EXTRADITION: AFFIDAVIT BEFORE MAGISTRATE: AFFIDAVIT RE PECUNIARY INTEREST:

The sheriff of a county or any other party having no pecuniary interest should be permitted to make an affidavit before a magistrate, and the affidavit regarding pecuniary interest, for interstate rendition purposes.

August 16, 1940

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Honorable Frank G. Harris
Lieutenant Governor
Jefferson City, Missouri

Dear Sir:

This is in reply to your request for our opinion by your letter dated June 10, 1940, which is in the following terms:

> "I have before me a blank petition to be used in securing extraditions. On the back of it is an affidavit to be executed by the prosecuting witness, if and when he has pecuniary interests. The affidavit is to the effect that requisition for the fugitive sought is not for the purpose of collecting a debt or to allow anybody to travel at the expense of the state or to answer any private end whatever, but only to serve the ends of public justice. In some instances where the injured party, who should be the prosecuting witness, fails to make either the affidavit upon which the warrant is issued or the affidavit above mentioned, that this fugitive is not sought for the purpose of collecting a debt, the sheriff of the county upon the advice of the prosecuting attorney frequently makes both of these affidavits.
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> I should like an opinion as to whether or not the injured party, who has a pecuniary interest, should make both of these affidavits mentioned or as to

> whether or not the sheriff of the county or some other party having no pecuniary interest should be permitted to make them."

I understand your question to deal particularly with offenses against property such as, for example, larceny, forgery, obtaining property by false pretenses, etc., where one citizen is most directly injured by the offense.

Article IV, Section 2 of the Constitution of the United States, in part provides:

> "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."

Section 5278, Revised Statutes of the United States, 18 U.S.C.A. Section 662 in part provides:

> "Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State 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, it shall be the duty of the executive authority of the State or Territory

> to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

In the type of case here considered, and in all cases, the sheriff of the county or some other party having no pecuniary interest should be permitted to make the affidavit before the magistrate upon which the interstate rendition proceedings and the rendition warrant are based. The offense is one against the state and not solely against the individual citizen who is most directly injured in a pecuniary way by the offense.

As stated in Keeton v. Gaiser 55 S. W. (2nd) 302, 303, 331 Mo. 499, "the extradition of fugitives from justice as between the several states is governed by the Constitution and statutes of the United States, and federal decisions are controlling." We know of no constitutional or statutory provisions or federal decisions which would militate against the point stated above. The federal courts have ruled that a police officer and a deputy sheriff may make the affidavit before a magistrate upon which interstate rendition is based. In Riley vs. Colpoys (1936) 85 Fed. 2nd 282, l.c. 283, 284, 66 App. D. C. 116, the affidavit was made before a magistrate by one Holland, a member of the police department of the City of Detroit, Michigan. It was contended that the fugitive should not be returned to the demanding state "because the affidavit made by affiant Holland in support of the complaint did not state facts within his personal knowledge, but upon information only." The United States Court of Appeals for the District of Columbia ruled that the affidavit was sufficient, and at l.c. 283, 284 of 85 Fed. 2nd in part said:

> "We think that these facts justify the arrest of appellant in this jurisdiction and his extradition to the state of Michigan. The affidavit made by Holland to the original complaint was unqualified and absolute in form and not made upon information and belief. The magistrate, accordingly, was justified in issuing a warrant for the arrest of the accused, and a motion to quash such arrest upon the ground that the complaint was made upon information and belief would not be sustained. * * * * * * * * * * * *
>
> Upon these authorities we conclude that the warrant of arrest was lawfully issued by the magistrate upon the filing of the first affidavit by Holland, and that the writ of requisition issued by the Governor of Michigan was thereby justified."

In Raftery ex rel Huie Fong vs. Bligh (CCA Mass. 1932) 55 Fed (2nd) 189, l.c. 193, 195, it was said:

> "The main question raised by the assignments of error is whether the complaint and accompanying affidavit of Officer Mullen, charging the person demanded with the crime of murder in the state of Minnesota, are such a compliance with section 5278 of the Revised Statutes of the United States (18 USCA Sec. 662) as would authorize the Governor of Massachusetts in issuing his warrant for the arrest of the person demanded. * * * * * * * * * * * * *
>
> We are therefore of the opinion that the supporting affidavit of Mullen, in connection with the sworn complaint, met the requirements of the provisions of the Constitution and of the Revised

> Statutes above referred to, and were, as a matter of law, sufficient to justify the Governor of Massachusetts in the issuance of his warrant."

In our opinion, the sheriff or some other party having no pecuniary interest should be permitted to make the affidavit regarding pecuniary interest, which is referred to in your letter dated June 10, 1940, and which appears at the top of page two of the printed form of the petition for requisition. From the affidavit it appears that it is to be made by the prosecuting witness. The prosecuting witness intended by this form appears to be the person who made the affidavit before the magistrate upon which the rendition proceeding is based. The requirement by governors of various states of said affidavit regarding pecuniary interest grew out of a conference of the governors of several states regarding interstate rendition. The presence of pecuniary interest is a matter which the governor of an asylum state may consider in his discretion. The affidavit regarding pecuniary interest is not required by law.

In State ex rel Gaines vs. Westhues 2 S. W. (2nd) 612, l.c. 616, the Supreme Court of Missouri said:

> "Nothing that we have said must be considered as intimating that the Governor of the state upon which a demand is made for the surrender of an alleged fugitive from justice may not exercise his discretion in determining whether the demand is made for some ulterior or improper purpose, as, for example, the collection of a private debt. Because it is very generally held that, if he finds such to be the case, he may properly refuse to issue a warrant, even where the requisition papers are apparently sufficient and in due form. State v. Toole, 69 Minn. 104, 72 N. W. 53, 38 L.R.A. 224, 65 Am. St. Rep. 553; Work v. Corrington, 34 Ohio St. 64, 32 Am. St. Rep. 345. What we do say is that, in a proceeding on habeas corpus wherein the person held in custody under a rendition warrant

> seeks release, the motives underlying the institution of the prosecution against him in the demanding state cannot be considered by the court. This for two reasons: (1) The executive discretion in that respect is not subject to court review (Gaskins v. Davis, 115 N. C. 85, 20 S. E. 188, 25 L.R.A. 813, 44 Am. St. Rep. 439); and (2) the matter of motive, in so far as it has any relevancy at all, is essentially one of defense, cognizable solely in the courts of the demanding state which have jurisdiction to hear and determine the criminal cause."

The Springfield Court of Appeals stated the same rule in Ex parte Ellis 9 S. W. (2nd) 544, l.c. 547.

The case of In Re Block (1898) 87 Fed 981, l.c. 984, was a habeas corpus proceeding arising out of interstate rendition in the District Court of the United States for the Western District of Arkansas, in which the petitioner was remanded to custody. The Court in part said:

> "The response also contains matter tending to show that the requisition papers have been set on foot and are instigated by malice, and not in good faith, and are intended to harass and annoy the petitioner. It is sufficient to say that these are matters which must either go to the courts in Illinois, or to the governor of the state of Arkansas, who issued the warrant. It is not a question that this court has a right to pass upon under habeas corpus. Nor do they, if true, constitute any predicate for affirmative relief by the court."

The term "prosecuting witness" is defined in a

note in 50 C. J. page 795 as "maker of preliminary complaint or affidavit." It is elsewhere defined, in an action for a penalty under a statute, as the person in whose name the suit was brought (6 Words and Phrases 1st Series p. 5736). Our conclusion that the sheriff should be permitted to make the affidavit regarding pecuniary interest is based on the foregoing definitions, the apparent meaning of the form, and the proposition that said affidavit is not required by law in any event. We believe these considerations should prevail although the term "prosecuting witness" was once defined as the person alleged to be injured by the commission of the offense (State vs. Christopher 149 N. W. 40, 41, 167 Iowa 109). Extradition laws should be construed "liberally to effect their important purpose". Biddinger vs. Commissioner of Police 245 U. S. 128, 38 Sup. Ct. 41, 43, 62 L. Ed. 193.

We believe the governor in the exercise of his discretion regarding pecuniary interest will be concerned chiefly with the motives of the person who actually instigated the prosecution, and that person is the one who made the original affidavit before the magistrate.

CONCLUSION

The sheriff of a county or any other person having no pecuniary interest should be permitted to make an affidavit before a magistrate, and the affidavit regarding pecuniary interest, for interstate rendition purposes.

Respectfully submitted,

LAWRENCE L. BRADLEY
Assistant Attorney General

APPROVED:

COVELL R. HEWITT
(Acting) Attorney General

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