RED ROVER, RED ROVER—BRINGING TO LIGHT THE LACK OF STANDARDS FOR TEXAS COURTS TO USE WHEN DECIDING WHETHER A STAY OF THE EXTRADITION ORDER SHOULD BE GRANTED

Tray Gober*

I. INTRODUCTION 692
A. *The Issue:* 694
B. *Why Is This Issue Relevant?* 695
II. BACKGROUND 697
A. *History of Extradition—the Extradition Clause Gets Some Teeth* 697
B. *Extradition Theory* 699
C. *Interstate Agreements Regarding Extradition* 699
1. Interstate Agreement on Detainers Act—Texas Code of Criminal Procedure 51.14 700
a. Article III—Prisoner Requests Extradition 700
b. Article IV—Demanding State Requests the Prisoner's Extradition 701
2. Uniform Criminal Extradition Act—Texas Code of Criminal Procedure 51.13 702
D. *The Extradition Process—A General Overview* 703
1. Is This Proposed-Extradition Within the Scope of the Extradition Clause? 703
2. Demand by the Demanding State 703
3. Restrictions on the Governor—When a Governor's Warrant Is Proper 705
4. Governor's Hearing—Discretionary 706
5. Grant or Deny the Extradition—Governor's Action .706
III. LIMITED CONSTITUTIONAL PROTECTION FOR EXTRADITEES ...706

*Candidate for J.D., Baylor University School of Law, May 2008; B.A., Political Science, *magna cum laude*, Texas A&M University, 2005. Following graduation, the Author will work for Dan Wood, Jr. of Terrell, Texas. The Author would like to express his gratitude to Professor Brian Serr for his help and guidance in writing this Comment.

IV. TEXAS PROCEDURE TO CONTEST EXTRADITION 707
A. How to Contest Extradition.....707
B. What May Not Be Considered?.....707
1. Guilt or Innocence.....708
2. Case Is Pending in Court Without Jurisdiction to Try the Case.....708
3. Whether Charging Document Is Incorrect per Demanding State Law.....708
C. What May Be Considered?.....709
1. Whether the Extradition Documents on Their Face Are in Order.....709
2. Whether the Proposed-Extraditee Has Been Charged with a Crime in the Demanding State 710
3. Whether the Proposed-Extraditee Is the Person Named in the Request for Extradition 711
4. Whether the Proposed-Extraditee Is a Fugitive 711
V. INSURING APPELLATE REVIEW OF THE TRIAL COURT'S GRANT OF EXTRADITION AND DENIAL OF HABEAS CORPUS ...712
A. Appellate Review Is the Best Means to Insure that the Extradition Procedures Are Followed 712
B. Review Is Allowed 713
C. Ex Parte Stowell Lays the Groundwork.....714
VI. SUGGESTIONS 715
A. What the Practitioner Should Do Until the Problem Is Fixed.....716
B. Judicial Remedy 717
C. Legislative Remedy.....717
VII. CONCLUSION.....717

I. INTRODUCTION

Texas courts and practitioners—both prosecutors and defense attorneys—are without standards to know when full appellate review of the propriety of an extradition[1] should be insured by the grant of a stay of the

[1] This Comment uses the word "extradition" and not "rendition". Texas law and cases are generally consistent with this approach. Cases and treatises are inconsistent with when which word should be used, and the debate on which word is appropriate for which uses will be left to

extradition order. It seems that the current system is left to the arbitrary decision of the courts to decide when review will and will not be allowed, opening the door for an increased number of improper extraditions and thus leaving potentially innocent proposed-extraditees[2] dependent on the seemingly standardless decisions of the courts.

One example of a person who fell victim to this standardless system is Mrs. Kirkpatrick.[3] Mrs. Kirkpatrick was a Texas citizen accused by the State of Arizona of violating the terms of her probation. Arizona requested Mrs. Kirkpatrick's extradition from Texas to Arizona. Through counsel, Mrs. Kirkpatrick filed an application for writ of habeas corpus and a request for a stay of the extradition order with the district court in the county in which she was being held; she simultaneously filed a request for stay of the extradition order with the appropriate court of appeals.[4] Mrs. Kirkpatrick contested the extradition on the ground that the governor's warrant was defective on its face. The district court denied the application for writ of habeas corpus and the request for a stay of the extradition order. The court of appeals denied the request for stay of the extradition order. Between the time that the district court denied the application for writ of habeas corpus and the court of appeals could hear the case on appeal, Mrs. Kirkpatrick was extradited to Arizona. Since Mrs. Kirkpatrick had already been

others to discuss. *See, e.g.*, 1 NANCY HOLLANDER et. al., WHARTON'S CRIMINAL PROCEDURE § 6:11 (14th ed. 2005) (quoting the UNIF. EXTRADITION AND RENDITION ACT, 11 U.L.A. 98 (1980) for the proposition that extradition is distinct from rendition: "The first and most important distinction is that rendition operates only at the level of prosecutor and judge in both the asylum and demanding state. Actions by only four of the nine state agencies involved in the process of extradition are required for rendition. The only agencies involved in rendition are those interested in the prosecution of the outstanding charge and those with the authority to protect the accused's interest in not being retrieved without a finding of probable cause . . . . The second distinction is that rendition is not available if the fugitive is being prosecuted or imprisoned in the asylum state . . . ."). *Compare* JAMES A. SCOTT, THE LAW OF INTERSTATE RENDITION, 1–3, 5 (Sherman Hight 1917) (citing Lascelles v. Georgia, 148 U.S. 543 (1893) (contending that "'rendition' and not 'extradition' [is] the proper word to be used when referring to the arrest and surrender of interstate criminals")).

[2]The term "proposed-extraditee" is used to mean a person who is contesting extradition; the person is technically not an extraditee because they have yet to be extradited.

[3]This anecdote is based on the true story of a person whose case the author became familiar with while working for her attorney, Dan Wood, Jr. of Terrell, Texas.

[4]Mrs. Kirkpatrick filed neither an application for writ of habeas corpus nor a request for stay of extradition with the Texas Court of Criminal Appeals.

extradited the court of appeals held that the case was moot and dismissed her appeal of the denial of the application for writ of habeas corpus.[5]

This Comment is written with a dual purpose: the first is to inform the Texas legal community about the absence of standards to know when a stay of the extradition order is appropriate or inappropriate; the second purpose is to suggest practical solutions for practitioners, the courts, and the legislature. This Comment has been organized in such a way to achieve the two purposes outlined. Part II of this Comment examines the background of interstate extradition in the United States—discussing the history, theory, and development of interstate extradition. Next, Part III explores the rights a proposed-extraditee has while contesting an extradition. Then, Part IV explains the specifics of how to contest extradition in Texas and what may and may not be considered by Texas courts. Part V investigates the appellate review process under current Texas law. Finally, Part VI gives suggestions to the legislature, the judiciary, and practitioners for the best way to proceed.

A. The Issue:

In *Ex parte Stowell*, the Fourth District Court of Appeals in San Antonio expressly told Texas practitioners that, "[t]o insure that [extradition] proceedings get a complete review in the asylum state's courts, an appellant may seek a stay of extradition pending appeal."[6] The problem is that there is no rule, statute, or case that says what standards should be considered when granting or denying a stay of the extradition order. Thus, courts are left to decide when to grant a stay of extradition order based on nothing more than, at best, that court's beliefs as to when a stay of the extradition order should be granted or denied, and, at worst, a completely arbitrary decision of the court to grant or deny the requested stay. If the stay of the extradition order and the application for writ of habeas corpus are denied, then in practice the Texas prosecutor will decide if the proposed-extraditee will get a full a review of the proposed extradition. The prosecutor will decide to: (1) wait for the appeal of the extradition order to become final or, (2) instruct the police holding the proposed-extraditee that the extradition may precede. So long as the extradition is complete before the court of appeals hears the appeal, then the issue of the extradition being

[5] *Ex parte* Kirkpatrick, No. 05-05-00595-CR, 2005 WL 1163981, at *1 (Tex. App.—Dallas May 18, 2005, no pet.) (mem. op.) (not designated for publication).

[6] 940 S.W.2d 241, 243 (Tex. App.—San Antonio 1997, no writ).

improper is moot and will be dismissed accordingly.[7] Normally this is not a problem, as most district attorneys do not order a proposed-extraditee's extradition until the case has been fully reviewed by Texas courts, but this flaw in the procedure can and does allow district attorneys to spirit proposed-extraditees out of the state at their discretion.[8] Prosecutors should not be given the discretion to decide if a proposed-extraditee will be given the opportunity to have a full review by Texas courts.[9]

This Comment focuses on the lack of clarity as to what the standards are that determine whether a proposed-extraditee should be granted a stay of the extradition order so as to insure a full review by Texas courts. Neither statute nor case law dictates the procedures or standards by which one can obtain a stay of the extradition order.[10]

B. Why Is This Issue Relevant?

Appellate review in Texas is the last chance to review the propriety of a proposed-extraditee's extradition. Once a person has been extradited from the territorial borders of the State of Texas, any direct appeal of the extradition process in Texas is moot,[11] and Texas no longer has the ability

[7] *Id.*

[8] See the following for examples of cases which could have only arisen when the proposed-extraditee is extradited prior to the time that the court of appeals can hear the appeal: *Ex parte Kirkpatrick*, 2005 WL 1163981, at *1; *In re* L.E.K., No. 2-05-050-CV, 2005 WL 675584, at *1 (Tex. App.—Fort Worth Mar. 24, 2005, no pet.) (mem. op.) (not designated for publication); *Ex parte* Mayhew, No. 03-03-00719-CR, 2004 WL 1278087, at *1 (Tex. App.—Austin June 10, 2004, no pet.) (mem. op.) (not designated for publication); *Ex parte Stowell*, 940 S.W.2d at 243.

[9] NORMAN DORSEN & LEON FRIEDMAN, DISORDER IN THE COURT: REP. OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK SPEC. COMM. ON COURTROOM CONDUCT 170 (1973) (citing Supreme Court Justice Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC'Y 18, 19 (1940) (acknowledging the possibility that "[t]here is little doubt that the enormous range of discretion held by prosecuting authorities in the United States allows them to use the law for political and other improper ends.")).

[10] Part of the reason for this problem is the fact that extradition proceedings are often waived, thus there is little case law on the topic of contested interstate extraditions from Texas. An additional problem is the fact that the limited number of Texas cases that address the use of a stay of the extradition order are very short opinions giving little to no analysis or insight into what the courts are considering when granting or denying a stay of extradition. *See, e.g.*, *Ex parte Kirkpatrick*, 2005 WL 1163981, at *1; *In re L.E.K.*, 2005 WL 675584, at *1; *Ex parte Mayhew*, 2004 WL 1278087, at *1; *Ex parte Stowell*, 940 S.W.2d at 241.

[11] *Ex parte Stowell*, 940 S.W.2d at 242.

to consider the propriety of the extradition.[12] Further, the United States Supreme Court has articulated in the *Ker* rule that the power of a demanding state's[13] courts to try a person for a crime is not impaired by the fact that the extraditee was extradited by an illegal process.[14]

Improper extraditions can impose harsh results on the extraditee. The threat of irregular extradition implicates the individual liberty interests of all persons in Texas.[15] This is especially important for a person who is absolutely innocent of the charges alleged by the demanding state. If there is no effective method to stay extradition while the propriety of the extradition is being reviewed, then the only point at which a person will be free to come back to Texas is when the charges in the demanding state have been dismissed or otherwise disposed of.

With all criminal prosecutions there is a danger that the defendant is innocent, but the threat of improper extradition threatens to improperly remove an innocent proposed-extraditee from his state of choice and relocate that person to the demanding state. This could mean that the innocent proposed-extraditee is taken thousands of miles away from family and friends. Thus, unlike a person wrongfully accused of a crime in his home state, an innocent proposed-extraditee is not only subject to false allegations but is without the support of his close family and friends to help cope with the stress of the situation. Additionally, extraditing a person also makes it more likely that a proposed-extraditee's employment will be threatened.

Further, consider an indigent proposed-extraditee who cannot afford to travel. If they are extradited from Texas to a far away state (Oregon, Maine, Alaska, Hawaii), then travel back to Texas could be an extreme economic hardship on that person and their family.

---

[12] *Id.* (citing Commonwealth v. Caffrey, 508 A.2d 322, 323 (Pa. Super. Ct. 1986)).

[13] The "demanding state" is the state demanding that the proposed-extraditee be extradited; in other words, the state to which the extraditee is sent.

[14] Ker v. Illinois, 119 U.S. 436, 444 (1886).

[15] One example of a liberty interest that is infringed upon by extradition is the right to free interstate travel. Invariably a proposed-extraditee will be taken from a state of choice; thus, extradition impedes his right to travel to the asylum state. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.38 (6th ed. 2000) ("Strict judicial scrutiny of state laws which serve as an impediment to immigration into a state is necessary to preserve our national cohesion as a single economic unit . . . ."). *But see*, U.S. CONST. art. IV, § 2, cl. 2, (which along with federal legislation—18 U.S.C.A. § 3182 (2000)—requires states to extradite certain persons).

Finally, the extradition process by its nature can take several days: (1) the person is arrested in Texas, (2) the person is held for a habeas hearing, (3) the writ of habeas corpus is denied by the trial court, (4) the Texas prosecutor gives the Texas authorities approval to extradite the proposed-extraditee, (5) Texas authorities contact that demanding state authorities to arrange the proposed-extraditee's travel, (6) the proposed-extraditee is transported to the demanding state, (7) the extraditee is processed in the demanding state's jail and (8) the extraditee may begin to attack the charges for which they were extradited.[16] It certainly would not be rare for the eight steps above to take several weeks.[17]

Thus if a proposed-extraditee wants to have any chance of contesting the propriety of the extradition is must be done prior to the extradition of the proposed-extraditee.

II. BACKGROUND

Extradition disputes have been a problem between the states, "from the very earliest colonial times" and extradition disputes have been attended with many "obstacles and difficulties . . . ."[18] However, after time states were able to reach a compromise and come to an agreement by becoming signatories to the Uniform Criminal Extradition Act.[19]

A. History of Extradition—the Extradition Clause Gets Some Teeth

The authority to extradite fugitives from one state to another is established in Article IV § 2, Clause 2 of the United States Constitution:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in

[16] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 (Vernon 2006).

[17] 18 U.S.C.A. § 3182 (2000) (The Federal Extradition Statute that gives power to the Extradition Clause, gives "thirty days from the time of the arrest" before the proposed-extraditee may be discharged because of delay.).

[18] JAMES A. SCOTT, THE LAW OF INTERSTATE RENDITION, § 4 (Sherman Hight 1917) (Discussing a dispute between the Governor of Pennsylvania and the Governor of Virginia in which the governor of Virginia refused to extradite three men alleged to have kidnapped a free African-American from Pennsylvania who they sold in Virginia. President Washington subsequently intervened and encouraged Congress to pass the first federal legislation giving enforcement power the Extradition Clause of the United States Constitution.).

[19] The Uniform Criminal Extradition Act has been substantially adopted by Texas. *See* TEX. CODE OF CRIM. PROC. ANN. art. 51.13.

> 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.[20]

The purpose of the Extradition Clause was to "preclude any state from becoming a sanctuary for fugitives . . . [because] in the administration of justice, no less than in trade and commerce, national unity was thought to be served by deemphasizing state lines for certain purposes, without impinging on essential state autonomy."[21]

The power given by the Extradition Clause is not self-executing and is thus implemented by a federal statute:[22]

> Fugitives from State or Territory to State, District or Territory.—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.[23]

[20] U.S. CONST. art. IV § 2, cl. 2.

[21] Michigan v. Doran, 439 U.S. 282, 287–88 (1978).

[22] 1 NANCY HOLLANDER ET. AL., WHARTON'S CRIMINAL PROCEDURE § 6:11 (14th ed. 2007).

[23] 18 U.S.C. § 3182 (2000).

B. Extradition Theory

The balance between state sovereignty and the right of a sister-state to try a proposed-extraditee was set by the Extradition Clause.[24] The asylum state has a duty and therefore must make a proposed-extraditee available for extradition upon a proper demand by the demanding state.[25] Performance of that duty by the asylum state can be compelled by the federal courts.[26] However, the proposed-extraditee does get some protections through the United States Constitution, the Uniform Criminal Extradition Act and the Interstate Agreement on Detainers Act—specifically, the proposed-extraditee is guaranteed that the statutory extradition procedures will be followed.[27] The Texas Court of Criminal Appeals has also articulated some protections that the proposed-extraditee has:

> [T]he law guarantees that a citizen shall not be sent to a foreign state for trial until the following steps have been taken, to-wit: (1) The Governor of this state shall issue a warrant which orders him delivered to the agent of the demanding state, (2) He shall be given an opportunity to apply for a writ of habeas corpus, and (3) He shall be given an opportunity to appeal to this court from an adverse ruling in the trial court.[28]

C. Interstate Agreements Regarding Extradition

States are allowed to effect extradition under requirements that are less stringent than those required by Section 3182, but are not allowed to make it any more difficult for there to be an extradition.[29] Most states—including

[24] U.S. CONST. art. IV § 2, cl. 2.

[25] Kentucky v. Dennison, 65 U.S. 66, 71 (1860).

[26] Puerto Rico v. Branstad, 483 U.S. 219, 228 (1987).

[27] Martin v. Pittman, No. 06-50759, 2007 U.S. App. LEXIS 18939, at *12 (5th Cir. Aug. 9, 2007) ("Thus, a prisoner in the custody of a State that has adopted the UCEA is entitled to a pretransfer hearing before being transferred to another state pursuant to Article IV of the IADA; and Texas has adopted the UCEA.").

[28] *Ex parte* Hagler, 161 Tex. Crim. 387, 278 S.W.2d 143, 144–45 (1955), *overruled on other grounds by Ex parte* Reagan, 549 S.W.2d 204 (Tex. Crim. App. 1977). *Ex parte Hagler* was more recently cited in *McPherson v. State*, 752 S.W.2d 178, 179 (Tex. App.—San Antonio 1988, pet. ref'd).

[29] Leslie W. Abramson, *Extradition in America: Of Uniform Acts and Governmental Discretion*, 33 BAYLOR L. REV. 793, 793 (1981).

Texas—have entered into two interstate agreements: (1) the Interstate Agreement on Detainers Act[30], and (2) the Uniform Criminal Extradition Act.[31]

1. Interstate Agreement on Detainers Act—Texas Code of Criminal Procedure 51.14

Texas is a signatory to the Interstate Agreement on Detainers—cited as the Interstate Agreement on Detainers Act (IADA).[32] The IADA only applies to prisoners of an asylum state who are imprisoned serving sentences and face charges in another state.[33] Extradition of prisoners who are serving sentences arises under two situations commonly known as Article III and Article IV extraditions.

a. Article III—Prisoner Requests Extradition

Article III of the IADA applies when a prisoner of the asylum state[34] requests the demanding state to seek her extradition and try her for some crime for which there is already an indictment, information, or complaint.[35] Extradition cases that arise under Article III of the IADA do not present a need to contest the extradition because the IADA provides that the prisoner's request for extradition simultaneously waives the ability to contest extradition.[36] The Texas Court of Criminal Appeals has held that, "Formal extradition proceedings are . . . unnecessary if [there is] a waiver of extradition."[37] But for there to be a waiver of extradition that is not statutorily provided for—as it is in Article III—"a valid waiver needs three essential elements: (1) an unequivocal statement by the accused of his

[30] TEX. CODE OF CRIM. PROC. ANN. art. 51.14 (Vernon 2007) (Uniform version at INTERSTATE AGREEMENT ON DETAINERS ACT 11 U.L.A. 323 (1974)).

[31] *Id.* art. 51.13 (Uniform version at UNIF. CRIMINAL EXTRADITION ACT 11 U.L.A. 294 (2003)).

[32] *Id.* art. 51.14.

[33] *See id.*

[34] The asylum state is the state from which an extraditee is extradited. The IADA uses the term "sending state." *See id.*

[35] *Id.* art. 51.14(III)(a) (The motivation and reasons for why a prisoner would request their own extradition can be understood by reading Article I and III of the IADA, but a discussion of those reasons is beyond the scope of this Comment.).

[36] *Id.* art 51.14(III)(e).

[37] Sara Rodriguez, *Appellate Review of Pretrial Requests for Habeas Corpus Relief in Texas*, 32 TEX. TECH L. REV. 45, 65 (2000).

intent to waive extradition rights, (2) made voluntarily, and (3) with some rudimentary understanding of the rights being relinquished."[38] The automatic waiver of extradition for Article III extraditions makes policy sense because: (1) it is the proposed-extraditee that is requesting the extradition,[39] and (2) one of the purposes behind the IADA is to insure the speedy trial of the proposed-extraditee, so delay by extended extradition proceedings would only directly contradict the desire of the proposed-extraditee to move forward in the proceeding.[40]

b. Article IV—Demanding State Requests the Prisoner's Extradition

Article IV provides for the procedure for when the extradition is requested by the demanding state.[41] However, the United States Supreme Court in *Cuyler v. Adams* held that prisoners who do not request extradition are given the protections of both the IADA and the Uniform Criminal Extradition Act when the asylum state is a signatory to the Uniform Criminal Extradition Act.[42] The basis of the Court's rationale was that Article IV(d) pronounces that:

> Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.[43]

---

[38] Drake v. Spriggs, No. 13-03-00429-CV, 2006 Tex. App. LEXIS 10657, at *4 (Tex. App.—Corpus Christi Dec. 14, 2006, no pet. h.) (mem. op.) (not designated for publication) (citing McBride v. Soos, 512 F. Supp. 1207, 1212–13 (N.D. Ind. 1981), *aff'd*, 679 F.2d 1223 (7th Cir. 1982)).

[39] TEX. CODE OF CRIM. PROC. ANN. art. 51.14(III)(a).

[40] *See id.* Extradition proceedings always delay—or, in some cases, permanently postpone—the trial of the proposed-extraditee by the demanding state, but the speedy trial protection is only to the proposed-extraditee and not the state, so it should be the proposed-extraditee's choice of whether to delay her trial by contesting extradition, or by speeding up the extradition and having a trial on the merits in the demanding state. *See* Barker v. Wingo, 407 U.S. 514, 519 (1972).

[41] TEX. CODE OF CRIM. PROC. ANN. art. 51.14(IV).

[42] 449 U.S. at 433, 449 (1981).

[43] TEX. CODE OF CRIM. PROC. ANN. art. 51.14(IV)(d); *see Cuyler*, 449 U.S. at 445.

If a state is a signatory to the Uniform Criminal Extradition Act then the protections in that act are applied to the prisoner as "any right which he may have".[44] But, prisoners that are being transferred from federal jurisdiction to a state jurisdiction do not get the protections of the Uniform Criminal Extradition Act because the United States Congress has not adopted the Uniform Criminal Extradition Act.[45] As applied to the issue of this Comment, a proposed-extraditee that is a Texas prisoner and being subjected to an Article IV extradition process is afforded the same protections under the Uniform Criminal Extradition Act as any other proposed-extraditees.[46]

2. Uniform Criminal Extradition Act—Texas Code of Criminal Procedure 51.13

Texas is also a signatory to the Uniform Criminal Extradition Act (UCEA).[47] The UCEA expressly states that "its general purpose [is to] make uniform the law of those States which enact it."[48]

The UCEA specifies the duty of the Governor of Texas is to "have arrested and delivered up to the executive authority of any other State of the United States any person charged in that State with treason, felony, or other crime, who has fled from justice and is found in [Texas]."[49] The UCEA also places an affirmative duty on the demanding state to demand the

[44] *Cuyler*, 449 U.S. at 445.

[45] Martin v. Pittman, No. 06-50759, 2007 U.S. App. LEXIS 18939, at *13 (5th Cir. Aug. 9, 2007) ("[T]he UCEA facially has no application to transfers involving the federal government as either the sending State or the receiving State."); *Ex parte* McGroathy, 762 S.W.2d 210, 211 (Tex. App.—Houston [1st Dist.] 1988, writ ref'd) (citing Mann v. Warden of Eglin Air Force Base, 771 F.2d 1453, 1454 (11th Cir. 1985)).

[46] *See Martin*, 2007 U.S. App. LEXIS 18939, at *13 ("As the UCEA is not applicable to transfers involving the federal government, there are here no UCEA pre-transfer hearing rights to be incorporated by the IADA.") (impliedly holding that had the facts been different—the prisoner was being transferred to federal custody—then UCEA protections would be incorporated in Article IV transfers under the IADA).

[47] TEX. CODE OF CRIM. PROC. ANN. art. 51.13.

[48] *Id.* art. 51.13 § 27.

[49] *Id.* art. 51.13 § 2.

extradition of the proposed-extraditee.[50] But the UCEA does not apply to transfers to or from the federal government, unlike the IADA.[51]

D. The Extradition Process—A General Overview

1. Is This Proposed-Extradition Within the Scope of the Extradition Clause?

First, determine if federal law enacting the Extradition Clause applies; if so, then the federal law controls.[52] The proposed-extradition is within the scope of the Extradition Clause when the proposed-extraditee is a fugitive.[53] If the proposed-extradition is within the scope of the extradition clause then process is dictated by federal statute.[54] But a state extradition statute may still facilitate extradition of the proposed-extraditee; the only limit to the state statute is that it may not abridge or lessen the duty imposed on the Governor of the asylum state by the Extradition Clause.[55]

2. Demand by the Demanding State

Under federal law, the Texas Governor only has jurisdiction to issue a Governor's warrant if he has received: (1) a demand by the executive of the state from which the proposed-extraditee has fled, and (2) a copy of: (a) an indictment, or (b) an affidavit made before a magistrate, charging the proposed-extraditee with having committed a specific crime.[56]

The UCEA mandates that:

> No demand for extradition of a person charged with crime in another State shall be recognized by the Governor unless: (1) in writing, alleging—except in cases [in which the accused is charged with committing in this or a third

[50] *Id.* art 51.13 § 3.

[51] *Martin*, 2007 U.S. App. LEXIS 18939, at *13 ("Unlike the IADA, the UCEA's definition of 'State' does not include the federal government. Thus, the UCEA facially has no application to transfers involving the federal government as either the sending State or the receiving State.").

[52] *See Ex parte* Wells, 108 Tex. Crim. 57, 298 S.W. 904, 905 (1927); Brooks v. State, 91 S.W.3d 36, 39–40 (Tex. App.—Amarillo 2002, no pet.).

[53] 18 U.S.C. § 3182 (2000). *See infra* Part IV.C.4 for a discussion of when a person is a "fugitive."

[54] 18 U.S.C. § 3182.

[55] *Ex parte* Peairs, 162 Tex. Crim. 243, 283 S.W.2d 755, 758 (1955).

[56] *Ex parte* Anderson, 135 Tex. Crim. 291, 120 S.W.2d 259, 260 (1938).

> state an act intentionally resulting in crime in the demanding state]—that the accused was present in the demanding state at the time of the commission of the alleged crime and thereafter fled from the state; and (2) accompanied by: (a) a copy of an indictment found or (b) by information supported by affidavit . . . , or (c) by a copy of an affidavit before a magistrate [in the state having jurisdiction of the crime], together with a copy of any warrant which issued thereupon, or (d) by a copy of a judgment or conviction or a sentence imposed in execution thereof, together with a statement by the Executive Authority of the demanding state the [proposed-extraditee] has escaped from confinement or has broken the terms of his bail, probation or parole. The indictment, information, or affidavit made before the magistrate must substantially charge the [proposed-extraditee] with having committed a crime under the law of that state; and the copy of the indictment, information, affidavit, judgment of conviction or sentence must be authenticated by the Executive Authority making the demand; provided however that all such copies of the aforesaid instruments shall be in duplicate, one complete set of such instruments to be delivered to the [proposed-extraditee] or his attorney.[57]

The demanding state does not need to describe the offense for which the proposed-extraditee is being extradited with the definiteness and particularity that are required in an indictment or information.[58]

The language that a copy of the "aforesaid instruments"[59] shall be delivered to the proposed-extraditee is directory and only becomes mandatory on a request by or on behalf of the proposed-extraditee.[60]

---

[57] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 3.

[58] *Ex parte* Faihtinger, 72 Tex. Crim. 632, 163 S.W. 441, 442 (1914).

[59] *See supra* text accompanying note 57.

[60] *Ex parte* Strunk, 444 S.W.2d 940, 941 (Tex. Crim. App. 1969); *Ex parte* Holmes, 397 S.W.2d 458, 459 (Tex. Crim. App. 1965); *Ex parte* Moore, 158 Tex. Crim. 407, 256 S.W.2d 103, 104 (1953).

Failure to furnish copies a copy of the "aforesaid instruments" after they are requested is reversible error.[61]

Any documents that must be "authenticated" can be done so by the Governor of the demanding state by including language that the Governor is to "certify that all documents attached hereto to be authentic and duly authenticated according to the laws of this state".[62]

3. Restrictions on the Governor—When a Governor's Warrant Is Proper

Certain evidence must be submitted to the Texas Governor by the demanding state before the Texas Governor may approve the extradition:

The governor of . . . [Texas] may not recognize a demand for extradition unless the demand includes either (1) a copy of an indictment, (2) an information supported by affidavit, (3) a copy of an affidavit before a magistrate in the demanding state, together with the warrant that issued on it, or (4) a copy of a judgment of conviction or of a sentence imposed, together with a statement by the demanding executive claiming that the individual has violated the terms of bail, probation, or parole.[63]

The purpose of "these requirements [is to] show that [the proposed-extraditee] was charged in the regular course of judicial proceedings."[64] That purpose is intended to better insure compliance with the Fourth Amendment as articulated in the United States Supreme Court in *Gerstein v. Pugh.*[65]

[61] *Ex parte* Sanchez, 605 S.W.2d 289, 290 (Tex. Crim. App. 1980); *Ex parte* Cain, 592 S.W.2d 359, 362 (Tex. Crim. App. 1980) (en banc); *Ex parte* Kronhaus, 410 S.W.2d 442, 444 (Tex. Crim. App. 1967).

[62] *Ex parte* Terranova, 170 Tex. Crim. 445, 341 S.W.2d 660, 662 (1960); *see Ex parte* Jones, 82 Tex. Crim. 627, 199 S.W. 1110, 1112 (1917).

[63] *Ex parte* McClintick, 945 S.W.2d 188, 192 (Tex. App.—San Anotonio 1997, no writ) (citing TEX. CODE OF CRIM. PROC. ANN. art. 51.13, § 3 and Noe v. State, 654 S.W.2d 701, 702 (Tex. Crim. App. 1983) (en banc), *cert. denied*, 464 U.S. 997 (1983)).

[64] *Ex parte* Rosenthal, 515 S.W.2d 114, 119 (Tex. Crim. App. 1974).

[65] 420 U.S. 103, 125 (1975) (holding that the Fourth Amendment requires a neutral and detached determination of probable cause by a magistrate or grand jury).

4. Governor's Hearing—Discretionary

The Texas Governor may—at his discretion—grant the proposed-extraditee a hearing.[66] The Governor may also call upon the Texas Secretary of State, the Texas Attorney General, or any prosecuting officer in Texas to investigate the demand for the extradition of the proposed-extraditee.[67] Lobbying the Governor for a hearing before he issues the Governor's warrant may be an effective means to prevent extradition—even if only for a little while.[68]

5. Grant or Deny the Extradition—Governor's Action

Both Texas law—UCEA—and federal law—18 U.S.C.A. 3182—impose a duty on the Governor to issue the governor's warrant when the request for extradition is proper.[69] However, if the proposed-extradition does not fall within the scope of the Extradition Clause of the United States Constitution, then the Governor may refuse to issue a Governor's warrant where it appears that the extradition is sought as a means to collect a debt owed by the proposed-extraditee by bringing the proposed-extraditee into the jurisdiction of the demanding state.[70]

III. LIMITED CONSTITUTIONAL PROTECTION FOR EXTRADITEES

Courts consistently find that the constitution gives little protection to the proposed-extraditee.[71] The Sixth Amendment right to a speedy trial and

[66] *Ex parte* Moore, 158 Tex. Crim. 407, 256 S.W.2d 103, 104 (1953).

[67] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 4 (Vernon 2007).

[68] AM. LAW YEARBOOK 55 (Jeffrey Lehman ed., Thomson Gale 2002) (President Bush—then Governor Bush—refused to approve the extradition of a woman who allegedly kidnapped her daughters and fled from California to Texas in order to protect them from their allegedly sexually abusive father.).

[69] The basics of exactly what does and does not make the request for an extradition proper is a voluminous topic and is only handled summarily in this Comment. For more information see 21 TEX. JUR. 3D *Criminal Law* §§ 1967–2017 (2001).

[70] *See* TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 25 (granting immunity to extraditee from service of civil process in civil case arising out of the same facts as the criminal proceeding for which the extraditee was extradited.); *Ex parte* Wells, 108 Tex. Crim. 57, 298 S.W. 904, 905–06 (1927).

[71] The Uniform Criminal Extradition Act does however provide some protection to the proposed-extraditee including a right to counsel, and a right to test the legality of her arrest. TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 10.

public trial does not apply to extradition proceedings.[72] Hearsay evidence is permitted in extradition proceedings.[73] There is no Sixth Amendment right to counsel at an extradition hearing.[74] There is no right to counsel before the issuance of the governor's warrant because the accused does not even have the right to be heard before the issuance of the governor's warrant.[75] It is an open issue as to whether there is a right to counsel for the preparation and argument of a petition for writ of habeas corpus in Texas for a proposed-extraditee.[76]

IV. TEXAS PROCEDURE TO CONTEST EXTRADITION

A. How to Contest Extradition[77]

The only means by which a proposed-extraditee may contest extradition is by a petition for writ of habeas corpus.[78] "The purpose of the writ is not to inquire into the viability of the prosecution or confinement in the demanding state, but rather is solely to test the legality of the extradition proceedings."[79]

B. What May Not Be Considered?

Claims relating to what actually happened, the law of the demanding state, and what may be expected to happen in the demanding state, are

[72] McDonald v. Burrows, 731 F.2d 294, 297 (5th. Cir. 1984).

[73] Escobedo v. United States, 623 F.2d 1098, 1102 n.10 (5th Cir. 1980).

[74] Anderson v. Alameida, 397 F.3d 1175, 1180 (9th Cir. 2005) (noting that the Uniform Criminal Extradition Act does provide a right to counsel); *but see* TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 10.

[75] *Ex parte* Ransom, 726 S.W.2d 203, 204 (Tex. App.—Dallas 1987, no writ).

[76] Potter v. State, 9 S.W.3d 401, 403 (Tex. App.—Houston [14th Dist.] 1999, pet. granted), *vacated in part on other grounds*, 21 S.W.3d 290 (Tex. Crim. App. 2000). The right to counsel is moot if it is the policy of the district court to appoint counsel to represent indigent proposed-extraditees.

[77] This Comment assumes that the governor's warrant has already been signed, meaning that the Texas Governor is satisfied that the Extradition is appropriate. It is certainly a rare case where the governor refuses to approve an extradition. However, there is one example where soliciting the Governor of Texas to not approve the extradition did work—at least until a federal court ordered the governor to sign the governor's warrant. *See supra* Part II.D.4.

[78] *Ex parte* Chapman, 601 S.W.2d 380, 382–83 (Tex. Crim. App. 1980); *Ex parte* Lebron, 937 S.W.2d 590, 593 (Tex. App.—San Antonio 1996, pet. ref'd).

[79] Lott v. State, 864 S.W.2d 152, 153 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd).

issues that must be tried in the courts of the demanding state, and not asylum state courts.[80] This prohibition of issues that the asylum state may consider is based on the rationale that it is the right of the demanding state to try the proposed-extraditee on the merits of the case, and that trial will be held pursuant to the procedural and substantive law of the demanding state. After the asylum state governor has approved extradition, no asylum state court may determine if probable cause of the charge exists.[81] The technical sufficiency of the indictment by the demanding state is not reviewable by the courts of the asylum state.[82] Any due process challenge connected to the extradition "must be presented to the courts of the demanding state."[83]

The following issues may not be considered:

1. Guilt or Innocence

The guilt or innocence of the proposed-extraditee "as to the crime of which she is charged may not be inquired into" by the asylum state.[84]

2. Case Is Pending in Court Without Jurisdiction to Try the Case

When a defendant can prove that the case is pending in a court in the demanding state that does not have proper jurisdiction to try the case, then the Texas court will presume that a proper order of transfer has been made.[85]

3. Whether Charging Document Is Incorrect per Demanding State Law

Matters of form under the demanding state's laws regarding the charging document attached to the request for extradition may not be considered by Texas courts.[86] Thus, unless the charging document is

[80] New Mexico *ex rel*. Ortiz v. Reed, 524 U.S. 151, 153–54 (1998).

[81] *See* Michigan v. Doran, 439 U.S. 282, 290 (1978).

[82] Munsey v. Clough, 196 U.S. 364, 373 (1905).

[83] *See Ex parte* McClintick, 945 S.W.2d 188, 190 (Tex. App.—San Antonio 1997, no pet.) (citing *Ex parte* Davis, 873 S.W.2d 711, 712 (Tex App.—Fort Worth 1994, no pet.)).

[84] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 20 (Vernon 2007).

[85] *Ex parte* Pinkus, 114 Tex. Crim. 326, 25 S.W.2d 334, 336 (1929).

[86] Henson v. State, 885 S.W.2d 485, 487 (Tex. App.—El Paso 1994, no pet.); *Ex parte* Bucaro, 656 S.W.2d 217, 219 (Tex. App.—Fort Worth 1983, no pet.); *Ex parte* Williams, 622 S.W.2d 482, 483 (Tex. App.—Beaumont 1981, pet. ref'd).

"clearly void," the question of the document's sufficiency as a criminal pleading is a question of form to be decided by the demanding state.[87]

C. What May Be Considered?

The asylum state may consider issues of identity; specifically whether the proposed-extraditee is actually the person who is charged with the crime in the demanding state.[88]

If the governor's warrant is regular on its face, then the burden shifts to the accused to show the warrant was: (1) not legally issued, (2) not based on proper authority, or (3) contains inaccurate recitals.[89] A governor's warrant[90] that is regular on its face makes out a prima facie case that the requirements for extradition have been met.[91] A governor's warrant restricts the scope of review by Texas courts to very limited subject matter. Specifically, once the governor of an asylum state grants extradition and issues a warrant to that effect, a court considering an application for habeas relief from such an order can only decide the following: "(a) whether the extradition documents on their face are in order; (b) whether the [proposed-extraditee] has been charged with a crime in the demanding state; (c) whether the [proposed-extraditee] is the person named in the request for extradition; and (d) whether the [proposed-extraditee] is a fugitive."[92]

1. Whether the Extradition Documents on Their Face Are in Order

The courts of the asylum state may consider whether the extradition documents on their face are in order.[93] The extradition documents should be admitted into evidence at the habeas corpus hearing and examined. This

[87] *Ex parte* Scott, 446 S.W.2d 307, 309 (Tex. Crim. App. 1969); *Ex parte* Corley, 439 S.W.2d 668, 669 (Tex. Crim. App. 1969); *see Ex parte* Gray, 426 S.W.2d 241, 242 (Tex. Crim. App. 1968).

[88] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 20.

[89] Sara Rodriguez, *Appellate Review of Pretrial Requests for Habeas Corpus Relief in Texas*, 32 TEX. TECH L. REV. 45, 65 (2001).

[90] A governor's warrant is the document by which the Texas Governor grants extradition. *See* TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 7.

[91] *Ex parte* Lekavich, 145 S.W.3d 699, 701 (Tex. App.—Fort Worth 2004, no pet.).

[92] Michigan v. Doran, 439 U.S. 282, 289 (1978); State *ex rel.* Holmes v. Klevenhagen, 819 S.W.2d 539, 543 (Tex. Crim. App. 1991).

[93] Henson v. State, 885 S.W.2d 485, 486 (Tex. App.—El Paso 1994, no pet.).

requirement presents an opportunity for proposed-extraditees to attack their extradition.

2. Whether the Proposed-Extraditee Has Been Charged with a Crime in the Demanding State

The indictment, information, or affidavit before the magistrate on which the demand for extradition is based must "substantially charge" the proposed-extraditee with having committed a crime under the law of the demanding state.[94]

A complaint is sufficient on its face to support the extradition demand when the complaint charges in positive terms an extraditable offense.[95] The standard for whether the complaint charges an extraditable offense is determined by the law of the demanding state.[96] If the charge is in the form of an indictment and the indictment alleges an offense against the defendant, then it is sufficient to support an extradition.[97] Otherwise, there is a rebuttable presumption that the complaint charges in positive terms an extraditable offense.[98] But there is also a rebuttable presumption that the law of the demanding state is the same as the law of Texas.[99] Thus, when the request for demand is based on a charge of conduct that is not an offense under Texas law, and there is no showing that such conduct is a crime under the law of the demanding state, the proposed-extraditee should not be extradited.[100]

---

[94] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 3.

[95] *Ex parte* Blankenship, 158 Tex. Crim. 667, 259 S.W.2d 208, 209 (1953).

[96] *Ex parte* Chapman, 435 S.W.2d 529, 530 (Tex. Crim. App. 1968); *Ex parte* Williams, 622 S.W.2d 482, 483 (Tex. App.—Beaumont 1981, pet. ref'd.); *Ex parte* Edwards, 621 S.W.2d 849, 850 (Tex. App.—Fort Worth 1981, no pet.).

[97] *See* Ibarra v. State, 961 S.W.2d 415, 416–17 (Tex. App.—Houston [1st Dist.] 1997, pet. ref'd).

[98] *Ex parte* Combs, 132 Tex. Crim. 500, 105 S.W.2d 1096, 1097 (1937); *Ex parte* Yawman, 113 Tex. Crim. 20, 18 S.W.2d 647, 647 (1929).

[99] *Ex parte* Martin, 374 S.W.2d 436, 438 (Tex. Crim. App. 1963); *Ex parte* Guinn, 162 Tex. Crim. 293, 284 S.W.2d 721, 722 (1955); *Ex parte* Gardner, 159 Tex. Crim. 365, 264 S.W.2d 125, 126 (1954).

[100] *Ex parte* Juarez, 410 S.W.2d 444, 445 (Tex. Crim. App. 1967); *Ex parte* Brunner, 396 S.W.2d 125, 126 (Tex. Crim. App. 1965).

If the demand for extradition is supported with an information the court will presume that the proposed-extraditee was charged with an extraditable crime, unless there is evidence of fraud.[101]

3. Whether the Proposed-Extraditee Is the Person Named in the Request for Extradition

The asylum state may consider issues of identity. Specifically, the asylum state may consider whether the proposed-extraditee is actually the person who is charged with the crime in the demanding state.[102]

4. Whether the Proposed-Extraditee Is a Fugitive

A fugitive is a person who: "[Left] a state under whose laws he or she has incurred guilt."[103] "The word 'fugitive' . . . does not import an intentional flight from a known deed but merely that a person is not present in the home state when wanted to answer a criminal accusation."[104] A consciousness of wrongdoing is not required to make a person a fugitive.[105]

A person who is charged with a felony in another state who is involuntarily transferred to Texas is a fugitive even if the demanding state approved the involuntary transfer.[106] Provisions in the UCEA provide for extradition of a person who was transferred involuntarily.[107] Further, acts of the demanding state will not be construed as being a waiver of the ability to seek extradition of the person because of specific language in the UCEA preventing waiver.[108]

---

[101] *Ex parte* Rosenthal, 515 S.W.2d 114, 119 (Tex. Crim App. 1974).

[102] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 20 (Vernon 2007). *See* 21 TEX. JUR. 3D *Criminal Law* § 1987 (2001).

[103] *Ex parte* Sanchez, 987 S.W.2d 951, 952 (Tex. App.—Austin 1999, pet. dism'd).

[104] *Ex parte* Carroll, 152 Tex. Crim. 581, 216 S.W.2d 580, 581 (Tex. Crim. App. 1949).

[105] *Ex parte* Robertson, 151 Tex. Crim. 635, 210 S.W.2d 593, 594 (1948); *Ex parte* Morris, 131 Tex. Crim. 596, 101 S.W.2d 259, 263 (1936).

[106] *Ex parte* Guinn, 162 Tex. Crim. 293, 284 S.W.2d 721, 722 (1955); *Ex parte* Crane, 115 Tex. Crim. 168, 29 S.W.2d 357, 358 (1930).

[107] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 §§ 5, 23.

[108] *Id.* art. 51.13 § 25b.

V. INSURING APPELLATE REVIEW OF THE TRIAL COURT'S GRANT OF EXTRADITION AND DENIAL OF HABEAS CORPUS

A. Appellate Review Is the Best Means to Insure that the Extradition Procedures Are Followed

Only three limitations are aimed at preventing improper extraditions.[109] First, there may be a 42 U.S.C. 1983 action available to a person who was subjected to an improper extradition.[110] The extradition of a prisoner—rather than an unincarcerated person—will more likely raise a § 1983 action because the United States Congress has approved the IADA but has not approved the UCEA. Thus, the IADA is more likely to be considered federal law than the UCEA alone.[111]

Second, some courts have noted that if an improper extradition was so extreme as to shock the conscience, then the demanding state's jurisdiction over the extraditee may be affected.[112]

Third, the UCEA provides that "any officer" who acts "in willful disobedience" of the rights guaranteed by the UCEA to the proposed-extraditee "shall be guilty of a misdemeanor and, on conviction, shall be fined not more than one thousand dollars or be imprisoned not more than six months, or both."[113]

---

[109] *See infra* notes 110–13 and accompanying text.

[110] *See* Michael A. DiSabatino, *Arrest and Transportation of Fugitive Without Extradition Proceedings as Violation of Civil Rights Actionable Under 42 U.S.C.S. § 1983*, 45 A.L.R. FED. 871 (1979) ("[T]here is a conflict among the courts as to whether extradition without compliance with state extradition procedures amounts to a violation of a prisoner's federal rights. This conflict results from differing interpretations of the interaction between federal and state provisions concerning extradition.").

[111] *See supra* Part II.C; Marlissa S. Briggett, *State Supremacy in the Federal Realm: The Interstate Compact*, 18 B.C. ENVTL. AFF. L. REV. 751, 761 (Summer 1991) ("[T]he Supreme Court has invested congressionally sanctioned interstate compacts with additional weight by recognizing them as federal law.") (citing Cuyler v. Adams, 449 U.S. 433, 440 (1981)); *see also* Alabama v. Bozeman, 533 U.S. 146, 149 (2001) ("As a congressionally sanctioned interstate compact within the Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, the Interstate Agreement on Detainers is a federal law subject to federal construction.") (citations omitted).

[112] Sneed v. State, 872 S.W.2d 930, 937 (Tenn. Crim. 1993) (recognizing a due process exception to the *Ker* Rule); *see* Weddell v. Meierhenry, 636 F.2d 211, 215 (8th Cir. 1980), *cert. denied*, 451 U.S. 941 (1980) (noting a due process exception to the *Ker* Rule, but finding the exception inapplicable to the case before it).

[113] TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 11 (Vernon 2007).

These deterring measures simply are not very threatening. Thus, the best means to protect against improper extraditions is to allow full review by the asylum state courts.

B. Review Is Allowed

In *Ex parte Hagler*, a 1955 opinion, the Texas Court of Criminal Appeals expressly stated that "a citizen shall not be sent to a foreign state for trial until . . . he be given an opportunity to appeal to [the Texas Court of Criminal Appeals] from an adverse ruling in the trial court."[114] The opportunity to appeal was arguably dicta because the proposed-extraditee in that case had actually been given the opportunity to appeal.[115] The Texas Court of Criminal Appeals has recognized as recently as 1980 the opportunity to appeal extradition.[116] In *Ex parte Chapman* the Texas Court of Criminal Appeals was directly addressing the proposed-extraditee's ability to appeal his extradition.[117] The *Ex parte Chapman* court concluded that the Uniform Criminal Extradition Act does not provide for appeal, but the proposed extraditee can appeal the case if, and only if, the proposed-extraditee seeks review of his extradition by means of an application for writ of habeas corpus.[118] Thus, a proposed-extraditee waives the opportunity to appeal unless she seeks habeas corpus review by the trial court.[119] It is clear from Texas case law that a proposed-extraditee must be given an opportunity to appeal her extradition; however, the case law that requires the opportunity to appeal is silent as to how that opportunity is insured. None of the case law that addresses the need for a stay of the extradition cites either *Ex parte Hagler* or *Ex parte Chapman*.[120]

---

[114] 161 Tex. Crim. 387, 278 S.W.2d 143, 144–45 (1955), *overruled on other grounds by Ex parte* Reagan, 549 S.W.2d 204 (Tex. Crim. App. 1977). *Ex parte Hagler* was more recently cited in *McPherson v. State*, 752 S.W.2d 178 (Tex. App.—San Antonio 1988, pet. ref'd.).

[115] The court did not cite any authority when it stated that the proposed-extraditee must be given an opportunity to appeal her extradition. *See id. Ex parte Hagler* has also been overruled on other grounds. *See Ex parte* Reagan, 549 S.W.2d 204, 205 (Tex. Crim. App. 1977) (overruling *Ex parte Hagler* to the extent that the State is required to formally—rather than informally—get the governor's warrant admitted into evidence at the hearing for writ of habeas corpus.).

[116] *See Ex parte* Chapman, 601 S.W.2d 380, 383 (Tex. Crim. App. 1980).

[117] *Id.*

[118] *Id.* at 382–83.

[119] *Id.*

[120] *See infra* Part V.C.

C. Ex Parte Stowell Lays the Groundwork

The Texas Court of Criminal Appeals has yet to address this issue of what is required to insure that a proposed-extraditee will be given an opportunity to appeal her extradition.[121] The most cited Texas case on this issue is *Ex parte Stowell*.[122] In *Ex parte Stowell*, the proposed-extraditee sought appellate review from an order of extradition and denial of habeas corpus relief.[123] Stowell gave written notice of appeal of the district court's holdings and shortly after that the State of Texas extradited him to the State of Michigan.[124] The San Antonio Court of Appeals found a "fundamental problem" with Stowell's appeal, it held that Stowell was no longer personally within the jurisdiction of Texas courts and thus that the appeal was moot.[125] The rationale behind the holding was that: "Were the [court] to grant [Stowell] relief [the court] would be focusing [its] order on the government of a sister state—an act that would place Texas at odds with our federal system of government."[126] Thus the *Ex parte Stowell* court stressed that "the legality of extradition must be tested in the asylum state prior to extradition, not afterwards."[127] The *Ex parte Stowell* court then concluded with a practical tip to practitioners: "To insure that [extradition] proceedings get a complete review in the asylum state's courts, an appellant may seek a stay of extradition pending appeal."[128] The court's use of the word "insure" is significant, it means that by following the suggested approach that "complete review" is guaranteed.[129] This statement

[121] *Ex parte* Stowell, 940 S.W.2d 241, 242 (Tex. App.—San Antonio 1997, no pet.) (noting specifically the problem the court had in finding authority for this issue.). Note that while *Ex parte Chapman* and *Ex parte Hagler* have established that the proposed-extraditee must have the opportunity to appeal and that that opportunity can be waived if habeas corpus review; technically there still is not a Texas Court of Criminal Appeals case that says exactly how the opportunity of appeal is insured.

[122] *See generally id.*

[123] *Id.* at 242.

[124] *Id.*

[125] *Id.* at 242–43.

[126] *Id.* at 242.

[127] *Id.* at 243 (quoting Commonwealth. v. Caffrey, 508 A.2d 322, 323 (Pa. Super. Ct. 1986)).

[128] *Id.*

[129] *Ex parte* Kirkpatrick, No. 05-05-00595-CR, 2005 Tex. App. LEXIS 3769, at *1 (Tex. App.—Dallas May 18, 2005, no pet.) (mem. op.) (not designated for publication); *In re* L.E.K., No. 2-05-050-CV, 2005 Tex. App. LEXIS 2250, at *1 (Tex. App.—Fort Worth March 24, 2005, not pet.) (mem. op.) (not designated for publication); *Ex parte* Mayhew, No. 03-03-00719-CR, 2004 Tex. App. LEXIS 5087, at *1 (Tex. App.—Austin June 10, 2004, no pet.) (mem. op.) (not

necessarily implies that "complete review" is available for those that are contesting extradition.[130] The *Ex parte Stowell* holding has been cited by three other Texas courts of appeals.[131] The *Ex parte Stowell* court based its suggestion on the use of a stay of the extradition order on out-of-state authority.[132]

The three court of appeals' opinions that cite *Ex parte Stowell* do not give any guidance as to what standards courts should follow in considering a stay of the extradition order.[133]

VI. SUGGESTIONS

Ex parte Stowell and its progeny are silent as to the standards that courts should use when determining to grant or deny a request for a stay of the extradition order. This Comment gives suggestions as to how practitioners, courts, and the legislature should cope with and fix the problem of the current standardless system.

Texas Rule of Appellate Procedure 31.4 provides for a discretionary "stay of mandate" to prevent extradition from the time that the court of appeals affirms the judgment of the trial court in the extradition proceedings until the Texas Court of Criminal Appeals has reviewed the propriety of the extradition.[134] The motion to stay mandate must have appended to it the proposed-extraditee's petition for discretionary review showing reasons why the Texas Court of Criminal Appeals should review the appellate court judgment.[135] Texas Rule of Appellate Procedure 18.2 provides for a

designated for publication). This would seem to be the best way to "insure" the "opportunity" to appeal that is established by *Ex parte Chapman* and *Ex parte Hagler*. *See supra* Part V.B.

[130] This is significant because the Uniform Criminal Extradition Act only gives a right to review by "a court of record in this State." *See* TEX. CODE OF CRIM. PROC. ANN. art. 51.13 § 10 (Vernon 2007).

[131] *Ex parte Kirkpatrick*, 2005 Tex. App. LEXIS 3769, at *1; *In re L.E.K.*, 2005 Tex. App. LEXIS 2250, at *1; *Ex parte Mayhew*, 2004 Tex. App. LEXIS 5087, at *1.

[132] 940 S.W.2d 241, 243 (Tex. App.—San Antonio 1997, no pet.) (citing Brewster v. Bradley, 379 S.W.2d 480, 481 (Ky. Ct. App. 1964) for the proposition that a stay of an extradition order is the best means available to preserve the right to appeal a denial of an application for writ of habeas corpus).

[133] *Ex parte Kirkpatrick*, 2005 Tex. App. LEXIS 3769, at *1 (stay of extradition was timely filed, but extraditee was still extradited rendering appeal moot); *In re L.E.K.*, 2005 Tex. App. LEXIS 2250, at *1; *Ex parte Mayhew*, 2004 Tex. App. LEXIS 5087, at *1.

[134] TEX. R. APP. P. 31.4.

[135] *Id.*

discretionary stay of mandate for when petition for writ of certiorari is being sought.[136] An 18.2 stay of mandate may be granted when the appellate court which rendered judgment finds: (1) the grounds for petition for writ of certiorari are substantial, and (2) the proposed-extraditee or others would incur substantial hardship if the United States Supreme Court were later to reverse the judgment. [137]

Further, the opportunity to appeal is provided by the *Ex parte Chapman* and *Ex parte Hagler* opinions.[138] As discussed above, there is still not a definitive set of standards for courts to follow in determining whether a stay of the extradition order should be denied or granted. Thus below are the suggested solutions for practitioners, courts, and the legislature.

A. What the Practitioner Should Do Until the Problem Is Fixed

The general strategy of the practitioner should be the kitchen-sink-approach—try everything to get the stay of the extradition order—because if you lose, then the propriety of the extradition becomes a moot issue.[139] When filing the original petition for writ of habeas corpus, alternatively seek a stay of extradition with the trial court, the court of appeals, and the Texas Court of Criminal Appeals.[140] Also, file a petition for writ of habeas corpus directly with the Texas Court of Criminal Appeals—which has both original and appellate jurisdiction for habeas corpus. The motion for stay of the extradition order should focus on the hardship that the proposed-extraditee or others will incur if the proposed-extraditee is improperly extradited. The motion should also make the court aware of the mootness problem outlined in *Ex parte Stowell* and the guaranteed "opportunity to appeal" expressly stated in *Ex parte Hagler* and *Ex parte Chapman*.

Finally, the motion should point out that even if the extradition is not reversed on appeal the worst harm that the demanding state could incur is a temporary delay in its adjudicative process.

---

[136] *Id.* 18.2.

[137] *Id.*

[138] *See supra* Part V.B.

[139] *Ex parte* Stowell, 940 S.W.2d 241, 242 (Tex. App.—San Antonio 1997, no pet.).

[140] Note that since there are no formal rules about "motions for stay of the extradition order" it is unclear as to what courts have jurisdiction to grant the stay. Certainly there are situations where the Texas Court of Criminal Appeals can hear an appeal directly from the trial court, so with equitable arguments, the court may grant the stay.

B. Judicial Remedy

The courts can satisfy the requirement of *Ex parte Chapman* and *Ex parte Hagler*—the requirement to give the proposed-extraditee an opportunity to appeal—very easily. The court should grant a stay of extradition so long as there is any good faith argument attacking the propriety of extradition.

C. Legislative Remedy

The legislature has the choice of two approaches: (1) insure that the proposed-extraditee will have the opportunity to get a complete appellate review of the proposed-extradition,[141] or (2) expressly contradict the *Ex parte Chapman* and *Ex parte Hagler* case law and provide for the exact circumstances for which a proposed-extraditee will be allowed to appeal the order of extradition, if at all. If the legislature took the second route then a "stay of the extradition order" would not be necessary because proposed-extraditees would have a statute directly on point as to when they should be allowed to appeal.

VII. CONCLUSION

Interstate extradition carries with it a significant threat of displacement from home, work, and family. A person who is improperly extradited suffers many of the same negative effects as a person wrongfully convicted. Currently in Texas there is no protection of the proposed-extraditee's opportunity to have a full review of the extradition. Case law suggests a stay of the extradition order will insure complete review by Texas courts, but there are not any standards for practitioners or courts to know when a stay of the extradition order is appropriate and when it is not. Until there are standards firmly set by either the courts or the legislature, courts are free to act in anyway they want—never will a refusal to grant a stay of the extradition order be an abuse of discretion. Thus, the final decision of who will and who will not get a full review of their extradition proceedings is left to prosecutors, whose power is subject to abuse by some that hold the power. Review by the courts is the best means to insure that extraditions are proper. Establishing clear standards for when a stay of the extradition

[141] The legislature could do this by creating an automatic stay of the extradition order until: (1) the express waiver by the person to be extradited, (2) review by the highest court in which review is allowed, or (3) the highest court in which review is allowed denies review.

order is appropriate is the best means to insure that proposed-extraditees in Texas will be given a complete review of their extradition.