

Habeas Corpus Litigation in Extradition Cases

Mark A. Fulks

I. Fundamental Principles

The law of extradition (sometimes called interstate rendition) is rooted in the United States Constitution, article IV, section 2, clause 2, which provides:

"2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another state, **shall** on demand of the executive authority of the State from which he fled, **be delivered up, to be removed to the State having jurisdiction** of the crime."

Because this provision is not self-executing, the United States Congress enacted an implementing statute, 18 United States Code section 3182, which provides:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

In other words, upon receipt of a demand for rendition of a fugitive, which includes a certified copy of an indictment or affidavit of complaint charging the fugitive with a crime, the governor of the asylum state *shall*:

(1) Issue a Governor's warrant for the arrest and detention of the fugitive, (2)
Notify the authorities in the demanding state; and

(3) Cause the fugitive to be delivered to the agent of the demanding state when
the agent appears, if the agent appears within 30 days.

To aid the implementation of the federal extradition act, most states have enacted either the *Uniform Criminal Extradition Act (UCEA)* or similar provisions. The Tennessee version of the UCEA is codified at Tennessee Code Annotated, Section 40-9-101. The UCEA includes the following provisions, which are not required under federal law:

(1) *Escapees and Violators.* Extradition is available for a fugitive who has been convicted and subsequently escaped from confinement or violated probation or parole. § 40-9-112(3).

(2) *Non-fugitive extradition.* Extradition is available for an accused who was never personally present in the demanding state but committed acts outside the demanding state that resulted in a crime in the demanding state. § 40-9-113.

(3) *Notice to Fugitive.* The fugitive may not be extradited unless the fugitive has been informed of the demand and advised of his right to counsel. § 40-9-119.

(4) *Habeas corpus.* If the fugitive, the fugitives friends, or the fugitives counsel, state a desire to challenge the legality of the arrest, the fugitive shall be taken before a judge of a court of record, who shall fix a reasonable time for the fugitive to apply for a writ of habeas corpus. §§ 40-9-119 and 29-21-101.

The United States Supreme Court explained the nature and purposes of the Extradition Clause:

The Extradition Clause was intended to enable each state to bring offenders to trial as **swiftly** as possible in the state where the alleged offense was committed. The purpose of the Clause was to **preclude any state from becoming a sanctuary for fugitives** from justice of another state and thus “balkanize” the administration of criminal justice among the several states. It articulated, in **mandatory language**, the concepts of comity and full faith and credit, found in the immediately preceding clause of Art. IV. The Extradition Clause ... served important national objectives of a newly developing country striving to foster national unity. **In the administration of justice national unity was thought to be served by de-emphasizing state lines** for certain purposes, without impinging on essential state autonomy.

Interstate extradition was intended to be a **summary and mandatory executive proceeding** derived from the language of Art. IV, § 2, cl. 2, of the Constitution. The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial.

Near the turn of the century this Court, after acknowledging the possibility that persons may give false information to the police or prosecutors and that a prosecuting attorney may act “either wantonly or ignorantly,” concluded:

“While courts will always endeavor to see that no such attempted wrong is successful, on the other hand, **care must be taken that the process of extradition be not so burdened as to make it practically valueless**. It is but one step in securing the presence of the defendant in the court in which he may be tried, and in no manner determines the question of guilt.”

Whatever the scope of discretion vested in the governor of an asylum state, **the courts of an asylum state are bound by Art. IV, § 2, by [18 U.S.C] § 3182, and, where adopted, by the Uniform Criminal Extradition Act**. A governor’s grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met. Once the governor has granted

extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. These are historic facts readily verifiable.

Michigan v. Doran, 439 U.S. 282, 288-289 (1978) (citations omitted).

In *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), the United States Supreme Court held that the Extradition Clause is enforceable in the federal courts via petition for writ of mandamus:

[W]hen a plain official duty, *requiring no exercise of discretion*, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance,” and it was no objection that such an order might be sought in the federal courts against a state officer. It has long been a settled principle that federal courts may enjoin unconstitutional action by state officials.

...

[T]here is no justification for distinguishing the duty to deliver fugitives from the many other species of constitutional duty enforceable in the federal courts. Indeed the nature of the obligation here is such as to avoid many of the problems with which federal courts must cope in other circumstances. That this is a **ministerial duty** precludes conflict with essentially discretionary elements of state governance, and eliminates the need for continuing federal supervision of state functions. The explicit and long-settled nature of the command, contained in a constitutional provision and a statute substantially unchanged for 200 years, eliminates the possibility that state officers will be subjected to inconsistent direction. Because **the duty is directly imposed upon the States by the Constitution itself**, there can be no need to weigh the performance of the federal obligation against the powers reserved to the States under the Tenth Amendment.

Id. at 227-228 (citations omitted).

II. Habeas Corpus Litigation

A. Authority for Habeas Corpus Review.

Pursuant to § 40-9-119, a fugitive arrested under a governor's warrant has a right to counsel and to a reasonable amount of time in which to file a petition for writ of habeas corpus challenging extradition. *See also* Tenn. Code Ann. § 29-21-101.

B. Habeas Corpus Procedure.

Habeas corpus proceedings are governed by 29-21-101, *et seq.* The petition should be filed in the court most convenient in point of distance to the applicant, unless a sufficient reason is given for proceeding in a different court. Tenn. Code Ann. § 29-21-105. The habeas corpus statute imposes the following requirements on petitions:

1. The petitioner must be signed by the petitioner or “some person on the petitioner’s behalf” and it must be verified by affidavit.
2. The petition shall state that the petitioner is illegally restrained.
3. The petition shall identify the person imposing the restraint and the place of the restraint.
4. The petitioner shall identify the cause of the restraint (i.e. Governor’s warrant on a demand for rendition).
5. The petition shall include a copy of the legal process imposing the restraint or provide a satisfactory reason for its absence.
6. The petition shall state that the legality of the restraint has not already been adjudged.
7. The petition shall state that it is the first application for the writ or, if a previous application has been made, shall include a copy of the previous

petition and record of the proceedings or satisfactory reasons for failing to do so.

Tenn. Code Ann. § 29-21-107.

C. Duty of the Trial Court

The trial court has a duty to act upon an application for the writ “instanter.” Tenn. Code Ann. § 29-21-108. Additionally, because extradition law contemplates the **prompt** return of the fugitive after a summary executive proceeding, the court should hear the petition promptly. If additional factual materials must be obtained from the demanding state, additional time may be required. The fugitive complaint proceedings should be stayed pending disposition of the habeas corpus petition.

D. Issues that May Be Litigated

Under *Michigan v. Doran*, the only issues which may be raised in the courts of the asylum state are:

- (1) whether the person in custody is the same person named in the extradition request,
- (2) whether the person is a fugitive,
- (3) whether the person is charged with or convicted of a crime in the demanding state, and
- (4) whether the extradition documents on their face are in order.

439 U.S. 282, 289 (1978); *State ex rel. Jones v. Gann*, 584 S.W.2d 235 (1979). These will be discussed in more detail to follow.

(1) Identity

The essence of this challenge to extradition is the claim that the person before the court is not the person named in the extradition request and governor's warrant. The identity of the person wanted may be established through the person's name, birth date, and Social Security number. Additional evidence may include photographs (driver's license, mug shot, family photograph) and fingerprints cards. An error in the initial of the person's name is insufficient to show lack of identity. On one occasion, proof of identity came in the form of a newspaper article in which the fugitive gave an interview and was photographed.

(2) Fugitivity

Fugitives. "Fugitivity" is established where it is shown that the person was in the demanding state when the alleged offense was committed and was subsequently found in the asylum state. It does not matter how the person left the demanding state. It may have been voluntary, involuntary, the result of legal process, or without any consideration of the alleged offense, but if the person is found in the asylum state, the person is a "fugitive" under extradition law.

Non-Fugitives. The requirement of "fugitivity," has been virtually eliminated through the adoption of Tenn. Code Ann. § 40-9-113. This section authorizes the extradition when the person was in the asylum state or a third state when the alleged offense was committed and intentionally resulted in a crime in the demanding state. A typical example is felony non-support: When a person, who is obligated to support another person, lives in the asylum state and fails to pay support to the person who lives in the demanding state, the failure to pay support results in an offense in the demanding state, even if the obligor never visited the demanding state,. *See, e.g., Timothy Hodges v. State*, No. M2005-01347-CCA-R3-HC, 2006 WL 448664 (Tenn. Crim. App. Feb. 23, 2006) (Rule 11 app. denied Tenn. June 26, 2006). Accordingly, the issue is really whether the person is a fugitive or otherwise subject to extradition.

(3) Criminal Charges

The fugitive must be “lawfully charged” with a crime. This refers to the substance of the charges. Extradition is not available for any civil claim, including contempt and, more particularly, or criminal contempt. The extradition act requires the demand show that the accused is lawfully charged by indictment, information, or affidavit of complaint sworn before a magistrate. Tenn. Code Ann. § 40-9-112. It also requires that the demand be “accompanied by a copy of an indictment found, or by information supported by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate there, together with a copy of any warrant which issued thereon.” Tenn. Code Ann. § 40-9-110. Whether the person is charged is a question of law to be determined on the face of the documents, evaluated under the language of the demanding state’s statute are sufficient. Generally, in addition to the charging documents, demanding states will attach copies of relevant statutes to demonstrate that the fugitive is charge with a crime.

A person who has been convicted, but has not been sentenced or has not completed serving the sentence, is “charged” for purposes of extradition. This is true whether the fugitive escaped, absconded, was allowed to leave on furlough, was returned to the sending state following trial after removal under the IAD, or was transferred to another state to serve a concurrent sentence there. *See* Tenn. Code Ann. § 40-9-112.

In *California v. Superior Court of California, San Bernardino County*, 482 U.S. 400 (1987), the fugitives claimed they were not charged with a crime in the demanding state. The Court ruled:

Their sole contention is that, in light of the earlier California custody decrees and the federal Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A, they have not been properly charged with a violation of Louisiana's kidnaping statute, La.Rev.Stat.Ann. § 14:45 (West 1986).

Section 14:45A(4) prohibits the “intentional taking, enticing or decoying away and removing from the state, by any parent, of his or her child, from the custody of any person to whom custody has been awarded by any court of competent jurisdiction of any state, without the consent of the legal custodian, with intent to defeat the jurisdiction of the said court over the custody of the child.”

A properly certified Louisiana information charges the Smolins with violating this statute by kidnaping Jennifer and Jamie Smolin. The information is based on the sworn affidavit of Judith Pope which asserts:

“ ‘On March 9, 1984, at approximately 7:20 a.m., Richard Smolin and Gerard Smolin, kidnaped Jennifer Smolin, aged 10, and James C. Smolin, aged 9, from the affiant's custody while said children were at a bus stop in St. Tammany Parish, Louisiana.

“The affiant has custody of the said children by virtue of a Texas court order dated February 5, 1981, a copy of said order attached hereto and made part hereof. The information regarding the actual kidnaping was told to the affiant by witnesses Mason Galatas and Cheryl Galatas of 2028 Mallard Street, Slidell, Louisiana, and Jimmie Huessler of 2015 Dridle Street, Slidell, Louisiana. Richard Smolin and Gerard Smolin were without authority to remove children from affiant's custody.’ ” App. B to Pet. for Cert. 5-6.

The information is in proper form, and the Smolins do not dispute that the affidavit, and documents incorporated by reference therein, set forth facts that clearly satisfy each element of the crime of kidnaping as it is defined in La.Rev.Stat. Ann. § 14:45A(4) (West 1986). If we accept as true every fact alleged, the Smolins are properly charged with kidnaping under Louisiana law. In our view, this ends the inquiry into the issue whether or not a crime is charged for purposes of the Extradition Act.

Id. at 408-409. Therefore, when the demand demonstrates that the fugitive is charged with violating a state statute in a properly certified charging instrument and the allegations of fact

contained in the affidavit satisfy each element of the charged offense, the fugitive is charge with a crime for purposes of extradition.

(4) Legal Sufficiency of Documents

The documents should be viewed in their entirety to determine if the essential contents are present. The Uniform Criminal Extradition Act requires that the demand be in writing and that it include:

- A authenticated copy of the charging instrument (indictment, information, or affidavit of complaint).
- A copy of an arrest warrant or capias.

Tenn. Code Ann. § 40-9-110. It also requires the demand to establish that:

- The accused is a fugitive or otherwise subject to extradition.
- The accused in currently in the asylum state.
- The accuses is charged with having committed a crime in that state.

Tenn. Code Ann. § 40-9-112.

The paperwork should be reviewed as a whole. Clerical errors and minor inconsistencies in the paper work are not fatal to the extradition. Additionally, if the governor of the demanding state has certified that the documents are authentic, no further inquiry is necessary on that issue.

As a practical matter, there should never be a problem with the paperwork. The paperwork is first received by the Extradition Officer in the Department of Correction. It reviewed by the Extradition Officer and then forwarded to the Attorney General's Office, where it is reviewed by one of three Extradition Attorneys. The paperwork is returned to the Extradition Officer, with evidence of the Attorney General's approval, and it is then reviewed by the General Counsel for the Department of Correction. Finally, the paperwork is sent to the Governor's Office, where it is reviewed by the Governor's Counsel before

being presented to the Governor for official endorsement. For the same reasons, there should never be a question about fugitivity, charges pending, or identity because the paperwork should resolve all of these issues.

E. Issues that May Not be Raised.

In *California v. Superior Court of California, San Bernardino County*, the Supreme Court explained:

As we have repeatedly held, extradition proceedings are “to be kept within narrow bounds”; **they are “emphatically” not the appropriate time or place for entertaining defenses or determining the guilt or innocence of the charged party.** Those inquiries are left to the prosecutorial authorities and courts of the demanding State, whose duty it is to justly enforce the demanding State’s criminal law—subject, of course, to the limitations imposed by the Constitution and laws of the United States.

482 U.S. 400, 407-408 (1987) (citations omitted).

This decision includes such typical defenses as denial of the right to a speedy trial, violation of the prohibition of double jeopardy, the unconstitutionality of the statute, and insanity. *See Earhart v. Hicks*, 656 S.W.2d 873 (Tenn. Crim. App. 1983).

Others that have been litigated include:

(1) Guilt or Innocence.

The question of guilt or innocence may *not* be raised in the courts of the asylum state. The habeas corpus statute expressly prohibits any inquiry into the guilt or innocence of the fugitive, except as may be required to identify the person held as the person charged with the crime. Tenn. Code Ann. § 40-9-114; *Earhart v. Hicks*, 656 S.W.2d 873 (Tenn. Crim. App. 1983) (trial court cannot conduct mini-trial on the substantive issues in the underlying case).

(2) Probable Cause.

The existence of probable cause for the charges shall not be questioned in the asylum state. “[W]hen a neutral judicial officer of the demanding state has determined that probable cause exists, the courts of the asylum state are without power to review the determination To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Art. IV, § 2. *Michigan v. Doran*, 439 U.S. 282, 290 (1978).

(3) Sufficiency of the Indictment.

The sufficiency of the indictment may not be challenged. *California v. Superior Court of California, San Bernardino County*, 482 U.S. 400 (1987); *State ex. Rel. Sandford v. Cate*, 285 S.W.2d 343 (Tenn. 1955). In *California v. Superior Court*, the United States Supreme Court rejected the argument that an indictment may be challenged if it is so insufficient that it cannot withstand a general motion to dismiss or common-law demurer. The Court held, “To the contrary, our cases make clear that no such inquiry is permitted.” *Id.* at 410-411. The Court explained that such an inquiry in the asylum state:

would impose upon the courts . . . the duty of a critical examination of the laws of States with whose jurisprudence and criminal procedure they can have only a general acquaintance. Such a duty would be an intolerable burden, certain to lead to errors in decision, irritable to the just pride of the States, and fruitful of miscarriages of justice. The duty ought not to be assumed unless it is plainly required by the Constitution.

Id. at 411 (quoting *Pierce v. Creecy*, 210 U.S. 387, 404 (1908)).

(4) Prison Conditions in Demanding States.

Claims of abuse in the demanding state’s prison system are not cognizable. *Sweeney v. Woodall*, 344 U.S. 86, 89-90 (1952) (“interstate rendition . . . do[es] not contemplate an appearance by [the demanding state] in respondent’s asylum to defend

against the claimed abuses of its prison system”). In *New Mexico ex rel. Ortiz*, 524 U.S. 151 (1998), the fugitive claimed that he fled the State of Ohio because his parole would be revoked without due process and that he would be returned to prison where he faced the threat of bodily injury. Crediting Ortiz’s un rebutted testimony, the courts of New Mexico concluded that duress negated his fugitive status because he was a “refugee from injustice” and awarded habeas corpus relief. The United State’s Supreme Court accepted the state court’s determination that the fugitive’s testimony was credible, but it reversed the award of habeas corpus relief because the claims were not cognizable in the asylum state:

We accept, of course, the determination by the Supreme Court of New Mexico that respondent’s testimony was credible, but this is simply not the kind of issue that may be tried in the asylum State. In case after case we have held that claims relating to what actually happened in the demanding state, the law of the demanding State, and what may be expected to happen in the demanding State when the fugitive returns are issues that must be tried in the courts of that State, and not in those of the asylum State. As we said in *Pacileo [v. Walker]*, 449 U.S. 86 (1980) (per curiam):

“Once the Governor of [the asylum state] issued the warrant for arrest and rendition in response to the request of the Governor of [the demanding state], claims as to constitutional defects in the [demanding state] penal system should be heard in the courts of [the demanding state], not those of [the asylum state]. ‘To allow plenary review in the asylum state of issues that can be fully litigated in the charging state would defeat the plain purposes of the summary and mandatory procedures authorized by Article IV, § 2.’

Id. at 153-154.

(5) Asylum State’s Constitution.

Provision in the asylum state’s constitution cannot be cited to defeat extradition. In *New Mexico ex rel. Ortiz*, the Supreme Court held:

The Supreme Court of New Mexico also held that the New Mexico Constitution’s provision guaranteeing the right “of seeking and obtaining

safety” prevailed over the State’s duty under Article IV of the United States Constitution. But as long ago as *Kentucky v. Dennison*, 24 How. 66, 16 L.Ed. 717 (1860), we held that the duty imposed by the Extradition Clause on the asylum State was mandatory. In *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987), we reaffirmed “the conclusion that the commands of the Extradition Clause are mandatory, and afford no discretion to the executive officers or the courts of the asylum State.” And in *California v. Superior Court of Cal., San Bernardino Cty.*, 482 U.S. 400, 405-406 (1987), we said:

“The Federal Constitution places certain limits on the sovereign powers of the States, limits that are an essential part of the Framers' conception of national identity and Union. One such limit is found in Article IV, § 2, cl. 2, the Extradition Clause: [text of clause omitted].

“The obvious objective of the Extradition Clause is that no State should become a safe haven for the fugitives from a sister State's criminal justice system.”

As is apparent from the length of time this proceeding has taken in the courts of New Mexico, it has been anything but the “summary” proceeding contemplated by the decisions cited above. This is because the Supreme Court of New Mexico went beyond the permissible inquiry in an extradition case, and permitted the litigation of issues not open in the asylum State.

Id. at 154-155.

(6) Prosecution in Bad Faith.

In rejecting the petitioner’s attempt to thwart extradition on a claim that the prosecution was initiated in bad faith as an attempt to collect a debt, the Tennessee Supreme Court ruled:

To paraphrase one of our leading cases, the only question open for our consideration in this appeal is whether the Relator is charged with crime in Illinois and is a fugitive from justice of that State. This was the only question proper for the Governor of Tennessee to consider in determining whether he should issue his warrant on the demand of the Governor of Illinois.

State ex rel. Iverson v. Sheriff & Officer of Cook County, Chicago, Ill., 210 S.W.2d 483, 485 (Tenn. 1948).

F. Burden of Proof

The issuance of a governor's rendition warrant creates a prima facie case that the person sought to be extradited was lawfully charged with crime in the demanding state and has fled from justice. *McLaughlin v. State*, 512 S.W.2d 657, 659 -660 (Tenn. Crim. App. 1974).

Fugitivity. In habeas corpus challenge to extradition, the petitioner may show that he was not in the demanding state at the time of the crime. But the petitioner's absence must be shown **beyond a reasonable doubt**. The petition will not be granted where the evidence is merely contradictory because habeas corpus to resist extradition is not a proceeding to try the question of alibi or the guilt or innocence of the accused. *McLaughlin v. State*, 512 S.W.2d 657, 660 (Tenn. Crim. App. 1974).

Criminal Charges. The issuance of the rendition warrant by the governor of Tennessee created a prima facie case that the petitioner was lawfully charged with a crime in the demanding state. This prima facie case was not rebutted by contradictory proof at the evidentiary hearing. *Reeves v. State, ex rel. Thompson*, 199 Tenn. 598, 288 S.W.2d 451 (1956); *State ex rel. Lingerfelt v. Gardner*, 591 S.W.2d 777, 779 (Tenn. Crim. App. 1979).

G. Bail

Admission to bail is permitted after a fugitive is arrested in Tennessee and while the fugitive awaits extradition (*i.e.* issuance of a governor's warrant and surrender to the demanding state), unless the offense is punishable by death or life imprisonment in the demanding state. Tenn. Code Ann. § 40-9-106. When a fugitive is admitted to bail, the

judge or magistrate is required to specify in the bond or undertaking a time for the fugitive to appear before the judge or magistrate **and** to require the fugitive to surrender to be arrested on the governor's warrant. *Id.* Because the right to bail terminates upon issuance of the governor's warrant, there is no right to bail pending a hearing on a habeas corpus petition.

H. Appeal.

Both the state and the fugitive have a right to appeal. Tenn. R. App. P. 3. Because the appellate process is often very time consuming, the constitutional requirement of prompt return of fugitives from justice may not be met if a case must run the normal appellate course. Thus, the state will usually request expedited review. There is no automatic stay of the extradition to allow the fugitive to seek relief in another court. The fugitive should be rendered over to the demanding state's agents.

I. Alternative to Appeal.

As an alternative to an appeal (or if the appeal is unsuccessful), a second attempt to extradite may be initiated. The governor is authorized to "issue another warrant whenever the governor deems proper." Tenn. Code Ann. § 40-9-117. As long as the underlying warrant remains outstanding in the demanding state, the fugitive remains subject to arrest with or without a warrant pursuant to Tenn. Code Ann. § 40-9-103 and -104. When sufficient additional documentation is received to correct any defect, a new governor's warrant may be issued. Alternatively, a new application, requisition, and supporting documents may be submitted with the previous defects corrected.

Even where habeas corpus relief was granted on the basis of a factual issue (i.e., identity or fugitivity), a second arrest and attempt to extradite is permissible, because the principles of *res judicata* or collateral estoppels do not apply in extradition proceedings.

However, it is usually advisable to offer new and/or additional evidence on the issue if a second attempt is made.