Sheriffs, Authority of to Photograph Prisoners. Prisoners, Authority of Sheriff to Photograph.

Photographs may be taken of persons accused of crime for the purpose of identification, provided no force is used in obtaining them, and provided, further, that they are not published to the injury of accused previous to his actual conviction of crime.

June 25, 1915.

Hon. Charles S. Henderson, Sheriff,
Butte, Montana.

Dear Sir:

I am in receipt of your communication under date the 23rd instant, asking for my opinion upon the following question:

> "Is it legal to take a photograph of a prisoner before his conviction?"

An examination of our laws fails to disclose any direct statutory authority for such action. However, among the other duties of the sheriff, we find the following:

> "Section 3010: The sheriff must: (1) preserve the peace. (2) Arrest and take before the nearest magistrate for examination, all persons who attempt or have committed a public offense. (6) Take charge of and keep the county jail and the prisoners therein."

This latter duty would imply the use of all measures reasonably effective in carrying out the mandate of the law.

An examination of the authorities upon this question, shows a divergence of opinion. One author expressed himself as follows:

> "One phase of police supervision is that of photographing alleged criminals and sending copies of the photograph to all detective bureaus. If this be directed by the law as a punishment for a crime of which the criminal stands convicted, or if the man is in fact a criminal, and the photograph is obtained without force or compulsion, there can be no constitutional or legal objection to the act. But the practice is not confined to the convicted criminals. It is very often employed against persons who are only suspected. In such a case, if the suspicion is not well founded, and the suspected person is in fact innocent, such use of his photograph would be a libel for which everyone could be held responsible who was concerned in its publication. And it would be an actionable trespass against the right of personal security, whether one is a criminal or not, to be compelled involuntarily to sit for a photograph to be used for such purpose, unless it was imposed by the statutes as a punishment for the crime of which he was convicted."
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> Tiedeman Limitations of the Police Power, Sec. 49.

The Supreme Court of Louisiana, in passing upon this question, said:

> "It is true that the respondent (sheriff) is authorized by law to take such measures as are needful to prevent crimes, to

> detect and arrest offenders, and to protect the rights of persons and property. None the less, the statute does not invest him with the right in limine to resort, as relates to picture-taking, to the extreme measures adopted in the present case, on the evidence offered and admitted. The necessity of the picture is not apparent, there being no evidence of any conviction of plaintiff, either in the courts of this state, or of any other state."
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> Schulman v. Whitaker, 117 Louisiana, 703, 42 S. 227.

These two authorities it will be seen, are inclined to deny the sheriff any such right in the absence of an express statutory provision, and they seem to lay especial stress upon the inability of the sheriff to use forcible means in obtaining a photograph; and further, they seem to hold that the publication of such a photograph, no matter how obtained, would be a libel, unless the person whose picture was so taken, had actually been convicted of a crime.

As opposed to these authorities, we find other courts holding that no right of an accused person is invaded by taking a photograph of him for the purpose of identification. Where an injunction was sought to prevent police authorities from measuring and photographing a person accused of crime, the defense was set up: (1) that the photograph and measurements were for identification only, (2) there was no intention to publish or distribute this photograph or measurements unless the plaintiff was convicted of the crime charged. The court held that it was within the right of the police officers in the execution of their duties imposed by statute, to use such means.

> "He may be exhibited for identification to the person injured by the commission of the crime, if it be one of violence, and we see no good reason why the police authorities may not be furnished with the further and more efficient means of his identification provided by the Bertillion system."
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> Downs vs. Swan, 73 Atlantic, 653; 23 L. R. A. (N. S.) 739.

After explaining the duties of a sheriff as to the custody of a prisoner, and the taking from him of money, weapons and other articles which might be useful for committing an escape, an Indiana court said:

> "It would seem, therefore, if, in the discretion of the sheriff, he should deem it necessary to the safe keeping of a prisoner, and to prevent his escape, or to enable him the more readily to recapture the prisoner if he should escape, to take his photograph, and a measurement of his height, and ascertain his weight, name, residence, place of birth, occupation, and the color of his eyes, hair and beard, as was done in this case, he could lawfully do so."
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> State ex rel Bruns v. Clausmeier, 154 Ind. 599; 50 L. R. A. 73.

An objection to the use of a photograph taken by an officer after a man had been arrested for murder was made at the trial of the accused. In passing upon the objection, the court of appeals of the District of Columbia used the following language:

> "We understand the objection to be * * * in other words, that the government had no right to photograph the accused while holding him in custody for the purpose of using that

> photograph to have him identified at the trial. This objection is founded upon the theory that the use of the photograph so obtained is in violation of the principle that a party can not be required to testify against himself. But we think there is no foundation for this objection. In taking and using the photographic picture, there was no violation of any constitutional right. There is no pretense that there was any excessive force or illegal duress employed by the officer in taking the picture. * * * It could as well be contended that a prisoner could lawfully refuse to allow himself to be seen, while in prison, by a witness to identify him, or that he could rightfully refuse to uncover himself or remove a mask in court, to enable witnesses to identify him as the party accused, as that he could rightfully refuse to allow an officer in whose custody he remained to set an instrument and take his likeness for the purposes of proof and identification."
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> Schaffer v. U. S. 24 D. C. Appealed Cases, 417.

The reasoning of this last case has in it much force. An accused person cannot object to being looked at in order that it may be determined whether or not he is the person responsible for the offense of which he is accused, and it would take rather refined reasoning to show that the record of his features by a camera would any more invade his right than submitting him to the view of a living person, if no more force were used in the one case than in the other. No doubt the constitutional guarantee of personal safety would prohibit the use of undue force in the taking of a photograph; likewise the protection of the law to a man's good name would prevent the use previous to his conviction of such picture in any way which would invade that right.

From a consideration of the above authorities, and the reasoning advanced by them, I am of the opinion that photographs may be taken of persons accused of crime for the purposes of identification, provided that no force is used in obtaining them, and provided further, that they are not published to the injury of the accused, previous to his actual conviction of crime.

In giving you a direct answer to this question, I have departed from the rule of this office, that opinions upon such questions are given only upon request of county attorneys, my reason being that the question is one of state wide importance which has been in the minds of a number of sheriffs. Ordinarily such communications should be submitted to the county attorney for his opinion.

Yours very truly,

J. B. POINDEXTER,

Attorney General.