

**Opinion No. 34-767**

May 29, 1934

**BY:** E. K. NEUMANN, Attorney General

**TO:** Hon. E. B. Swope, Superintendent, New Mexico State Penitentiary, Santa Fe, New Mexico.

{\*135} This is in reply to your letter of May 26th, 1934, in which you enclose copy of an opinion written by T. J. Mabry, District Attorney for the Second Judicial District, upon the subject of whether or not a county is liable for expenses incurred in keeping a prisoner at the Penitentiary, who has been sentenced to death, while his case is pending on appeal.

Authority for making a charge for keeping prisoners in the penitentiary while their cases are pending on appeal is found in State v. Board of County Commissioners, 33 N.M. 340. This case, however, is not, in my opinion, applicable to cases in which a prisoner has been sentenced to death. In such cases the sheriff is required by statute to deliver the prisoner to the Warden of the Penitentiary within ten days after sentence is pronounced. Section 35-321, 1929 Code.

I take this to mean that the sheriff does not have the right to custody of the prisoner after that time has elapsed even though an appeal may be taken. If this is correct, then the warden of the penitentiary is the person required by law to keep such prisoners and I know of no statute which makes the expense of so keeping him a charge against the county.

I am inclined to agree with Mr. {\*136} Mabry's opinion. However, if you consider the matter of sufficient importance you might bring a test suit to settle the matter.

By: QUINCY D. ADAMS,

Asst. Attorney General