy in such cases is habeas corpus ad testificandum, and where the Warden be served with a copy of such a writ, it is his duty, under the law, to see that the body be produced in court as commanded whenever the prisoner be in his custody. There is no alternative available to avoid said writ.

We have searched the statutes to discover if the Legislature has provided any advance fees or expenses incident to the transportation, safekeeping and return of a prisoner delivered pursuant to a writ of habeas corpus and we find none. On the other hand, Section 1389, supra, provides reimbursement to the penal commissioners for expenses incurred in the discharge of official duties, and we believe that the Legislature intended by this section the same reimbursement to extend to any subordinate penal employee who is delegated to perform as their agent any legal duty that necessitates traveling expenses in delivering prisoners in response to habeas corpus ad testificandum. This expense of reimbursement would be properly charged against money appropriated by the Legislature for costs in criminal cases.

On the other hand, there is no law prohibiting the Warden from asking and receiving reimbursement in lieu

Hon. J. M. Sanders

-7-

December 28, 1937

of a claim against the state, from persons expecting the benefit of said convict's testimony pursuant to habeas corpus ad testificandum..

Respectfully submitted,

WM. ORR SAWYERS
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

WOS:FE