Calculus of Risk Series Number 4.0

CALCULUS OF RISK ANALYSES 4.1 AND 4.2

ANALYSIS OF RISK OF EXTRAORDINARY LIABILITY AND RISK OF LOSS OF CUSTODY IN CAPTIS COOPERATIVE TRANSPOR

COMPUTER
ASSISTED
PRISONER
TRANSPORTATION
INDEX
SERVICE

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ANALYSIS OF RISK OF EXTRAORDINARY LIABILITY AND RISK OF LOSS OF CUSTODY IN CAPTIS COOPERATIVE TRANSPORTS

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MARCH 1978

Calculus of Risk Series

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PREFACE

The Calculus of Risk Series is intended to address those concerns of critical importance to user acceptance and the continuing, successful operation of the CAPTIS pilot system. Given that CAPTIS is feasible and that its cost benefits are promising, decision makers and practitioners must be assured that they may participate in the CAPTIS pilot system without fear of losing custody of any prisoner being transported or extraordinary vulnerability to tort suit should a mishap or incident occur during the journey.

Two Calculus of Risk analyses providing an in-depth examination of these concerns are scheduled for publication. These are:

Calculus of Risk Number 4.1:

Risk of Loss of Custody When Out-Of-State Officers Are Employed To Transport Prisoners

Calculus of Risk Number 4.2:

Risk of Extraordinary Liability In the Event of

Injury or Death To The Escort Officer, Prisoner, or Citizen Bystander.

It is planned that the CAPTIS program documentation will be complete with the publication of the Calculus of Risk Series.

Further information about the CAPTIS pilot system may be obtained by telephoning or writing:

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Calculus of Risk Number 4.1

RISK OF LOSS OF CUSTODY WHEN OUT-OF-STATE OFFICERS ARE EMPLOYED TO TRANSPORT PRISONERS

The Legal Feasibility Series (CAPTIS Document Series 3.1 - 3.5) examined among other questions whether an out-of-state agent may be appointed to transport a fugitive to a demanding state. The series concluded that there exists no Constitutional or statutory barrier to such an appointment. Existing case law on this general subject is exceedingly limited, and conclusions must be gleaned from cases where the agent's character or source of appointment is a peripheral question or included as dicta. The same paucity of case law exists for the subjects of the Calculus of Risk sections to follow.

The Legal Feasibility Series conclusion that states may appoint out-of-state agents requires a consideration of the degree of the risk of loss of custody in the event the appointment of such an agent is challenged either in the asylum state, or in any pass-through state, by a fugitive sought to be returned.

A. NATURE OF CAPTIS AGENT APPOINTMENT

Successful implementation and administration of the CAPTIS program depends entirely on the power of the various state governors to appoint as extradition agents individuals from asylum or third-party jurisdictions. In the alternative, success of the program depends on

the validity of the appointment of such agents by a demanding criminal justice agency in the event of a waiver of extradition, without either alternative risking a successful legal challenge by the fugitive so transported.

In the conventional fact situation, an agent is designated by a demanding state pursuant to the Uniform Criminal Extradition Act (hereinafter Act) to receive custody of a fugitive in an asylum state and transport him to a demanding state. In a CAPTIS cooperative transport such agent has no other factual connection with the demanding state, and holds an office or employment in a third-party state. The question is thus presented, what are the risks of either losing custody of the fugitive or suffering a delay in obtaining custody for the demanding state?

B. AREAS OF RISK

There exist at least three procedural questions concerning extradition which could or might be raised to challenge the right of a demanding state to custody of a fugitive alleging that appointment of an agent from a jurisdiction other than the demanding state is not "duly authorized" under the auspices of section 8 of the Act:

1. The fugitive could submit a motion to dismiss after arriving in the demanding state asserting a lack of subject matter jurisdiction by the court of the demanding state, arguing that the extradition was illegally conducted by an unauthorized agent not "duly appointed"

according to the provisions of section 8 of the Act.

2. The fugitive could initiate a habeas corpus hearing in the asylum state challenging the appointment of the third-party state agent as not "duly appointed" by the demanding state as required by section 8 of the Act.

3. The third alternative would be for the fugitive to delay his initiation of a habeas corpus action until physically present in a pass-through state, after the transport was in progress, again asserting that the escort agent was not "duly appointed" under section 8 of the Act.

C. SECTIONS OF THE UNIFORM CRIMINAL EXTRADITION ACT APPLICABLE TO DESIGNATION OF AGENT

1. Section 8 of the Act, "Manner and Place of execution" provides: "Such warrant shall authorize the peace officer or other person to whom directed to arrest the accused at any time and at any place where he may be found within the state and to command the aid of all peace officers or other persons in the execution of the warrant, and to deliver the accused, subject to the provisions of this act, to the duly authorized agent of the demanding state. (emphasis added).

2. The second pertinent section of the Act, referring to agent is section 22, "Fugitive From This State: Duty Of Governors", which provides, in part: [the governor of the demanding state] "... shall issue a warrant to some agent (emphasis added), commanding him to receive the fugitive if delivered to him and to convey him ...."

3. The final applicable section, "Written Waiver of Extradition Proceedings" section 26, a section particularly applicable to the CAPTIS program provides: "The judge shall direct the

> officer having such person in custody to deliver forthwith such person to the duly accredited agent or agents of the demanding state ...." (emphasis added).

Discernable from the foregoing is that "agent", "duly authorized agent" or "duly accredited agent" is undefined in the Act. This implies that the governor of the demanding state is left broad discretion in the appointment of the transporting agent.

D. RISK ANALYSIS

The analysis of the three procedural questions that might be raised by a fugitive in disputing appointment of an individual from a third-party state as the agent of a demanding state must be viewed in the context of the Act.

1. Motion To Dismiss In The Demanding State

A motion to dismiss by the fugitive would challenge the jurisdiction of the court in the demanding state over the subject matter and person of the fugitive predicated on the allegation that the fugitive was illegally retrieved from an asylum state. The cause of action would argue that the third-party agent conducting the transport from the asylum state was not a "duly authorized agent" of the demanding state, pursuant to the provisions of sections 8 and 22 of the Act, recited above. This argument would be derived from several cases decided since 1970 involving the validity of the criminal process for

alleged failures by state or federal officers to comply with the rules governing(1) transportation of fugitives.

a) Conclusion

A motion to dismiss in the demanding state, challenging the court's jurisdiction over the subject matter and the person of the fugitive would not be sustained. This would be the result, even if the court ruled the retrieval of the fugitive had violated the provisions of the Act by being accomplished by an agent not "duly authorized" by the demanding state.

b) Discussion

Should a fugitive seek the above described remedy, it could be based on one of two possible theories. First, the Act provides a remedy to a fugitive for violation of the requirements of the Act, albeit a remedy only by implication. This argument has been recently attempted by several fugitives, and has been consistently rejected by the courts.(2) One example of this attempt is State v. Stone.(3) The

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(1) See e.g., People ex. rel. Lehman v. Frye, 35 Ill.2d 343 (1966); State v. Stone, 294 A.2d 683 (Me. 1972); United States v. Tascanino, 500 F.2d 267 (2d Cir. 1974); Also 28 A.L.R.2d 685, 690 - 97 (1976); State v. Millican, 501 P.2d 1076 (N.M. 1972); Yurk v. Brunk, 202 Kan. 755, 451 P.2d 230 (1968).

(2) Cases reported at 165 A.L.R. 947.

(3) 294 A.2d 683 (Me. 1972).

fact situation involved a physical abduction of fugitives by Maine state troopers. The court restated and applied the rule that any remedies implied by the Act do not extend to non-compliance with the requirements of the Act for fugitive retrieval. The court's reasoning was that compliance with the Act by criminal justice agencies is not of sufficient value or importance as to divest a court of personal or subject matter jurisdiction in a case alleging illegal or improper retrieval.

The second theory that might be argued by a fugitive challenging the jurisdiction of the demanding state would rely on the Due Process Clause of the Fourteenth Amendment, and by implication on the Federal Kidnapping Act.(4) The fugitive would argue that the court must divest itself of jurisdiction due to a violation of his constitutional rights by a retrieval that did not comply with the Act. This argument should be equally unsuccessful, based solely on a charge the transporting agent was not "duly authorized".

The controlling cases are Ker v. Illinois(5) and Frisbie v. Collins(6). Ker involved an improper extradition from Peru and the

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(4) 18 U.S.C.A. section 1201.

(5) 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1888).

(6) 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952).

Supreme Court held that the method used to bring Ker to trial in the demanding jurisdiction was not a concern; the Due Process Clause required only that the defendant be properly indicted and fairly tried.

In Frisbie the defendant argued that his Michigan conviction should be reversed because of an inter-state abduction by Michigan officers who handcuffed, blackjacked and kidnapped him from Chicago. The defendant argued that this unlawful transport violated both the Due Process Clause of the Fourteenth Amendment, and the Kidnapping Act. The court rejected the application of either claim, asserting that the Kidnapping Act did not imply dismissal of criminal charges as a remedy, and further, "the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court's jurisdiction by reason of forcible abduction."(7)

These cases have evolved the "Ker-Frisbie" rule (or more popularly, the "Frisbie" rule, due to the preeminence of the latter case), holding that due process was limited to the guarantee of a constitutionally fair trial, and the means by which the defendant was brought before the court was immaterial.

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(7) Id., 522.

The Frisbie doctrine has been criticized.(8) A recent federal circuit court decision has questioned the desirability of the philosophy expressed in Frisbie.(9) The circuit court criticism of Frisbie has been limited to egregious police misconduct, relating to brutality and/or reckless disregard of the legal process during fugitive retrieval. No court or critic has suggested that Frisbie should not be applied to a case involving a mere technical flaw in the extradition process. Even if subjected to the most critical scrutiny, improper appointment of an extradition agent would be such a technical flaw. It is extremely unlikely that any court would ever hold that the personal or subject matter jurisdiction of the demanding state would be impaired by any interest the fugitive might have in the propriety of the authorization of the transporting agent or any state interest in encouraging rigid compliance with all the technical requirements of the Act.

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(8) Pitler, "The Fruit of the Poisonous Tree", Revised & Shepardized, 56 Calif. L.Rev. 579 (1968).

(9) Toscanino, 500 F.2d 267.

The core countervailing interest in this type of case is the demanding state's interest in prosecution of persons charged with violation of its criminal laws. Once this interest is enhanced by the physical presence of the defendant in the court of the demanding state, a challenge to the jurisdiction of the court, an application for writ of habeas corpus,(10) or a petition for post conviction relief(11) would be unsuccessful if predicated upon a technical flaw in the extradition process. No court has responded positively to any of these challenges to the right of a demanding state to try a defendant because a positive response would be an immunization from prosecution.(12)

The foregoing discussion assumes a challenge by an unwilling fugitive to the appointment of an agent. The CAPTIS program is designed to provide for cooperative prisoner transport when extradition proceedings are waived by the fugitive, as well as those which are contested. Approximately 75 percent of the extraditions annually undertaken are accomplished through a waiver by the fugitive.(13) If

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(10) DeBaca v. Trujillo, 447 P.2d 533 (Colo. 1968).

(11) Herman v. Brewer, 193 N.W.2d 540 (Iowa 1972).

(12) Stone 294 A.2d 683.

(13) Results of the National Sheriffs' Association's County Law Enforcement Survey (CLE) Andrew McKean, Project Director, indicate that 75 percent of all fugitives returned during 1976 waived formal extradition proceedings. These and other results of the CLE survey are now being prepared for publication in the spring of 1978.

the party transported does not contest the physical extradition, the possibility (s)he will contest the authority of the transporting agent is very remote.

2. Habeas Corpus Hearing In The Asylum State

By petitioning a court in the asylum state for a writ of habeas corpus, the fugitive would challenge the legality of the requisition by the governor of the demanding state, alleging that the transporting agent was not "duly authorized" as required by section 8 of the Act.

a) Conclusion

Limited case law reveals a minimal risk of delay in obtaining custody of the fugitive. The procedure utilized to appoint the CAPTIS agent may affect the risk of delay.

b) Discussion

While the issue of whether a state may appoint a third-party agent to receive custody of and transport a fugitive appears to have never been tested in court, the authority of the demanding state's agent (regardless of domicile) to receive custody is an issue which has been, and may again be, raised at a habeas corpus hearing in the asylum

state. This issue has been raised in at least three reported state cases(14) but the fugitive prevailed in only one.(15) No case has been found which questions the relevance of this issue in the habeas corpus hearing.

Challenging the authority of the agent by a habeas corpus hearing in the asylum state, prior to extradition, is significantly distinct from a motion to dismiss in the demanding state, after extradition. In the former, the prosecutorial interest of the demanding state is not supported by the presence of the fugitive in the demanding state. The action for habeas corpus primarily concerns the issue of the responsibility of the asylum state to verify the legality of the external demands for custody of a fugitive residing within its boundaries. The result sought by the fugitive is prosecutorial immunity.

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(14) Poucher v. State, 46 Ala. App. 272 (1970); Ex parte Wells, 108 Tex. Crim. 57, 298 S.W. 904 (1927); Ex parte Pinkus, 114 Tex. Crim. 326, 25 S.W.2d 334 (1930).

(15) Pinkus, 114 Tex. Crim. 326.

All three of these issues were considered in Ex parte Pinkus the sole successful challenge to the authority of the demanding state's agent. Pinkus, although a 1930 case, concerned a minor requirement now found in section 22 of the Act.

A requisition from the governor of New York prompted an arrest of a fugitive by Texas state officers. The writ of habeas corpus challenged the authority of the New York agent to receive custody on the grounds that the commission of the New York agent was defective because it was not impressed with the great seal of the state of New York, a feature presently required by section 22 of the Act. The court held that the validity of the commission of the demanding state's agent could be challenged at the habeas corpus hearing, and held that the agent's commission was invalid by failing to be impressed with the great seal of the state of New York. The court further held, however, that the fugitive was not entitled to either prosecutorial immunity or to discharge from custody, as the asylum state could continue custody for the statutory period, and that within that period, the demanding state could correct the defect in its agent's commission and accomplish the extradition.

If there exists any risk of a successful challenge to a CAPTIS agent's authority in a habeas corpus hearing in the asylum state, that risk is obviously not an irremediable loss of custody, but only a risk of delay in obtaining it.

The asylum state can continue custody of the fugitive while the demanding state corrects whatever defects may exist in the requisition.(16) In the unlikely event a discharge should occur through a writ of habeas corpus the matter is not res judicata beyond the issue that the accused was illegally in custody at the time of discharge. Consequently, discharge from the habeas corpus action would not preclude re-arrest and extradition for the same offense.(17)

Historical background material and information surrounding the adoption of the constitutional provision for extradition and for the Federal Extradition Act is silent on what connection or association an extradition agent must have with the demanding state. The question was not discussed during the drafting of the Act. Custom and usage by the various sheriffs' departments lend some support to cooperative prisoner transports, as these have been undertaken, to a limited and informal extent, in the past. The few cases dealing with the authority of extradition agents under the Act indicate a slight risk of a successful challenge to the authority of a CAPTIS agent.

Neither the Constitution nor the Act require that the CAPTIS agent be an officer of the demanding state, and the current practice is one of custom, rather than any legal requirement. The Act expressly distinguishes between "officers" and "agents" of the demanding state,

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(16) Sections 15 and 17 of the Act.

(17) Collins v. Loisel, 262 U.S. 426 (1923); 102 A.L.R. 382 (1936).

and envisions both as permissable for transporting fugitives from asylum to demanding states.(18) There are two pertinent decisions on this question, the first being McLean v. Mississippi.(19) In McLean, the court held that should a sheriff act as an extradition agent, he has the status of only a "special agent", until such time as he returns the prisoner to his own county.

The second applicable case is Boston v. Causey,(20) involving a transport by a demanding state sheriff, and a private citizen, pursuant to a waiver of extradition. The court held that the formal extradition process, including appointment of an agent, required action by the state governors, and that county sheriffs were not expressly authorized any power under the Act. Consequently, in the absence of a formal requisition, the sheriff was acting in the capacity of a private citizen, at least until he returned to his own county. While not an issue, the court implied throughout its opinion that the transport by a "private citizen" was permissable.

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(18) Section 12, 2d paragraph of the Act.

(19) 96 F.2d 741.

(20) 206 Okl. 251, 242 P.2d 712 (1952).

A CAPTIS retrieval would commonly be characterized by the absence of any factual connection between the agent and the demanding state, other than the agent's commission as an extradition agent for the demanding state. The CAPTIS agent would, in all probability, hold a pre-existing office, or employment, in a third-party state, in approximately one-half of the transports. Risks of delay may be effected by the circumstances and manner of appointment of the CAPTIS agent.

For formal extraditions which procedurally require involvement of the governors of the asylum and demanding states, there are two distinct procedures for appointment of CAPTIS agents. The first procedure would be appointment of an agent by the sheriff of the demanding state without the control or approval of the governor. This is the common practice throughout the nation in the event of a waiver of extradition by the fugitive. When extradition is waived, the demanding state governor is rarely involved, and appointment of the extradition agent is commonly made by the sheriff. There are hundreds of thousands of examples of this commonly accepted custom for the court's examination, and extension of this procedure to contested extraditions is a natural and fully defensible confirmation of this procedure.

In the event of a contested extradition, appointment of a CAPTIS agent solely by the sheriff might be challenged in a habeas corpus hearing in the asylum state, under one of two theories.

First, the fugitive might argue that this procedure delegates to the sheriff the power of appointment of an agent, a power delegated exclusively to the governor by section 22 of the Act,(21) The Act requires, however, that the governor appoint "some agent" and does not further specify either to "who" or "how" the appointment is to be made.

The second theory a fugitive might employ would be based on the 1970 Alabama decision in Poucher v. State.(22) Poucher involved an appeal from the denial of a writ of habeas corpus to resist extradition from Georgia to Alabama. The accused argued that the Alabama governor's requisition to the Georgia governor was invalid because it permitted delivery of the accused to a named sheriff from Alabama "and/or his agent". The court, relying on an earlier Texas decision(23) said that delivery could be made to the named sheriff or to his duly commissioned deputy. The court would not permit delivery of the accused to a person other than a duly commissioned deputy of the named sheriff.

Poucher's requirement that the extradition agent be a deputy of the sheriff is not related to any prospective use of the power of arrest. The extradition agent is empowered to receive custody from

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(21) McLean v. Mississippi, 96 F.2d 741 (5th Cir. 1938).

(22) 46 Ala. App. 272 (1970).

(23) Wells, 108 Tex. Crim. 57.

asylum officers and to transport the fugitive. This does not include a power of arrest in any third-party jurisdiction during a retrieval.(24)

The deputy requirement in Poucher was intended to avoid the agency principle of "delegatus non potest delegare". The court utilized the argument that a deputy was an "alter ego"(25) rather than an agent, and ignored both that the extradition function was ministerial, and that the governor had provided for a delegation of agent, in the rendition warrant.(26)

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(24) Ex parte Hobbs, 32 Tex. Crim. 312, 22 S.W. 1035 (1893).

(25) 46 Ala. App. 272, 273 - 4 (1970).

(26) There is no doubt that the decision in Poucher was wrong. The court determined that if "agent" as used in the governor's rendition warrant calling for delivery of an accused to a named sheriff and/or agent referred to any agent the sheriff might choose, the maxim that delegated power cannot be delegated would intervene. The Poucher court purported to save the delivery and to act in harmony with Ex parte Wells by deciding the designation of the named sheriff includes -- but is limited to -- his duly commissioned deputy, this according to the ancient and esoteric doctrine that a deputy is not strictly the agent of the sheriff but is his alter ego. (The opinion in Ex parte Wells contained no such requirement.) Actually, delegatus non potest delegare does not apply to purely ministerial acts such as the return of the accused by the governor's agent. W. Seavey, HANDBOOK OF THE LAW OF AGENCY, Sec. 21K (1964) [hereinafter cited as AGENCY]. But assuming arguendo that it does, the court in Poucher is still wrong. The maxim is authoritatively stated to mean that: "[T]he person to whom an office or duty is delegated cannot lawfully devolve the duty on another, `unless he be expressly authorized to do so' (emphasis added)." BLACK'S LAW DICTIONARY 513 (rev. 4th ed. 1968); see also RESTATEMENT (SECOND) OF AGENCY Sec. 18 1958 [hereinafter cited as RESTATEMENT]: "Unless the principal manifests otherwise ..." From the facts of the case it is clear that the rendition warrant in calling for the delivery to the named sheriff and/or agent was "faithful to the demand" levied. Therefore it can be concluded that the governor of the demanding state had expressly empowered the sheriff to accomplish the return or to designate another to do so.

An alternative procedure would be for the governor to specifically designate the CAPTIS agent. This would not resolve the issue of whether a third-party designee qualifies as a "duly authorized agent" required by section 8 of the Act. This question has not been addressed either in legislative history, or in case law. A fugitive might argue that the Act envisions an agent over whom the demanding state has some control beyond that of a commission. .The Act presumably would have indicated this attitude, if it had been of any significance or concern. As detailed in Legal Feasibility Analysis 3.1, the most pursuasive authorizations for the use of third party state extradition agents are the compacts for interstate crime control giving each party state the statutory authority to employ as its agents the criminal justice agencies and officers of other party states.

The fugitive might cite cases requiring that the "business of the state must be performed by citizens or denizens of the state; and the officers charged with it must be residents in the state".(27) The exceptions to this rule are quite limited and are generally founded on a legislative base.

The purpose of this rule is protection of state interests and those over whom the state agents act. Where there is at least minimal connection between the agent and the state, the state's ability to control abusive conduct by its agents is enhanced. The fugitive might

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(27) In re Mosness, 39 Wisc. 509 (1876); Attorney General v. Scott, 182 N.C. 865 (1921).

argue that the demanding state would have no control over an extradition agent not residing within its boundaries. The CAPTIS agent could be a resident of a third state, and reside neither in the complaining fugitive's asylum nor demanding state, with a possibility of adversely effecting the fugitives interests in the event of a multi-sovereign claim.(28) The demanding state is bound by the decisions of the extradition agent, including the decision to withdraw the governor's requisition.(29)

This argument would ignore the fact that in virtually all inter-state transactions, a state's business must inevitably involve the participation of a variety of persons and organizations minimally connected with the state, residing in and employed by another state. When an agent sent by a demanding state assumes custody of a fugitive in an asylum state, the fugitive could just as reasonably claim the asylum state lacked minimal control of an agent while still within its boundaries. The court should appreciate that an objection to an agent on the grounds that either the demanding or asylum jurisdiction lacks minimal control could become reductio ad absurdum.

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(28) J. Murphy, ARREST BY POLICE COMPUTER, ch. 7 (Lexington Books, 1976).

(29) In re Troutman, 24 N.J.L. 634 (1854).

3. Writ Of Habeas Corpus In A Pass-Through State

This procedure assumes that a fugitive applies for a writ of habeas corpus in a pass-through state while in the custody of a CAPTIS agent. It is further assumed that the only issue at the hearing is the question of whether the CAPTIS agent is "the duly authorized agent of the demanding state" under section 8 of the Act.

a) Conclusion

This challenge to the lawfulness of custody by CAPTIS agents over fugitives in pass-through states should be unsuccessful.

b) Discussion

There are two answers to the fugitive's request for a writ of habeas corpus in a pass-through state. First, the powers of the governors of the asylum and demanding states are set forth in the federal core of extradition law -- Article IV, section 2, clause 2, of the United States Constitution and implementing federal legislation. There is no interest or function provided for any of the states through which the fugitive must be moved enroute to the demanding state. Unlike the states' ultimate authority to construe their own laws, it is

their duty to administer extradition consistent with the federal core of extradition law.(30)

Therefore, if the court in the pass-through state during the habeas corpus hearing is satisfied with the documents submitted by the agent that the person in custody is being held by virtue of the federal core of extradition law, then the court has no jurisdiction to inquire further into the legality of custody of the fugitive. Under the supremacy clause of the United States Constitution, the court in the pass-through state is obliged to apply federal law, including the federal core of extradition law.

Consequently, if a court in a pass-through state intervenes in an extradition transaction beyond a bare inquiry into the basis of custody of the agent of the demanding state, this state intervention violates the supremacy clause. This should preclude any forum of a pass-through state from inquiring independently into the authority of the agent. The inquiry of the pass-through state and its legal interest should terminate on production by the agent of a validly issued commission. Although this theory is based upon the supremacy clause, it is also

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(30) DeGenna v. Grasso, 413 F.Supp. 427 (Conn. 1976); State v. Waggoner, 508 S.W.2d 535 (Tenn. 1973).

reflected in the Uniform Criminal Extradition Act which is part of the statutory law of practically all of the states. The last sentence of the second paragraph of section 12 of that Act expressly states that the fugitive "shall not be entitled to demand a new requisition while in this state" (pass-through state). The only obligation on an agent of the demanding state exercising custody of a fugitive while in a pass-through state is to produce satisfactory written evidence of the fact that the agent is actually transporting a fugitive to the demanding state after a requisition by the governor of the demanding state.

The second response to the fugitive's writ of habeas corpus in a pass-through state is based upon the only reported opinion on point, In re Burke.(31) This theory is based upon Article IV, section 1 of the United States Constitution which reads, "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." Congress implemented that provision in 17 U.S.C.A. section 1738. If we assume that the CAPTIS agent has in

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(31) 4 Fed. Cas. No. 2, 158 (D. Minn. 1879).

his or her possession all of the documents relating to the extradition, properly authenticated as required by 17 U.S.C.A. section 1738, the court in the pass-through state would be required to give full faith and credit to all of these documents. The Burke case supports this proposition. The court in Burke assumed that the court in Wisconsin (pass-through state) had before it all of the documents relating to the extradition, duly authenticated. On this submission, Burke held that the Wisconsin court should have proceeded no further. The submission would have disclosed authenticated documents resolving the custody issue on the basis of records of sister states.

Calculus of Risk Number 4.2

RISK OF EXTRAORDINARY LIABILITY IN THE EVENT OF INJURY OR DEATH TO THE ESCORT OFFICER, PRISONER, OR CITIZEN BYSTANDER

Units of government were once broadly protected against suit by the doctrine of sovereign immunity, and it could be stated that with few exceptions "there is ordinarily no liability for the torts of police officers, even where they commit unjustifiable assault and battery, false arrest, trespass on land or injury to property, or are grossly negligent, and even though the ... authorities ratify the act."(1) The doctrine of sovereign immunity, however, has been increasingly narrowed in recent years by the judiciary and state legislatures. Suits alleging injurious misconduct by law enforcement officers are now filed and won against municipal, county, and state units of government. Awards ranging into hundreds of thousands of dollars are no longer unusual.

Not surprisingly, tort liability in the event of injury or death to the escort officer, prisoner, or citizen bystander is an important concern to those who desire to participate in CAPTIS. Closely allied to this concern is that of who shall be liable for any indemnity arising from the terms and conditions of employment with a producer

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(1) W. Prosser, HANDBOOK OF THE LAWS OF TORTS Sec. 131 (4th ed.) (1971).

agency should an escort officer be killed or suffer disabling injury while transporting a prisoner for another state. What then is the actual risk of liability in tort or indemnity to the participants in a cooperative transport arranged through CAPTIS?

A. RISKS TO THE CAPTIS PARTICIPANTS

Causes of action or claims will most likely result in the following instances:

1. The prisoner assaults and injures or kills the escort officer while attempting to escape.
2. The escort officer injures or kills the prisoner to prevent his escape or in other circumstances where legal justification is not possible.
3. Situations 1) and 2) occur, and a bystander (or perhaps a volunteer) also is injured or killed.
4. The prisoner or the escort officer or both of them become casualties of an accident.

B. CONCLUSION

The risk of extraordinary liability in tort or indemnity to CAPTIS participants in the event of death or injury to an escort officer, prisoner, or bystander is negligible. There are three reasons for this:

1. The frequency of death or injury during the course of an

interstate prisoner transport is very low. Thus the possibility of a cause of action or claim arising at all is small.

2. Established principles of tort law and indemnity are affirmed and buttressed in contract provisions to assure that the participants shall become financially obligated only for the negligence or misconduct of their personnel. Not only does this guarantee the expectations of the participants, but it means that insofar as "pocket liability" applies, an escort officer transporting the prisoner of another state travels in the same shoes as when he is transporting the prisoner of his own state, thus underlining the incentive to the producer agency to assure due care and that improper conduct does not occur.
3. The risk of injury or death is insurable.

C. DISCUSSION

1. The Extent Of The Risk

When assessing the risk of extraordinary liability being imposed because of tort or indemnity arising from an interstate prisoner transport, first it should be understood that the likelihood of the death or injury of an escort officer, his prisoner or a citizen bystander is very, very low. This is evidenced by a survey of over 1500 sheriffs' and police departments that together transported some 15,000 prisoners in 1976 revealing that only one injury was inflicted

in an escape attempt during these transports.(2) In this incident a prisoner who had previously suffered a leg injury struck the escort officer with his crutch. The officer received first aid in a hospital emergency room and was then released. There were no reports of injuries of any kind to prisoners or citizens as the result of escape attempts.

There is no reason to suppose that these results would change because of the mere fact that an escort officer happens to be transporting the prisoner of another state, and though precise statistical comparisons are impossible, it is apparent that this single minor "line-of-duty" injury reported for interstate prisoner transports during 1976 compares very favorably to the number of injuries suffered during the same time frame by law enforcement and corrections personnel, suspects and prisoners, and members of the public generally as the result of assaults or other violent incidents occurring while state and local criminal justice agencies were attempting to carry out their primary missions. Further it must not be overlooked that participation in CAPTIS might well make it possible to reduce what little risk of death or injury there is.

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(2) This is the County Law Enforcement (CLE) Survey conducted by the National Sheriffs' Association, Andrew McKean, Project Director. A report of the completed findings is now being prepared for publication in the spring of 1978.

Because of the present high manpower costs of interstate prisoner transports, many criminal justice agencies are forced to forego the precautionary measure of assigning two escort officers to each prisoner who must be returned or transferred. Though unnecessary if the transport goes well, in the unlikely event of trouble the extra officer provides an invaluable margin of safety and, moreover, his presence may prevent an escape attempt in the first instance. By increasing productivity and thus lowering costs per escort, CAPTIS could permit participating agencies to stretch their transport budget dollar far enough to assign an additional officer whenever the circumstances warrant.

As pointed out earlier, the possibility of intentionally inflicted death or injury is not limited to escape attempts. One of the most troubling aspects of tort liability concerning criminal justice agencies involves alleged acts of "police brutality." But though specific data is not available regarding the risk of an escort officer maliciously harming or otherwise behaving improperly towards his prisoner during the course of an interstate prisoner transport, reasoned speculation suggests that acts of intentional misconduct are rare. Not only would such conduct endanger the officer's safety, for often the escort officer is traveling alone and, given sufficient provocation, the prisoner could be legally justified in defending himself or in retaliating, but most interstate transports involve a considerable amount of unavoidable contact with the public. Whether traveling by vehicle or air, the officer and his charge usually must move among the general population, all of whom are potential witnesses,

and there is little opportunity for the privacy that seems a necessary condition precedent to acts of brutality being committed against persons in custody.

The risk of an accident is always a possibility. But as a logical proposition, there is no reason to suppose that escort officers and prisoners are any more vulnerable to the consequences of negligence or chance when they are involved in a cooperative interstate transport than when a unilateral, single handed transport is being conducted.

EXHIBIT I: Incidence of Death or Injury Experienced In Charter Air Transports presents some general data about the possibility of death or injury from all causes when a prisoner is being transported by light aircraft and crews chartered by criminal justice agencies. Because of the unique advantages of charter air transport from the standpoint of security and safety, this data should be viewed with some caution as it is possibly not fully representative of prisoner transports accomplished by other modes of transportation. Still, it demonstrates the negligible risks involved under optimum conditions and is worth considering as an antidote to exaggerated imaginings of catastrophic liability in tort or indemnity when mention is made of cooperative transports across state lines.

The foregoing discussion is intended to provide a realistic perspective upon the extent of the risk of extraordinary liability likely to be incurred by CAPTIS participants, not to deny the existence of risk altogether, nor to belittle the concern over its existence. It

EXHIBIT I

INCIDENCE OF DEATH OR
INJURY EXPERIENCED IN
CHARTER AIR TRANSPORT

Company	Type	Number of Years Transporting	Estimated Number of Prisoners Transported*	Number of Injuries or Deaths
Security Transport, Visalia,CA	Specializes in Prisoner Transport	18	100,000	0
Air Security Transport, Ft.Lauderdale, FL	Specializes in Prisoner Transport	1 1/2	3,000	0
Baltimore Airways, Glen Burnie, MD	General Aviation	3 1/2	400	0

*Note: Includes both inter- and intrastate transports

SOURCE: Telephone and interviews with company officers.

is extremely important, however, to appreciate that CAPTIS participants arranging cooperative interstate prisoner transports may do so without any greater exposure to the risk of a death or injury occurring -- whether from violence or accident -- than would be the case in an ordinary transport accomplished with their own officers, and further, that the extent of this risk is quite limited.

2. "Who Shall Pay?"

"Pocket liability" in tort arising from the negligence or intentional misconduct of their personnel always is a primary and particular concern to law enforcement and corrections managers, and this is no less true when they consider participating in CAPTIS. If an escort officer performing a cooperative transport is remiss in his duties or discharges them improperly and a prisoner or bystander suffers injury or death thereby, the officer has committed a tort and very likely expensive litigation and a hefty award for damages will follow. Who then is to satisfy these costs and damages? The producer agency and its provider government who agreed to transport the prisoner? Or the recipient agency and its purchasing government for whom the transport is being performed?

The problem ordinarily is not one of determining who shall be liable for the wrongdoer's acts in the first instance. The delinquent escort officer is the employee of a criminal justice agency, an independent contractor, performing a nonservant agency for his

principal, the demanding, requesting, or sending state.(3) Barring extraordinary circumstances, this officer's criminal justice agency may be held for his torts according to the rules of respondeat superior. This is because it is deemed to retain a right of effective control over the details of his physical activities. On the other hand, the state whose prisoner is being transported does not have this control and therefore, cannot be made responsible for the assaults, negligence, or other tortious conduct engaged in by the escort officer.(4)

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(3) The status of the out-of-state agent when transporting prisoners for another state is fully explored in Legal Feasibility Analysis Number 3.3.

(4) W. Seavey, HANDBOOK ON THE LAW OF AGENCY Sec. 91 (1964). Note that producer agencies invariably retain full control over their officers when they are delivering contract services. National Sheriffs' Association (NSA), Contract Law Enforcement: Site Visit Case Reports (1976) (an unpublished document of limited circulation on file at NSA headquarters office, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036.) For guidelines regarding the right of control see NSA, "Roles in Policy and Administration" and "Coordination, CONTRACT LAW ENFORCEMENT: A PRACTICAL GUIDE TO PROGRAM DEVELOPMENT" 40 - 43 (1977). Where liability lies among the participants in contract law enforcement programs has been analyzed by organizations other than the NSA and they have arrived at the same conclusions. For example, the Bureau of Governmental Research and Service, University of Oregon, in CONTRACTING FOR POLICE SERVICES IN OREGON 14 - 15 (1975) determined that:

> When police services are provided by contracting and the unit receiving services does not exercise control over the unit providing services, then under general tort law terminology the service provider would be considered a "non-servant agent." The legal consequence is that the service provider (usually the sheriff and county) would be liable for tort actions even though the services are provided for the benefit of the contracting unit.

The real question is whether the dollars-and-cents consequences of the wrongdoer's act shall be -- or can be -- shifted from the shoulders of the producers and providers to those of the recipients and purchasers. This question has been faced in hundreds of contract law enforcement programs in jurisdictions throughout the United States. With rare exceptions the answer has been "No!" And to assure that "pocket liability" does not and cannot shift, participants in contract law enforcement programs in almost all their agreements stipulate that the provider government shall a) assume liability for, b) defend against, and c) secure the purchasing government from all costs or damages for injury to person or property caused by the negligence or intentional misconduct of producer agency officers when delivering contract services.

As applied to cooperative transports, the standard allocation formula developed in contract law enforcement simply makes it certain that the producer agency continues to have the same potential financial responsibilities for what its escort officers do or fail to do while they are in interstate transit with the prisoner of a recipient agency, as it would have were its own prisoner being transported. The escort officers are personnel of the producer agency and there can be no doubt that it should and must make good damages caused by their conduct -- regardless of whose prisoner is being transported. This means that the producer agency will conduct transports for recipient agencies with as many safeguards and as much efficiency as it does its own. By the same token, the recipient agency is assured that it will have no "pocket liability" for torts committed by escort officers belonging to the

producer agency and who it may have never seen before or will ever see again. Finally, by "putting it in the contract" all of the participants are protected from the vagaries of the currently popular "no rule" approach to conflicts of law. The possibility (however remote) of becoming entangled in other complex legal difficulties (whatever those might be) because of the interstate character of cooperative transports arranged through CAPTIS is avoided altogether should a death or injury result from negligence or misconduct.

The problem of who shall be obligated for any indemnity arising out of terms and conditions of employment also is dealt with in the contract. The same principles apply and the same approach is used. The end result is that the participants stipulate that the recipient agency and the purchasing government shall not be financially responsible for indemnity to any producer agency officers for injury arising out of their assignment to deliver transport services.

3. Insurance

Lest any element of the potential risk of cooperative transports arranged through CAPTIS still be thought in any way extraordinary, it should be noted that it is possible for the producer agency to insure against the risk of injury or death while providing escort services, and many criminal justice agencies already have this protection under the terms and conditions of their current comprehensive liability policy. For example, the NSA's "Law Enforcement Officers'

Comprehensive Liability Insurance," explicitly extends full coverage to contract law enforcement programs and activities. Approximately 60,000 criminal justice personnel are protected by this particular policy.

Additional cost-free insurance is available to a transporting agent who should die in the line of duty during a CAPTIS cooperative transport. By a request through the LEAA coordinator, CAPTIS requested an opinion concerning the applicability of the Public Safety Officers Benefit Act (hereinafter cited as PSOB) to both an agent who is otherwise covered by the PSOB and also to an agent who is not otherwise covered.

The opinion from the LEAA General Counsel appears as EXHIBIT II:

EXHIBIT II

UNITED STATES GOVERNMENT
DEPARTMENT OF JUSTICE
MEMORANDUM
LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

TO: Public Safety Officers' Benefits Division (PSOB)

FROM: Office of General Counsel (OGC)

SUBJECT: Coverage of Extraterritorial Agents Transporting Prisoners

This is in response to your February 15, 1978, request for advice on NCJISS' queries concerning PSOB coverage of law enforcement officers transporting prisoners outside their jurisdiction.

With respect to the first question, generally, an officer covered by PSOB in his own jurisdiction is also covered while outside his jurisdiction and transporting a prisoner, unless he dies while in the course of a personal mission. The attached legal opinion addresses this question in greater detail (opinion omitted).

With respect to the second question, the Act defines "public safety officer" as "a person serving a public agency in an official capacity..." (emphasis added) The "official capacity" requirement is usually satisfied in difficult cases by a position description, or a statement of authorization by an appropriate official of the agency in question. Written authorization given prior to the fatal trip by an appropriate superior officer to the employee transporting the prisoner, would, therefore, ordinarily be sufficient evidence that the transporting agent was acting in an official capacity.

If any further information or assistance is required in this matter, please call David Tevelin of this office on Ext. 63691.

/S/C. A. Lauer, For

Thomas J. Madden
Assistant Administrator
General Counsel

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