MAGISTRATE COURT:
HABEAS CORPUS:

Application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that application for such a writ to a magistrate court must state that no circuit judge is available.

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Honorable O. Hampton Stevens
Assistant Prosecuting Attorney
Jackson County
Courthouse
Kansas City, Missouri

Dear Sir:

This department is in receipt of your recent request for an official opinion. You thus state your opinion request:

> "Our office would like an official opinion on the right of a Magistrate to grant a Writ of Habeas Corpus.
>
> "Apparently, the statute governing the right of a Judge of the Magistrate Court to issue a Writ of Habeas Corpus is Sect. 1658, Art. 6, Writ of Habeas Corpus, Rev. Statutes 1939. (Sect. 532.030, 1949.) The caption of this section is, 'Application, to what court first made.' The pertinent part of this section of the statute reads as follows:
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> "'When a person applies *** his application, in the first instance, shall be to the judge of the Circuit Court for the County in which the applicant is held in custody, if, at the time of the application, such judge be in the County ***.'
>
> "It is our opinion that an application for a Writ of Habeas Corpus cannot be made to a Magistrate's Court in Jackson County, unless the application sets out that none of the Circuit Court judges are present in the county at the time the application is made. (We have ten divisions of our Circuit Court.) We

> believe the opinion of the Supreme Court in Banc. Ex Parte Hagan, 245 S.W. 336, which case interprets the above statute, and that the language of the opinion should be governing on this point. We quote L.C. 337--
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> "'It should be said that Sect. 1944, R.S. 1919, really contemplates that if the Circuit Judge is in the County, application should not be made for the Writ to an inferior court rather than to the Circuit Judge. This, on the theory that it would be a reasonable regulation to require application to a superior court rather than an inferior court, if a Judge of the superior court was at hand.'
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> "We would appreciate your advice on this subject."

We will first state that it is our belief that a magistrate court has the power to issue a writ of habeas corpus. We have so held in an opinion issued to Honorable H. A. Kelso, Prosecuting Attorney of Vernon County, on July 23, 1946, a copy of which opinion is enclosed.

We assume from your letter that you do not question the power of a magistrate court to issue this writ, but that you do ask us to decide whether, when an application for the writ is made to a magistrate court, the application must state that no circuit judges in the county are available to entertain the application. In regard to this matter, we direct your attention to the following portion of Section 532.030, RSMo 1949:

> "When a person applies for the benefit of this chapter, who is held in custody on a charge of crime or misdemeanor, his application, in the first instance, shall be to the judge of the circuit court for the county in which the applicant is held in custody, if, at the time of the application, such 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 he, at the time of the application, shall be in said city; * * *"

Prior to 1922, numerous cases held that the above section, which has been in force in Missouri for many years, in substantially its present form, meant that application for a writ of habeas corpus was always to be made first to the circuit judge, rather than to a superior court, if the circuit judge was available. Two of these cases, Ex parte Joseph Gaume, Petitioner, 162 Mo. 390, and Ex parte James Shoffner, 173 Mo. App. 403, the first being decided in the Missouri Supreme Court and the second in the Springfield Court of Appeals, held that those courts were without power to issue a writ of habeas corpus because the application made to them did not state that the circuit judge was not available. However, in 1922, the Missouri Supreme Court, in the case of Ex parte Hagan, 245 S.W. 336, put a different interpretation on what is now Section 532.030, RSMo 1949. In this case the petitioner applied to the Missouri Supreme Court for a writ of habeas corpus, which writ was granted. Subsequently a motion was filed to quash the writ of habeas corpus issued by the Missouri Supreme Court on the ground that the court was without jurisdiction. In overruling this motion the court stated, in part, l.c. 337:

> "I. We have first a motion to quash our writ. Of recent years this motion is novel, to say the least. It has, however, foundation both in statute and decisions. Singular as it may seem, plain constitutional provisions are sometimes overlooked by the courts. In the grant of power to this court the Constitution (section 3, art. 6) says:
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> "'The Supreme Court shall have a general superintending control over all inferior courts. It shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari and other original remedial writs, and to hear and determine the same.'
>
> "(1) This constitutional power to issue the writ is absolute. It is a grant of original and concurrent jurisdiction. There is no qualification or restriction in the organic law. Without a restriction in the organic law, the Legislature is without power to limit our jurisdiction. Our jurisdiction

is one of a broad and unrestricted constitutional grant and a legislative restriction would be violative of this grant.

"We must concede that section 1944, R.S. 1919 (a statute upon the books for years), seemingly undertakes to restrict the original jurisdiction of this court, as such is given by the Constitution."

* * * * *

"Without discussion, this statute, as a restriction upon the prerogatives of this court, has been enforced in certain cases. Ex parte Gaume, 162 Mo. 390, 62 S.W. 984; Ex parte Shoffner, 173 Mo. App. 403, 158 S.W. 853. The Gaume Case from this court has never been cited since, except in 173 Mo. App. 403, 158 S.W. 853, and in State v. Buckner (Mo. Supp.) 234 S.W. loc. cit. 652, so far as we find, in the latter, with nothing but a limited approval. It is true that the statute and the Gaume case, supra, sustain the contention of the respondents in this case. The Gaume Case, from its face, shows that the real question was not raised or considered. In the early case of Ex parte Bethurum, 66 Mo. loc. cit. 553, the unrestricted right of this court to issue the writ is recognized, and the right of the lawmakers to destroy this right is also denied."

* * * * *

"Under the Constitution, this court is given the right to grant writs of habeas corpus. No legislative act can take away or curtail this constitutional grant. It would be useless for the people (in the Constitution) to grant this court a right, if the Legislature could later destroy the right. What is granted by the Constitution cannot be curtailed or destroyed by legislative act.

> "It should be said that section 1944, R.S. 1919, really contemplates that if the circuit judge is in the county, application should not be made for the writ to an inferior court, rather than to the circuit judge. This on the theory that it would be a reasonable regulation to require application to a superior court rather than an inferior court if a judge of the superior court was at hand. This principle is far different from that of cutting down an original and concurrent jurisdiction in a superior court. Of recent years we have recognized the unrestricted right of this court, in the exercise of its constitutional right, to issue and hear these writs."

The above case was cited with approval by the Missouri Supreme Court in 1929, in the case of State vs. Rudolph, 17 S.W. 2d 932, l.c. 934.

It will be observed that the Hagan case states, by way of dictum, that if the circuit judge is in the county at the time application for the writ is made, that the application should be to him rather than to an inferior court. The case of Ex parte Hagan, supra, overrules the cases of Ex parte Joseph Gaume, supra and Ex parte James Shoffner, supra, only insofar as the jurisdiction of the Supreme Court and the courts of appeals are concerned.

We would here call attention to Section 4, Article V of the Constitution of Missouri, which states:

> "The supreme court, courts of appeals, and circuit courts shall have a general superintending control over all inferior courts and tribunals in their jurisdictions, and may issue and determine original remedial writs."

It will be observed that magistrate courts are not courts named as ones having jurisdiction to issue remedial writs, of which habeas corpus is one. Therefore, the right and jurisdiction must be shown.

Honorable O. Hampton Stevens

In view of all of the above, it is our belief that an application to a magistrate court for a writ of habeas corpus should state the unavailability of a circuit judge for that purpose.

CONCLUSION

It is the opinion of this department that application for a writ of habeas corpus should not be made to a magistrate court when a circuit judge is available, and that when an application for a writ of habeas corpus is made to a magistrate court, it should state the unavailability of a circuit judge for the purpose of entertaining the application.

Respectfully submitted,

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APPROVED:

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Enclosure.