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ATTORNEY GENERAL OPINION NO. 87-147

Mr. Timothy J. Chambers  
Reno County Attorney  
Law Enforcement Center  
210 West First Street  
Hutchinson, Kansas 67501

Re: Counties and County Officers -- Sheriff --  
Transporting Inmates to Civil Proceedings

State Departments; Public Officers and Employees --  
Department of Corrections -- Transportation of  
Inmates to Civil Proceedings

Synopsis: The primary responsibility for transporting a  
prisoner to court in a civil case under a writ of  
ad testificandum lies with the custodian. In  
the absence of statutory or judicial direction,  
there is no authority to cause third parties who  
are neither custodians nor parties to the  
litigation to bear the costs of transporting a  
prisoner. Cited herein: K.S.A. 19-812; 60-1503;  
75-5201; 28 U.S.C. §§ 2241 and 2243.

Dear Mr. Chambers:

As Reno County Attorney, you have requested our opinion  
concerning the transportation of prisoners to court.  
Specifically, you inquire whose responsibility it is to  
transport a prisoner in the custody of the Secretary of  
Corrections when that prisoner is needed to appear in court in  
a civil case.

You indicate that in criminal cases the Department of Corrections transports the prisoner if the crime occurred within their institution. When the crime is one that occurred in Reno county, outside K.S.I.R., the sheriff's office transports the prisoner to court. Thus, the problem of transporting a prisoner arises only when a civil proceeding is involved. You further indicate that it is undisputed that both the Department of Corrections and the Sheriff, as officers of the court, must obey the mandate of the court and transport prisoners if the court so orders. K.S.A. 75-5201 et seq. and K.S.A. 19-812. However, because the transportation of prisoners to civil proceedings causes a hardship on both, you request our opinion.

There are no statutes or case law in our state specifically setting forth the relative responsibilities of transporting prisoners to civil proceedings. As such, the question presented is one appropriately for the legislature. However, because we are presented with an issue of substantial practical importance (who must bear the costs of transporting prisoners when directed by our courts), we are persuaded to answer your question in the context of a writ of habeas corpus ad testificandum.

A writ of habeas corpus ad testificandum is an order calling for the production as a witness of one lawfully incarcerated. Courts issue these writs when it is necessary to bring a person who is confined in a prison or jail into court to testify in a pending case. U.S. v. Bailey, 585 F.2d 1087, 1090, (D.C. Cir. 1978). Although subject to regulation by statute, the power to issue the writ is inherent in the courts. When such a writ is served, the sheriff, jailer or other custodian of such person is bound to bring him into court to give his testimony. 97 C.J.S. Witnesses §30 (1957).

The Supreme Court of the United States has had occasion to answer whether third parties, who are neither custodian nor parties to the litigation, should bear the cost of producing prisoners in a federal court under a common-law writ of habeas corpus ad testificandum. In PA. Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 106 S. Ct. 355, 88 L.Ed.2d 189 (1985), the United States Marshals Service was ordered by the United States District Court for the Eastern District of Pennsylvania to transport a prisoner from the county jail to the federal court. This decision was reversed by the United States Court of Appeals for the Third Circuit. On certiorari, the United States Supreme Court

affirmed, holding that in the absence of exceptional circumstances, neither a magistrate nor a district court has the authority to order the Marshals to transport state prisoners to the federal courthouse in an action brought by a state prisoner under 42 U.S.C. §1983 [a civil action] against county officials. (But c.f., Justice Steven's dissent).

The holding in this case is predicated in part on the habeas corpus statute found in 28 U.S.C. §2243. It provides in pertinent part that the writ "shall be directed to the person having custody of the person detained." The Supreme Court agreed with the Court of Appeals that there was no basis in the habeas corpus statute for the District Court's authority to direct a writ ad testificandum to a non-custodian. The Supreme Court reasoned:

"We find no evidence in the language of §2241 and §2243, in their legislative history, or in the common-law writ ad testificandum to suggest that courts are also empowered to cause third parties who are neither custodians nor parties to the litigation to bear the cost of producing the prisoner in a federal court. We therefore conclude that there is no basis in the habeas corpus statute for a federal court to order the Marshals to transport state prisoners to the federal courthouse." PA. Bureau of Correction v. U.S. Marshals Service 474 U.S. at 39, 106 S.Ct. at 359, 88 L.Ed.2d at 194-195 (1985). (Emphasis added.)

While not directly on point (because it deals with federal marshals' duties), the Supreme Court case is useful by analogy. The Kansas statute dealing with general writs of habeas corpus is found at K.S.A. 60-1503, which states:

"(b) Form. The writ shall be directed to the party having the person under restraint and shall command him or her to have such person before the judge at the time and place specified in the writ."

The statute makes it clear that general writs are to be addressed to the custodian and that the custodian is charged with bringing the person before the judge. Applying this

statute to writs of habeas corpus ad testificandum, we conclude that the custodian is the proper entity to be charged with the transportation.

Accordingly, it is our opinion that the custodian of the prisoner is the appropriate entity to be charged with the transportation of a prisoner to a civil action until such time as the legislature further clarifies the relative responsibilities. See also Note, "Transportation of State Prisoners to their Federal Civil Rights Actions," 53 Fordham L. Rev. 1211, 1228-29 (1985), cited in U.S. v. Sokolov, 814 F. 2d 864 (2nd Cir. 1987).

Very truly yours,

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RTS:JLM:GE:jm