

## Opinion No. 74-38

November 18, 1974

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** James L. Brandenburg District Attorney Second Judicial District County Courthouse  
Albuquerque, New Mexico

### QUESTIONS

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Upon arrest within the State of New Mexico of any person named in a Governor's Warrant, do the State Courts of New Mexico have authority to release such individual on bail bond or any other form of release under the Uniform Criminal Extradition Act (Sections 41-19-1 to 41-19-30)? Does any other authority exist for such release on bail bond or other form of release, excluding the Writ of Habeas Corpus proceeding authorized by the Uniform Extradition Act?

#### CONCLUSION

See analysis.

### OPINION

#### {\*76} ANALYSIS

You have asked a question which has provoked much discussion among extradition officials throughout the United States in recent years. The problem presented by your question is of great interest to the National Association of Extradition Officials, of which New Mexico is a member. It seems to be the consensus among members of that association that after a fugitive has been arrested in the asylum state on a **governor's warrant of extradition**, he is not entitled to be released on bail by bond or otherwise. Of course, this opinion must consider the question in light of New {\*77} Mexico law and constitutional provisions.

New Mexico has enacted the Uniform Criminal Extradition Act as Sections 41-19-1 through 41-19-30, NMSA, 1953 Comp. Sections 41-19-13 through 41-19-17, **supra**, provide for arrest of a fugitive **prior** to issuance of a governor's warrant and for imprisonment awaiting such governor's warrant for a period not to exceed ninety days. With reference to bail in extradition cases, Section 41-19-16, NMSA, 1953 Comp. states:

"Bail -- In what cases -- Conditions of bond. -- Unless the offense with which the prisoner is charged is shown to be an offense punishable by death or life imprisonment

under the laws of the state in which it was committed, a judge or magistrate in this state may admit the person arrested to bail bond, with sufficient sureties, and in such sum as he deems proper, conditioned for his appearance before him at a time specified in such bond, **and for his surrender, to be arrested upon the warrant of the governor of this state.**" (Emphasis added.)

This section provides for bail before issuance of the governor's warrant but makes no mention of bail **after** arrest on the governor's warrant. However, Article II, Section 13 of the Constitution of New Mexico states:

"All persons shall beailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

There is no New Mexico case law on the subject of bail after issuance of a governor's warrant in extradition cases. There is authority on the topic, however, from other states which have the same or similar statutory and constitutional provisions as those set out above.

**Walden v. Mosley**, 312 F. Supp. 855 (N.D. Miss 1970) addressed the question:

"Is a petitioner facing extradition entitled to bail pending the determination of a habeas corpus proceeding challenging his extradition?"

In response to this question, the court explained:

"There is a conflict of authority as to whether a petitioner challenging extradition in a habeas corpus proceeding is entitled to bail pending the determination of that proceeding. Although both federal and state laws generally provide for bail wherever possible when it does not endanger the public, the cases have often held that such provisions are inapplicable to extradition proceedings. One early Mississippi case held that the Mississippi extradition statute, Miss. Code 1906, § 2446, predecessor of the present extradition statute, specifically forbade bail in extradition proceedings in spite of the provision of the Mississippi Constitution specifically requiring bail in all non-capital cases.

The reasoning behind the rule refusing bail appears to be that the petitioner's right to bail will be afforded him in the demanding state pending trial there. In the relatively few reported cases in which a petitioner has been admitted to bail pending a habeas corpus hearing on extradition, it was almost always before the governor of the asylum state had issued his warrant of rendition where it appeared there might be a substantial delay before the petitioner would be extradited and have an opportunity to make bail in the demanding state."

**Balasco v. State**, 289 So.2d 666 (Ct. App. Ala. 1974) referred to bail under Alabama's Uniform Criminal Extradition statute:

"In Title 14, §§ 62, 63, Code of Alabama 1940, it is a requirement, subject to an exception not applicable here, that an accused be admitted to bail on a fugitive warrant, to await the execution of a rendition warrant of the {\*78} Governor of Alabama, but there is no statutory authority for bail after an arrest on the latter warrant. The general rule is that an accused being held on a warrant of rendition is not entitled to bail. 35 C.J.S. Extradition § 19, p. 445."

See also **People ex rel. McGill v. Wright**, 62 Misc.2d 154, 307 NYS.2d 964 (1970); **Wayans v. Wolfe**, 30 Conn. Sup. 60, 300 A.2d 44 (1972); **Grano v. State**, 257 A.2d 768 (Del. 1969).

There are two cases adopting the opposite view from the cases cited above. Both cases rely in part on habeas corpus statutes. **Application of Haney**, 289 P.2d 945 (Idaho 1955) held that:

Sec. 19-4218, I.C. permitting one in a habeas corpus proceeding to obtain bail is not limited to criminal charges brought under the laws of this State. The statute refers to a person imprisoned on a criminal charge for want of bail. The petitioner is so imprisoned.

As such offense isailable we conclude that Art. 1, Sec. 6, Idaho Constitution and the general statutes covering bail in a criminal proceeding are broad enough to include bail on appeal from a judgment of remand in a habeas corpus proceeding pending the appeal and determination by this Court, when the prisoner has secured a certificate of probable cause from the district judge who heard the matter.

We therefore conclude that the power to grant bail exists, but in such cases bail is discretionary. Otherwise a person held in custody on an executive warrant, while testing the sufficiency and legality of the proceedings, could be compelled to remain in jail for minor, as well as grave offenses.

The constitutional provision, Art. 1, Sec. 6, is all inclusive and provides that all persons shall beailable with certain exceptions. The exceptions contained in the provision and the general statutes permitting bail, do not except persons held in custody under an executive warrant in interstate extradition proceedings.

In our opinion bail should be granted or denied petitioner in the sound legal discretion of the trial judge."

**Ruther v. Sweeney**, 137 N.E.2d 292 (Ohio 1956) recognized that:

"There is no provision for bail after the relator is held in custody for extradition on the warrant of the Governor of Ohio issued in accordance with and under the authority of Chapter 2963, R.C."

The court went on to hold that Ohio's Criminal Extradition Act did not provide a procedure to be followed in seeking release from custody so the general procedure

provided by habeas corpus and appeals statutes would be applicable. Since habeas corpus was considered a collateral remedy, civil in nature, and an appeal had been provided for as in other cases, the court allowed the fugitive to give bond and be released from custody pending appeal.

The latter two cases deal with bail during the pendency of an appeal from a decision remanding petitioner to custody in an extradition habeas corpus proceeding. The New Mexico habeas corpus statutes, Sections 22-11-1 through 22-11-37, NMSA, 1953 Comp. do not provide for an appeal in such cases. See **In re Forest**, 45 N.M. 204, 113 P.2d 582 (1941). Thus the reasoning of **Haney** and **Ruther** does not seem particularly persuasive.

New Mexico's habeas corpus statutes provide with respect to bail:

"Petitioner legally committed or guilty of offense -- Release on bail. -- If it appears that the party has been legally committed for any criminal offense, or if he appears, by the testimony offered with the return upon the hearing thereof, to be guilty of such an offense, although the commitment is irregular, the officer before whom such party is brought shall proceed to let such party {\*79} to bail, if the case be bailable and good bail is offered, or if not, shall forthwith remand such party." Section 22-11-19, NMSA, 1953 Comp.

"Bail proceedings -- Authorization -- of habeas corpus -- Committing magistrate's proceedings to be reviewed. -- Hereafter all persons to whom bail has been denied or who are confined for failure to give bail, may have the benefit of a writ of habeas corpus for the purpose of being admitted to bail or having the bail reduced, and the court or judge shall, upon habeas corpus, review the proceedings or action of a committing magistrate." Section 22-11-23, NMSA, 1953 Comp.

Neither section requires the granting of bail in every case. Indeed, Nevada has a statute similar to Section 22-11-23, **supra**. (NRS. 34, 350), and this statute was not deemed to require bail after issuance of a governors' warrant in an extradition case. **State v. Second Judicial District Court**, 471 P.2d 224 (Nev. 1970) (dissenting opinion).

**State v. Judicial District Court, supra**, held that a fugitive charged with an offense in a sister state was not entitled to bail after issuance of a governor's warrant authorizing extradition. The case refers to authority that the failure in the Uniform Criminal Extradition Act to mention bail after issuance of the governor's warrant was intentional. It also cites **State ex rel. Stringer v. Quigg**, 91 FLA. 197, 107 So. 409 (1926):

"Authority for interstate rendition of fugitives by extradition emanates solely from the power delegated to the federal government by the Constitution of the United States. \* \* \* Legislation as to interstate rendition of fugitives being within the power of Congress, the federal law upon that subject is paramount to state Constitution and statutes. [Citation omitted.] **When the executive warrant of rendition has been issued, the fugitive is then held solely upon that authority. His detention is not for the purpose of trying**

**him in the courts of this state, for he is charged with no offense against our laws, but he is apprehended and detained for the sole purpose of rendition to the demanding state.** (Emphasis added.)

The Nevada Constitution contains a provision similar to the above-quoted section of the New Mexico Constitution:

"All persons shall be bailable by sufficient sureties; unless for Capital Offenses when the proof is evident, or the presumption great." Nevada Constitution, Art. I, § 7.

In **State v. Second Judicial District Court, supra**, the fugitive argued that under this provision, he had a constitutional right to bail. The court rejected this argument, again quoting **State ex rel. Stringer v. Quigg, supra**:

"This provision of the Constitution of Florida [a provision identical to Nevada's but for the immaterial substitution of the word 'except' for 'unless'], one of the greatest bulwarks of personal liberty, should not be narrowly or illiberally construed. On the other hand, it should not be enlarged beyond its plain sphere of operation. The quoted provision of our Declaration of Rights, except as to those persons expressly excluded by its terms, unquestionably affords the right to bail to all persons who are charged with or who may be convicted of crime under the laws of the state of Florida, but in the present state of law we do not regard its provisions as applicable to one who is charged with an offense under the laws of another state, and who is before the courts of this state for the sole purpose of determining the lawfulness of his detention under an executive warrant of extradition, under which latter process this state holds him for rendition to to the demanding state, and for no other purpose. Extradition laws are enacted upon the presumption that the demanding state will accord the fugitive his right to bail, and all other {\*80} legal rights. When a fugitive is held under executive warrant of extradition, it is entirely appropriate and just that his right to bail be tested by the laws of the demanding state, where he is charged with crime, and where his guilt or innocence must be judicially determined, and not by the laws of the asylum state which holds him solely for the purpose of rendition."

In discussing the reason for this rule, the court cited another Florida case, **Buchanan v. State ex rel. Weiss**, 166 So.2d 596 (Fla. App. 1964):

"One of the reasons supporting the rule against granting bail in extradition cases where the fugitive has been reduced to custody by the execution of a governor's rendition warrant, is because the offense is not one cognizable in the courts of the asylum state, whereas the demanding state has all of the facilities to determine the gravity of the offense, the amount of bail, if any, and the conditions thereof. Here there is no restraint on the respondent's leaving the jurisdiction. The integrity of the processes of the courts of Florida as well as the solemnity and dignity that we should accord the request of a demanding sister state, places in jeopardy the ability of this state to produce the prisoner for delivery to the demanding state when that time arrives."

Therefore, although there appears to be a split of authority on the question, we believe the more persuasive authority indicates that after issuance of the governor's warrant, a fugitive is not entitled to bail.

We believe that Article II, Section 13 of the Constitution of New Mexico affords the right to bail to all persons charged with or convicted of crime under the laws of the State of New Mexico. A fugitive from justice is charged with or convicted of crime under the laws of a sister state; therefore, it is the constitution and laws of that state which should dictate whether the right to bail exists and in what form. The extradition process is grounded upon the idea that one state should surrender to a demanding state a fugitive located within the asylum state, without regard to the merits of the charge in the demanding state. The fugitive is held in the asylum state solely for purposes of rendition to the demanding state. Our courts should not usurp the function of the courts of a demanding state by deciding to allow the fugitive to bail and by deciding what the form of bail shall be. Under the Uniform Criminal Extradition Act, the fugitive should be arrested on the governor's warrant, advised of his rights by a court of record, and either be allowed to file application for writ of habeas corpus to test his arrest under the governor's warrant or be returned immediately to the demanding state. See Section 41-19-10, NMSA, 1953 Comp. If the fugitive desires to test the legality of his arrest, the judge of the court of record determines a reasonable time within which he is to apply for the writ of habeas corpus. This provision of the extradition act helps assure that a fugitive will not remain incarcerated in the asylum state for an unduly long period of time after arrest under a governor's warrant.

If the fugitive chooses to remain in the asylum state for purposes of testing the legality of his arrest, the issues in that proceeding are whether he is the individual named in the warrant, whether he is substantially charged with a crime in the demanding state, and whether he was in the demanding state when the crime was committed. **Martin v. State of Maryland**, 287 A.2d 823 (Md. 1972); **People v. Smith**, 12 Ill. App. 3d 9, 297 N.E.2d 29 (1973). There should be no inquiry into the merits of the underlying charge; the guilt or innocence of the fugitive is not an issue. **Luker v. Koch**, 489 P.2d 191 (Colo. 1971); **Ex parte Bacquet**, 469 S.W.2d 578 (Tex. 1971).

Furthermore, we must be reminded that in the extradition process, we are {81} dealing with a person who has little to lose by violating the conditions of his bail and leaving the jurisdiction. By the very nature of his status as a fugitive, it appears that such a person has already fled from justice and judicial processes. By posting a bond and leaving the asylum state (or changing areas in the asylum state) after his return to the demanding state appears likely by virtue of issuance of the governor's warrant, the fugitive makes a mockery of the extradition process required by the federal constitution. Article IV, Section 2, Constitution of the United States. He would be again able to "lose" the demanding state; he buys freedom and a greater chance that he will not be convicted or incarcerated.

Because of these statutory provisions, policy considerations, and case law, we believe the interpretation that Article II, Section 13 of the Constitution of New Mexico does not apply to fugitives held for rendition to a sister state is warranted and proper.

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