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Interstate Rendition:
Rights and Remedies of the Accused Seeking Asylum in Massachusetts

By

GENE R. SHREVE*

The subject of Interstate Rendition is one of conspicuous unfamiliarity to the average Massachusetts lawyer. Yet, as this article indicates, the rendition hearing presents a valuable opportunity to alert defense counsel to assist the accused at a critical stage of the criminal proceeding. The author, a graduate of Harvard Law School is presently law clerk to United States District Judge Sarah T. Hughes of the Northern District of Texas. He formerly served as Massachusetts Assistant Attorney General where he presided at numerous rendition hearings conducted by the Department of the Attorney General for the Governor.

Each year several hundred persons in Massachusetts find themselves the subjects of out-of-state criminal rendition demands. Members of the bar advising and defending in these cases for the first time must necessarily approach a body of rules and procedures which lay outside the ordinary scope of criminal process. Consequently, essential knowledge and appreciation of the successive steps of the rendition process often eludes the defense lawyer. The object of this article is to enhance the lawyer's understanding of his client's situation as an alleged fugitive from justice and of the steps which might be taken to block his return.

The First Arrest

The process leading to the original arrest of the accused begins when local Massachusetts police authorities receive word from the demanding state that a warrant is currently outstanding against the accused in the demanding jurisdiction. A police officer then appears before the local district court and on his own oath or on the strength of an out-of-state complaint obtains a fugitive arrest warrant. Local authorities may, where the out-of-state offense is punishable "by death or by imprisonment for a term exceeding one year," arrest the accused without a fugitive warrant, subject to the procedure of § 20B.

The accused is arraigned in district court. After being advised of his right to counsel, the accused is asked if he wishes to waive rendition proceedings pursuant to § 20J. If he refuses, the local authorities will subsequently notify the law enforcement officials of

* The opinions expressed are those of the author and do not reflect the policies of the Governor or the Department of the Attorney General.
the demanding state. The prosecutorial officer of the demanding state, usually a district attorney, will begin preparing the rendition request papers for the Governor of Massachusetts.

Meanwhile, under § 20C, the subject may be placed in custody for an initial period not to exceed thirty days to allow an opportunity for the rendition papers to be prepared and acted upon by the Governor of Massachusetts. Under § 20F, this period may be extended for an additional sixty days.

Unless the offense the subject has allegedly committed in the demanding jurisdiction is punishable in that jurisdiction by death or life imprisonment, the subject may be admitted to bail under § 20D.

The Attorney General’s Hearing

A short time after the arrest of the accused, the Governor of Massachusetts receives rendition papers on the subject accompanied by a covering request certificate from the Governor of the demanding state. The Governor of Massachusetts must then decide whether to issue a warrant of arrest described in §§ 16 and 17. In the absence of a successful petition for habeas corpus under § 19, this would result in the surrender of custody of the accused to authorities of the demanding state who would appear in Massachusetts pursuant to §§ 12 and 13.

Before his warrant can validly issue, the Governor must determine to his satisfaction that the rendition papers substantially charge the accused with a crime in the demanding jurisdiction and are otherwise valid as to authentication and form. The Governor must also determine that the accused is in fact a fugitive from justice.2

The Governor has by § 15 the prerogative of calling upon the Attorney General to investigate the facts of each rendition request and advise upon the validity of the papers. Out of this practice has evolved the fixed procedure of an investigative hearing conducted by a member of the Attorney General’s legal staff.

These hearings are relatively informal. Often only the staff attorney, his secretary, the accused, and his counsel are present. No oaths are administered. Usually no stenographic record is taken and the Governor is not obliged to follow the recommendations of the hearing examiner which subsequently appear in the hearing report.3 Hence, defense counsel often do not take the hearing seriously. This is most unfortunate because it is at the stage of the Attorney General’s hearing that an accused subjected to the process of rendition most often has an opportunity to block his return. For
this reason it may be worth examining in detail some misconceptions commonly reflected by counsel concerning the nature and potential usefulness of the hearing.

Defense counsel often consider the Attorney General's hearing to be a mere formality required by law. On the contrary, the hearing is held at the discretion of the Governor and could conceivably be dispensed with altogether without rendering a resulting governor's arrest warrant defective. At all events, in practice, the hearing is the principal source of information upon which the Governor will base his decision.

Defense counsel often erroneously believe that the hearing examiner is fulfilling a prosecutorial role. This feeling is no doubt based on defense counsel's awareness of the standard prosecutorial duties of the Attorney General's legal staff and by the absence of any prosecutorial officials from the demanding state at the hearing. In fact, the purpose of the hearing is to uncover any weaknesses which may exist in the request of the demanding state. The alleged fugitive has much to gain and little to lose by vigorously pursuing his arguments at this stage.

A third error of judgment often made by the defense counsel, one related to the two already discussed, is the pervasive feeling that no great amount of preparation of the accused's case is necessary until after the Governor of Massachusetts has issued an arrest warrant and the Superior Court hears a petition for habeas corpus pursuant to § 19. Steps which counsel should take at a habeas corpus proceeding will be the subject of the following section. It is sufficient to note here that the powers of the Governor to grant relief to the accused by not honoring the request of the demanding state are far broader than are the powers of the court to void the Governor's warrant of arrest once he has decided to comply with the demand.

The hearing is usually brief. It is conducted around four questions asked by the examiner. The examiner asks the accused through his attorney: first, if he is the person identified in the demanding papers; second, if he was present in the demanding state at the time the alleged crime occurred; third, if he has any objection to the legal form of the documents; and, fourth, if he has any statement to make which is in any way a plea to the Governor.

The first of these questions is designed to uncover cases of mistaken identity. The second assists the Governor in determining whether the accused is a fugitive from justice (a discussion of what facts must be present before the accused can be found to be a fugi-
tive from justice appears in the following section). The third question concerns the legal criteria of form and authentication for the demand papers set out in § 14. The fourth and final question is frequently the most important. It provides the accused with an opportunity to offer any reasons why he believes his presence in Massachusetts should not be terminated.

The response given to the last question is probably more instrumental in the Governor's periodic decision not to act on a rendition demand than the responses given to any of the other three. Although federal law clearly states that the executive authority of the asylum state "shall" turn custody of the accused over to authorities of the demanding state if legal requirements are met. 18 U.S. C.A. 3182 (1951), the Governor of each state will periodically refuse to act upon an interstate rendition demand when he concludes that honoring the request would produce a harsh or inequitable result upon the accused or others in the asylum state. In so acting, state governors are beyond the reach of federal courts. Each governor remains aware, however, that his own rendition demands are being considered by governors of other states and that, in the general interest of law enforcement, most valid requests must be honored.

In responding to the four questions discussed above, counsel for the accused may support his arguments with written evidence or the testimony of witnesses. The hearing examiner ordinarily prepares his report immediately after the hearing, but he may postpone preparation of the report for a reasonable period of time to receive further evidence.

Relief by Habeas Corpus

If the Governor does decide to issue his warrant of arrest, the accused is entitled to petition for a writ of habeas corpus described in § 19. In Massachusetts the proceeding is used to attack the Governor's warrant of arrest on three grounds.

First, the petitioner may argue that he is not the person identified in the Governor's warrant of arrest. While the question is ordinarily framed so as to allege a mistake of identity in the Governor's warrant, the underlying issue becomes one of the identity of the person referred to as the fugitive in the papers of the demanding state.

Second, the petitioner can argue that the demand papers do not meet the standards set forth in § 14.

Third, the petitioner may argue that he is not a "fugitive from
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justice.” To be a fugitive from justice, the accused must have been in the demanding state at the time the crime was alleged to have been committed. He must also have been charged with a crime in the demanding state and have left its jurisdiction. Two of the requirements above have been broadened by § 13. The accused may be subject to surrender by the Governor to the demanding state even though he was not present in the demanding state when the crime was committed if he committed acts in another state intentionally resulting in a crime in the demanding state. Section 13 also permits the Governor to surrender the accused even though he left the demanding state involuntarily.

While the cases in Massachusetts are not entirely clear, the standards of proof necessary for the petitioner to prevail in each of the three arguments discussed in this section appear to vary greatly.

Relative to the question of the identity of the person named in the Governor’s warrant of arrest, in Baker, petitioner, the Supreme Judicial Court stated:

“We . . . assume, in favor of the petitioner, that the point he intended to raise . . . was that the burden of proving that the petitioner was the person charged with the crime and was the one intended to be extradited to New Hampshire for trial of the offense of which he was accused is upon the respondent. The identity of the petitioner with the person named in the rendition warrant is open upon a petition for habeas corpus.” Supra at pg. 730.

One construction of this language would mean that the petitioner, by merely denying his identity to be that of the person mentioned in the papers, puts the burden of proving the question on the respondent.

This rule of proof contrasts with the general rule applicable to the question whether the standards of form and authentication of § 14 have been met. First laid down in Davis’s Case, and subsequently quoted in a number of Supreme Judicial Court opinions, the most recent of which was Murphy, petitioner, the rule states that the Governor’s warrant of arrest

“. . . is prima facie evidence, at least, that all necessary legal prerequisites have been complied with, and, if the previous proceedings appear to be regular, is conclusive evidence of the right to remove the prisoner to the state from which he fled.” Supra, at p. 211.

When the petitioner argues that he is not a fugitive from justice, he encounters even greater problems of proof. While the two arguments previously discussed present questions of law readily
open to judicial inquiry in a habeas corpus proceeding, whether the petitioner is a fugitive from justice is a question of fact, initially decided by the Governor. The Supreme Judicial Court in Murphy, petitioner, supra, observed that "whether the petitioners were fugitives from justice was a question of fact for the Governor to determine upon evidence satisfactory to him."

In Massachusetts the standard of proof necessary for the petitioner to upset the Governor's decision that the petitioner is a fugitive from justice is very difficult to meet. Quoting the United States Supreme Court opinion, McNichols v. Pease, Chief Justice Rugg in Germain, petitioner, stated: supra, at pp. 295-296,

"When a person is held in custody as a fugitive from justice under an extradition warrant, in proper form, and showing upon its face all that is required by law to be shown as a prerequisite to its being issued, he should not be discharged from custody unless it is made clearly and satisfactorily to appear that he is not a fugitive from justice within the meaning of the Constitution and laws of the United States."

Massachusetts cases shed light on what the petitioner must do to "clearly and satisfactorily" prove he is not a fugitive from justice by negative implication. The Supreme Judicial Court in Murphy, petitioner, supra, quoted the language of Almunsen v. Clough, supra, at pp. 295-296,

"... the court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of presence in or absence from the state, as habeas corpus is not the proper proceeding to try the question of alibi, or any question as to the guilt or innocence of the accused." (See also Baker, petitioner, supra, at pp. 732-733. Germain, petitioner, supra, at pp. 296-297; and G.L. c. 276, § 20H.) supra, at p. 210.

Supreme Judicial Court opinions reveal that, when the petitioner challenges his status as a fugitive from justice, it is usually on the ground that he was not present in the demanding state at the time the crime was allegedly committed. This is doubtless because the question whether the petitioner has been substantially charged with a crime can be more easily raised within the context of § 14.

There is another argument which, though untested in the Supreme Judicial Court, appears fully applicable in a habeas corpus proceeding under § 19. This is the challenge that the arrest on the Governor's warrant was without probable cause. "There is no reason why the Fourth Amendment, which governs arrests, should not
govern extradition arrests.” Kirkland v. Preston. Kirkland stated that unless the demand is accompanied by an indictment, which “embodies a grand jury’s judgment that constitutional probable cause exists . . ., there is no assurance of probable cause unless it is spelled out in the affidavit itself.”

FOOTNOTES

1 G.L. c. 276 § 20A.*
2 All further citations to the Uniform Criminal Interstate Rendition Law, appearing as G.L. c. 276 §§ 11-20R, will be by section alone. These sections restate and expand the text of governing federal law found at 18 U.S.C.A. 3182 (1951) to provide an extensive codification of the stages of the rendition process and the rights of the accused.

Ex parte Germain, 258 Mass. 289, 155 N.E. 12, 51 A.L.R. 789 (1927); see “Rights of the Accused in Interstate Rendition of Fugitives”, 41 Harv. L. Rev. 74, 75 (1927).

In re Murphy, 321 Mass. 206, 209, 72 N.E.2d 413 (1947).

See the analysis of Justice Wilkins in In re Murphy, supra, at pp. 208-209.

For a discussion of questions of form and authentication, see Murphy, petitioner, supra, at pp. 211-214, and the authorities cited therein.

Ex parte Kentucky v. Dennison, 24 How. 66, 16 L.Ed. 717 (1861).

See, e.g., Baker, petitioner, supra, at pp. 730-731.

See Murphy, petitioner, supra; and In re Baker, 310 Mass. 724, 39 N.E.2d 762 (1942), cert. den. 316 U.S. 899, 62 S.Ct. 1297, 86 L.Ed. 1768.


122 Mass. 324, 328 (1877).

See the analysis of Chief Justice Rugg in Germain, petitioner, supra, at pp. 291-296.

12 Supra at p. 291.

207 U.S. 100, 112. 28 S.Ct. 58, 52 L.Ed. 121 (1907).


15 883 F.2d 670, 676 (D.C. Cir. 1967).

16 (Supra, at p. 676). On the general subject of probable cause in state arrest, see Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964).