

Opinion No. 39-3153

May 27, 1939

BY: FILO M. SEDILLO, Attorney General

TO: Mr. John Baron Burg, District Attorney, Los Lunas, New Mexico.

{*55} In your letter dated May 23 you request an opinion upon Section 35-608, New Mexico Statutes Annotated, 1929 Compilation. The section under inquiry is a criminal statute directed against wife beating, etc. The section carries a penalty of a fine of not less than \$ 25.00 nor more than \$ 1,000.00, or imprisonment for not less than 30 days nor more than three years, or both such fine and imprisonment.

You state your inquiry as follows:

"The question, therefore, is whether or not under this section the District Court would have original and exclusive jurisdiction, whether or not the same should take to the classification of a special misdemeanor, or whether or not a complaint under this section could be commenced as complaints in felony cases and proceed by binding over to the District Court for filing on information."

Since the penalty that might be imposed is one beyond the jurisdiction of the justice of the peace, it would seem that a justice of the peace would not have original jurisdiction in such cases. See Section 79-209, New Mexico Statutes Annotated, 1929 Compilation, and also Attorney General's Opinion No. 1884, a copy of which is attached hereto for your additional information. Sections 79-804 and 79-805, New Mexico Statutes Annotated, 1929 Compilation, state in effect that when a criminal complaint is filed before a justice of the peace magistrate and it appears that the punishment of the offense of which is **not within his jurisdiction**, and that there is probably cause to believe the prisoner {*56} guilty thereof, the prisoner should be bound over to the next term of the District Court.

Section 35-103, New Mexico Statutes Annotated, 1929 Compilation, defines a felony as a public offense which is, or, in the discretion of the court, **may be** punishable by imprisonment in the penitentiary.

Section 130-145, New Mexico Statutes Annotated, 1929 Compilation, provides that all persons convicted of **any crime**, where the punishment is imprisonment for a term or time exceeding **six months**, shall be imprisoned in the **penitentiary**, and all courts in which such convictions shall be had, shall give judgment accordingly.

See also in this connection the cases of Territory vs. Gonzales, 14 N.M. 31, 89 P. 250, and State vs. Tinsley, 34 N.M. 458, 283 P. 907.

In view of the fact that an offense committed under Section 35-608, supra, may be punishable by a term in the state penitentiary, it is my opinion that a person charged of a crime thereunder is entitled to a preliminary hearing before a committing magistrate and the cause should proceed by binding over to the next district court term for filing on information.

Trusting the foregoing sufficiently answers your inquiries, I am,

By: FRED J. FEDERICI,

Asst. Atty. Gen.