



## NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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RETIRED JUDGES

March 19, 2018

### LETTER OPINION

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*Counsel for Respondent, Commonwealth of Virginia*

RE: *Jose Wilfredo Abarca Soriano v. Commonwealth of Virginia*  
CL-2018-303

Dear Counsel:

This cause came before the Court on the petition for a writ of habeas corpus of Jose Wilfredo Abarca Soriano ("Petitioner"), advanced pursuant to Virginia Code

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§ 19.2-95, seeking release from incarceration in averment of alleged defects in the extradition of his person sought by the State of California. Petitioner's merits claim raises the questions of who has the burden of production and persuasion as to the evidence to be adduced, of whether the Governor of the requesting state may act indirectly through an agent, of what evidence is sufficient to establish the identity of the individual sought, and to the extent the decision of this Court is appealable, of whether this Court has the authority to fashion an order which allows Petitioner to remain in Virginia pending the outcome of such appeal such that it is not rendered moot by his premature transfer to California.

For the reasons as more fully set forth herein, the Court finds Petitioner challenging extradition by means of seeking a writ of habeas corpus under Virginia Code § 19.2-95 has a limited burden of production of evidence to introduce the documents constituting the "Form of Demand" under Virginia Code § 19.2-87; that Petitioner has the burden of persuasion as to why he should not be extradited; that the Governor of the requesting state may act indirectly through an authorized agent in pursuing his or her request if so authorized by that state's laws; that being named in the indictment in California and being identified in the request of the Governor of that state in such fashion that it is clear Petitioner is the precise individual being sought, including being designated by Alien Registration number, is sufficient to satisfy the identity requirement of the extradition request; and that to the extent the decision of this Court is appealable, this Court has both the statutory and inherent authority to fashion an order which allows Petitioner to remain in Virginia pending the outcome of such appeal so it is not rendered moot. Consequently, the petition for a writ of habeas corpus is denied, and

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until such time as his appeal is resolved with finality, *execution* of the judgment of the Court is suspended pursuant to Virginia Code § 8.01-676.1(C) and (J). Petitioner is ordered, pursuant to the Court's inherent authority, to remain at the Fairfax County Adult Detention Center pending resolution of his appeal, if any is taken.

## BACKGROUND

Petitioner is currently incarcerated at the Fairfax County Adult Detention Center pursuant to a warrant from the Governor of Virginia at the request of the Governor of California, who is seeking the return of the prisoner as a fugitive from justice. U.S. Const., Article IV, § 2, cl. 2. According to the California "Governor's Requisition and Agent Appointment," Petitioner is charged with four counts of conspiracy to commit murder and one count of criminal street gang conspiracy to commit murder. The Fairfax County Police Department arrested Petitioner on October 25, 2017. On October 31, 2017, when the Petitioner declined to waive extradition, a formal extradition process began.

On November 28, 2017, the District Attorney for Santa Barbara County filed an Application for Requisition, containing the warrant and the indictment (with an accompanying document titled "Exemplification of Record"). The warrant included an alleged physical description of Petitioner. The Application also included the Affidavit of Detective Theodore Toedte asserting the fingerprint comparison of the prints from Fairfax County matched those on record with the Federal Bureau of Investigation ("FBI") and with the Immigration and Customs Enforcement agency ("ICE"). On November 30, 2017, the Office of the Governor of California issued a Governor's Requisition and

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Agent Appointment to the Governor of Virginia that incorporated the Application by reference. Interstate Rendition Officer Kristina Lindquist signed such Requisition. On December 5, 2017, the California Secretary of State affirmed the Governor's Requisition. On December 19, 2017, pursuant to those documents, the Governor of Virginia ordered officers "to arrest and secure the said Jose Wilfredo Abarca Soriano wherever he may be found within [Virginia]."

Petitioner maintains California is requesting his extradition solely because his name matches that of an individual who may have committed a crime in California. Petitioner argues that "[n]o supporting documentation has been presented to show that Kristina Lindquist has been given written authorization by Governor Brown to sign documents in his name, or take any other action under the color of the office of the Governor of California." Pet'r's Mot. at 4. Thus, Petitioner concludes the Governor's Requisition and Agent Appointment is deficient.

Respondent argues the California Governor's Requisition and Agent Appointment is in order with Kristina Lindquist's signature. Respondent notes the signature block on the document reads that Ms. Lindquist is an Interstate Rendition Officer pursuant to California Penal Code § 1554.2. That statute reads that an "agent authorized in writing by the Governor whose authorization has been filed with the Secretary of State, may sign a requisition for the return of the person charged[.]" Respondent notes that Governor Brown delegated this power to Ms. Lindquist on January 31, 2014. Resp't's Ex. 1. Respondent thus argues Ms. Lindquist's signature on the Requisition complies with both the United States and Virginia Codes.

Respondent's Exhibit 1 was not part of the original Governor's Papers filed in pursuit of the extradition. Petitioner complains Respondent may not cure this deficiency at trial. Moreover, Petitioner maintains the agent authorization is defective inasmuch as it is not identical in form to the information appearing below the signature block of the Requisition. Petitioner also maintains the Governor of California's delegation of his requisition extradition authority is barred by application of 18 U.S.C. § 3182, which requires the demand be "certified as authentic by the governor" of the requesting state.

Petitioner also attacks the documents California provided as being insufficient to substantiate Petitioner's identity. He critiques California forensic technician Mike Schwab's "Exemplar Print Comparison," which identified fingerprints of the Petitioner taken by Fairfax County Police, Lorton's ICE office, and the FBI as being identical. Petitioner argues that since he has never been arrested in Santa Barbara County, Schwab had no California fingerprints with which to compare the other fingerprints in order to confirm Petitioner was wanted for the California crime. Further, Petitioner notes while the extradition documents contain a mugshot of himself from the Fairfax County Adult Detention Center, there is no corresponding image of him from California. Petitioner claims the California warrant includes a description of a Hispanic male with brown hair, approximately five feet six inches tall, and a broad age range of 19-24, which description is too general to identify only the Petitioner.

As it relates to identity, Respondent retorts the warrant issued by the Governor of Virginia complies with Virginia Code § 19.2-87, as it includes an indictment and warrant which contains the name of Petitioner, and his accurate physical description. Respondent states Petitioner is in the country illegally and has not previously been

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arrested in California, which accounts for the lack of fingerprints, mugshots, available pictures, or a state issued identification. Respondent also argues Petitioner's identity can be confirmed through his own statements to California detectives while Petitioner was in the Fairfax jail. By way of example, Petitioner is alleged to have admitted using the alias "Slayer" as his rap music name, and that same name is listed as an alias on the indictment from California.

## **ANALYSIS**

### **I. Standard for consideration of the Petition for a Writ of Habeas Corpus in extradition cases, and the burden of production and persuasion**

Interstate extradition of fugitives is governed by Article IV, § 2, Clause 2 of the United States Constitution, providing that: "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." Such Constitutional provision is further enforced by federal statute:

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.

U.S. Code 18 U.S.C. § 3182.

In Virginia, the General Assembly has codified the Uniform Criminal Extradition Act, §§ 19.2-85 — 19.2-118, which provides the state enforcement mechanism for delivering fugitives to sister states. The Code of Virginia provides the mode under which detained suspects may challenge their extradition via application for a writ of habeas corpus, including by providing the petitioner with counsel and a right to a hearing, stating:

No person arrested upon such warrant shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken forthwith before a judge of a circuit or general district court in the Commonwealth, who shall inform him of the demand made for his surrender and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if the prisoner or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof and of the time and place of hearing thereon shall be given to the attorney for the Commonwealth of the county or city in which the arrest is made and in which the accused is in custody, and to the agent of the demanding state.

Va. Code Ann. § 19.2-95.

A petitioner seeking relief through grant of a writ of habeas corpus generally has the burden of persuasion of his claim. See *Peyton v. Fields*, 207 Va. 40, 44 (1966). It is “well settled” such petitioner has the burden of proof “by a preponderance of the evidence.” *Peyton v. Ellyson*, 207 Va. 423, 426 (1966). Virginia Code § 19.2-95 does not statutorily alter such burden, but rather affirms it in allowing Petitioner to “test the legality of his arrest.” The ambit of Petitioner’s challenge is restricted. “[A]n asylum state may not itself hold a traditional probable cause inquiry when the extradition documents on their face are in order and when those documents, although they do not set out the

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supporting facts, establish that there had been, in the demanding state, finding that there was 'reasonable cause' to believe that the individual as to whom extradition was sought had committed the charged offense." *Zambito v. Blair*, 610 F.2d 1192, 1196 (4th Cir. 1979) (citing *Michigan v. Doran*, 439 U.S. 282 (1978)).

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.

*Doran*, 439 U.S. at 289 (citations omitted). Thus, as in this cause, once the Governor of Virginia honors the extradition request of the Governor of another state, the four *Doran* factors are the only ones this Court may consider in the challenging of extradition.

It is thus implicit, however, that before this Court may consider the grant of a writ of habeas corpus, the Court must have before it the Governor's Papers, i.e., the Governor of Virginia's grant of the extradition request of the sister state, along with the "Form of Demand" documents enumerated in Virginia Code § 19.2-87, which reads:

No demand for the extradition of a person charged with, or convicted of, crime in another state shall be recognized by the Governor unless in writing alleging, except in cases arising under § 19.2-91, that the accused was present in the demanding state at the time of the commission of the alleged crime and that thereafter he fled from such state, and accompanied: (1) by a copy of an indictment found, (2) by a copy or an information supported by an affidavit filed in the state having jurisdiction of the crime, (3) by a copy of an affidavit made before a magistrate in such state together with a copy of any warrant which was issued thereupon, or (4) by a copy of a judgment of conviction or of a sentence imposed in execution thereof together with a statement by the executive authority of the demanding state that the person claimed 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 person demanded 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.

Va. Code Ann. § 19.2-87. The Petitioner therefore has the burden of production of the Governor's Papers, which in forming the basis for the detention of the Petitioner, undergird his statutory right to challenge his confinement. Petitioner is not required himself to comply with the whole of § 19.2-87, but only to produce those documents the Commonwealth has filed in contemplation thereof. To the extent such documentation might be incomplete, that may be a basis to challenge the extradition, to which the Petitioner may avail himself in this cause.

**II. Whether the extradition documents on their face are in order, and whether the Governor of the requesting state may act by and through an agent**

Petitioner challenges the extradition documents as not being in order on their face pursuant to the first *Doran* factor, averring it is not the Governor of California, but rather another person claiming to be the Governor's agent who is making the request. The Petitioner posits both 18 U.S.C. § 3182 and Virginia Code § 19.2-87 require the Governor of California be the demanding and authenticating party to the request. Petitioner maintains the California Governor may not act through an agent, and even if he could act through such subordinate, the Governor's Papers may not be supplemented at trial to cure any defect therein.

The request from the Governor of California does not on its face appear to comply with Virginia or Federal law, in that it is not an entreaty executed by him. In the relevant part of the document the Governor states "acting through my duly authorized

Interstate Rendition Officer, do hereby respectfully demand that the above-named fugitive from justice be arrested, secured, and delivered . . . .” While the document is signed by the Rendition Officer and the Deputy Secretary of State, nowhere is there a signature from the Governor authorizing his agent to perform this act. Recognizing the void in their defense the Commonwealth introduced Respondent’s Exhibit 1, a duly certified record reflecting the Governor’s appointment of the Rendition Officer as his agent. Petitioner objected to this document as being tendered too late, as inappropriate ancillary evidence not allowed by law, and in addition, that the “style of the signature” is at variance with that contained in the Governor’s request.

The California Penal Code authorizes the Governor to make extradition demands through an authorized agent. “Upon receipt of an application under this section, the Governor or agent authorized in writing by the Governor whose authorization has been filed with the Secretary of State, may sign a requisition for the return of the person charged and any other document incidental to that requisition or to the return of the person charged.” Cal. Pen. Code § 1554.2(d). While both 18 U.S.C. § 3182 and Virginia Code § 19.2-87 require the extradition request be made by the Governor of California, neither provision specifies he may not act through an agent. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” USCS Const. Art. IV, § 1. Thus, because it is clear the Governor of California made the extradition request, albeit through a duly authorized agent, this Court must give Full Faith and Credit to the manner in which such request is communicated to the Governor of Virginia.

The document authorizing the agent does state “[t]his style of the signature of the Interstate Rendition Officer as authorized herein shall be as follows” and then contains the signature of such officer followed by the words below the signature line “[b]y Interstate Rendition Officer,” on the next line “(Penal Code §§ 1549.2, 1554.2),” and on the final line “(Authorization filed with the Secretary of State).” The request, in contrast, contains below the signature line of the agent the language “Kristina Lindquist,” on the next line “Interstate Rendition Officer,” and on the final line “Pursuant to Penal Code section 1554.2.” A plain and ordinary reading of “[t]his style of the signature” clearly refers not to the text appearing below the signature line but to the signature itself, which is virtually identical in both documents. The fact that the agent is duly authorized by the Governor and has signed in her official capacity of Interstate Rendition Officer is sufficient to exercise lawfully the request of the Governor of California.

### **III. Whether the identification of Petitioner is sufficient**

It is axiomatic that an extradition request must be directed at the fugitive being sought. Virginia Code § 19.2-87 does not, however, require a detailed identification. Rather, the extradition request has to merely be directed at the Petitioner for him to be delivered to California. The copy of the indictment of the Petitioner is sufficient for this purpose in that it names him with particularity and accurately describes his approximate age range. Moreover, California authorities attached a further identifying document to the extradition demand titled “CSI Request” containing numerous descriptive identifiers of the Petitioner, including his Alien Registration Number matched to his fingerprint card. The position of Petitioner is that his identity has not been proven because he has

never before been arrested in California. He maintains that it is not proven he is the wanted fugitive merely because he has an identical name to that charged in the indictment. Petitioner's argument falls short in that he is reading the legal requirements imposed on the requesting state too broadly. All § 19.2-87 requires is that the requesting state accurately name the fugitive sought in the indictment, and then designate with particularity that it is the Petitioner whose extradition they seek, a burden the requesting authorities have met.

**IV. Whether the Court has the statutory authority to order the suspension of the *execution* of its order and the inherent power to order Petitioner remain in Virginia pending resolution of his appeal**

In this cause, the parties aver they are uncertain whether Petitioner has the right to appeal an adverse ruling of this Court and if so, whether such appeal would lie to the Court of Appeals of Virginia or to the Supreme Court of Virginia. "Whether an inmate is entitled to habeas relief is a mixed question of law and fact," which on appeal from this Court is generally reviewed "de novo" by the Supreme Court of Virginia. See *Laster v. Russell*, 286 Va. 17, 22 (2013). However, the petition in the instant case is brought pursuant to Virginia Code § 19.2-95, a penal statute incorporating the right to apply for a writ of habeas corpus in the context of extradition proceedings. The Court of Appeals of Virginia has implied in unpublished persuasive authority there is a right to appeal extradition habeas corpus proceedings, where proper procedure is followed. See *Bailey v. Commonwealth*, 00 Vap UNP 0266994 (2000). More precisely, in published precedent, the Court of Appeals of Virginia has previously exercised jurisdiction over an

appeal of a denial of a writ of habeas corpus in an extradition case. See *Manning v. Commonwealth*, 1 Va. App. 60 (1985).

*Manning* raises the tangential question as to whether the appeal of this cause may lie to the Court of Appeals, although the source of such authority specific to that Court appears in no statute, rule, other reported court decisions, or Attorney General opinions. Irrespective, if the appeal is filed in the incorrect Virginia appellate court it will be transferred to the appellate court having appropriate jurisdiction. Va. Code Ann. § 8.01-677.1.

The current statute controlling the appellate jurisdiction applicable in this cause is subsection B of § 17.1-406 of the Code of Virginia, indicating the Court of Appeals does not *currently* have the authority to hear the appeal of this Court's final order. It states:

B. In accordance with other applicable provisions of law, appeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed, from a final decision, *judgment or order of a circuit court involving a petition for a writ of habeas corpus*, from any final finding, decision, order, or judgment of the State Corporation Commission, and from proceedings under §§ 54.1-3935 and 54.1-3937. Complaints of the Judicial Inquiry and Review Commission shall be filed with the Supreme Court of Virginia. *The Court of Appeals shall not have jurisdiction over any cases or proceedings described in this subsection.* (1984, c. 701, § 17-116.05:1; 1985, c. 371; 1987, cc. 707, 710; 1988, c. 873; 1998, c. 872; 2007, c. 889; 2013, c. 746.)

Va. Code Ann. § 17.1-406 (emphasis added). The provision directing habeas corpus appeals to the Supreme Court of Virginia became effective July 1, 1985. *Manning* was argued July 24, 1985, but was therefore surely appealed before July 1. The Court of Appeals panel issued its decision on September 3, 1985. This procedural circumstance also explains why Shepardizing *Manning* produces nothing of substance, and why there are no further habeas corpus extradition appellate cases attributable to the Court of

Appeals. *Manning* was literally one of the first cases handled by the Court of Appeals after it was created. The relevant appellate jurisdictional statute has been amended six times since its initial enactment in 1984. The Court of Appeals was created legislatively during the 1984 General Assembly session, and the relevant statutory amendment occurred at the very next session. See 1985 VA. ACTS OF ASSEMBLY, Chapter 371. It seems unlikely the legislative change was due to an avalanche of habeas corpus petitions swamping the Court of Appeals, especially since the Court did not begin to sit until January, 1985. After the initial legislation creating the Court of Appeals was enacted, it is inferrable the General Assembly realized the question of habeas corpus jurisdiction for the Court of Appeals was ambiguous, being neither asserted nor denied, resulting in the necessity to clarify the statute applicable. It is thus clear, at present, appellate jurisdiction over Circuit Court habeas corpus extradition proceedings rests with the Supreme Court of Virginia.

“It is well settled that habeas corpus is a civil and not a criminal proceeding. It is designed to challenge the civil right of the validity of the petitioner’s detention.” *Smyth v. Godwin*, 188 Va. 753, 760 (1949). The proceeding in the instant case being civil, this Court has the authority to suspend *execution* of its final order in application of Virginia Code § 8.01-676.1(C) and (J). The judgment is not monetary in nature. No security need be posted as a prelude to allowing its execution to be held in abeyance without dispossessing such judgment of its appealable finality. Petitioner will in any case remain detained without bond at the Fairfax County Adult Detention Center while in Virginia, whether awaiting resolution of an appeal or the effecting of his extradition.

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Should this Court be found not to have the statutory authority to suspend *execution* of its judgment in order to enable Petitioner to pursue his appeal to determine whether this Court's merits ruling is in error, the Court has additionally the inherent authority to order Petitioner remain in Virginia while his appeal is adjudicated. In a similarly situated cause, a detained juvenile appealed the constitutionality of the Interstate Compact Relating to Juveniles (Virginia Code §§ 16.1-323 — 16.1-330). The trial Court found the Compact constitutional, did not stay its judgment, but ordered the individual be held in Virginia pending resolution of his appeal. The Supreme Court of Virginia denied the petition for appeal, but did not intervene during its pendency to reverse the order of the trial Court keeping the appellant in Virginia. *Padilla v. Commonwealth, Va.* Record No. 151818 (2016). The Court deems that when its orders are arguably subject to appellate review it should not thwart appeal by inaction which causes the appeal be mooted, and thus this Court finds itself compelled to fashion an order that allows Petitioner to remain in Virginia until his appeal is finalized.

### CONCLUSION

The Court has considered the petition for a writ of habeas corpus of Jose Wilfredo Abarca Soriano, docketed pursuant to Virginia Code § 19.2-95, seeking release from incarceration in averment of alleged defects in the extradition of his person sought by the State of California. Petitioner's merits claim raises the questions of who has the burden of production and persuasion of the evidence to be adduced, of whether the Governor of the requesting state may act indirectly through an agent in his or her request, of what evidence is sufficient to establish the identity of the individual sought,

and to the extent the decision of this Court is appealable, of whether this Court has the authority to fashion an order which allows Petitioner to remain in Virginia pending the outcome of such appeal such that it is not rendered moot by his premature transfer to California.

For the reasons as more fully set forth herein, the Court finds Petitioner challenging extradition by means of seeking a writ of habeas corpus under Virginia Code § 19.2-95 has a limited burden of production of evidence to introduce the documents constituting the "Form of Demand" under Virginia Code § 19.2-87; that Petitioner has the burden of persuasion as to why he should not be extradited; that the Governor of the requesting state may act indirectly through an authorized agent in pursuing his or her request if so authorized by that state's laws; that being named in the indictment in California and being identified in the request of the Governor of that state in such fashion that it is clear Petitioner is the precise individual being sought, including being designated by Alien Registration number, is sufficient to satisfy the identity requirement of the extradition request; and that to the extent the decision of this Court is appealable, this Court has both the statutory and inherent authority to fashion an order which allows Petitioner to remain in Virginia pending the outcome of any such appeal so it is not rendered moot. Consequently, the petition for a writ of habeas corpus is denied, and until such time as his appeal is resolved with finality, *execution* of the judgment of the Court is suspended pursuant to Virginia Code § 8.01-676.1(C) and (J). Petitioner is ordered, pursuant to the Court's inherent authority, to be held without bond at the Fairfax County Adult Detention Center pending resolution of his appeal, if any is taken.

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This Court shall issue a separate order incorporating the ruling in this Letter Opinion.

AND THIS CAUSE CONTINUES.

Sincerely,



David Bernhard  
Judge, Fairfax Circuit Court

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