CRIMINAL LAW: Convict under death penalty reprieved by Governor
INSANITY: and discharged by State Hospital as sane is subject to execution.

October 18, 1941

10-24

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

Dear Sir:

We are in receipt of your request for an official opinion from this department under date of October 15, 1941, which is as follows:

> "This office is desirous of obtaining an opinion from the Attorney General's Office upon several questions of criminal procedure, based upon the facts hereafter set out:
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> "On June 26th, 1929, one FERDINAND BROCKINGTON, a negro, was found guilty of 'Murder in the First Degree,' before the Honorable Ralph S. Latshaw (now deceased), then Judge of the Criminal Court of Jackson County, Missouri, and the said BROCKINGTON'S punishment was assessed at death by hanging. The Supreme Court of Missouri, on the 25th day of March, 1931, affirmed the sentence of death and fixed the date of execution at the 8th day of May, 1931, and, in describing the facts attending the murder, used the following language (see 36 S. W. (2) 911):
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> "'Defendant was a negro fifty-four years of age, and May 12, 1929 lived at 1409 Brooklyn, Kansas City. His family consisted of a wife and several children, four of whom and one son-in-law were in the house with him at the time of the alleged murder. On the night of May 11, 1929, he came from his work for his supper at the usual time, went back to

the city and returned after midnight, drunk. He had originally come from Arkansas and had been in Kansas City only a few months. He was in a bad temper, raised a disturbance with his family and ordered his wife to pack his suit case, he was going back to Arkansas; made sinister threats and created such a disturbance that one daughter went out and called the police. Also his son-in-law, George Ross, called the police. The defendant learned of these calls, became enraged and said if the police came he would mow them down. Officers Ralph Hinds and Delbert Bates came to the place. Hinds knocked on the door calling out, 'Police Officers.' The defendant had a revolver, opened the door and fired several shots, three of which struck Hinds, mortally wounding him. Bates was wounded, the defendant ran out of the back door. He was arrested two or three hours later. A half-pint bottle of corn whiskey about half full was found on him, also a 32-calibre revolver which was empty but indicated by the odor of burnt powder that it had been recently discharged .....'

"'I. The defense was insanity and one point made in the motion for new trial is that the evidence was insufficient to sustain a verdict of murder in the first degree because it showed the defendant was in such mental condition that his act could not have been deliberate. The defendant introduced a number of witnesses who testified that at times he showed evidence of insanity, and they believed him insane. The state introduced counter evidence upon that point. The defendant and members of his family, all of whom contradicted their written statements made the next day after the homicide, testified that he had spells during which he didn't know what he was doing. He himself said that

he came home that night, became unconscious, and didn't know anything that happened from the time he got home until he found himself in the police station, lying on the floor and somebody kicking him. There was sufficient evidence from which the jury could readily find that he was only beside himself with whiskey, that the shooting was deliberate, and that he was fully cognizant of the character of the act.'

"On the 14th day of July, 1930, Henry S. Caulfield, Governor of the State of Missouri, wrote a letter to J. H. Smedley, Sheriff of Jackson County, Missouri, advising said Sheriff that a petition had been presented to the said Governor tending to support a claim of insanity on the part of BROCKINGTON. Governor Caulfield in the letter cited Section 4148, R. S. Missouri 1919 (now Section 4192 R. S. Missouri 1939); Section 4149 R. S. Missouri 1919 (now Section 4193 R. S. Missouri 1939); Section 4150 R. S. Missouri 1919 (now Section 4194 R. S. Missouri 1939); and Section 4151 R. S. Missouri 1919 (now Section 4195 R. S. Missouri 1939).

"The above statutes provide in substance that if a sheriff shall have cause to believe that any convict who has been sentenced to the punishment of death has become insane, he may summon a jury of twelve jurors to inquire into such insanity; provide that the Prosecuting Attorney shall attend such inquiry, that if such convict is found insane the sheriff shall suspend the execution of the sentence until he has received a warrant from the Governor or from the Supreme or other Court directing the execution of such convict; and that the sheriff shall transmit such inquisition to the Governor.

"Governor Caulfield after citing said statutes requested an opinion from the

sheriff as to whether BROCKINGTON was probably insane and whether the sheriff would summon a jury to hold an inquisition as provided by the above sections of the statutes. As a result of said letter the sheriff of Jackson County, summoned a jury which found the defendant to be insane as of that time. Acting upon this finding Governor Caulfield, on the 29th day of April, 1931, less than a month after the Supreme Court had affirmed the death sentence, suspended the execution of said sentence and ordered the sheriff of Jackson County to immediately convey said FERDINAND BROCKINGTON to the State Hospital for the Insane No. 2, located at St. Joseph, Missouri, 'there to be detained until restored to reason.' The Governor further ordered the Superintendent of said State Hospital to receive said BROCKINGTON, safely keep him confined in said Hospital and treat him for insanity 'until restored to reason,' at which time the said Superintendent should give due notice to the Governor of the State 'who shall then order sentence to be executed.' The said BROCKINGTON was confined in the State Hospital No. 2, at St. Joseph, Missouri, from the 30th day of April, 1931, until the 1st day of August, 1933, at which time he escaped therefrom.

"The records of said State Hospital show that FERDINAND BROCKINGTON was never classified as to any psychosis, ie., as to whether he was sane or insane. Said records further show that on the 21st day of August, 1934, over a year after BROCKINGTON escaped from the Hospital, he was 'discharged' from the Institution by authority of the President of the Board of Managers of the State Eleemosynary Institutions. According to an affidavit of James R. Bunch, now Superintendent of said State Hospital No. 2, the records of said Institution show 'that the said Ferdinand Brockington is no longer

wanted by said Institution.'

"FERDINAND BROCKINGTON was arrested in Pontiac, Michigan, on the 22nd day of September, 1941, under the name of 'John D. Oliver.' He has been positively identified as the FERDINAND BROCKINGTON above described; and the finger prints of the man arrested in Pontiac, Michigan, have been declared by the Federal Bureau of Investigation, Washington, D. C., to be identical with those of the FERDINAND BROCKINGTON above described.

"FERDINAND BROCKINGTON has been returned to the State of Missouri, under extradition proceedings instituted by the Prosecuting Attorney's Office of this County, and he is now confined in the County Jail in Kansas City, Missouri.

"Affidavits have been obtained in Pontiac, Michigan, by the office of the Prosecuting Attorney of Jackson County, tending to show that FERDINAND BROCKINGTON for the past four and one-half years has been sane.

"Bearing in mind the above facts the following questions have arisen as to the procedure to be followed henceforeward in the execution or commitment of the defendant:

"1. Under Sections 4194 and 4195 R. S. Missouri Statutes 1939, should a hearing be held by the Governor of the State of Missouri, to determine whether or not the defendant has recovered his sanity; the nature of the hearing; if a jury should inquire into the facts of sanity or insanity and if such a hearing is required, who should request the Governor for said hearing?

"2. By whom should the costs of said

hearing before the Governor be defrayed?

"3. If the defendant is found by the Governor to have recovered his sanity, may the Governor issue a warrant setting time and place for the execution of the defendant? If so, to whom is the warrant directed and the form of same? And is it necessary, if the defendant is found to have recovered his sanity, that application be made to the Supreme Court of the State of Missouri, for an order directing the Circuit Court of Jackson County to re-sentence the defendant in accordance with the present method of execution? If so, who should make such application to the Supreme Court?

"4. In view of the fact that the Judge of the Circuit Court before whom the defendant was tried is deceased, should such re-sentencing, if necessary, be done by the present Judge of the Criminal Division 'A' in Jackson County, or should it be done by the Circuit Judge presiding over the Division in which the defendant was convicted?

"5. What, if any, suggestions has the Attorney General to make as to the type of evidence that should be adduced before the Governor to establish that the defendant is sane at the present time?

"6. In case the Governor finds the defendant to be insane, what order or commitment should be issued by the Governor, to whom issued and its contents?"

The three following sections are applicable to your request. Section 4192, R. S. Mo. 1939, reads as follows:

"If, after any convict be sentenced to the punishment of death, the sheriff or warden having in charge his person shall have cause to believe that such convict has be-

> come insane he may summon a jury of twelve competent jurors to inquire into such insanity, giving notice thereof to the prosecuting attorney of the county where such criminal proceedings originated, or to the circuit attorney of the city of St. Louis, if such proceeding originated in the city of St. Louis."

It is very noticeable under the above section that either the sheriff or warden having charge of the person may summon a jury to inquire into his insanity. Under the present law, which provides for the execution of the death sentence by the warden by the use of lethal gas within the walls of the State penitentiary, yet the sheriff may have the person in charge before his transfer to the penitentiary and, under the above section, may summon a jury of twelve persons to inquire into the sanity of the person.

Section 4194, R. S. Mo. 1939, reads as follows:

> "The inquisition of the jury shall be signed by them and by the officer in charge of said convict. If it be found that such convict is insane, the execution of the sentence shall be suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme or other court as hereinafter authorized, directing the execution of such convict."

Under the above section it is only applicable to a case where the convict is declared insane by the sheriff's or warden's jury, and does not apply where the convict is declared sane. It should be specifically noticed that in this section if the convict is declared insane the execution of the sentence should be suspended until the officer in charge of such conviction receives a warrant from the Governor, or from the Supreme or other court as hereinafter authorized, directing the execution of such convict.

Section 4195, R. S. Mo. 1939, reads as follows:

> "The officer in charge of such convict shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the time of execution, pursuant to his sentence; or, he may, in his discretion, commute the punishment to imprisonment in the penitentiary for life."

Under the above section, if the jury, as summoned under Section 4192, supra, should find the convict sane, the Governor, upon receipt of the inquisition or verdict of said jury, may, as soon as he shall be convinced of the sanity of the convict, issue a warrant and set a time for the execution, or, he may commute the sentence to imprisonment in the penitentiary for life. The purpose of this section is to set a certain time for the execution, where it has been suspended at a time near the time of the execution and the trial of the case may overlap the certain date set. In that case this section authorizes the Governor to set a different date.

Section 9352, R. S. Mo. 1939, reads as follows:

> "If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor."

This section is a general section applying only to where the penalty is for a term of years in the penitentiary and does not apply where the penalty is a death sentence. It will be noticed that it uses the term "and before the execution, in whole or in part, of the sentence of the court, become insane, * * *." This section further states "If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor." In such a case, upon the convict being declared sane by anyone who has charge of the convict by reason of the inquisition of the governor, the execution of the sentence will begin without an order of the governor. This section (9352, supra) is a general section and is not applicable. In case of a general law and a special law, such as Section 4192, supra, the special law should be followed. It was so held in State v. Harris, 87 S. W. (2d) 1026, l. c. 1029, para. 6, 337 Mo. 1052, where the court said:

> "Assuming for the purpose of this case that section 4428 is a valid enactment, we have, then, two legislative acts passed at the same session of the Legislature, taking effect at the same time and relating to the same general subject. They should be construed together and if possible harmonized so as to give effect to each. Gasconade County v. Gordon et al., 241 Mo. 569, 581, 145 S. W. 1160. If, however, the statutes are necessarily inconsistent, that which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature. Gasconade County v. Gordon et al., supra. The rule is thus stated in State ex rel. County of Buchanan v. Fulks et al., 296 Mo. 614, 626, 247 S. W. 129, 132, quoting from 36 Cyc. 1151:
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> "'Where there is one statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should

> be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one; and where the general act is later, the special will be construed as remaining an exception to its terms, unless it is repealed in express words or by necessary implication.'"

In your request you state that the record of State Hospital Number Two shows that on the 21st day of August, 1934, Ferdinand Brockington was discharged from the institution by authority of the President of the Board of Managers of the State Eleemosynary Institutions and you further stated that James R. Bunch, now Superintendent of State Hospital Number Two, by an affidavit stated "that the said Ferdinand Brockington is no longer wanted by said Institution."

Section 9321, R. S. Mo. 1939, reads as follows:

> "Persons afflicted with any form of insanity shall be admitted into the hospitals for the care and treatment of same. Any patient so admitted may be discharged or paroled whenever in the judgment of the Superintendent and his staff such person should be discharged or paroled. The decision of the Superintendent and his staff on such matter shall be final and the respective counties of this State are hereby prohibited from removing any indigent insane person unless such insane person is discharged as herein provided."

Under the above section it will be noticed that the decision of the Superintendent and his staff on the matter of an inmate of the State hospital who have charge of insane persons, shall be final. Also in the case of In re Moynihan, 62 S. W. (2d) 410, para. 11-15, the court said:

"However, such an order for temporary restraint, as made by the probate court here, is not binding upon the superintendent of a state hospital to keep the person confined until an order is made in that court for release. It is in no sense like a commitment in a criminal case for a definite term in jail or in the penitentiary. The person may lawfully be either discharged or paroled and set at liberty by the superintendent of his own motion at any time. Section 8629, R. S. 1929 (Mo. St. Ann. Sec. 8629). The hospital is a state institution. Chapter 46, articles 1 and 2, R. S. Mo. 1929 (section 8560 et seq. (Mo. St. Ann., Sec. 8560 et seq.)). The superintendent is one skilled in the treatment of mental diseases. Section 8578, R. S. 1929 (Mo. St. Ann. Sec. 8578). He is better qualified to determine a person's mental condition and the necessity for his confinement than the probate judge. He is a public officer, and improper action on his part will not be presumed. * * * * * * * * * *"

In your request you also state:

"* * * As a result of said letter the sheriff of Jackson County, summoned a jury which found the defendant to be insane as of that time. Acting upon this finding Governor Caulfield, on the 29th day of April, 1931, less than a month after the Supreme Court had affirmed the death sentence, suspended the execution of said sentence and ordered the sheriff of Jackson County to immediately convey said FERDINAND BROCKINGTON to the State Hospital for the Insane No. 2, located at St. Joseph, Missouri, 'there to be detained until restored to reason.' The Governor further ordered the Superintendent of said State Hospital to receive said BROCKINGTON, safely keep him

> confined in said Hospital and treat him for insanity 'until restored to reason,' at which time the said Superintendent should give due notice to the Governor of the State 'who shall then order sentence to be executed.' * * * *"

Since Governor Caulfield set the suspension until the convict was restored to reason and also required the Superintendent to give notice to the Governor of the State, who then should order the sentence to be executed, and since there is no record that such a notice has been given, we must rely upon the order and authority of the President of the Board of Managers of the State Eleemosynary Institutions that Ferdinand Brockington is now sane. Governor Caulfield could have set out any restrictions to be entered into under the suspension of the sentence or on any parole or commutation so long as the restriction is not illegal, immoral or impossible of fulfillment. It was so held in Jacobs v. Crawford, 272 S. W. 931; Ex parte Strauss, 7 S. W. (2d) 1000; Ex parte Webbe, 30 S. W. (2d) 612, and Lime v. Blagg, Acting Warden, 131 S. W. (2d) 583.

Under Section 4194, R. S. Mo. 1939, it specifically states that the execution should be suspended until either the Governor or the Supreme Court or other court directs the execution of such convict. Since the form of punishment in a capital offense has been changed since the time of the affirming of the sentence in the Ferdinand Brockington case from hanging to death in the lethal gas chambers within the walls of the State penitentiary, it will be necessary for this office to file a motion to modify the original judgment and affirmance in the case of State v. Ferdinand Brockington, 36 S. W. (2d) 911. This was done in the case of State v. Brown, 112 S. W. (2d) 568, l. c. 571, where the court said:

> "It is therefore ordered and decreed that the opinion heretofore adopted by this court be modified; that the sentence to suffer death by hanging be set aside; that the conviction of appellant of murder in the first degree and the infliction of capital punishment be affirmed; that the case be remanded to the trial court; and that that court as soon as may be expedient, have the appellant brought

> before it for the purpose of passing a sentence in accordance with the provisions of Laws Mo., 1937, pp. 222, 223. It is so ordered."

The procedure set out in this case was also followed in State v. Kenyon, 126 S. W. (2d) 245, 343 Mo. 1168; State v. Wright, 112 S. W. (2d) 571, 342 Mo. 58, and State v. Boyer, 112 S. W. (2d) 575, 342 Mo. 64.

When an order is made by the Supreme Court directing the person in charge of the convict to have him resentenced on the death penalty he is then sent to the penitentiary in compliance with Section 4108, R. S. Mo. 1939. Section 4108 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."

In compliance with Section 4108, supra, if the sheriff does not desire to call a jury to inquire into the sanity of Ferdinand Brockington, then he is placed in custody of the warden and if the warden has good reason to believe Ferdinand Brockington is insane he may call a jury, as set out in Section 4192, supra.

In your request as to the proper evidence on such a hearing, we find that the law does not set out the procedure except that a jury may be summoned to inquire into the sanity of the convict and the only other procedure is set out in

Section 4193, R. S. Mo. 1939. This section does not specifically state that the rules of civil or criminal procedure be followed. It follows that any information - such as affidavits, depositions or witnesses in person, may be inquired into by the jury.

You also inquire in your request that upon an order of resentence by the Supreme Court which judge shall resentence Ferdinand Brockington. We find that in the original case of State v. Ferdinand Brockington, 36 S. W. (2d) 911 he was sentenced by the Honorable Judge Ralph S. Latshaw, who was judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, and, in checking as to his present successor, we find that Division 8 of the Sixteenth Circuit in Jackson County, Missouri, is now presided over by the Honorable Judge Paul A. Buzzard. Your main inquiry in this respect is whether the judge of the same division of the circuit should resentence or whether it should be the judge of Criminal Division A of the Circuit Court of Jackson County. We find that in the case of State v. Messino, 30 S. W. (2d) 750, l. c. 757, 325 Mo. 743, the court said:

> "While, as stated, there are some decisions to the contrary, we think the weight of authority is that, where the judge who presided at the trial dies or goes out of office leaving a motion for new trial undisposed of, his successor in office, if the facts are fully presented to him, has authority to determine the motion on its merits, even where the sufficiency of the evidence is challenged, and without express statutory provision. In this state, as we have seen, the statute impliedly confers authority. We are satisfied with the construction heretofore given the statute, and we are convinced that defendant was not deprived of any constitutional right by such construction and the holding that in the circumstances shown the successor of the trial judge had authority to determine the motion for new trial.
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> "Defendant has by leave of court added to his brief a citation to Patton v. United States, 281 U. S. 276, 50 S. Ct. 253, 74 L. Ed. 854, decided April 14, 1930, in which the United States Supreme

Court holds that on certain conditions one accused of felony may waive his right to a constitutional jury of twelve and consent to a lesser number or to trial without a jury. The decision does not involve the question above discussed.

"But it is urged that the remarks made by Judge Woodbury at the time of overruling the motion show that he did not acquaint himself with and consider all of the evidence. We think otherwise. He said that he had carefully studied the authorities presented in support of the motion and had spent many hours 'referring to parts of the reporter's notes and parts of the transcript of the testimony.' Appellant's counsel say they had had parts of the testimony transcribed and submitted to the court and that a full transcript had not been made. The hearing of the motion occurred some four months after the trial and extended over a period of several days, after which the judge took a month to consider before ruling on the motion. We may safely presume that all the facts thought to bear upon points made in the motion were fully presented and that the judge gave full consideration to all questions urged. The suggestion that he could not read the reporter's notes, therefore could glean nothing by reference to them, is hypercritical. His action in overruling the motion shows that he considered the verdict to be sufficiently supported by the evidence. And in view of the fact that at least five unimpeached and uncontradicted witnesses identified defendant as the driver of the car from which deceased was killed, we do not see how the sufficiency of the evidence can be seriously questioned. We rule this point against defendant."

In the above case the court specifically held that in a murder case where the judge who tried the case died before the motion for a new trial was passed on, then the judge of that particular division should pass upon the motion for a new trial and sentence the defendant. And, in view of this decision, there is no question but that the judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, should resentence the defendant when ordered under a mandate of the Supreme Court, and not the judge of Division A or B, designated by the rules of the Jackson County Court as such division.

Of course, the present Governor, under Section 8, Article V, of the Constitution of Missouri, even after the Supreme Court of this State has modified the opinion of the original case to the extent that he be administered lethal gas by the warden within the walls of the State penitentiary, may grant a reprieve, pardon, another suspension of sentence, or commutation of the convict. Section 8, Article V, Constitution of Missouri, reads as follows:

> "The Governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses, except treason and cases of impeachment, upon such condition and with such restrictions and limitations as he may think proper, subject to such regulations as may be provided by law relative to the manner of applying for pardons. He shall, at each session of the General Assembly, communicate to that body each case of reprieve, commutation or pardon granted, stating the name of the convict, the crime of which he was convicted, the sentence and its date, the date of the commutation, pardon or reprieve, and the reason for granting the same."

Under the present statement of facts it does not seem necessary that the Governor at this time hold any inquisition until the record in the original case is properly modified to comply with the present law of execution under the death penalty. Of course, the sheriff at the present time may call for a jury to inquire as to the sanity of Ferdinand Brockington under Section 4192, supra.

You also inquire as to the costs of a hearing before the governor, sheriff or warden, under Sections 4192 and 4194, supra. These sections do not provide for costs or fees to be paid either by the county or State and since, under such sections, no costs or fees can be taxed they cannot be allowed. It was so held in State ex rel. v. Wilder, 196 Mo. 418, l. c. 433, where the court said:

> "This court has uniformly held that no costs can be taxed except such as the law in terms allows, and it being essential that the witnesses actually and necessarily travel the mileage in consequence of a subpoena legally served upon them, and there being no legal service of process upon the witnesses claiming fees in this case, it must be ruled that the auditor was warranted in refusing to allow the fees for such witnesses as certified by the judge and prosecuting attorney."

And, it was also so held in State ex rel. v. Wilder, 197 Mo. 27, l. c. 32, where the court said:

> "The sole question arising from the facts alleged by the relator and admitted by the State Auditor, is whether the State is liable for the costs claimed by the relator. For many years this court, in obedience to strict statutory provisions, has sedulously maintained that no costs can be taxed except such as the law in terms allows. (Shed v. Railroad, 67 Mo. 687; Crouch v. Plummer, 17 Mo. 420; State ex rel. v. Hill, 72 Mo. 512; Williams v. Chariton County, 85 Mo. 646.)"

CONCLUSION.

In answer to your first question, it is the opinion of this department that under Sections 4194 and 4195, R. S.

Mo. 1939, in view of the modification to be made in the original case of State v. Ferdinand Brockington, it is not necessary at this time that a hearing be held by the Governor of the State of Missouri to determine whether or not the defendant has recovered his sanity. Of course, the sheriff who has now custody of Ferdinand Brockington may inquire as to his insanity under Section 4192, R. S. Mo. 1939.

In answer to your second question, it is the opinion of this department that the costs of a hearing before a jury summoned by the sheriff or by the warden, or, in a hearing by the Governor later, if necessary, should not be paid either by the county or by the State and cannot be taxed in any manner.

In answer to your third question, it is further the opinion of this department that in view of the motion for a modification in the original case, it would not be necessary for the Governor to issue a warrant setting the time and place for the execution of the defendant. The only time that this authority is granted to the Governor is when the jury summoned by the sheriff or warden find that the convict is sane as set out under Section 4194, R. S. Mo. 1939, and the time originally set by the court has passed on account of the time being taken up by the inquiry of the jury. It is mandatory that a motion to modify the original judgment in the Supreme Court of this State be filed by this office.

In answer to your fourth question, it is the opinion of this department that the present judge of Division 8 of the Sixteenth Circuit in Jackson County, Missouri, who is now the Honorable Judge Paul A. Buzzard, must resentence Ferdinand Brockington upon the receipt of the mandate from the Supreme Court, after the filing of the motion for the modification of the original judgment in the cause.

In answer to your fifth question, it is the opinion of this department that since we have held that it is not necessary for the Governor at this time to hold a hearing and that in view of the motion for modification and a mandate of the Supreme Court, if an inquiry is held by a jury upon the order of a sheriff or warden, any evidence such as affidavits, depositions or personal witnesses, may be used at the hearing. We base this opinion on the fact that under the facts applicable upon a procedure set out in your request no mention is made

that the hearing should be in accordance with any civil or criminal procedure.

In answer to your sixth question, it is our opinion that the Governor, in view of our answers to your first five questions, need not make any order of commitment, but await the mandate of the Supreme Court on the motion to modify the judgment or decision in the original case.

Respectfully submitted,

W. J. BURKE
Assistant Attorney-General

WJB:CP

APPROVED:

VANE C. THURLO
(Acting) Attorney-General