

**Opinion No. 139.****Clerk of Court—Fees—Habeas Corpus  
—Mileage**

Held: The clerk of the court is without authority to make a charge for filing an application for a writ of habeas corpus and a sheriff may not charge the applicant service and mileage fees.

October 7, 1943.

Mr. Milton G. Anderson  
County Attorney  
Richland County  
Sidney, Montana

Dear Mr. Anderson:

You have submitted, for my opinion, the following questions:

"1. Is the clerk of the district court authorized to charge filing and other fees in connection with habeas corpus proceedings?"

"2. Is a sheriff allowed to charge service and mileage fees in a habeas corpus proceeding?"

Section 4893, Revised Codes of Montana, 1935, provides:

"No fees must be charged the state, or any county, or any subdivision thereof, or any public officer acting therefor, or in habeas corpus proceedings for official services rendered, and all such services must be performed without the payment of fees." (Emphasis mine.)

The language of this section is clear and unambiguous. It was undoubtedly the intent of the legislature in adopting this section to protect the rights of individuals from unlawful restraint and to open the doors of the courts to those who questioned the restraint of their liberty, without payment of fees.

In 25 Am. Jur. 144, the text states:

"A free people venerate this ancient writ of habeas corpus as a fundamental guaranty and protection of their right of liberty and as the most effective remedy known to the law for securing release from unlawful restraint."

It is the policy of the law to afford every person the free and untrammelled privilege of exercising all of his constitutional rights and to require the payment of a fee in order to determine the lawfulness of the loss of liberty would invade his constitutional prerogatives, and in many cases might deprive an applicant of such constitutional and statutory right.

The Constitution of the State of Montana, Section 21, Art. III, provides:

"The privilege of the writ of habeas corpus shall never be suspended, unless, in case of rebellion, or invasion, the public safety require it."

It is noted in *State v. Story*, 53 Mont. 573, 165 Pac. 748, the Supreme Court of this state holds that the term "fee" includes "mileage," the following quotation being taken from the case:

"Neither in common parlance nor in legal usage has the word 'fees' any such narrow limit as that assigned to it by the appellant's counsel. It has many meanings, general and particular. Generally it signifies a reward or payment of money (Trench's Select Glossary); money paid or bestowed; emolument (Century Dictionary); reward or compensation for services rendered or to be rendered (Webster's International Dictionary). In its particular sense it imports a recompense or reward fixed by law for the services of a public officer. (Century Dictionary). Legally, it means a reward or wages given to one for the execution of his office, differing from costs in that fees are a recompense to the officer for his services. (Bouvier's Law Dictionary). Nowhere is it said to connote a particular source, as from individuals, and not from nation, state or county . . ."

It is therefore my opinion the clerk of the court is without authority to make a charge for filing an application for a writ of habeas corpus and a sheriff may not charge the applicant service and mileage fees.

Sincerely yours,  
R. V. BOTTOMLY  
Attorney General