CRIMINAL COSTS:

Statute of limitations begins to run after conviction and sentence and not from the time of certification of a fee bill.

June 3, 1938

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Mr. W. P. Wilkerson,
Prosecuting Attorney,
Scott County,
Sikeston, Missouri.

Dear Sir:

This is in reply to your request dated May 30, 1938 for an official opinion from this department which request is as follows:

> "The above named Defendants were convicted in our Circuit Court on felony charges and sentenced to the penitentiary. At the time of conviction they were all given bench paroles. They were out on parole for a period of more than two years during which time the cases were carried on our docket and reports of good conduct were made. At the end of a little more than two years they violated their paroles and were sent to the penitentiary at which time the Judge ordered the costs certified which accordingly was done in due course and payment was refused by Mr. Nutter, the criminal cost clerk, on the ground that the claims were not exhibited within the two years statute of limitations as provided in Sec. 11416, Page 7803 M.S.A. In addition to this statute Mr. Nutter also relies on State vs. Draper, 48 Mo. 56, for the proposition that the statute of limitations applies to criminal cost bills and on State ex rel. v. Kelly, 274 S.W., l.c. 733, on the proposition that

the case was concluded when final judgment and sentence was rendered.

In other words Mr. Nutter has reached the conclusion that the statute begins to run when final judgment and sentence was rendered which in this case was more than two years before the cases were certified.

I have no quarrel with his conclusion of law that criminal cost bills are subject to the two years statute of limitations. I think he was undoubtedly right about that.

But I feel that he has been improperly advised when he says that the Kelly case is authority for the proposition that the statute begins to run at the time of judgment and sentence. The Kelly case involves only a determination of the powers of a special judge in connection with a parole and in this connection I will say that I am now defending an action in the Springfield Court of Appeals in the nature of Habeas Corpus, which if the points raised are fully passed upon, will completely charify the powers of a special judge as well as those of the regular judge where the plea is heard by a special judge in connection with granting and revoking paroles. I have been very close to the Kelly case and have heard it argued a hundred times and by counsel on each side of it and by Judge Kelly, and I can say to you and I do not believe it can be contradicted that the whole point in that case revolves about the powers of special judges in criminal cases and incidentally the power of the Circuit judge to commit where the action of the special judge is void for the lack of jurisdiction.

It is my idea, and the law must be, that the statute of limitations does not begin to run on cost bills such as these, that is, where a parole was granted, until the order to certify same is entered. If the law is otherwise it would cost the State thousands of dollars annually that otherwise could be avoided. In this county at least we use every possible method to compel parolees to pay all costs and that is the reason and the only reason that the costs in these cases were not certified until the cases were finally terminated by commitment to the penitentiary. We had hopes that we might compel the Defendants to pay these costs and thus save the State that much money.

It is apparent to me that as far as the workings of our courts are concerned, it makes little difference whether the State Auditor will say that the statute of limitations begins to run at the time of sentence and judgment, or whether it begins to run at the time certification is ordered. I take it there is no doubt that the court can and no doubt will order all costs in criminal cases certified at the time sentence and judgment is entered so that they may be paid by the State as the law provides, and the county saved unnecessary expense, but to do so it seems to me would be an unwise move for the reason that by bringing pressure to bear on parolees, the courts all over the State no doubt will collect large sums from them and save the entire governmental setup that much money and in my opinion they should be encouraged to do this.

However, as I say I am sure it will be no inconvenience to us one way or the other, but we would like to have the point definitely settled so that criminal cost bills in the case of parolees can be handled in such a way as to meet the requirements of the

State Auditor's Office in the future.

Will you please, therefore, let me have your opinion as to whether the statute of limitations in cases such as these, begins to run at the time of judgment and sentence or at the time the case is finally closed and the parolee ordered discharged or committed, and the costs ordered certified."

Section 11416, R.S. Mo. 1929, reads as follows:

"Persons having claims against the state shall exhibit the same, with the evidence in support thereof, to the auditor, to be audited, settled and allowed, within two years after such claims shall accrue, and not thereafter."

In State ex rel. Johnson v. Draper, State Auditor, 48 Mo. 56, the court passed upon a section of the general statute which was very similar to Section 11416, supra, It said in respect to this statute as follows:

"It is admitted that these supplemental costs bills were not presented until after the expiration of two years from the final determination of the prosecutions, and I can see no reason for excluding this class of claims from the operation of the statute. The language is general, and if the statute should be held not to apply to the claims of those interested in costs bills, I know not whose should be included, or how to fix any rule for enabling the auditor to decide what must be presented within two years, or what may lie by for an indefinite period. The reason of the requirement certainly

> applies with as much force to this as to any other class of claims, and we have no authority to say that the Legislature did not intend to require their prompt presentation. It is clear that the Legislature intended to limit the power of the auditor to recent and fresh claims, reserving to itself the power, if any strong equity should be shown in favor of an older one, to pass upon it by a special act."

Section 3844, R.S. Mo. 1929 reads as follows:

> "When a fee bill shall be certified to the state auditor for payment, the certificate of the judge and prosecuting attorney shall contain a statement of the following facts: That they have strictly examined the bill of costs; that the defendant was convicted or acquitted, and if convicted, the nature and extent of punishment assessed, or the cause continued generally, as the case may be; that the offense charged is a capital one, or punishable solely by imprisonment in the penitentiary, as the case may be;"* * * * * * * * * *

In your letter of request you desire to know when the statute of limitations begin to run. You ask if it starts at the time of certification of cost bill or does it start at the time of conviction and sentence. In the case of State v. Kelly, 274 S.W. 731, l.c. 733, the court said:

> "Of course, the special judge may pass on the motion for a new trial, grant an appeal, settle the bill of exceptions, etc. This because such matters, being but procedural steps to be taken in arriving at the ultimate determination of defendant's guilt or innocence, are so related to the trial of the cause as

> to be deemed incident thereto. But the granting of a parole has naught to do with the ascertainment of guilt or innocence. It presupposes the defendant's guilt. An application for parole cannot be entertained until after a judgment of conviction has been rendered (sections 4156 and 4157, R.S. 1919) and that judgment has become a finality (section 4167, R.S. 1919). The granting of a parole, therefore, whether it be deemed a conditional suspension of sentence or a conditional pardon is no part of the trial of a cause which culminates in a judgment of conviction, nor is it in any way incident thereto. No appeal lay from the judgment entered on the pleas of guilty of defendants Morgan and Burnett. It was a final determination of the cause. When Judge Ing rendered that judgment, his powers and duties as special judge came to an end. Consequently he was not the judge of the Cape Girardeau county circuit court on the 31st day of August, 1923, for any purpose whatever."

In this opinion the court not only passed on the authority of the special judge in granting a parole but also ruled that the parole was an incident to the conviction and was no part of the trial of the cause and could not be given until after a judgment of conviction had been rendered and that judgment has become a finality. This holding means that after the judgment and sentence, the cause was finally disposed of and that the parole was a matter separate and apart from the case itself and, therefore, the statute of limitations begin to run at the time of the final judgment and sentence and not at the time of certification of the cost in the case.

Section 3821, R.S. Mo. 1929 reads as follows:

"No parole shall be granted in any case

> while an appeal is pending, nor shall the action of any court or judge in granting or terminating a parole be subject to review by any appellate court."

In other words, this section shows that the intention of the legislature in passing the act deemed that after judgment and sentence the cause was finally disposed of as far as the crime itself, and that the parole was no part in the trial of the cause nor in any way incident thereto. This Section 3821, supra, was also passed on in State v. Kelly, supra.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the statute of limitations on cost bills in criminal cases in which the state is liable for the cost begins to run from the time of the judgment of conviction and sentence and not from the time that the costs was certified by the prosecuting attorney and criminal judge.

Respectfully submitted,

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Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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