

FILE

Subject

Elections, Voters

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*Absentee
Procedure Criminal
Process & Parole
Restoration of Rights*



STATE OF KANSAS

Office of the Attorney General

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Attorney General

August 14, 1974

Opinion No. 74- 280 .

Mrs. Ruth W. Wilkin
State Representative
1610 Willow Avenue
Topeka, Kansas 66606

Re: Absentee registration and voting of pretrial detainees and convicted misdemeanants. Restoration of civil rights to state and federal felons upon completion of their sentences or parole.

Dear Mrs. Wilkin:

You inquire concerning absentee registration and/or absentee voting by convicted misdemeanants who are in jail and pretrial detainees imprisoned in the county of their residence.

In O'Brien v. Skinner, ___ U.S. ___, 38 L.Ed. 2nd. 702, 94 S.Ct., 740 (1974), the Court held New York statutes unconstitutional which purported to deny absentee registration or voting to detainees in county jails awaiting trial or serving misdemeanor sentences. The Court ruled that the challenged statutes were arbitrary and denied equal protection to the detainees under the Fourteenth Amendment.

K.S.A. 21-4615 provides in pertinent part:

"A person who has been convicted in any state or federal court of a crime punishable by death or by imprisonment for a term of one (1) year or longer and is imprisoned pursuant to such conviction shall by reason of such conviction and imprisonment, be ineligible to hold any public office under

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the laws of the State of Kansas, or to register as a voter or to vote in any election held under the laws of the State of Kansas. . ."

K.S.A. 21-3105 provides:

"(1) A felony is a crime punishable by death or by imprisonment in any state penal institution.

(2) All other crimes are misdemeanors."

In light of the foregoing, it is our opinion that K.S.A. 24-4615 denies the voting rights only to those convicted of felonies but does not apply to detainees awaiting trial or serving misdemeanor sentences.

You also inquire whether civil rights are restored to convicted felons (either state or federal) upon completion of their sentence or parole. K.S.A. 1973 Supp. 22-3722 which provides in pertinent part:

"When an inmate on parole or conditional release has performed the obligations of his release for such time as shall satisfy the authority that his final release is not incompatible with the best interest of society and the welfare of the individual, the authority may make a final order of discharge and issue a certificate of discharge to the inmate. . . Such discharge, and the discharge of an inmate who has served his term of imprisonment, shall have the effect of restoring all civil rights lost by operation of law upon commitment. . ." [Emphasis supplied].

This office concluded in Opinion No. 71-21-9 that when a state or federal inmate has fully discharged the terms of his sentence, the disabilities imposed by law cease to attach and his civil rights are fully restored provided the statutory requirements of K.S.A. 22-3722 have been met. Our opinion remains unchanged.

The question remains to be considered in what manner the right to register and vote may be extended under Kansas law to persons so detained. K.S.A. 25-2309(a) states in pertinent part thus:

"Except as provided in subsections (b) and (c) of this section, no person shall be registered unless he appears in person before the county election officer or a deputy county election officer at the office of the county election officer or at a place designated by the county election officer, and applies in writing, while so appearing, to be registered" [Emphasis supplied.]

Subsection (b) provides for registration of persons who are sick or physically disabled:

"Any sick or physically disabled person who because of such illness or physical disability will be unable to appear in person as provided in subsection (a) of this section within the time required by law, may apply to the county election officer to be registered."

Such an application must be attested by a duly licensed physician or by a Christian Science practitioner. Absentee registration is authorized by subsection (c), by "[a]ny person who, because of being absent from the county, cannot appear in person as provided in subsection (a)"

Personal appearance to cast one's vote is not required, similarly, for those who are sick and physically disabled, and those who are absent from the county in which the voter is legally entitled to cast his vote. K.S.A. 25-1229 states thus:

"Any elector of the state of Kansas, having complied with the law in regard to registration where such registration is required and who is sick or physically disabled and because of such sickness or physical disability will be unable to attend and vote at his voting place upon the day of any national, state, county, school or city primary or general election, or any special election of whatever nature, may cast his vote at such election as hereinafter provided." .

Under K.S.A. 25-1122, one who is

"necessarily absent from the county in which he resides or in which he is otherwise authorized by law to vote as a former resident, or will be necessarily absent on the day of said primary or general election"

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is entitled to cast an absentee ballot.

Thus, one who is detained in a county other than that in which he resides or is otherwise entitled to vote as a former resident, is legally eligible for absentee registration and voting. One who is detained in the county of his residence is not, however, for he is not "absent from the county" The question remains whether any person so detained is "physically disabled" so as to qualify for registration and voting procedures applicable to the sick and/or physically disabled.

In the litigation leading to the decision in O'Brien v. Skinner, supra., this question was posed. It was answered initially by the Supreme Court for Monroe County in New York thus:

"The court concluded that the election laws should be construed to apply to an inmate confined in jail and not otherwise disenfranchised since this constituted a 'physical disability' in the sense that he was physically disabled from leaving his confinement to go to the polls to vote, and that the statute therefore entitled such persons to vote by absentee ballot. . . . The Appellate Division of the Fourth Judicial Department of the Supreme Court of New York on review gave a similar construction to the Election Laws stating:

'We believe that petitioners being so confined are physically disabled from voting and should be permitted to do so by casting absentee ballots.'" 38 L.Ed.2d. at 706.

The New York Court of Appeals, the highest appellate court of the state, reversed, adopting the contrary view, holding that confinement or detention did not constitute a "physical disability." The United States Supreme Court stated thus:

"The construction given the New York statutes by its trial court and the Appellate Division may well have been a reasonable interpretation of New York law, but the highest court of the State has concluded otherwise and it is not our function to construe a state statute contrary to the construction given it by the highest court of a state. We have no choice, therefore, but to hold that, as construed, the New York statute denies appellants the equal protection of the law guaranteed by the Fourteenth Amendment." 38 L.Ed.2d. at 708.

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The Kansas statutes concerning the rights of sick and physically disabled persons to register and to vote other than in person must be construed in the light of this decision, and with a view to upholding their constitutionality, as applied to persons detained as described above, insofar as possible. To construe the term "physical disability" as including only bodily infirmities and disabilities, and not physical constraints imposed by the state which bar detainees from voting, would require a conclusion that, as applied, the resulting restrictions upon the rights of persons detained in counties of their residence are unconstitutional and void, under O'Brien v. Skinner, supra.

Accordingly, in light of that decision, it is our opinion that persons detained awaiting trial, and convicted misdemeanants serving sentences of less than one (1) year, must be deemed persons "physically disabled," within the meaning of K.S.A. 25-1229, and entitled to the registration and voting procedures available to such persons. We note that the application for registration by such persons under K.S.A. 25-2309(b) requires that it be attested by a duly licensed physician, or by a Christian Science practitioner. This requirement appears designed to assure that the sickness or physical disability is bona fide. Obviously, a medical judgment is not required to confirm that a person so detained as described above is not able to appear in person in order to register. Nonetheless, this requirement may be enforced, consistent with the construction of the statute described above, and should be adhered to.

It is, to recapitulate, our opinion that persons who are detained awaiting trial, and those serving misdemeanor sentences, who are otherwise qualified electors under the Constitution and laws of the State of Kansas, must be extended the same rights of registration and voting as available to persons who are "physically disabled" under the statutes cited above.

Yours very truly,



VERN MILLER
Attorney General

JRS:jdm