IN THE SUPREME COURT OF FLORIDA

DREW GALLOWAY, Sheriff of Holmes County,

Petitioner,

-VS-

CASE NO. 67,747

JIMMY JOSEY,

(CORRECTED COPY)

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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_____/

STATEMENT OF THE CASE AND FACTS

On March 26, 1984, the Governor of Florida issued a rendition warrant pursuant to §941.03, Fla.Stat., for the arrest of Jimmy D. Josey, Respondent (R 12). The rendition warrant stated that Josey was charged with the crime of theft of property, second degree in the State of Alabama (R 12). The Governor issued this rendition warrant pursuant to the requisition or demand made by Alabama (R 10) wherein the Governor of Alabama requested the extradition of Josey as a fugitive from justice. The demand states that Josey "was personally present in the State of Alabama at the time of the alleged commission" of the offense charged (R 10). Accompanying the demand was an application for requisition made by Thomas Sorrells, District Attorney, 204th Judicial Circuit of Alabama, to the Governor of Alabama requesting the Governor of Alabama to issue the Requisition Warrant or Demand (R 4). The application for Requisition certifies

that Josey is charged with theft of property, second degree, in Henry County, Alabama; that the offense is alleged to have been committed on October 16, 1983, in Headland, Alabama; and that Josey was present in the State of Alabama at the time of the commission of the crime (R 4). Furthermore, the application alleged that

> Jimmy D. Josey, did knowingly obtain or exert unauthorized control over ten tons of nitrogen fertilizer, the property of Don Johnson, of the value of, to-wit: $1,500.00, with the intent to deprive the owner of said property, in violation of 13A-8-3 of the Code of Alabama.
>
> (R 4).

Among the documents in support of the application was an indictment and a warrant (R 6-9). The indictment charged that Josey knowingly obtained or exerted unauthorized control over the fertilizer; however, the indictment did not specify the date or time of the offense (R 6).

Josey filed a petition for writ of habeas corpus in the Circuit Court of Holmes County, Florida contesting his extradition to Alabama (R 1). Josey's petition alleged that he had "not been properly charged with any crime and that he was in the State of Florida at all times and on all dates of the incident out of which the alleged crime arose" (R 1). A hearing on the petition was held on April 17, 1984, before Holmes County Circuit Judge Warren Edwards. At the hearing the State introduced into evidence the rendition warrant and accompanying documents (extradition packet) (R 20). Josey called seven witnesses to testify, including himself, his wife, his brother, two neighbors,

a customer, and a witness who allegedly was present at the time of the offense.

Josey testified he was not in Alabama at any time on October 16, 1983 (R 20-22). On cross-examination, Josey admitted that he was hired to sell fertilizer for the Golden Plant Food Company in Headland, Alabama (R 24-25). Josey testified he received 3700 gallons of the fertilizer at his home and that this fertilizer was shipped to him via the company's personal truck from Missouri (R 25). Josey's wife, Joanne, testified that Josey left the house only once during the day of October 16, 1983. Joanne Josey stated that Respondent Josey left with a neighbor, Mrs. Gilley, and was gone for approximately 20-30 minutes (R 26). Respondent's brother, James Josey, testified that he arrived at Respondent's house on October 16, 1983, at approximately 8:30-9:00 a.m. and remained there until 5:30-6:00 p.m. (R 28). James Josey stated that Respondent left the house once, with Mrs. Gilley, and was gone for approximately 30 minutes (R 28-29). Mrs. Gilley testified that she saw Respondent several times on October 16, 1983; the earliest being 1:00 or 1:30 p.m., and the last time was at 5:30 p.m. (R 29-32). Mr. Gilley's testimony reflected that he saw Respondent on October 16, 1983, on two occasions, at approximately 3:20 or 4:20 p.m., and later around 4:30-5:30 p.m. (R 33-34). Bill Stevens testified that he stopped at Respondent's house shortly after 4:15-4:30 p.m. on October 16, 1983, to buy some oats, and stayed at Respondent's house for 30-40 minutes with Respondent Jimmy Josey present (R 35-36). The last witness to testify, John

Wilson, testified that on October 16, 1983, he was in Headland, Alabama, at a "fertilizer place", where he observed a truck being loaded with fertilizer (R 37). Wilson stated he stopped to investigate, and was shown an order from Golden Plant Food Company (R 37). Wilson testified he did not see Respondent there (R 37). There was no testimony from Wilson as to what time of day he observed the truck being loaded.

On May 4, 1984, the court entered an order denying Respondent's petition for writ of habeas corpus (R 15). Respondent appealed to the First District Court of Appeal. After the initial briefs were filed, the First District entered an order directing the parties to file supplemental briefs on the following question:

> Whether, in a habeas corpus proceeding in which a prisoner being held for extradition to the demanding state has introduced competent and substantial evidence showing that he was not present in the demanding state at the time of the alleged offense, the State holding such prisoner, to establish a bona fide conflict in the evidence on this issue sufficient to support extradition:
>
> 1. May rely on simply the content of the extradition papers;
>
> 2. May rely on the extradition papers supported by the affidavit of a competent witness; or
>
> 3. Must present in-court testimony of a competent witness to facilitate cross-examination by the prisoner.

After consideration of the briefs and supplemental briefs, the First District issued its opinion reversing and remanding back

to the trial court "to make the appropriate finding of fact on whether petitioner has met his burden of proof, with leave to take additional evidence if necessary." 10 F.L.W. 2241 . In the opinion, Judge Zehmer wrote that in order to give substance to the fugitive's fundamental constitutional right to challenge the factual determination of fugitivity, the demand for extradition (required by §941.03) cannot, by itself, be deemed competent evidence to create a conflict on the factual issue of fugitiveness. The court certified conflict with the Fourth District's decision in Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983) on the issue of whether the foreign executive's demand, standing alone, is sufficient competent evidence to create a conflict in the evidence requiring denial of habeas corpus relief. The First District further held that the sworn application for requisition in this case is not competent evidence to prove that Respondent was in Alabama at the time of the offense "because it was not based on the personal knowledge of the district attorney and did not contain the necessary recitation of evidentiary facts upon which the district attorney based his conclusion." 10 F.L.W. 2241. Petitioner will address other portions of the First District's opinion in the Argument section of this brief.

SUMMARY OF ARGUMENT

The First District's opinion has erroneously construed United States Supreme Court pronouncements concerning extradition. The First Distrct has in effect mandated that in habeas corpus proceedings contesting extradition, the asylum state must rebut a fugitive's presentation of evidence on the issue of fugitivity, in addition to the prima facie case and presumption enjoyed by the asylum state by virtue of a legally sufficient demand and accompanying paperwork received from the demanding state. The proper standard set by the U.S. Supreme Court is that the burden is on the fugitive to rebut the presumption of fugitivity created by the issuance of the Governor's warrant; the fugitive must show by clear and convincing evidence, beyond a reasonable doubt, that he is not a fugitive from justice. Where there is substantial, competent evidence on both sides, there is merely contradictory evidence and the habeas court has a duty to uphold extradition. The writ of habeas corpus should be granted only when it is so conclusively proved that no question can be made that the person was not within the demanding state at the time of the crime. South Carolina v. Bailey, infra; Munsey v. Clough, infra. The First District has incorrectly decided that the presumption afforded by the rendition warrant and demand is insufficient to create a conflict in the evidence when the fugitive presents evidence tending to show he was absent from the demanding state at the time of the crime. In other words, the First District is holding that the demand and

accompanying papers do not constitute competent, sufficient evidence of fugitivity. The case of Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983) is correct and the First District's opinion below is wrong.

ARGUMENT - ISSUE

THE FIRST DISTRICT COURT OF APPEAL INCORRECTLY HELD THAT THE DEMAND FOR EXTRADITION REQUIRED BY SECTION 941.03 CANNOT, STANDING ALONE, BE DEEMED COMPETENT EVIDENCE TO CREATE A CONFLICT ON THE ISSUE OF FUGITIVITY IN A HABEAS CORPUS PROCEEDING CONTESTING EXTRADITION: AND, INCORRECTLY DECIDED THAT THE HOLDING OF BRUNELLE V. NORVELL, 433 SO.2D 19 (FLA. 4TH DCA 1983) IS INCONSISTENT WITH THE FUNDAMENTAL RIGHT OF A FUGITIVE TO CHALLENGE THE FACTUAL ISSUE OF FUGITIVITY IN A HABEAS CORPUS PROCEEDING.

Since extradition is essentially a federal matter and affects all fifty states, Appellant has divided the argument section into two parts: an introduction to extradition, and discussion of the merits of the issue. The introductory section is intended to provide an overview and exploration of the important concepts underlying extradition, as well as controlling legal principles.

A. Introduction

Interstate extradition proceedings are controlled by federal law, being provided for directly by the United States Constitution and implemented by federal legislation.[1] South

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[1] Article IV, Section 2 of the United States Constitution provides:

Carolina v. Bailey, 289 U.S. 412 (1933); Innes v. Tobin, 240 U.S. 127 (1916); Kentucky v. Dennison, 65 U.S. 66 (1860). The federal extradition statute (18 U.S.C. §3182) was enacted for the purpose of controlling the subject of interstate rendition, and its provisions were intended to be dominant and as far as they operated controlling and exclusive of state power. Smith v. State of Idaho, 373 F.2d 149 (9th Cir. 1967); Day v. Keim, 2 F.2d 966 (4th Cir. 1924). It should be noted that 18 U.S.C. §3182 places no absolute limitation on the methods by which the states may provide for extradition. See, New York v. O'Neil, 359 U.S. 1 (1959). However, because federal law is controlling,

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1 (cont.)

"A person charged in any State with Treason, Felony, or other Crime, who shall flee from justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the Crime."

This constitutional mandate is effectuated by 18 U.S.C. §3182:

"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 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."

an asylum state cannot require more of a demanding state for the return of a fugitive from justice than required by 18 U.S.C. §3182. United States ex rel Grano v. Anderson, 318 F.Supp. 263 (D.C.Del. 1970).

In Kentucky v. Dennison, 65 U.S. 66, 109 (1860) the U.S. Supreme Court described a state's duty to extradite accused persons as stemming from a "compact entered into with the other states when it adopted the Constitution of the United States, and became a member of the Union." The paramount interests underlying the extradition process are matters of federal, rather than merely local, concern, as every state has an equal interest in the execution of a compact absolutely essential to peace and well-being. Id. at 109. In emphasizing that extradition is a matter of overriding federal interest and control, the Court explained that

> This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon Congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded. . .
>
> 65 U.S. at 104.

Unlike the states' ultimate authority to construe their own laws, it is the states' duty to administer extradition in accord with the construction placed on the federal constitutional and statutory provisions by the Supreme Court. South Carolina v. Bailey, supra; DeGenna v. Grasso, 413 F.Supp. 427 (D.C.Conn. 1976), affirmed Carino v. Grasso, 426 U.S. 913.

The Uniform Criminal Extradition Act, adopted by Florida (§941.01-941.29, Florida Statutes, 1941) signifies Florida's willingness and determination to cooperate with other states pursuant to their obligation under the Federal Constitution to extradite persons charged with crimes in other states. The Uniform Criminal Extradition Act was drafted and enacted to implement the constitutional requirements of Article IV and to set forth the procedural mechanism for the summary disposition of extradition cases. Because the Uniform Criminal Extradition Act is a uniform law, decisions from other states should provide guidance. See Parks v. Bourbeau, 477 A2 636 (Conn. 1984); Hill v. Blake, 441 A2 841 (Conn. 1982).

The extradition clause was intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. Michigan v. Doran, 439 U.S. 287 (1978), Biddinger v. Commissioner of Police, 245 U.S. 128 (1917). As stated by the Court:

> Such a provision was necessary to present the very general requirement of the state Constitutions that persons accused of crime shall be tried in the county or district in which the crime shall have been committed from becoming a shield for the guilty rather than a defense for the innocent, which it was intended to be. Its design was and is, in effect, to eliminate, for this purpose, the boundaries of states, so that each may reach out and bring to speedy trial offenders against its laws from any part of the land. Such being the origin and purpose of these provisions of the Constitution and statutes, they have not been construed narrowly and technically by the courts as if they were penal laws, but liberally to effect their important purpose. . . .

Biddinger v. Commissioner of Police, 245 U.S. 128, 133 (1917). The clause was intended to prevent any state from becoming a sanctuary for fugitives from justice, and likewise served the important policy objective of fostering national unity. "In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy." Michigan v. Doran, 439 U.S. 282, 289 (1978). Although its basic purpose is to serve the judiciary in the swift administration of justice, extradition is a summary, executive proceeding designed to benefit the states, not the fugitives. Id., supra; Wirth v. Surles, 562 F.2d 319 (4th Cir. 1977); Smith v. State of Idaho, 373 F.2d 149 (9th Cir. 1967). The right of extradition has long been recognized as belonging to the demanding state and not to the fugitive. Ker v. Illinois, 119 U.S. 436 (1886), Frisbie v. Collins, 342 U.S. 519 (1952), rehearing denied, 343 U.S. 937. Since the extradition clause contemplates the speedy rendition of fugitives by the asylum state, the clause has been construed liberally in favor of the demanding state's demand.[2] Biddinger, supra.

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[2] Extradition is not a criminal proceeding. It does not involve determination of the guilt or innocence of the person to be extradited and, therefore, does not invoke the same degree of protection of the defendant's constitutional rights. McDonald v. Burrows, 731 F.2d 294 (5th Cir. 1984).

A governor's grant of extradition is prima facie evidence that the constitutional and statutory requirements have been met; once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide a) whether the extradition documents on their face are in order; b) whether the petitioner has been charged with a crime in the demanding state; c) whether the petitioner is the person named in the request for extradition; and d) whether the petitioner is a fugitive. Michigan v. Doran, supra. It is the State's position in this case that the First District Court of Appeal incorrectly applied controlling legal principles concerning the question of fugitivity, the issue below.

B. The Fugitivity Issue

The framers envisioned that the governors of the states would play the primary role in effectuating interstate extradition. Crumley v. Snead, 620 F.2d 481 (5th Cir. 1980). The responsibility of determining whether one is a fugitive from justice rests with the governor issuing the rendition warrant,[3] People v. Harrell, 87 N.E. 2d 765 (Ill. 1949). The amount or

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[3] Whether in fact a person whose interstate extradition is demanded is a fugitive from justice is for the governor of the surrendering state to determine, and his conclusion that he is such a fugitive must stand on habeas corpus unless clearly overthrown. Hogan v. O'Neill, 255 U.S. 52 (1921); Chase v. State ex rel Burch, 113 So. 103 (Fla. 1927).

character of evidence necessary for this factual determination of fugitivity is not prescribed by statute, and need only be satisfactory to the governor issuing the warrant. Id. "The inquiry whether the appellant is a fugitive from justice is one of fact, to be resolved by the [governor] to whom the demand for extradition is made, and his judgment thereon is not subject to judicial impeachment by habeas corpus unless it conclusively appears that the person sought to be extradited could not be a fugitive from justice under the law." Brewer v. Goff, 138 F.2d 710, 712 (10th Cir. 1943). The habeas court is essentially reviewing the factual determination of the governor[4] as to the presence of the accused in the demanding state, and the guilt or innocence of the accused is not in question. Smith v. State of Idaho, 373 F.2d 149 (9th Cir. 1967). This factual determination of fugitivity by the executive should not be disturbed if there is "evidence pro and con" on the question, or if there is "some evidence sustaining the finding." Hyatt v. People of State of New York ex rel Cockran, 188 U.S. 691 (1903); Moncrief v. Anderson, 342 F.2d 902 (D.C. 1964). The rationale for sustaining the executive finding of fugitivity if at all supportable is that non-fugitivity is an alibi defense which should be raised in the courts of the demanding state. Brewer v. Goff,

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[4] The decision of the governor on this point is sufficient to justify the arrest and extradition, unless the presumption in its favor is overthrown by contrary proof. Roberts v. Reilly, 116 U.S. 80 (1885).

supra. The governor "is not obliged to demand proof apart from proper requisition papers from the demanding state, that the accused is a fugitive from justice." McNichols v. Pease, 207 U.S. 100 (1907). If the governor issues a warrant without any basis whatsoever for finding fugitivity, habeas corpus is the proper remedy:

> When it is conceded, or when it is so conclusively proved, that no question can be made that the person was not within the demanding state when the crime is said to have been committed, and his arrest is sought on the ground only of a constructive presence at that time, in the demanding state, then the court will discharge the defendant. Hyatt v. Cockran, 188 U.S. 691, [23 S.Ct. 456, 47 L.Ed. 657] affirming the judgment of the New York Court of Appeals, 172 N.Y. 176, [64 N.E. 825]. But this court will not discharge a defendant arrested under the governor's warrant where there is merely contradictory evidence on the subject of the 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 guilt or innocence of the accused. South Carolina v. Bailey, 289 U.S. 412, 421-422 (1932); Munsey v. Clough, 196 U.S. 364, 374-375, (1905).

Thus, the habeas court, in reviewing the factual determination made by the governor, may not weigh the evidence when the evidence on the fact of fugitivity is merely contradictory. See, In Re Rowe, 423 N.E.2d 167 (Ohio, 1981); People v. Babb, 123 N. E.2d 822 (Illinois, 1955); People v. House, 378 N.E.2d 331 (Ill. App. 1978). Weighing the evidence would be tantamount to trying the issue of alibi or determining guilt or innocence; instead, the habeas court's role is limited to merely ascertaining whether the executive order of extradition was so palpably wrong as

to warrant an inference of fraud or inadvertence. People v. Babb, supra; People v. Harrell, supra.

The court is not required to make a ruling on the issue of fugitivity upon the weight of the evidence, nor is it required to resolve any genuine conflict. State ex rel Kimbro v. Starr, 65 So.2d 67 (Fla. 1953). The habeas court's duty is to determine if there is competent evidence to sustain the warrant; and, where the evidence is in conflict, it is the plain duty of the court to enter an order of remand. Id. Additionally, an appellate court should not determine the question on appeal, as the duty of resolving the conflict belongs to the trial court in the demanding state. Id.[5]

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[5] As noted by the court in South Carolina v. Bailey, 289 U.S. 412, 417 (1932), concerning the controverted fact of fugitivity:

> The statute and public policy require that such fact be determined in a summary manner. Doubtless in given cases different minds would work out diverse conclusions, but after all it is perhaps wise that the determination of the ultimate fact should be lodged in the sound legal discretion of an impartial judge, commissioned by the law of the land and the inherent sense of the responsibility of his high office 'to do what to justice appertains.' He hears the witnesses and observes their mental leanings or bias toward the question involved. He senses the atmosphere of the case. Moreover, it would doubtless be a dangerous experiment to undertake by a judicial decree of an appellate court to prescribe a legal straitjacket for such matters.

at 416.

The governor's warrant creates a presumption that the person sought was present in the demanding state on the date the offense was allegedly committed. Roberts v. Reilly, 116 U.S. 80 (1885); Johnson v. Cronin, 690 P.2d 1277 (Colo. 1984); Miller v. Debekker, 668 P.2d 927 (Colo. 1983). The accused has the burden of proving his absence from the demanding state at the time of the offense. South Carolina v. Bailey, supra. Because the issue of presence on the date of the crime so closely approximates factual issues material to guilt or innocence (such as alibi), which cannot be tried in an extradition proceeding, a defendant who denies he is a fugitive from justice has the burden of proving that fact by clear and convincing evidence, beyond a reasonable doubt. Id. A court should not discharge a defendant where there is merely contradictory evidence; the defendant must prove clearly and satisfactorily, beyond a reasonable doubt that he was not present. Id.

The First District Court of Appeal, in its opinion below, has enunciated an incorrect standard for the habeas court and has misconstrued the intent of the Supreme Court:

> Appellant then introduced contrary evidence proving, if believed, that he was not in Alabama on the date of the offense and was not a fugitive from justice. It was the trial court's duty at this point to evaluate the competent evidence presented by the state and appellant to determine whether there was conflicting evidence on the issue of fugitiveness. If the court found such a conflict in the evidence, it would have been required to deny appellant's petition for writ of habeas corpus as a matter of law. Munsey v. Clough, 196 U.S. at 375. If, however, the court had determined there was

> no competent evidence in the record conflicting with appellant's evidence, then it would have been the trial court's duty to judge the credibility and persuasiveness of appellant's witnesses and determine whether appellant proved by clear and satisfactory evidence beyond a reasonable doubt that he was not in Alabama on the date of the offense. South Carolina v. Bailey, 289 U.S. at 421-27.
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> 10 F.L.W. at 2239-2240.

The court further held that the foreign executive's demand, standing alone, is not sufficient competent evidence to create a conflict in the evidence requiring denial of habeas relief, certifying conflict with Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983). The court's rationale for this holding was:

> If the demand for extradition from a foreign jurisdiction, which is a statutorily required document, is treated as sufficient evidence of fugitiveness to create an evidentiary conflict requiring denial of habeas corpus as a matter of law, the state need never adduce more proof than the demand and appellant's constitutional right to challenge the governor's factual conclusion of fugitiveness in the warrant of arrest by presenting evidence of his presence elsewhere amounts to little more than a sham.
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> 10 F.L.W. at 2240.

These holdings are incorrect and conflict with the pronouncements of the United States Supreme Court and federal courts in our nation. Additionally, the First District's opinion is detrimental to the original reasons for the Extradition Clause and legislation, i.e. . . . extradition is supposed to be a summary and mandatory executive proceeding.

The Clough and Bailey rationale that when conflicting evidence on the fugitivity issue appears, habeas corpus should not be granted has been widely accepted and applied in both state and federal courts. Perhaps the best explanation of the Clough and Bailey requirements was set forth by the Ohio Supreme Court in In Re Rowe, 423 N.E.2d 167 (Ohio 1981) as follows:

> [f]irst, the burden is upon the petitioner to rebut the presumption created by the issuance of the Governor's warrant that the petitioner is a fugitive from justice by proof beyond a reasonable doubt. Secondly, that where there is contradictory evidence upon the issue of fugitivity and there is substantial and credible evidence placing the petitioner in the demanding state on or about the date of the offense, the petitioner has not met the burden placed upon him and the habeas corpus court may not, under the guise of passing upon the credibility of witnesses, resolve the fact of the petitioner's presence in the demanding state in favor of the petitioner and discharge him from custody. To conclude otherwise and hold the court possesses its ordinary unlimited authority to pass upon the credibility of witnesses and resolve disputed questions of material fact would not be consonant with the summary and unique character of extradition proceedings wherein issues of guilt and innocence, including alibi, are for resolution in the courts of the demanding state. This is not to deny to the habeas corpus court its authority to pass upon the credibility of witnesses, but to limit that function in extradition habeas corpus adjudication in conformity with United States Supreme Court pronouncements upon the issue.
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> At 173-174.

Thus, it is only when there is no substantial and competent evidence showing the accused's presence, and the accused has presented clear and convincing evidence beyond a reasonable doubt

that he was not present, that the habeas court can justifiably grant habeas corpus. If the demand and accompanying papers show that the accused was present, and the accused presents evidence to rebut that presumption, the result is "merely contradictory evidence" or conflicting evidence on the issue of presence, which, by its very nature, requires the habeas court to deny habeas corpus since conflicting evidence on the issue of fugitivity is too much akin to the issue of alibi which cannot be tried in the courts of the asylum state. It is only when it is so conclusively proved that no question can be made that the person was not within the demanding state when the crime is said to have been committed can the accused be discharged. South Carolina v. Bailey, supra.

The First District's conclusion that Brunelle v. Norvell, 433 So.2d 19 (Fla. 4th DCA 1983) is inconsistent with the accused's fundamental right to challenge the factual issue of fugitivity is erroneous. The First District held below that "in order to give substance to this fundamental constitutional right . . . the demand for extradition required by Section 941.03 cannot, standing alone, be deemed competent evidence to create a conflict on the factual issue of fugitiveness." 10 F. L.W. at 2240. In Brunelle, the court noted that Section 941.03 requires the foreign executive's demand to allege fugitivity, and held that:

> The foreign executive's demand sufficiently alleged appellant's presence on the critical date. Testimony introduced by appellant to prove that he was present in Florida on

> this date does no more than create a conflict in the evidence on the question of his whereabouts. The court's duty in this situation is to remand him to the custody of the demanding state.
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> 433 So.2d at 20.

Brunelle is correct and is in compliance with the United States Supreme Court pronouncements in Clough, Bailey, Doran.

The First District made another erroneous holding below when it found the sworn application for extradition was not competent evidence to prove that Josey was in Alabama at the time of the offense because"it was not based on the personal knowledge of the district attorney and did not contain the necessary recitation of evidentiary facts upon which the district attorney based his conclusion." 10 F.L.W. at 2241. The First District cited no authority for this holding, and Petitioner doubts that any legal authority could be found to support that holding. The courts of the asylum state review the decision of the governor of the asylum state to issue the rendition warrant; the governor of the asylum state must issue the rendition warrant if the demand from the demanding state is in order. Kentucky v. Dennison, supra. The governor of the demanding state issues the demand based upon the application for requisition and accompanying papers. Whether or not the application for requisition submitted to the governor of the demanding state is based on personal knowledge or contains a recitation of evidentiary facts is not one of the four issues that can be raised via habeas corpus in extradition proceedings, see Michigan v. Doran, supra.

And, there is no requirement in the Uniform Criminal Extradition Act that the application for requisition be based on the "personal knowledge of the prosecutor" or "contains the necessary recitation of evidentiary facts upon which the district attorney based his conclusion." §941.23(1), Florida Statutes, requires only that the application shall state:

> the name of the person so charged, the crime charged against him, the approximate time, place, and circumstances of its commission, the state in which he is believed to be, including the location of the accused therein, at the time the application is made and certifying that, in the opinion of the said state attorney the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim.
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> §941.23(1), Fla.Stat.

The First District's holding is clearly wrong and in direct contravention to the Uniform Act and federal law. The demand and accompanying papers (including the application for requisition, the indictment, etc.) constitute competent evidence to show Josey's presence in Alabama at the time of the offense.

Finally, the evidence presented by Josey failed to rebut the presumption of fugitivity as Josey's evidence did not account for the entire day of October 16, 1983. Although Josey testified he was at home all day, this is not competent evidence to overcome the presumption, as the testimony of an accused or his spouse, or both, that he was not present in demanding state at the time the crime was committed is not sufficient to overcome the prima facie case made by the demand. Bradley v. Hickey, 436

N.E.2d 1359 (Ohio 1982); Johnson v. Ledbetter, 348 So.2d 1007 (Miss. 1977); Ex Parte Harrison, 469 S.W.2d 571 (Tex.Cr.App. 1971); Ex Parte Johnson, 651 S.W.2d 440 (Tex.Cr.App. 1983); Ex Parte Harvey, 459 S.W.2d 853 (Tex.Cr.App. 1970); Ex Parte Sutton, 455 S.W.2d 274 (Tex.Cr.App. 1970). The reason for this rule is that any person demanded by a state could defeat extradition by merely denying that he was in the demanding state at the time of the offense. Josey's remaining witnesses gave testimony accounting for small periods of time during the day in question; the testimony does not account for Josey's whereabouts for the entire 24 hour period. The exact time of day the crime occurred was not alleged, and thus Josey had the burden of proving his whereabouts for the entire 24 hour period. The case of Illinois ex rel McNichols v. Pease, 207 U.S. 100, 109-12 (1907) establishes that the state's prima facie case is not overcome by proof that the accused was not at the place of the alleged crime for part of the day in question, where the record does not disclose the hour of the crime. Josey did not present any evidence showing that he could not have been physically present due to distance at the place of the crime during the time periods not accounted for by the witnesses' testimony. See, Ex Parte Sutton, supra.

Josey's evidence did not conclusively establish that he was outside the demanding state for the entire 24 hours of October 16, 1983. Thus, the evidence was merely contradictory. In the words of the Supreme Court, "it is not possible to say

with certainty where the truth lies", South Carolina v. Bailey, supra at 419. Josey's alibi defense is a matter for the courts of the demanding state. Munsey v. Clough, supra.[6]

The First District, by virtue of its opinion below, has thrown a rod into the gears of the extradition process, a well-oiled federal machine dependent upon the cooperation of the states to ensure national unity in the administration of justice. The First District, in effect, has mandated that the asylum state produce more evidence at a habeas corpus hearing, i.e., more than the demand and accompanying papers, than is necessary to justify extradition. As stated earlier, federal law controls the extradition process, and an asylum state cannot require more of a demanding state for the return of a fugitive than is required by 18 U.S.C. §3182. The First District's opinion, if allowed to stand, will inevitably frustrate the purpose of the Extradition Clause and §3182 by forcing protracted litigation in the asylum state (Florida) on the issues of fugitivity

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6 Evidence in extradition proceedings should be construed liberally in favor of the demanding state, as necessitated by Article IV, Section 2 of the United States Constitution. McLaughlin v. State, 512 S.W.2d 657 (Tenn.App. 1974). Otherwise, the Extradition Clause would be thwarted, as it is extremely impracticable, if not impossible, for a demanding state to meet the technical rules of evidence in a trial in the asylum state on such an issue as alibi, having to bring witnesses from the demanding state, etc. See State v. Lann, 567 S.W.2d 772 (Tenn. App. 1978), cert. denied (Tenn. 1978).

and alibi defenses.[7] Such an intrusive determination by this asylum state court does violence to the essential principle of federalism underlying extradition.

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[7] Also, requiring the asylum state to rebut a fugitive's evidence with additional documents (besides the demand and accompanying papers) and witnesses would result in delays and thus, extra costs to the demanding state. The delays would occur as the asylum state attempts to obtain additional evidence from the demanding state. The extra costs are incurred by the demanding state, as a demanding state must pay for all the costs of extradition, including time spent in jail in the asylum state. Since fugitives should be extradited quickly, a change in the process could result in additional overcrowding in jails in asylum states. Extradition was intended to be a summary process, enabling the courts of the demanding state to swiftly bring offenders to trial.

CONCLUSION

The First District's decision below should be reversed, and the trial court's order denying habeas relief should be effectuated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Counsel for Respondent, W. PAUL THOMPSON, Post Office Drawer 608, DeFuniak Springs, Florida 32433, this 25th day of November, 1985.

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