

CRIMINAL EXTRADITION:
WRITTEN WAIVERS OF:
HABEAS CORPUS APPLICATIONS:
MAGISTRATE COURT MAY TAKE, WHEN:

1. As judge of a court of record, a magistrate may accept written waiver of criminal extradition, when the accused executes or subscribes waiver in presence of magistrate, as provided by Section 548.260, RSMo 1959. 2. One arrested on governor's rendition warrant, when taken before magistrate, in accordance with Section 548.101, RSMo 1959, informs magistrate of desire to test legality of his arrest; magistrate shall fix reasonable time for application for habeas corpus. Application in first instance shall be made to circuit judge of county where accused is in custody, as provided by Section 532.030, RSMo 1959. If circuit judge is out of county and statement of unavailability of such judge is in application, such application may then be made to a magistrate of same county, who shall determine if habeas corpus shall or shall not be issued.

OPINION NO. 94.

July 3, 1963

Honorable Lawrence F. Gepford
Prosecuting Attorney
415 East 12th Street
Kansas City 6, Missouri



Dear Mr. Gepford:

This office is in receipt of your request for a legal opinion which reads in part as follows:

"Do the words, 'judge of a court of record' also mean magistrates?"

"Do the magistrates have the power under Section 548.260 to accept written waivers of extradition?"

"Under Section 548.010, can the magistrate inform the accused person of demand made for his surrender and of the crime with which he is charged, etc. . .?"

Our research fails to disclose any statutory definition or appellate court decisions defining the term "judge of a court of record" referred to in the opinion request.

In the case of *State v. Crawford*, 295 P.2d 174, it was held that a "judge" is one who conducts or presides over a court of justice.

The terms "judge of a court of record" are defined in C.J.S., Vol. 48, p. 948, as follows:

Honorable Lawrence F. Gepford

"A judge authorized by law to hold a court which is a court of record is a judge of a court of record."

Section 482.010 (1), RSMo 1959, provides for the election of magistrates at the general election of 1946, and every four years thereafter, who shall hold office for a term of four years, or until their successors are elected and qualified or appointed, commissioned and qualified.

Subsection (2) of Section 482.010, RSMo 1959, is in regard to the number of magistrates in each county, and reads as follows:

"In counties of thirty thousand inhabitants or less the probate judge shall be the judge of the magistrate court. In counties of more than thirty thousand and not more than seventy thousand inhabitants there shall be one magistrate. In counties of more than seventy thousand and less than one hundred thousand inhabitants there shall be two magistrates. In counties of one hundred thousand inhabitants or more there shall be two magistrates and one additional magistrate for each additional one hundred thousand inhabitants, or major fraction thereof."

From the provisions of Section 482.010(2), supra, the words "magistrate" and "judge of the magistrate court" have been used interchangeably, as referring to the judge who is authorized to preside over a magistrate court.

Section 476.010, RSMo 1959, names the courts which are courts of record in Missouri, and reads as follows:

"The supreme court of the state of Missouri, the courts of appeals, the circuit courts, the existing courts of common pleas, the magistrate courts and the probate courts in this state shall be courts of record, and shall keep just and faithful records of their proceedings."

Section 517.050, RSMo 1959, also provides that magistrate courts shall be courts of record.

Honorable Lawrence F. Gepford

From the foregoing it is readily seen that a magistrate court is a court of record and that the judge or magistrate who presides over said court is a judge of a court of record.

Therefore, our answer to the first inquiry of the opinion request is in the affirmative.

The second inquiry of the opinion request reads as follows:

"Do the magistrates have the power under Section 548.260 to accept written waivers of extradition?"

Section 548.260, RSMo 1959, referred to in the second inquiry of the opinion request, reads as follows:

"1. Any person arrested in this state charged with having committed any crime in another state or alleged to have escaped from confinement, or broken the terms of his bail, probation or parole may waive the issuance and service of the warrant provided for in sections 548.071 and 548.081 and all other procedure incidental to extradition proceedings, by executing or subscribing in the presence of a judge of any court of record within this state a writing which states that he consents to return to the demanding state; provided, however, that before such waiver shall be executed or subscribed by such person it shall be the duty of such judge to inform such person of his rights to the issuance or service of a warrant of extradition and to obtain a writ of habeas corpus as provided in section 548.101.

"2 If and when such consent has been duly executed it shall forthwith be forwarded to the office of the governor of this state and filed therein. The judge shall direct the officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state, and shall deliver or cause to be delivered to such agent or agents a copy of such consent; provided, however, that nothing in this section shall be deemed to limit the rights of the accused person to return voluntarily and without formality to the demanding state, nor shall this waiver procedure be deemed to be an exclusive procedure

Honorable Lawrence F. Gepford

or to limit the powers, rights or duties
of the officers of the demanding state
or of this state." (Underscoring ours)

Sections 548.071 and 548.081, RSMo 1959, referred to in the above quoted section, are in regard to the governor's rendition warrant, its issuance, recitals and the place of execution of the warrant, respectively.

Section 548.260, supra, provides that one charged with the commission of a crime in another state may waive the issuance and service of the governor's rendition warrant, as well as other procedure incidental to the extradition of the accused person.

From that portion of Section 548.260, supra, we have underscored, it appears the written waiver of the issuance of the rendition warrant, its service, and formal extradition proceedings by the accused, shall be executed or subscribed by him "in the presence of a judge of any court of record within this state * * *", without making a requirement this shall be done before a judge of a particular court of record, and no other. Since there is no such limitation found in said section, the accused may make the waiver before the judge of any court of record in this state which may be available to him for that purpose, or if more than one judge is available at the time the accused wishes to make the waiver, then he can make such waiver before the judge of the court of record he or his attorney may choose.

We have previously pointed out that a magistrate, is a judge of a court of record in Missouri, and such judge is a judge of a court of record, within the meaning of Section 548.260, supra. One arrested in Missouri, who is accused of a crime in another state, or who is alleged to have escaped from confinement, or broken the terms of his bail, probation or parole, may waive the issuance and service of the governor's rendition warrant, and other procedure incidental to such person's extradition, by executing or subscribing a waiver of all such formal procedure, in the presence of the judge of a magistrate court.

Our answer to the second inquiry of the opinion request, is in the affirmative.

Honorable Lawrence F. Gepford

The third inquiry of the opinion request reads as follows:

"Under Section 548.010, can the magistrate inform the accused person of demand made for his surrender and of the crime with which he is charged, etc. * * *?"

There is no Section 548.010, RSMo 1959. It is believed Section 548.101, RSMo 1959, is the one you intended to refer to in the third inquiry, as some of the provisions of said section are mentioned in this inquiry. We shall therefore treat the inquiry as if it were in regard to Section 548.101, RSMo 1959. Said Section 548.101, reads as follows:

"No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the prosecuting officer of the county in which the arrest is made and in which the accused is in custody, and to the said agent of the demanding state." (Underscoring ours)

After issuance and service of the governor's warrant in accordance with provisions of Sections 548.071 and 548.081, the arresting officer cannot surrender custody of the person arrested to the agent of the demanding state until after the provisions of Section 548.101, supra, have been complied with. Said section provides that a person arrested upon such warrant shall not be delivered to the agent of the demanding state unless he shall first be taken forthwith before a judge of a court of record in this state, who shall inform the accused person of the demand made for his surrender, the crime charged and of his right to procure legal counsel. If said person

Honorable Lawrence F. Gepford

or his counsel inform the judge of this, or their desire to test the legality of his arrest, the judge of such court of record shall fix a reasonable time within which application for a writ of habeas corpus may be made.

In view of the fact that the judge of a magistrate court is a judge of a court of record, the arresting officer may take the accused before a magistrate judge in pursuance of the provisions of Section 548.101, supra. The judge of such court may perform all of the duties to be performed by a judge of a court of record mentioned therein except that an application for a writ of habeas corpus cannot in the first instance be filed and acted upon by the magistrate in the absence of a showing of certain existing facts or circumstances at the time of the filing of the application, which will be presently noted.

In this connection, we call attention to two opinions of this office, the first of which was written for Honorable H. A. Kelso, Prosecuting Attorney of Laclede County, Missouri, on July 23, 1946, and concluded that a magistrate court has jurisdiction to issue a writ of habeas corpus, a copy of which opinion is enclosed.

The second opinion of this office, to which we refer, was written for Honorable O. Hampton Stevens, Assistant Prosecuting Attorney of Jackson County, Missouri, on October 8, 1951. While the writer of said opinion agreed that a magistrate court might issue a writ of habeas corpus, and referred to the Kelso opinion, the writer entered into a more detailed discussion which in effect modified the holding in the earlier opinion. A conclusion was reached in the latter opinion that an application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that an application for habeas corpus to a magistrate should state the unavailability of a circuit judge for the purpose of entertaining the application, a copy of which is enclosed. In reaching the conclusion, the writer quoted in the body of his opinion, and relied upon Section 532.030, RSMo 1949, (now Section 532.030, RSMo 1959), which requires that an application for writ of habeas corpus, by one in custody charged with crime or misdemeanor, shall be made in the first instance to the judge of the circuit court of the county in which the applicant is in custody, if, at the time of the application such (circuit) judge be in the county, except that in the city of St. Louis, the application, in the first instance shall be made to the judge of the St. Louis Court of Criminal Correction, if at the time of the application he shall be in the city.

Honorable Lawrence F. Gepford

It is believed the above-mentioned opinions, and particularly the second, as well as Section 532.030, RSMo 1959, are fully applicable to the factual situation involved in the third inquiry, except that portion of Section 532.030, requiring applications for habeas corpus to be made in the first instance to the St. Louis Court of Criminal Corrections, which does not apply to such inquiry (as the opinion request does not concern applications for a writ in St. Louis City).

Upon his appearance before the judge of a magistrate court, if the accused person or his attorney inform the judge of his or their desire to test the legality of the arrest of the accused, under the governor's rendition warrant, said judge shall fix a reasonable time within which an application for a writ of habeas corpus may be made. Under provisions of Section 532.030, RSMo 1959, the application shall be in the first instance made to a circuit judge of the county in which the accused is held in custody. However, if no circuit judge is in the county, the application may then be made to the judge of any magistrate court of the same county, if a statement as to the unavailability of a circuit judge appears in the application. The magistrate shall in such a situation perform the duties imposed upon him by Section 548.101, supra. From the evidence offered at the hearing, the magistrate shall determine whether to issue or to deny the issuance of a writ of habeas corpus.

CONCLUSION.

Therefore, it is the opinion of this office that a magistrate, as a judge of a court of record in this state, is authorized to accept a written waiver of criminal extradition from one charged with crime in another state, when the waiver is executed or subscribed in the presence of said judge in accordance with the provisions of Section 548.260, RSMo 1959.

It is further the opinion of this office that when one is arrested upon the governor's rendition warrant and taken before the judge of a magistrate court in pursuance of the provisions of Section 548.101, RSMo 1959, and the accused informs the judge of his desire to test the legality of his arrest, said judge shall fix a reasonable time within which application for a writ of habeas corpus may be made. Said application in the first instance shall be made to a circuit judge of the county in which the accused is held in custody, in accordance with provisions of Section 532.030, RSMo 1959.

Honorable Lawrence F. Gepford

In the event a circuit judge is not present in the county to whom the application can be made, and a statement of the unavailability of a circuit judge appears therein, said application may then be made to the judge of a magistrate court of the county in which the accused is held in custody. Said judge shall have jurisdiction of the application and determination as to whether a writ of habeas corpus shall be issued or denied.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Paul N. Chitwood.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC: jh