



**OFFICE OF
THE ATTORNEY GENERAL
AUSTIN, TEXAS**

PRICE DANIEL
ATTORNEY GENERAL

February 11, 1947

Hon. Thomas E. Hayden, Jr. Opinion No. V-08
District Attorney
42nd District
Abilene, Texas

Re: Authority for issuance and form of writ by Court to procure attendance of convict as witness.

Dear Sir:

You request advice from this Department as follows:

"As District Attorney of the 42nd Judicial District of Texas, I have a case to be tried in which a material witness is now confined to the State Penitentiary at Huntsville; and I have written the Texas Prison System at Huntsville asking what papers they require in order to release him to the Sheriff of Taylor County so that he might appear as a witness. The authorities at Huntsville wrote your department on or about September 23, 1946, in which they received a reply in Opinion Number 0-7426, as follows:

'The Texas Prison System authorities may release a prisoner for trial or as a material witness on the furnishing of a bench warrant.'

"It is my understanding of the law that a bench warrant can only be issued for the defendant, and I know of no rule of law that would permit a bench warrant for a witness. I would like for you to advise me concerning this matter. It is my opinion that if a subpoena with attachment was issued that the witness could be released to the Sheriff of Taylor County, who, in return, would take the prisoner back to Huntsville after the trial. Please advise me concerning this

matter. If I cannot obtain this witness, then I will have to dismiss the case now pending."

It is within the power of a court to compel the attendance as a witness of a person confined in State prison when it appears to the satisfaction of the court that such attendance is necessary. 70 C. J. 41, "Witnesses", Sec. 14; 18 C. J. S. 110, "Convicts", Sec. 9b.

The power was impliedly recognized in *Lee v. State*, 70 S. W. (2d) 190, by the Court of Criminal Appeals, wherein the process was termed a "bench warrant".

That the court may issue writs and process not specifically described or in situations not specifically contemplated by statute is expressly recognized in *Ex Parte Lowe*, 251 S. W. 506, by the Court of Criminal Appeals, wherein a warrant issued by the Court directed to the Sheriff of McLennan County commanding delivery of a defendant charged in Hill County to the Sheriff of Hill County to the end that defendant might be present and attend his trial in the District Court of Hill County was held to be within the powers of the District Court of Hill County. There the defendant was in custody under a charge of lunacy in McLennan County. And the writ was termed a "Bench Warrant."

We doubt that it matters whether the writ be termed a "bench warrant" or an "attachment." We are also of the opinion that a subpoena is not necessary and that the writ may issue upon determination by the court that the witness is required in order to attain the ends of justice.

This Department by Opinion 0-7426 held, in the same authority, that the Texas Prison System might release a prisoner as a material witness upon the furnishing of a "bench warrant" in form attached to that opinion. We are enclosing a copy of 0-7426 with the form attached.

SUMMARY

Court may issue writ designed to procure attendance of an inmate of a State

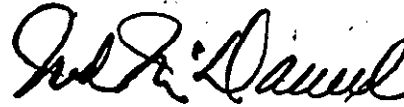
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Penitentiary as a witness in a pending criminal action, and no subpoena is necessary.

Very truly yours

ATTORNEY GENERAL OF TEXAS

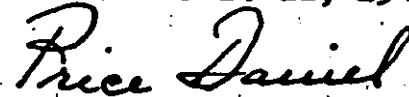
By



Ned McDaniel
Assistant

NM:jt
Enc. 1

APPROVED FEB. 11, 1947



ATTORNEY GENERAL OF TEXAS

APPROVED OPINION COMMITTEE BY B.W.B., CHAIRMAN