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JEFFERSON CITY

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OPINION LETTER NO. 56

Honorable Donald L. Manford
State Senator, District 8
Room 425, Capitol Building
Jefferson City, Missouri 65101

Dear Senator Manford:

This letter is in response to your question asking:

> "Does a judge of a municipal court of a constitutional charter city have the power to grant bench paroles in vehicular and general ordinance cases? Is this power inherent in the court?"

Additionally, you have provided the following hypothetical factual situation:

> "City A, a constitutional charter city having municipal courts--defendant B is charged under and found guilty of a violation of an ordinance of said city--can judge by inherent power of the municipal court grant B a bench parole?"

From your question and the hypothetical example we assume that the constitutional charter makes no reference to such authority.

Since your question is purely hypothetical, we do not rule concerning the charter or code provision of any specific constitutional charter city. A ruling as to any constitutional charter city would require an analysis of such city's charter and code provisions.

A bench parole is a conditional release from physical custody of a convicted and sentenced defendant ordered by a judge of the convicting court. The prisoner is released upon conditions

to be observed by him, but his conviction and sentence remain in force and he continues in constructive custody. See State v. Brinkley, 193 S.W.2d 49 (Mo. 1946) and 59 Am.Jur.2d Pardon and Parole §78, p. 53.

In Ex Parte United States, 242 U.S. 27, 61 L.Ed. 129, 37 S.Ct. 72 (1916), the United States Supreme Court held that the authority to define and fix the punishment for crime is legislative and the right to relieve from punishment fixed by law is executive in nature. The court further held that within the legislative power to define and fix punishments for crimes is the right to bring to the judicial discretion elements of consideration which would otherwise be beyond the scope of judicial authority. In Affronti v. United States, 350 U.S. 79, 100 L.Ed. 62, 76 S.Ct. 171 (1955), the same court held that the federal judicial power to grant probations springs solely from legislative action and citing Ex Parte United States, supra, held that federal district courts had no power to permanently suspend execution of sentences and release a sentenced and convicted defendant without service of the sentence prior to the Probation Act of 1925.

In State ex rel. Oliver v. Hunt, 247 S.W.2d 969 (Mo. Banc 1952), the court held that prior to the enactment of the Parole Law of 1897 all persons, no matter how extenuating the circumstances, were upon conviction required to undergo the punishment fixed by statute. In so holding the court stated at page 973:

> ". . . While, in this State, we have not held that the power to suspend sentences was inherently vested in the courts, yet, unless the pardoning power granted the governor by the Constitution precludes it from doing so, it is within the power of the legislature to invest the courts with that right. The parole law does that very thing. . . ."

In Weber v. Mosley, 242 S.W.2d 273 (St.L.Ct.App. 1951), the court held a criminal judgment assessing a jail sentence is the penalty prescribed by the court for the violation of law. The essence of the judgment is the kind and amount of punishment inflicted. The judgment is to be satisfied only by undergoing the punishment inflicted unless it be remitted by the sovereign or absolved by death. The court continuing held that under the bench parole law the judicial department was granted the power to grant bench paroles in certain circumstances. In State v. Merk, 281 S.W.2d 607 (St.L.Ct.App. 1955), the court held that the granting or refusal of a bench parole is no part of the trial of the cause

nor is it in any way incident thereto citing State ex rel. Browning v. Kelly, 274 S.W. 731 (Mo. Banc 1925).

Missouri courts have been given the authority to grant bench paroles by the legislature. Sections 549.058 to 549.197, RSMo 1969, grant such authority to circuit and magistrate courts. Section 98.250 grants a similar authority to municipal judges in second class cities. Section 74.653, repealed in 1959, granted judges of alternative form first class cities the authority to grant bench paroles. The court in State ex rel. Oliver v. Hunt, supra, held that such grants were not in conflict with the Governor's constitutional power to grant pardons.

Rule 37.67(c), V.A.M.R., pertaining to municipal and traffic courts, provides as follows:

> "Any court having original jurisdiction to try offenses under these Rules may recommend to the appropriate pardon, probation or parole authorities the granting of a pardon, probation or parole for any defendant convicted and sentenced in such court, or may grant the same if authorized by law."

As there is presently no authorization by law for the granting of bench paroles by judges of municipal courts of constitutional charter cities, such courts may only make the recommendations as provided by subsection (c) quoted above.

It is, therefore, our view that courts including those of constitutional charter cities do not have inherent authority to grant bench paroles but that such authority may be constitutionally invested in those courts by the charter of such a city or by the legislature.

Yours very truly,

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Attorney General