

COMPTRROLLER:  
CRIMINAL COSTS:

An indigent defendant is not entitled to have the cost of a mental examination under Section 552.

020, RSMo Supp. 1971 or Section 552.030, RSMo 1969, by a physician "of his own choosing" taxed against the state. However, costs of mental examinations made by "independent" physicians appointed by the court pursuant to such sections are taxable against the state in cases which come under the provisions of Section 550.020, RSMo 1969.

OPINION NO. 2

March 29, 1973

Honorable Christopher S. Bond  
Governor of Missouri  
Office of Administration  
State Capitol Building  
Jefferson City, Missouri 65101



Dear Governor Bond:

Mr. John C. Vaughn, the State Comptroller, requested an official opinion of the Attorney General as to the inquiry hereinafter set forth. Because the functions of State Comptroller have succeeded to the Office of Administration, and the Comptroller's duties to the Commissioner of Administration, and, since in the absence of a Commissioner of Administration, the Governor shall take charge of such office and superintend the business thereof, we are therefore directing this opinion to you.

Mr. Vaughn requested an official opinion of the Attorney General as to the following question:

"Does Section 552.080, Section 2 RSMo. 1969, require the office of Budget and Comptroller to reimburse the County for fees or expenses provided in Sub-Section 1 of Section 552.080 RSMo. 1969, if the defendant has requested the psychiatric examination and is subsequently sentenced to the Department of Corrections?"

He also advised that:

"There is a difference of opinions regarding this matter between the Prosecuting Attorney of Greene County and the office of Budget and

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Comptroller. This office at the present time, allows payment for the examination when a person is acquitted of a crime punishable solely by imprisonment in the Department of Corrections, and when the examination is requested by the Prosecuting Attorney under the provisions of Chapter 550 RSMo. 1969."

In our Opinion No. 56 dated January 27, 1966, to the Honorable Claude E. Curtis, copy enclosed, we held that such cost of examination of indigents incurred by the appointment of physicians by the court were not costs incurred on behalf of the defendant within the meaning of Chapter 550 relating to costs in criminal cases. We also held in that opinion that costs of an examination by a physician of the defendant's own choosing are costs incurred on his behalf.

In our later opinion No. 340 and addendum thereto dated December 10, 1971, to the Honorable Dee Wampler, copy enclosed, we reaffirmed our holding in the opinion to Curtis and further stated that our view is that the cost of examinations made by physicians appointed by the court are not costs incurred on behalf of the defendant and where otherwise taxable against the state are so taxable.

In order to more closely draw the distinction which you require, please note that subsection 4 of Section 552.020, RSMo Supp. 1971, expressly provides that:

". . . Within five days after the filing of the report [of the physician or physicians appointed by the court to make the examination under subsection 2], both the accused and the state shall, upon written request, be entitled to an order granting them an examination of the accused by a physician of their own choosing and at their own expense. . . ."

A similar provision is contained in subsection 4 of Section 552.030, RSMo 1969. Therefore, with respect to costs incurred by reason of the appointment of a physician of a defendant's "own choosing" whether such defendant be indigent or not such costs cannot be paid by the state.

As we have noted, however, in the enclosed opinions, both Sections 552.020 and 552.030 provide for the appointment of physicians by the court. In the case of an indigent, the distinction between "a physician of their own choosing" and the appointment of an "independent" physician by the court is made clear by the holding of

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the Missouri Supreme Court in State ex rel. Hoover v. Bloom, 461 S.W.2d 841, 844 (Mo. banc 1971) in which the court stated that the provision of the statute providing for a selection of a physician of one's choosing at his own expense is nothing more than a declaration of what has always been a privilege of a person of means. However, the court concluded the indigent relator was not entitled to an examination by a physician of his own "choosing" but, in the first instance, it is for the trial court to make the selection of a physician to make an "independent" examination and the judge should convince himself that the court appointed physician can function in such capacity.

The thrust of your question is whether under Chapter 550 and particularly Sections 550.010 and 550.020, RSMo 1969, the state is prohibited from paying such costs because such statutes prohibit the payment of costs incurred on the part of the defendant.

Section 550.010 provides:

"Whenever any person shall be convicted of any crime or misdemeanor he shall be adjudged to pay the costs, and no costs incurred on his part, except fees for board, shall be paid by the state or county."

Section 550.020 provides in part:

"1. In all capital cases in which the defendant shall be convicted, and in all cases in which the defendant shall be sentenced to imprisonment in the penitentiary, and in cases where such person is convicted of an offense punishable solely by imprisonment in the penitentiary and is sentenced to imprisonment in the county jail, workhouse or reform school because such person is under the age of eighteen years, the state shall pay the costs, if the defendant shall be unable to pay them, except costs incurred on behalf of defendant."

However, as noted in our opinion to Curtis and in our subsequent opinion to Wampler, the costs resulting from the appointment of an independent physician by the court on behalf of an indigent under Sections 552.020 and 552.030 are not costs incurred on the part of such defendant within the meaning of Sections 550.010 and 550.020. This view is supported by the decision of the Supreme Court in State ex rel. Hoover v. Bloom, above. Thus, while an indigent is not entitled to have the state pay for the examination

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by a physician "of his own choosing," he is nonetheless entitled to an "independent" examination by a physician appointed by the court.

We further note by comparison that the Missouri Supreme Court in Cramer v. Smith, 168 S.W.2d 1039, 1041 (Mo. banc 1943) held, with respect to the statutory provisions relating to furnishing transcripts on appeal to indigents, that:

"It is not contended that the provision of Section 13344 [now Section 485.100, RSMo Supp. 1971], that the 'court reporter's fees for making the same [transcript] shall be taxed against the state or county as may be proper,' (Emphasis ours) which is found in Chapter 94 in relation to court reporters, authorizes a judgment, as for costs, against either the state or county as of the time the order is made. A fair construction requires us to hold that the language means said fee is to be taxed as costs, in the same manner as other costs are taxed, but with ultimate liability for the same on the state or county as may be proper under the general statutes in relation to criminal costs. Being thus relegated to the general statutes, it is apparent the provision of Section 13344 casting liability for such transcript on 'the state or county as may be proper' cannot be reconciled with Sections 4221 [now Section 550.020, RSMo 1969] and 4222 [now Section 550.030, RSMo 1969], both of which expressly provide that neither the state nor county shall pay such costs 'as were incurred on the part of the defendant.' Section 13344, being the later enacted statute, must be held to have repealed, by necessary implication, the contrary provisions of Sections 4221 and 4222, to the extent noted."

The above holding is applicable in the premises because under Section 552.080 the costs are payable by the county as an interim payment (State v. Siecke, 472 S.W.2d 367 (Mo. banc 1971)) to be repaid by the state "where the state . . . is liable for such costs under the provisions of chapter 550, RSMo." Thus, the contrary limitation imposed by Sections 550.020 and 550.030 excluding costs incurred on behalf of the defendant in such a case is, as in Cramer, repealed by necessary implication to the extent of the conflict.

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". . . The right of the defendant to an examination by a specialist at the expense of the State would depend upon either a statute or rule granting such right or that it was essential to due process of law. . . ." State v. Aubuchon, 381 S.W.2d 807, 813 (Mo. 1964)

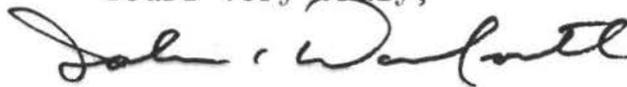
In the premises, it is our view that that right is granted by statute and is essential to due process.

CONCLUSION

It is, therefore, the opinion of this office that an indigent defendant is not entitled to have the cost of a mental examination under Section 552.020, RSMo Supp. 1971 or Section 552.030, RSMo 1969, by a physician "of his own choosing" taxed against the state. However, costs of mental examinations made by "independent" physicians appointed by the court pursuant to such sections are taxable against the state in cases which come under the provisions of Section 550.020, RSMo 1969.

The foregoing opinion, which I hereby approve, was prepared by my assistant, John C. Klaffenbach.

Yours very truly,



JOHN C. DANFORTH  
Attorney General

Enclosures: Op. No. 56  
1/27/66, Curtis  
  
Op. Ltr. No. 340  
12/10/71, Wamper