EXTRADITION: SUFFICIENCY OF AN INFORMATION.

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Governor Guy B. Park
Executive Office
Jefferson City, Missouri

Dear Governor Park:

Your request for an opinion dated September 28th was in words and figures as follows:

> "Please advise me in extradition matters, whether or not an information sworn to by a Prosecuting Attorney is sufficient to support the demand for the fugitive."

The United States Constitution provides at Clause 2, Section2, Article IV as follows:

> "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."

28 U.S.C.A. Sec. 662 provides as follows:

> "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. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand, shall be paid by such State or Territory."

Your question briefly can be stated thus: where a Prosecuting Attorney makes an affidavit upon his information and belief that treason, felony, or other crime has been committed by a named defendant, is the said information complying with the Federal Code above set out, which requires "an affidavit made before a magistrate * * * charging the person demanded with having committed treason, felony, or other crime * * * "?

In the case of Ex Parte Hart (Maryland 1894) 63 F. 249, I find that the court held an information of a Prosecuting Attorney not sufficient to support an extradition under the federal code, for the reason that the information did not rise to the dignity of an indictment and the court said:

> "We do not consider this a compliance with the Act of Congress, which we think requires the copy of an indictment found by a Grand Jury, and not the copy of an information filed by the attorney for the State. * * * To authorize the removal of a citizen of Maryland to the State of Washington for trial on a charge of crime, something more than the oath of a party unfamiliar with the facts that he believes the allegations of an information to be true, should be required, and is demanded by the law. To hold otherwise would enable irresponsible and designing parties to make false charges with impunity against those who may be the subjects of their enmity, and permit them, after they have caused public officials to believe their representations, to secure the arrest, imprisonment, and removal of innocent persons on papers regular in character, but without merit, and fraudulent in fact." (Underscoring ours)

Again in Ex Parte Morgan (D.C. Arkansas 1883) 20 F. 298, l.c. 307 the court held that the affidavit in that case was not sufficient because it was founded on belief or information and the court said:

> "The Act of Congress provides for a method that is summary in its effect and it must therefor be strictly complied with. * * * In the affidavit in this case the affiant says 'that he has reason to believe and does believe from information received, that one Frank Morgan did commit the crime of willful murder'. This is a charge upon suspicion, and the constitution of the United States and the laws of congress are not satisfied with such a charge. The affiant Patton swears to his belief. Suspicion does not warrant the arrest of a party that may be sent from a state where he may be found to another, and it may be a distant state. All legal intendments in a case of this kind are to avail the prisoner." (Underscoring ours)

In the case of Ex Parte Nash, 44 F.(2d) 403, (Arkansas 1930) the District Federal Court held that an information of a Prosecuting Attorney is sufficient if it charges the crime under the law of the demanding state, and said:

> "Under the decisions of the Supreme Court of the United States in construing and applying the Interstate Extradition Act of Congress, the state law must be taken into account for the purpose of effecting the object of the constitutional provision." (Underscoring ours)

The State and Federal Courts are bound by the construction of the Constitution and Federal Extradition Laws as adopted by the United States Supreme Court. The decisions of the courts of different states vary on the question presented in this brief. It is to be noted that the decisions of the Federal District Courts as above set out also vary on the question presented in this brief, for in the Hart and Morgan cases an information was held not sufficient while in the Nash case it was held sufficient to support the extradition in as much as it was sufficient to charge the crime properly in the demanding state. In the case of In Re Strauss (1905) 197 U.S. 324, 25 S.Ct. 535, the United States Supreme Court said:

> "Under the constitution each state was left with full control of its criminal procedure. No one could

> have anticipated what changes any state could make therein, and doubtless the word 'charged' was used in its broad signification, to cover any proceeding which a state might see fit to adopt by which a formal accusation was made against an alleged criminal. * * * It may be true as counsel urge, that persons are sometimes wrongfully extradited; * * * that a creditor may wantonly swear to an affidavit charging a debtor with obtaining goods by false pretenses. But it is also true that a prosecuting officer may either wantonly or ignorantly file an information charging a like offense. But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify extradition? Such possibilities as these can not be guarded against". (Underscoring ours)

Again in Pierce v. Creecy, 210 U.S. 387, 28 S.Ct. 714, our Supreme Court said:

> "But the Constitution does not require as an indispensable prerequisite to interstate extradition that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime." (Underscoring ours)

Thus we see that the United States Supreme Court upholds the logic and holding in the Nash decision above set out. The Pierce case holds that the United States Constitution requires nothing more than the affidavit sworn before a magistrate charge a crime, and the Strauss case went far enough while considering both the United States Constitution and Federal Act above set out to ask the question, "But who would doubt that an information, where that is the statutory pleading for purposes of trial, is sufficient to justify extradition"?

It follows as the opinion of this office that an information of a Prosecuting Attorney when properly charging a crime under the laws of the demanding state, it is sufficient to support an extradition of a fugitive from an asylum state under the provisions of the Federal Constitution and Code. The sense of such a ruling is apparent. Under the Federal Constitution the states have been left with full control of their criminal procedure. Take Wisconsin for an example. In Wisconsin in criminal cases the only prodedure known under its constitution and laws is a trial upon the information of the Prosecuting Attorney. Fugitives from Wisconsin are necessarily arrested on extradition papers supported by informa-

tion, and it is not reasonable to believe that our United States Supreme Court will tell the people of Wisconsin that they must change their fundamental law and their criminal procedure before they can have the right to a return of fugitives for trial for crimes committed in Wisconsin.

We recognize that a copy of an affidavit of a prosecuting witness made before a magistrate when Missouri is the demanding state is to be preferred from the Prosecuting Attorney to a copy of his information charging the crime, for the former method has never been questioned by any state in the union as not a compliance with the Federal Constitution and Code. We are aware that the Supreme Court of several states have held the opposite to the holding of this opinion, and refused to dignify an information in matters of extradition. We think as a matter of policy your office should as a general rule continue to require the affidavit of the prosecuting witness rather than the information of the Missouri Prosecuting Attorney, as no doubt by the present policy Missouri messengers are avoiding unnecessary delay and expense in asylum states while messengers from other states are taking time to debate the legality of an information. Your present policy is expedient.

Respectfully submitted,

WM. ORR SAWYERS.
Assistant Attorney General.

APPROVED:
Roy McKittrick
Attorney General

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