

## Opinion No. 64-65

May 18, 1964

**BY:** OPINION OF EARL E. HARLEY, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Mr. Wayne W. Schmidt, Constable /- Precinct No. 44, 2820 Chama, N. E. Albuquerque, New Mexico

### QUESTION

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1. Are constables restricted in serving civil process to that issuing from the justice of the peace courts in their respective precincts?
2. May constables serve criminal process issued by any court of this State in any county?
3. May constables make arrests anywhere in the City of Albuquerque without a warrant, as the city policemen do?

#### CONCLUSIONS

1. No.
2. See Analysis.
3. Yes, but see Analysis.

### OPINION

#### ANALYSIS

The answer to your first question above will of necessity involve an interpretation of the New Mexico statutes since the common law in this area has been almost entirely abrogated by statute. It was the common rule that a sheriff or constable was limited to his own territorial jurisdiction as said in 1 Anderson on Sheriffs, Coroners, Constables 97, § 100 (1st Ed. 1941)

". . . The sheriff is limited to the territorial boundaries of his county and in the absence of statutory authority it would seem to follow that a constable is likewise restricted to his **precinct** or district for which he was elected. These officers, cannot, in the absence of an enabling statute, execute any kind of process outside of the above mentioned territorial limits and any attempt so to do constitutes an illegal action, and the attempted

service is absolutely void. . . . **Of course, these are common law rules, and may be altered by the law-making powers.**" (Emphasis added)

And further in § 7 thereof:

". . . With respect to territorial limitations circumscribing the official functions of the constable, it may be stated generally that, **in the absence of a constitutional or statutory grant of authority**, he cannot act outside of his own district, precinct or town in which he was elected." (Emphasis added)

It may thus be seen from the above that the common law rule would require an affirmative answer to your question. However, there is enabling legislation in New Mexico which we believe has extended the territorial limits of the constables' jurisdiction. We are referring to Sections 36-4-1 and 36-4-3, N.M.S.A., 1953 Compilation which are quoted below:

"36-4-1. Process Requirements. -- All process shall run in the name of the State of New Mexico, be dated on the day of issue, signed by the justice, and directed to the sheriff, **or any constable of the proper county.**

36-4-3. Sheriff or constable to execute process or executions. -- All processes or executions issued by a justice of the peace **may be executed by any sheriff or constable of the county in which the action is commenced.**" (Emphasis added)

There is an important rule of statutory construction which directs that statutes which are in derogation of the common law must be strictly construed. **El Paso Cattle Loan Co. of El Paso, Texas v. Hunt**, 30 N.M. 157, 228 P. 888; **Hinds v. Velasquez**, 63 N.M. 282, 317 P. 2d 899; **Miera v. Chavez**, 70 N.M. 289, 373 P. 2d 533. It has also been held that the chief aim of statutory construction is to arrive at true legislative intent and that the legislative intent is to be determined primarily by language of statute, and resort may be had to construction only in case of ambiguity. **Montoya v. McManus**, 68 N.M. 381, 362 P. 2d. Following along this line is the case of **George v. Miller & Smith**, 54 N.M. 210, 219 P. 2d 285, where it was said:

"In interpreting a statute the intent is to be first sought in the meaning of the words used, **and when they are free from ambiguity and doubt and express plainly, clearly and distinctly the sense of the legislature, no other means of interpretation should be resorted to.**" (Emphasis added)

There does not appear to be an ambiguity in either of the two statutes which we have quoted above. The language employed therein is quite plain and clear in granting constables the power to execute process issuing from any justice of the peace court which is within the county of the constable. We feel that there is no need to go outside of the plain meaning of the words used in the statute to determine legislative intent.

Further evidence of the fact that the territorial jurisdiction of constables has been extended is contained in Section 36-11-1, N.M.S.A., 1953 Compilation which is entitled "Forms in Civil Actions." Some of these forms are directed "To the sheriff (or constable) of \_\_\_ county." Also, Section 36-4-6, N.M.S.A., 1953 Compilation permits the justice of the peace court to empower a private citizen to execute process, but before such person can be so empowered the justice must be satisfied that a constable from the justice's precinct **or of an adjoining precinct** are not available. There is absolutely no indication that the legislature intended to follow the common law rule and restrict the constable to the boundaries of his particular precinct, as regards the service of civil process.

It is thus our opinion based upon the foregoing analysis that constables are not restricted in serving civil process to that which issues from the justice of the peace court in their respective precincts. The territorial limits of their jurisdiction for the service of civil process is, rather, their respective counties.

Your second inquiry is two-pronged. First it concerns in effect the question of whether a constable may legally serve criminal process anywhere within the boundaries of the State of New Mexico. Second, it concerns the question of whether a constable may legally accept process for service from **any** court in this state.

The first part of the question is easily answered. There is little doubt that constables may serve criminal process in any county within this State in view of the following:

"41-1-8. Officers authorized may serve criminal process in any county. -- All officers authorized to serve processes in this state shall be authorized to serve processes in any county in criminal cases."

No construction of the above statute is deemed necessary in view of the unequivocal language employed therein to express the intent of the legislature. It is clear that constables are officers authorized to serve processes in this state; thus, it is our opinion that they are authorized by this statute to serve criminal process in any county within the State of New Mexico.

In order to answer the second part of question No. 2 as above set forth, we need only make reference to a specific statute presently in force. This is Section 41-1-6, N.M.S.A., 1953 Compilation which reads as follows, and which applies to criminal process only:

"41-1-6. Process issued to sheriff -- Service and return. -- It shall be the duty of the clerk of the district court, in all causes not otherwise provided for, to issue all process to the sheriff of the county in which the trial or cause shall be commenced or presented, or in which final sentence shall be rendered, and it shall be the duty of the sheriff to execute faithfully such process, and return the same to the said court, as provided by law."

The above section is couched in mandatory terms, so that, if the clerk of the district court were to issue **any** process to a constable for service, there would be a clear

violation of law. There appears to be only one permissible deviation from the requirement that the clerk shall issue all criminal process to the sheriff. This is provided for in Section 41-1-7, N.M.S.A., 1953 Compilation which reads as follows:

"41-1-7. Disqualification of sheriff or vacancy in office -- Service of process. -- Until a vacancy shall be filled by the election (appointment) and qualification of a sheriff, or when the sheriff shall be a party to the suit, or otherwise disqualified from serving the process, **the court or officer issuing the process shall have the power to issue such process in all cases directed to some proper person, who is hereby fully authorized to serve such process and return the same properly served**, under oath, and such service shall have the same force and effect as if it had been made by any regular sheriff of the state." (Emphasis added).

Presumably a constable would be a "proper person" and could be directed to act for the sheriff in serving process issuing from the district court. This is, however, no general grant of power to the constable or other person, but would become applicable only upon the occurrence of the circumstance specified in Section 41-1-7, supra. In every other instance the sheriff alone is the officer to serve process issuing from the district court.

There is no statutory indication that it was the intent of the legislature to grant to the constables of this state the power to serve process, either civil or criminal, issuing from all courts in New Mexico. Certainly, we believe that constables may serve criminal process which issues from any justice of the peace court within their respective counties pursuant to Sections 36-13-1 and 41-1-1, N.M.S.A., 1953 Compilation. They may also serve any process authorized to be made by any city or town officer pursuant to Section 38-1-4, N.M.S.A., 1953 Compilation. But, they may **not**, except in the situation set forth in Section 41-1-7, supra, serve process which issues from district courts.

The answer to your third and last question must be in the affirmative in view of the following:

"38-1-4. Authority of constable or sheriff to serve process and make arrests. -- Any constable or sheriff of the county may serve any process **or make any arrests authorized to be made by any city or town officer.**" (Emphasis added).

The unequivocal language of the above statute would permit a constable of the county to make the same arrests without a warrant that a city or town officer is authorized to make. We call your attention to the following appropriate passage found in 1 Anderson on Sheriffs, Coroners, Constables 160, § 166 (1st Ed. 1941):

"Heed should ever be paid to the voice of common law as it has echoed down through the ages, loudly proclaiming in the interest of the rights of the citizen, that it must not be forgotten that there can be no arrests without due process of law. An arrest without warrant has never been lawful except in those cases where the public security required it, and this has been confined to felonies and in cases of breach of the peace committed in the presence of the officer."

It must be noted, however, that in some instances the right to arrest without a warrant is granted specifically by statute, though even then there always exists the question of reasonableness and thus due process of law.

To summarize the above analysis and conclusions, it is our opinion that:

1. Constables may accept civil process for service from any justice of the peace court within their respective counties.
2. Constables may serve criminal process in any county within this State. They are restricted in accepting process for service to those justice of the peace courts in their respective counties; to that process authorized to be accepted by any city or town officer within the constables' county; and, possibly upon the occurrence of those specific circumstances provided for in Section 41-1-7, supra.
3. Constables within Bernalillo County may make arrests without warrants anywhere in the City of Albuquerque, that are authorized to be made by a city policeman.