

PENAL INSTITUTIONS: Upon conviction in a capital case on
CRIMINAL PROCEDURE: appeal and stay of execution the sheriff
must deliver the convict to the Warden
of the Penitentiary not more than ten
days from the date of the judgment.

March 31, 1941

Honorable Michael W. O'Hern
Prosecuting Attorney of Jackson County
Kansas City, Missouri



Dear Sir:

This is in reply to yours of recent date wherein you
request an opinion from this department, as follows:

"On February 1st, 1941, in Jackson
County, Missouri, one JAMES BUTTS
was found guilty of Murder in the
First Degree by a jury and the death
penalty was assessed; thereafter, on
the 22nd day of March, 1941, sentence
was pronounced and judgment rendered
against the defendant and the Court
ordered the defendant to be delivered
to the custody of the Sheriff of
Jackson County, and by said Sheriff
to be delivered to the Warden of the
State Penitentiary on the 26th day of
March, 1941, it was further ordered
by the Court that the said JAMES BUTTS
be executed by the Warden on the 1st
day of May, 1941. The defendant filed
an affidavit of appeal and the Court
allowed such appeal.

"In compliance with the order of the
Court the Sheriff on this date is to
deliver the prisoner to the Warden of
the State Penitentiary. Counsel for
the defendant contends that under the
law all proceedings, including the de-
livery of the prisoner to the Warden,

are stayed once an order is made allowing an appeal and that the prisoner should remain in the custody of the Sheriff of Jackson County pending said appeal.

"This office is desirous of having an opinion from your office construing SECTIONS 4108, 4132 and 4135 R. S. Mo. 1939. Such an opinion from your office will be greatly appreciated."

Section 4106 R. S. Mo. 1939, which relates to penitentiary sentences only, reads as follows:

"Where any convict shall be sentenced to imprisonment in the penitentiary, the clerk of the court in which the sentence was passed shall forthwith deliver a certified copy thereof to the sheriff of the county, who shall, without delay, either in person or by a general and usual deputy, cause such convict to be transported to the penitentiary and delivered to the keeper thereof."

Under this section it is mandatory that the sheriff without delay transfer the convict to the penitentiary unless an appeal is taken and a stay of execution granted under Section 4132, R. S. Mo. 1939. Under Section 4106 the execution of the sentence is the taking of the defendant to the penitentiary.

Section 4108, R. S. Mo. 1939, reads as follows:

"When judgment of death is rendered by any court of competent jurisdiction a warrant signed by the judge and attested by the clerk under the

seal of the court must be drawn and delivered to the sheriff. It must state the conviction and judgment and appoint a day on which the judgment must be executed, which must not be less than thirty nor more than sixty days from the date of judgment, and must direct the sheriff to deliver the defendant, at a time specified in said order, not more than ten days from the date of judgment, to the warden of the state penitentiary at Jefferson City, Missouri, for execution."

Under Section 4108, supra, that part which is underlined specifically states: "judgment must be executed." In other words, the execution of the judgment under the death penalty now is performed by the Warden at the Penitentiary. The underlined portion of Section 4108, supra, also directed the sheriff to deliver the defendant to the Warden of the State Penitentiary by order of the court and the delivery of the convict to the penitentiary must be made not more than ten days from the date of the judgment. Under Section 4108, supra, the sheriff is not directed to execute the judgment, but the Warden is directed to execute it as set out in Section 4112, R. S. Mo. 1939.

The act of the sheriff in taking the prisoner to the penitentiary under Section 4108, supra, is only a ministerial act, the same as taking him from the courtroom to the county jail after a defendant has been sentenced to the penitentiary.

The stay of execution granted under Section 4132, R. S. Mo. 1939, is a stay of the administering of the case by the Warden as set out in Section 4112, R. S. Mo. 1939.

Section 4132, R. S. Mo. 1939, reads as follows:

"No such appeal or writ shall stay or delay the execution of such judgment or sentence, except in capital cases, unless the supreme court, or a judge thereof, or the court in which the judgment was rendered, or the judge of such court, on inspection of the record,

shall be of opinion that there is probable cause for such an appeal or writ of error, or so much doubt as to render it expedient to take the judgment of the supreme court thereon, and shall make an order expressly directing that such appeal or writ of error shall operate as a stay of proceedings on the judgment; but in capital cases the order granting the appeal shall operate as such stay absolutely."

This section grants a stay of judgment of sentence to the penitentiary as carried out under Section 4106, supra, upon a proper order being made by the court or, under the case law, by the making of a bond. It also stays execution under the death penalty in capital cases without an order from the supreme court, the court in which the judgment was ordered or, judge of said court.

All sections of the statutes applicable to the same subject matter must be read together. It was so held in *Sayles vs. Kansas City Structural Steel Co.*, 128 S. W. (2d) 1046, 344 Mo. 756. Courts cannot interpolate in a statute where omission is not plainly indicated. It was so held in *Betz vs. Columbia Telephone Co.*, 24 S. W. (2d) 224.

Section 4132, supra, does not state that the sheriff cannot proceed with his duties under the law, but states: "shall operate as a stay of proceedings on the judgment." Under a penitentiary sentence taking the prisoner to the penitentiary was a proceeding in the execution of the judgment, where, under the death sentence, the proceeding on the judgment is the act of the Warden.

Section 4108, supra, was re-enacted in the Laws of 1937, page 221, and is a much later law than Section 4132, supra. That the later law governs was held in *Stiers vs. Vrooman*, 115 S. W. (2d) 84. Section 4135, R. S. Mo. 1939, reads as follows:

"If the defendant in the judgment so ordered to be stayed shall be in custody, it shall be the duty

of the sheriff, if the order were made by the court rendering the judgment, or upon being served with the clerk's certificate and a copy of the order, to keep the defendant in custody without executing the sentence which may have been passed, to abide such judgment as may be rendered upon the appeal or the writ of error."

The above section applies only to the execution of sentences which are performed by the sheriff and is not applicable to the execution of the sentence calling for the gas chamber which is performed by the Warden of the Penitentiary. Section 4135 and Section 4132, R. S. Mo. 1939, were construed in Ex Parte Carey, 267 S. W. 806, loc. cit. 808, 306 Mo. 287, where the court said:

"The fundamental idea underlying both decisions, as disclosed by the opinions, is this: If a defendant in a criminal cause who has appealed from the final judgment therein may, notwithstanding, be subjected to the punishment assessed against him, while his appeal is pending and before it can be heard, then the remedy afforded by appeal can thereby be measurably defeated; this the Legislature after expressly conferring the remedy could not have intended."

Under the above holding the Supreme Court declared it was not the intention of the Legislature that a man who had been convicted on a criminal charge and had appealed shall be subjected to the punishment assessed against him while his appeal is pending. These sections set out are only applicable to cases where the defendant receives a penitentiary sentence and are not applicable to cases where the defendant is adjudged to die in the gas chamber. Under the law, a defendant con-

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victed and assessed the death penalty cannot make bond and must be held under Section 4108, supra, in the penitentiary until the final judgment of the case in the Supreme Court.

CONCLUSION

In view of the above authorities, it is the opinion of this department that when Section 4132, R. S. Missouri 1939, is invoked in a death case, a stay of execution automatically exists without an order of any court. Under that part of Section 4108, R. S. Missouri 1939, which provides that the sheriff deliver the defendant, where a death sentence has been rendered, at a time specified in an order of the court, it is mandatory that the sheriff deliver the prisoner within a time not more than ten days from the date of the judgment. He should deliver the prisoner to the Warden of the State Penitentiary at Jefferson City, Missouri, for execution of the judgment. The stay of execution only applies to the warden and not to the sheriff who takes the prisoner to the penitentiary for the reason that the execution of the judgment is performed by the warden under Section 4112, R. S. Missouri 1939, and the act of the sheriff in taking the prisoner to the penitentiary is not a part of the execution of the judgment.

Respectfully submitted

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APPROVED:

VANE C. THURLO
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