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# Comments: An Indigent Accused Does Not Have a Constitutional Right to Appointed Counsel at Extradition Hearings: An Analytical Approach

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# COMMENTS

## AN INDIGENT ACCUSED DOES NOT HAVE A CONSTITUTIONAL RIGHT TO APPOINTED COUNSEL AT EXTRADITION HEARINGS: AN ANALYTICAL APPROACH

*While the United States Supreme Court has developed two distinct tests to determine when an indigent has a right to counsel in a judicial proceeding, it has never specifically considered whether an indigent accused enjoys this right in an extradition proceeding. Courts which have addressed the issue have refused to recognize this right without providing an adequate discussion of the Supreme Court's tests. This comment examines the nature of the extradition process, applies the two constitutional tests, and concludes that no right to appointed counsel exists under either the sixth amendment or the due process clause of the Constitution.*

### I. INTRODUCTION

The majority of courts in the United States hold that an indigent accused does not have a constitutional right to appointed counsel during extradition<sup>1</sup> hearings.<sup>2</sup> This rule was embraced by the Court of Appeals of Maryland in *Utt v. State*.<sup>3</sup> Other state courts have consistently applied this rule despite an increased recognition of the importance of the assistance of counsel,<sup>4</sup> and that an accused is subject to arrest, detention, and delivery to the demanding state through the extradition process.<sup>5</sup>

In determining whether an indigent accused has a constitutional right to appointed counsel during extradition proceedings, most courts have failed to employ an in-depth analysis of the right to counsel. Rather, these decisions are based upon the restrictive characterization of extradition as a summary proceeding, the right to counsel as attaching to "critical stages" of the criminal prosecution, and conclusory rea-

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1. Extradition is "[t]he surrender by one state or country to another of an individual accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other, which, being competent to try and punish him, demands the surrender." BLACK'S LAW DICTIONARY 526 (5th ed. 1979). This comment examines the process of extradition between states, *i.e.*, interstate extradition.
  2. *Utt v. State*, 293 Md. 271, 284, 443 A.2d 582, 588 (1982).
  3. 293 Md. 271, 443 A.2d 582 (1982).
  4. The *Utt* court indicated that several Supreme Court decisions, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932), signaled the increasing recognition of the importance of counsel. *Utt*, 293 Md. at 276, 443 A.2d at 585.
  5. See Note, *Indigents' Right to Appointed Counsel in Interstate Extradition Proceedings*, 28 STAN. L. REV. 1039 (1976) [hereinafter cited as Note, *Right to Counsel*].

soning. This comment begins with the proposition that the right to counsel always deserves greater attention than courts have given it on this issue. From this proposition, this comment critically analyzes the extradition process, the right to counsel, and the decisions rejecting a constitutional right to counsel at extradition. Finally, by applying right to counsel "tests" to the extradition process, this comment concludes that the right to counsel should not extend to extradition.

## II. BACKGROUND

### A. Interstate Extradition

The extradition clause of the United States Constitution 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.<sup>6</sup>

Since the extradition clause is not self-executing,<sup>7</sup> implementation is provided by Congress.<sup>8</sup> In addition, although interstate extradition is primarily a federal matter, most states have adopted legislation to facilitate the federal provisions.<sup>9</sup>

The purpose of the extradition clause is to prevent any state from becoming an asylum for an accused sought by another state.<sup>10</sup> The

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6. U.S. CONST. art. IV, § 2, cl. 2.

7. Constitutional provisions which are not self-executing require implementing legislation. *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691, 708 (1903); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 104 (1860).

8. See 18 U.S.C. §§ 3182-3195 (1970). The main extradition provision states:

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.

*Id.* § 3182.

9. *State v. Sinacore*, 151 N.J. Super. 106, 112, 376 A.2d 580, 583 (1977). The Uniform Criminal Extradition Act, 11 U.L.A. CRIM. LAW & PROC. 51 (1974), has been adopted by every state except Mississippi and South Carolina. *Utt v. Warden*, 48 Md. App. 486, 493 n.6, 427 A.2d 1092, 1096 n.6 (1981), *aff'd*, 293 Md. 271, 443 A.2d 582 (1982).

10. *Michigan v. Doran*, 439 U.S. 282, 287 (1978); *Biddinger v. Commissioner of Police*, 245 U.S. 128, 132 (1917).

clause is intended to enable each state to bring offenders to trial as swiftly as possible in the state of the alleged offense.<sup>11</sup> The process is necessary to preserve both the harmony between the states and the law and order within each state.<sup>12</sup> To carry out these purposes, the scope of inquiry permitted in the asylum state<sup>13</sup> is very limited. For example, the asylum state may neither inquire into the merits of the case<sup>14</sup> nor question the guilt or innocence of the accused.<sup>15</sup>

When the governor of the asylum state receives a proper demand<sup>16</sup> from the governor of the demanding state, the only issues relevant to whether the accused should be surrendered are: (1) whether the accused is the individual named in the demand; (2) whether the accused is substantially charged<sup>17</sup> with a crime<sup>18</sup> in the demanding state; and (3) whether the accused is a fugitive<sup>19</sup> from justice.<sup>20</sup> The responsibility for determining these issues rests with the executive of the asylum state; there is no prescribed method of determination or standard of proof.<sup>21</sup>

When Maryland is the asylum state, a governor's hearing is usually held as a matter of public policy<sup>22</sup> to determine these issues, but this hearing is not constitutionally required.<sup>23</sup> The governor may call upon the attorney general to assist in investigating the demand.<sup>24</sup> In Maryland, the hearing is usually conducted by a special hearing officer

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11. *Michigan v. Doran*, 439 U.S. 282, 287 (1978); *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952); *Biddinger v. Commissioner of Police*, 245 U.S. 128, 133 (1917).
  12. *Appleyard v. Massachusetts*, 203 U.S. 222, 227 (1906); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 102-03 (1860).
  13. An asylum state is the state in which the fugitive is found, while a demanding state is the state from which the fugitive has fled.
  14. *Wise v. State*, 197 Neb. 831, 834, 251 N.W.2d 373, 376 (1977); *Ex parte Colier*, 140 N.J. Eq. 469, 471, 55 A.2d 29, 30 (1947), *cert. denied*, 333 U.S. 829 (1948).
  15. *Smith v. Idaho*, 373 F.2d 149, 155 (9th Cir.), *cert. denied*, 388 U.S. 919 (1967); *In re Maldonado*, 364 Mass. 359, 362, 304 N.E.2d 419, 421 (1973); *Wise v. State*, 197 Neb. 831, 834, 251 N.W.2d 373, 376 (1977); *Ex parte Colier*, 140 N.J. Eq. 469, 471, 55 A.2d 29, 30 (1947), *cert. denied*, 333 U.S. 829 (1948); *see also* MD. ANN. CODE art. 41, § 34 (1978).
  16. MD. ANN. CODE art. 41, § 18 (1978).
  17. Substantially charged means that the demand includes allegations sufficient to constitute a crime in the demanding state, but the allegations need not conform to the technical requirements of a criminal pleading. *Pierce v. Creecy*, 210 U.S. 387, 404 (1908); *Ex parte Reggel*, 114 U.S. 642, 651 (1885).
  18. A crime includes all offenses of the demanding state. *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 103 (1860).
  19. A fugitive is one charged with a crime in the demanding state who leaves that state regardless of purpose or motive after the commission of the crime. *Appleyard v. Massachusetts*, 203 U.S. 222, 227 (1906).
  20. *Munsey v. Clough*, 196 U.S. 364, 372 (1905); *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691, 710 (1903); *Ex parte Reggel*, 114 U.S. 642, 649 (1885).
  21. *Ex parte Reggel*, 114 U.S. 642, 652 (1885).
  22. MARYLAND EXTRADITION MANUAL 22 (N. Rogers ed. 1981) [hereinafter cited as EXTRADITION MANUAL].
  23. *Munsey v. Clough*, 196 U.S. 364, 372 (1905); *Haynes v. Sheriff*, 253 Md. 278, 280-81, 252 A.2d 807, 809 (1969).
  24. MD. ANN. CODE art. 41, § 19 (1978).

appointed by the attorney general.<sup>25</sup> Once the governor is satisfied that the elements of extradition have been established,<sup>26</sup> he will issue a warrant of arrest.<sup>27</sup> This warrant raises the presumption that the accused is the fugitive wanted, which in turn justifies the accused's arrest, detention, and delivery to the demanding state.<sup>28</sup>

Before being delivered to the demanding state, however, the accused has the right to petition for a writ of habeas corpus to challenge his detention.<sup>29</sup> The habeas corpus court may consider only the same basic issues that were considered by the governor.<sup>30</sup> The scope of inquiry for the habeas corpus court is otherwise considerably restricted.<sup>31</sup> Furthermore, to overcome the presumption raised by the arrest warrant, the accused at a habeas corpus proceeding must prove beyond a reasonable doubt either that he was not present in the demanding state at the time of the alleged offense, or that he is not the person named in the warrant.<sup>32</sup>

The Supreme Court's opinion in *Michigan v. Doran*<sup>33</sup> provides an insightful analysis of the purpose, scope, and character of the extradition process. By relying on the requirement that an affidavit must substantially charge the fugitive with a crime under the law of the

25. EXTRADITION MANUAL, *supra* note 22, at 22. A special assistant to the attorney general is a proper person to conduct the governor's hearing. *State ex rel. Zack v. Kriss*, 195 Md. 559, 74 A.2d 25 (1950).

26. *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691, 709 (1903).

27. MD. ANN. CODE art. 41, § 22 (1978).

28. *South Carolina v. Bailey*, 289 U.S. 412, 417 (1933); *Compton v. Alabama*, 214 U.S. 1, 8 (1909); *Munsey v. Clough*, 196 U.S. 364, 372 (1905); *Roberts v. Reilly*, 116 U.S. 80, 95 (1885).

29. The habeas corpus hearing is the process by which the accused may challenge the legality of his detention in a court of the asylum state. MD. ANN. CODE art. 41, § 25 (1978); *see generally* Note, *Extradition Habeas Corpus*, 74 YALE L.J. 78 (1964).

30. In reviewing a governor's grant of extradition, a habeas corpus court can do no more than decide whether the extradition documents are in order, whether the accused has been charged with a crime in the demanding state, whether the accused is the person named in the demand, and whether the petitioner is a fugitive. *Michigan v. Doran*, 439 U.S. 282, 289 (1978).

31. A habeas corpus court may not inquire into whether probable cause exists for arrest, *id.* at 282, whether the criminal prosecution pending against the accused in the demanding state is legal, *Garrison v. Smith*, 413 F. Supp. 747 (D. Miss. 1976); *Commonwealth ex rel. Colcough v. Aytach*, 227 Pa. Super. 527, 323 A.2d 359 (1974), whether the accused has been denied the right to a speedy trial, *In re Maldonado*, 364 Mass. 359, 304 N.E.2d 419 (1973); *Wise v. State*, 197 Neb. 831, 251 N.W.2d 373 (1977), whether evidence should be suppressed, *Thomeczek v. Bray*, 198 Colo. 341, 600 P.2d 66 (1979); *Martin v. Maryland*, 287 A.2d 823 (D.C. 1972), whether the statute of limitations has run, *Biddinger v. Commissioner of Police*, 245 U.S. 128 (1917), and whether the accused is fit to stand trial, *Mandarano v. Tierney*, 151 Conn. 155, 195 A.2d 48 (1963); *State v. Tyler*, 398 So. 2d 1108 (La. 1981).

32. *South Carolina v. Bailey*, 289 U.S. 412, 422 (1933); *cf.* *McNichols v. Pease*, 207 U.S. 100, 112 (1907) (clearly and satisfactorily); *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691, 711 (1903) (by conclusive evidence).

33. 439 U.S. 282 (1978).

demanding state, the Michigan court held that a habeas corpus court may review the demanding state's finding of probable cause.<sup>34</sup> The Supreme Court disagreed,<sup>35</sup> noting that allowing review of issues which can be fully litigated in the charging state would defeat the purposes of the extradition clause.<sup>36</sup> According to the Court, these purposes are to: (1) bring offenders to trial as swiftly as possible in the demanding state; (2) prevent any state from becoming a sanctuary for fugitives; and (3) promote the principles of comity and full faith and credit.<sup>37</sup> The *Doran* Court concluded by emphasizing that "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding . . . . The Clause never contemplated that the asylum state was to conduct the kind of preliminary inquiry traditionally intervening between the initial arrest and trial."<sup>38</sup> Consequently, the Supreme Court held that the asylum state may not review the probable cause determination made by the demanding state.<sup>39</sup>

The *Doran* opinion is significant because it identifies the purposes of the extradition clause and demonstrates that the scope of inquiry in the asylum state is limited by these purposes. Furthermore, the opinion indicates that the characterization of extradition as a summary, mandatory executive proceeding is derived from the purposes of the extradition clause itself.

### *B. The Right to Counsel During Extradition Proceedings*

The Supreme Court has not considered whether an indigent accused has a constitutional right to appointed counsel during extradition proceedings.<sup>40</sup> Most state courts that have considered this issue have declined to recognize the right at the governor's hearing.<sup>41</sup> The majority of states have similarly declined to recognize a constitutional right to appointed counsel at the habeas corpus proceeding.<sup>42</sup> Other states have held that any right to counsel during extradition would be statutory and not constitutional.<sup>43</sup>

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34. *Id.* at 285.

35. *Id.* at 286.

36. *Id.* at 290.

37. *Id.* at 287-88.

38. *Id.* at 288.

39. *Id.* at 290.

40. *Utt v. Warden*, 48 Md. App. 486, 496, 427 A.2d 1092, 1098 (1981), *aff'd*, 293 Md. 271, 443 A.2d 582 (1982).

41. *See Seymour v. State*, 21 Ariz. App. 12, 515 P.2d 39 (1973); *Powell v. State*, 19 Ariz. App. 377, 507 P.2d 989 (1973); *Rugg v. Burr*, 1 Ariz. App. 280, 402 P.2d 28 (1965); *Utt v. State*, 293 Md. 271, 443 A.2d 582 (1982); *Rutledge v. Preadmore*, 21 Mich. App. 726, 176 N.W.2d 417 (1970), *cert. denied*, 401 U.S. 915 (1971); *Commonwealth ex rel. Coleman v. Cuyler*, 261 Pa. Super. 274, 396 A.2d 394 (1978).

42. *See Sullivan v. State*, 43 Ala. App. 133, 181 So. 2d 518 (1965); *Oppenheimer v. Boies*, 95 Ariz. 292, 389 P.2d 696, *cert. denied*, 377 U.S. 948 (1964); *Powell v. State*, 19 Ariz. App. 377, 507 P.2d 989 (1973).

43. *Dunkin v. Lamb*, 500 F. Supp. 184 (D. Nev. 1980); *Wertheimer v. State*, 294 Minn. 293, 201 N.W.2d 383 (1972); *Roberts v. Hocker*, 85 Nev. 390, 456 P.2d 425

The right to appointed counsel at the governor's hearing is denied because of the summary nature of the proceeding.<sup>44</sup> Consequently, extradition proceedings are not a "critical stage" of the criminal prosecution which would entitle an indigent to court appointed counsel under the sixth amendment.<sup>45</sup> The constitutional right to appointed counsel at the habeas corpus hearing is denied for similar reasons and also because habeas corpus is a civil proceeding, not a criminal prosecution.<sup>46</sup> According to at least one court that has rejected the right, the accused's right to counsel is adequately protected by the assurance of the right in subsequent proceedings.<sup>47</sup>

In Maryland, the accused has a statutory right to demand and procure legal counsel at the habeas corpus hearing.<sup>48</sup> The court will appoint counsel at this stage if the accused is indigent.<sup>49</sup> However, at the governor's hearing there is no recognized constitutional or statutory right to appointed counsel,<sup>50</sup> although the accused may retain counsel.<sup>51</sup>

Most courts that have considered whether an indigent is entitled to court appointed counsel during extradition proceedings have summarily disposed of the issue. A typical analysis is illustrated by the Court of Appeals of Arizona in *Powell v. State*:<sup>52</sup>

A governor's hearing . . . is a mere factual determination that the person demanded is charged with a crime and is a fugitive from justice. It is based upon the demanding state's submitted requisition papers and is not an adversary proceeding.

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(1969). Section 10 of the Uniform Criminal Extradition Act, 11 U.L.A. CRIM. LAW & PROC. 51 (1974), provides that the accused has the right to demand and procure counsel at habeas corpus proceedings. Some courts have interpreted this to include the right of an indigent to appointed counsel at habeas corpus proceedings. See *Mora v. District Court*, 177 Colo. 381, 494 P.2d 596 (1972); *People ex rel. Harris v. Ogilvie*, 35 Ill. 2d 512, 221 N.E.2d 265 (1966); *Rutledge v. Preadmore*, 21 Mich. App. 726, 176 N.W.2d 417 (1970), *cert. denied*, 401 U.S. 915 (1971); *Roberts v. Hocker*, 85 Nev. 390, 456 P.2d 425 (1969); *In re Turner*, 410 S.W.2d 639 (Tex. Crim. App. 1967). For a discussion of an indigent's right to appointed counsel under the Uniform Criminal Extradition Act, see Note, *An Indigent is Entitled to Court Appointed Counsel In a Habeas Corpus Proceeding Under the Uniform Criminal Extradition Act*, 27 MD. L. REV. 435 (1967).

44. See *Rutledge v. Preadmore*, 21 Mich. App. 726, 730, 176 N.W.2d 417, 420 (1970), *cert. denied*, 401 U.S. 915 (1971); *Commonwealth ex rel. Coleman v. Cuyler*, 261 Pa. Super. 274, 280, 396 A.2d 394, 397-98 (1978).

45. *Dunkin v. Lamb*, 500 F. Supp. 184, 187 (D. Nev. 1980); *Roberts v. Hocker*, 85 Nev. 390, 394, 456 P.2d 425, 428 (1969).

46. *Oppenheimer v. Boies*, 95 Ariz. 292, 299, 389 P.2d 696, 701, *cert. denied*, 377 U.S. 948 (1964); *Powell v. State*, 19 Ariz. App. 377, 378, 507 P.2d 989, 990 (1973).

47. *Rutledge v. Preadmore*, 21 Mich. App. 726, 730, 176 N.W.2d 417, 420 (1970), *cert. denied*, 401 U.S. 915 (1971).

48. MD. ANN. CODE art. 41, § 25 (1978).

49. EXTRADITION MANUAL, *supra* note 22, at 25.

50. *Utt v. State*, 293 Md. 271, 443 A.2d 582 (1982).

51. EXTRADITION MANUAL, *supra* note 22, at 23.

52. 19 Ariz. App. 377, 507 P.2d 989 (1973).

One is not entitled to have counsel appointed at this stage.<sup>53</sup>

The Court of Appeals of Maryland provided a more detailed examination of this issue in *Utt v. State*.<sup>54</sup> The court recognized that the right to counsel attaches at the "critical stages" of the criminal prosecution.<sup>55</sup> *Utt* also defined "critical stages" as those proceedings that could impair a defense on the merits or when the accused is threatened with a loss of liberty in a proceeding analogous to the criminal prosecution.<sup>56</sup> In applying this test to extradition, the court reasoned that because of the summary nature of the extradition proceedings,<sup>57</sup> basic rights are not irretrievably lost,<sup>58</sup> and the deprivation of liberty does not occur in a proceeding sufficiently analogous to a criminal prosecution.<sup>59</sup> Consequently, the *Utt* court held that the governor's hearing is not a "critical stage" of the criminal prosecution that would confer upon an indigent the right to appointed counsel.<sup>60</sup>

In light of the importance that should be given the right to counsel, and the cursory examination used by most courts in determining whether the right to counsel attaches during extradition, a detailed analysis of the Supreme Court's opinions concerning the right to counsel should be applied to the extradition process.

### III. ANALYSIS

Two aspects of the right to counsel are relevant to a determination of whether that right attaches to extradition proceedings.<sup>61</sup> First, the sixth amendment of the Constitution<sup>62</sup> guarantees the right to counsel at "critical stages" of the criminal prosecution.<sup>63</sup> Second, the due process clauses of the fifth and fourteenth amendments have also been

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53. *Id.* at 378, 507 P.2d at 990 (citations omitted).

54. 293 Md. 271, 443 A.2d 582 (1982).

55. *Id.* at 274, 443 A.2d at 583.

56. *Id.* at 279, 443 A.2d at 586.

57. *Id.* at 276, 443 A.2d at 584.

58. *Id.* at 285, 443 A.2d at 589.

59. *Id.* at 279, 443 A.2d at 586.

60. *Id.* at 286, 443 A.2d at 589.

61. This comment does not address the fifth amendment provision of counsel embodied in the prohibition against self incrimination. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966). For a discussion of this topic in reference to extradition, see generally Note, *Miranda Safeguards Are Inapplicable to Interstate Extradition Proceedings or Habeas Corpus Hearings Instituted to Contest the Legality of Detention for Extradition*, 46 TEX. L. REV. 274 (1967). In addition, this comment also does not address an equal protection argument since one may retain counsel during extradition proceedings, see EXTRADITION MANUAL, *supra* note 22, at 24, but an indigent is not entitled to appointed counsel.

62. U.S. CONST. amend. VI.

63. See *infra* text accompanying notes 88-90. The due process clause of the fourteenth amendment, U.S. CONST. amend. XIV, makes this right binding on the states. See, *e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963). Reference to the sixth amendment right to counsel in this comment includes its application to the states.



used to extend the right to counsel in certain non-criminal proceedings.<sup>64</sup> While most courts have employed sixth amendment analysis to deny the right to counsel during extradition,<sup>65</sup> they have rarely ventured into an analysis of the due process right to counsel when dealing with extradition. The Court of Appeals of Maryland in *Utt v. State*<sup>66</sup> analyzed several due process cases in denying the right to counsel at extradition, but this was done under the guise of "critical stage" analysis.<sup>67</sup> Because the sixth amendment and due process rights to counsel demand separate modes of analyses, this comment will examine and apply each to the extradition process.

### A. *The Right to Counsel in the Criminal Prosecution*

The sixth amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>68</sup> The right to counsel for criminal prosecution was given greater emphasis in America<sup>69</sup> than in England,<sup>70</sup> and the right is actually older than the Constitution itself.<sup>71</sup> Until 1932, however, this right was considered only in reference to retained counsel. In that year, the Supreme Court in *Powell v. Alabama*,<sup>72</sup> held that in a trial for a capital offense<sup>73</sup> involving an indigent defendant<sup>74</sup> who is unable to defend himself adequately,<sup>75</sup> due process of law requires that the court assign counsel to him.<sup>76</sup>

Although originally limited to its outrageous facts,<sup>77</sup> the *Powell*

64. See *infra* text accompanying notes 121-25. The term non-criminal proceedings refers to those proceedings which do not constitute a criminal prosecution and to which, therefore, the sixth amendment does not apply. Reference to the due process right to counsel includes its application to the federal government and the states.

65. See sources cited *supra* notes 47-49.

66. 293 Md. 271, 443 A.2d 582 (1982).

67. See *supra* note 56 and accompanying text.

68. U.S. CONST. amend. VI.

69. See generally Comment, *An Historical Argument For The Right To Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1030-31 (1964) (brief history of the right to counsel in the American colonies).

70. See generally T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 331-33 (1868) (brief history of the right to counsel in England).

71. In at least twelve of the thirteen colonies, the right to counsel was fully recognized in all criminal prosecutions except that in one or two instances the right was limited to capital offenses or other serious crimes. *Powell v. Alabama*, 287 U.S. 45, 64-65 (1932).

72. 287 U.S. 45 (1932).

73. A capital crime is one for which the death penalty may be imposed. BLACK'S LAW DICTIONARY 189 (5th ed. 1979).

74. Refers to one who is unable to afford counsel. See *id.* at 695 (indigent defendant).

75. The Court in *Powell v. Alabama*, 287 U.S. 45 (1932), indicated that a person is unable to defend himself adequately when he is "incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like . . ." *Id.* at 71.

76. *Powell v. Alabama*, 287 U.S. 45 (1932).

77. Note, *Sixth Amendment Right to Counsel Must Be Honored in All State or Local*

holding was steadily expanded by the Court. The right to appointed counsel was first extended to federal cases in which the accused's life or liberty was in jeopardy,<sup>78</sup> and then to all capital cases.<sup>79</sup> The right of an indigent defendant to appointed counsel in non-capital state prosecutions, however, had a different development than in non-capital federal prosecutions.

In *Betts v. Brady*,<sup>80</sup> the Supreme Court originally rejected the proposition that the fourteenth amendment incorporated the specific guarantees of the sixth amendment which would have made that constitutional provision binding on the states. Instead, the Court adopted a case-by-case analysis to determine whether the particular trial was conducted without the fundamental fairness required by fourteenth amendment due process.<sup>81</sup> Twenty-one years later, by reasoning that right to counsel is a fundamental prerequisite to a fair trial, the Supreme Court overruled the *Betts* case-by-case approach in *Gideon v. Wainwright*.<sup>82</sup> The *Gideon* Court held that the sixth amendment's right to appointed counsel is obligatory upon the states through the due process clause of the fourteenth amendment.<sup>83</sup> Although *Gideon* involved a felony offense, its holding was subsequently extended beyond the felony defendant to any defendant who is subjected to imprisonment for any offense.<sup>84</sup>

The right of an indigent defendant to court appointed counsel at trial is based upon the concept that the right to be heard is fundamental

*Criminal Actions That May Lead to Loss of Liberty*, 45 NOTRE DAME LAW. 351, 353 (1970). An appropriate summary of these facts is found in *Betts v. Brady*, 316 U.S. 455, 463 (1942):

[I]gnorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel, were hurried to trial for a capital offense without effective appointment of counsel on whom the burden of preparation and trial would rest, and without adequate opportunity to consult even the counsel casually appointed to represent them. This occurred in a State whose statute law required appointment of counsel for indigent defendants prosecuted for the offense charged.

78. *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938).

79. *Avery v. Alabama*, 308 U.S. 444, 445 (1940).

80. 316 U.S. 455, 461-62 (1942).

81. "[W]hile want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, we cannot say that the [Fourteenth] Amendment embodies an inexorable command that no trial . . . can be fairly conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473.

82. 372 U.S. 335 (1963).

83. *Id.* at 342.

84. In 1972, the Court held that a non-felony defendant who is charged with a crime for which imprisonment may be imposed is entitled to appointed counsel. *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). The Court refined its holding seven years later in *Scott v. Illinois*, 440 U.S. 367 (1979), when it held that a non-felony defendant may not actually be sentenced to imprisonment without having had the assistance of counsel. *Id.* at 374; see generally Note, *No Indigent Criminal Defendant May Be Sentenced to a Term of Imprisonment Unless He Has Been Afforded the Right to Appointed Counsel*, 56 N.D.L. REV. 434 (1980).

to a fair trial.<sup>85</sup> Without the assistance of counsel, the right to a hearing is meaningless and a defendant cannot be assured of a fair trial.<sup>86</sup> A defendant, "unfamiliar with the science of law," is unable to make knowledgeable decisions concerning the conduct of his defense and trial.<sup>87</sup>

The Supreme Court has since held that because the right to assistance of counsel is based upon the right to a fair trial, a defendant is entitled to assert this right at any stage in the prosecution when counsel's absence will deprive the defendant of his right to a fair trial.<sup>88</sup> These stages, which are characterized as "critical stages,"<sup>89</sup> are those pretrial procedures which may impair a defense on the merits, or otherwise deprive the defendant of his right to a fair trial if counsel is not present.<sup>90</sup>

The Supreme Court established the "critical stage" test in *Hamilton v. Alabama*.<sup>91</sup> In *Hamilton*, the defendant was arraigned without the assistance of counsel.<sup>92</sup> Under Alabama procedure, the defense of insanity must be pleaded at arraignment or it is waived.<sup>93</sup> The Court held that a defendant is entitled to the assistance of counsel at this stage because the events at arraignment in Alabama "may affect the whole trial . . . [since] [a]vailable defenses may be irretrievably lost."<sup>94</sup> Furthermore, providing counsel at "critical stages" is a mandatory rule; a court may not inquire into whether actual prejudice results when a defendant is denied the assistance of counsel at a "critical stage."<sup>95</sup>

In *United States v. Wade*,<sup>96</sup> the Supreme Court extended the "critical stage" analysis beyond the irretrievably lost defenses test established in *Hamilton*. The *Wade* Court, however, reaffirmed the rationale that "critical stages" are those pretrial procedures at which the absence of counsel will deprive the defendant of his right to a fair

85. *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938); *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

86. See cases cited *supra* note 85.

87. *Id.*

88. *Coleman v. Alabama*, 399 U.S. 1, 7-10 (1970); *United States v. Wade*, 388 U.S. 218, 226-27 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 54 (1961).

89. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975); *Coleman v. Alabama*, 399 U.S. 1, 7 (1970); *United States v. Wade*, 388 U.S. 218, 227 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961).

90. See cases cited *supra* note 89. Although this comment does not address the self incrimination issue, *White v. Maryland*, 373 U.S. 59, 60 (1963) ("critical stage" when accused is not represented by counsel at a preliminary hearing and accused enters a guilty plea which is later introduced as evidence), indicates that the "critical stage" test encompasses those judicial proceedings at which self incrimination may occur.

91. 368 U.S. 52 (1961).

92. *Id.* at 53.

93. *Id.*

94. *Id.* at 54.

95. *Id.* at 55.

96. 388 U.S. 218 (1967).

trial.<sup>97</sup> In holding that the post-indictment lineup was a critical stage of the criminal prosecution, the *Wade* Court reasoned that the "critical stage" test requires a court to:

[S]crutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right to meaningfully cross-examine the witness against him and to have effective assistance of counsel at the trial itself.<sup>98</sup>

Since the sixth amendment guarantees the right to counsel at those stages of the criminal prosecution when the absence of counsel will deprive the defendant of his right to a fair trial, the two-step inquiry will be used for purposes of the present analysis. Initially, it must be determined whether extradition is a stage of the criminal prosecution. If so, the next question is whether the absence of counsel at extradition will deprive an accused of his right to a fair trial.

For purposes of this analysis, it is assumed that extradition is a part of the criminal prosecution. First, extradition occurs after the demanding state has initiated the charging process.<sup>99</sup> Second, extradition is no more than the process by which the offender is brought for prosecution to the state having jurisdiction of the crime.<sup>100</sup> Finally, extradition is but one step in the resulting prosecution.<sup>101</sup>

The crucial inquiry therefore is whether the absence of counsel at extradition will deprive the defendant of his right to a fair trial.<sup>102</sup> The

97. *Id.* at 227.

98. *Id.* (emphasis supplied). Other important "critical stage" cases include *Mempa v. Rhay*, 389 U.S. 128 (1967), in which the Court determined that the Washington deferred sentencing proceedings are a "critical stage" because, under Washington law, the "absence of counsel at the imposition of the deferred sentence might well result in loss of the right to appeal," *id.* at 136, and *Gerstein v. Pugh*, 420 U.S. 103 (1975), in which the Court held that "[b]ecause of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointment of counsel." *Id.* at 122.

99. 18 U.S.C. § 3182 (1970), requires that the demand for extradition be accompanied by "a copy of an indictment found or an affidavit made . . . charging the person demanded with having committed . . . [a] crime." C. WHITEBREAD, *CRIMINAL PROCEDURE* 377 (1980), indicates that the criminal prosecution has already begun when the charging process is undertaken. Professor Whitebread states that "[t]he role of the charging grand jury is to determine whether there is probable cause to proceed with the prosecution of a particular defendant." *Id.* at 377 (emphasis supplied).

100. An extradition proceeding, which occurs between the charging process and the demanding state's pretrial procedures, is necessary only because the defendant is a fugitive.

101. The analogy here is to the preliminary hearing of the criminal prosecution, which is used to determine whether there is justification for detaining the defendant for trial. C. WHITEBREAD, *supra* note 99, at 331. Similarly, an extradition proceeding determines whether there is a justification for delivering the defendant to the demanding state for trial.

102. See *supra* notes 88-90 and accompanying text.

absence of counsel at extradition may prejudice the defendant. For example, if the accused waives his right to extradition,<sup>103</sup> fails to petition for a writ of habeas corpus,<sup>104</sup> or waives any other extradition procedures,<sup>105</sup> his right to those legal safeguards is lost. Just as a defendant is unable to conduct his defense at trial because he is unfamiliar with the law,<sup>106</sup> an accused is unable to make informed decisions concerning these issues at extradition. Furthermore, once extradited an accused loses any right to a procedurally proper extradition since he is precluded from questioning the validity of the extradition once in the demanding state.<sup>107</sup> Without the assistance of counsel, the accused may irretrievably lose his right to extradition and his right to a procedurally proper extradition.

A "critical stage" entitling one to appointed counsel, however, is a proceeding in the criminal prosecution at which the absence of counsel will deprive the defendant of his right to a fair trial. The sixth amendment does not confer the right to counsel to protect the defendant's right to a fair pretrial proceeding unless that proceeding affects the trial itself.<sup>108</sup> The only issues considered at extradition proceedings—whether the accused is the individual named in the demand; whether the accused is substantially charged with a crime in the demanding state; and whether the accused is a fugitive from justice—are separate from, and do not affect, the issues that will be considered at trial.<sup>109</sup> Since the absence of counsel at extradition does not prejudice the defendant's right to a fair trial, it follows that extradition is not a "critical

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103. See EXTRADITION MANUAL, *supra* note 22, at 21.

104. MD. ANN. CODE art. 41, § 25 (1978).

105. *Id.* § 39.

106. *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

107. See Note, *Right to Counsel*, *supra* note 5, at 1049-50 nn.61-63.

108. See *United States v. Wade*, 388 U.S. 218 (1967). *United States v. Ash*, 413 U.S. 300 (1973), however, indicated that the right to counsel may attach to certain pretrial proceedings to protect the accused because these proceedings constitute trial-like confrontations. *Id.* at 314. Even under this analysis, no right to counsel attaches at extradition because the proceedings are not analogous to many pretrial proceedings and a trial-like confrontation. See *Michigan v. Doran*, 439 U.S. 282, 288 (1978).

109. Since extradition is a summary proceeding in the sense that the scope of inquiry is limited, it is an important factor in denying the right to counsel at the proceeding. This factor, however, is important only within the "critical stage" analysis and not as a restrictive characterization. As summarized by the court of appeals in *Utt v. State*, 293 Md. 271, 285, 443 A.2d 582, 589 (1982):

The Governor's rendition hearing fundamentally is a factual proceeding unconnected with guilt or innocence. Defenses need not be raised. Basic rights cannot be said to be irretrievably lost. The absence of counsel will not impair defense on the merits. At the habeas corpus hearing, where he does have counsel, the accused individual may bring forward those contentions properly cognizable in his effort to avoid return to the place from whence he came. The rendition hearing is in sharp contrast to those situations heretofore found to be critical stages of criminal proceedings.

stage" of the prosecution which would entitle the accused to appointed counsel.

This conclusion finds support through a combined reading of two Supreme Court cases, *Gerstein v. Pugh*<sup>110</sup> and *Michigan v. Doran*.<sup>111</sup> In *Gerstein*, the Court held that the right to counsel does not attach to a proceeding at which the issue is whether there is probable cause to detain a defendant.<sup>112</sup> Extradition, like the proceeding at issue in *Gerstein*, is a pretrial proceeding at which the decision is made whether to detain a defendant for trial. Since *Doran* held that no probable cause determination can be made during extradition proceedings,<sup>113</sup> it is logical that extradition is a proceeding of lesser legal significance than that at issue in *Gerstein*. Since there is no right to counsel at a *Gerstein* hearing, and because extradition is a proceeding of lesser legal significance, the right to counsel should therefore not extend to extradition.

### B. *The Due Process Right to Counsel*

Although the sixth amendment does not guarantee an indigent the right to appointed counsel at extradition, the right to counsel should also be analyzed on due process grounds.<sup>114</sup>

The due process clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."<sup>115</sup> In *In re Gault*,<sup>116</sup> the Court addressed whether the right to counsel attaches to non-criminal proceedings. One issue in that case was whether an indigent juvenile was entitled to court appointed counsel at a delinquency proceeding.<sup>117</sup> Under state law, the delinquency proceeding was not a criminal prosecution that would entitle the accused to sixth amendment rights.<sup>118</sup> Because the proceeding was essentially analogous to a criminal prosecution,<sup>119</sup> the Court held that due process includes the appointment of counsel for indigent juveniles facing

110. 420 U.S. 103 (1975).

111. 439 U.S. 282 (1978).

112. *Gerstein v. Pugh*, 420 U.S. 103, 122 (1975).

113. *Michigan v. Doran*, 439 U.S. 282 (1978).

114. Two reasons demand analysis of the due process right to counsel. First, since extradition is a proceeding which deprives the defendant of an interest within the fourteenth amendment, *see infra* notes 139-41 and accompanying text, the accused is entitled to due process of law. *See, e.g., Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1979). Second, extradition may not necessarily be a part of the criminal prosecution. As such, the sixth amendment would not apply and the due process right to counsel would be the only available right to counsel. For example, it may be argued that extradition is not a part of the criminal prosecution because it results in arrest and detention separate from the criminal prosecution conducted in the demanding state.

115. U.S. CONST. amend. XIV. The fifth amendment contains a similar restriction which applies to the federal government. U.S. CONST. amend. V.

116. 387 U.S. 1 (1967).

117. *Id.* at 34.

118. *Id.* at 17.

119. *Id.* at 36.

delinquency proceedings at which the juvenile's freedom may be curtailed.<sup>120</sup> In subsequent cases, the Court developed a balancing test to determine whether due process requires the appointment of counsel.

Under this test, the initial determination is whether the proceeding in question is subject to the requirements of due process.<sup>121</sup> The test considers whether the nature of the individual's interest is encompassed by the fourteenth amendment and whether the state is depriving the individual of a life, liberty, or property interest as contemplated by the amendment.<sup>122</sup> If so, to determine whether the process due includes the right to counsel,<sup>123</sup> the individual's interest must be balanced with the nature of the governmental interest.<sup>124</sup> When the individual's interest in that right outweighs the governmental interest in denying it,<sup>125</sup> the right to counsel attaches to those proceedings.

The Court applied this test in *Gagnon v. Scarpelli*<sup>126</sup> to determine whether "an indigent probationer or parolee had a due process right to be represented by appointed counsel at revocation proceedings."<sup>127</sup> The Court first noted that although revocation proceedings are not a stage of the criminal prosecution, they may result in a loss of liberty and, accordingly, the probationer or parolee is entitled to due process protection.<sup>128</sup> In balancing the state and individual interests to determine whether the process due included the right to counsel, the Court emphasized the need to protect the informal nature of the proceedings and, therefore, rejected a per se right to counsel at revocation proceedings.<sup>129</sup> Recognizing that an individual may, in certain circumstances, require assistance in presenting his version of disputed facts,<sup>130</sup> the Court expressly rejected an inflexible rule regarding the right to counsel and embraced a case-by-case determination.<sup>131</sup> Finally, the Court identified certain criteria which the state authority charged with administering the probation or parole system should use in exercising its discretion.<sup>132</sup>

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120. *Id.* at 41.

121. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

122. *Id.*

123. *Gagnon v. Scarpelli*, 411 U.S. 778, 783 (1973).

124. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also* *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

125. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). For a discussion of the due process right to counsel test, *see generally* Note, *Probation and Parole—Right to Attorney at Revocation Hearing: Are We Dragging Our Feet Toward Due Process and Equal Protection?*, 27 OKLA. L. REV. 279 (1974).

126. 411 U.S. 778 (1973).

127. *Id.* at 783.

128. *Id.* at 782.

129. *Id.* at 786-87.

130. *Id.* at 787.

131. *Id.* at 790.

132. *Id.* at 790-91.

The facts and circumstances in preliminary and final hearings are susceptible of almost infinite variation, and a considerable discretion must

Another important case to address the due process right to counsel in non-criminal proceedings is *Lassiter v. Department of Social Services*.<sup>133</sup> In holding that due process does not require the appointment of counsel in every parental status termination proceeding, the *Lassiter* Court reaffirmed *Scarpelli's* case-by-case approach.<sup>134</sup> The *Lassiter* opinion demonstrates the Court's trend toward adopting a case-by-case approach when determining whether due process requires the appointment of counsel. Furthermore, the *Lassiter* decision provides greater insight into the balancing test which determines whether the process due includes the right to counsel. Here, the Court applied the three factors identified in *Mathews v. Eldridge*:<sup>135</sup> (1) the nature of the private interest affected by governmental action; (2) the risk of erroneous deprivation of that interest created by the procedures used and the value of additional safeguards; and (3) the governmental interest, including the fiscal and administrative burdens.<sup>136</sup> These elements must be weighed and then applied against the presumption that a right to appointed counsel exists only if the indigent litigant faces a potential deprivation of personal liberty.<sup>137</sup> This test indicates that "as a litigant's interest in personal liberty diminishes, so does his right to appointed counsel."<sup>138</sup>

For purposes of the present analysis it must be determined whether an accused facing extradition is entitled to due process of law, and whether the balancing test, when applied to extradition proceedings, requires that the process due include the right to counsel.

Extradition proceedings may result in the arrest, detention, and

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be allowed the responsible agency in making the decision. Presumptively, it may be said that counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.

*Id.* For a discussion of *Gagnon*, see generally Note, *Criminal Procedure—A Previously Sentenced Probationer Is Entitled to a Preliminary Hearing; A State Is Not Under a Constitutional Duty to Provide Counsel For Indigents in all Probation Revocations, the Need For Counsel Being Determinable on a Case-By-Case Basis*, 51 J. URB. L. 776 (1974).

133. 452 U.S. 18 (1981).

134. *Id.* at 31-32.

135. 424 U.S. 319 (1976).

136. *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981).

137. *Id.*

138. *Id.* at 26.



delivery of the accused to the demanding state. The gravity of this type of restraint on liberty was highlighted in *Gerstein v. Pugh*.<sup>139</sup> Although *Gerstein* held that for fourth amendment purposes there is no right to counsel at the probable cause determination, the Court remarked that "pretrial confinement may imperil the suspect's job, interrupt his source of income and impair his family relationships. Even pretrial release may be accompanied by burdensome conditions that effect a significant restraint on liberty."<sup>140</sup>

Within the parameters established by the Court, this restraint is a sufficient deprivation of liberty which entitles the accused to due process of law.<sup>141</sup> The question remains, however, whether this individual interest sufficiently outweighs the governmental interest so that the process due includes the right to appointed counsel.

The principal governmental interests at extradition are derived from the purposes of the extradition clause: (1) to prevent any state from becoming a sanctuary for fugitives; (2) to promote the principles of comity and full faith and credit; and (3) to bring offenders to trial as swiftly as possible in the demanding state.<sup>142</sup> The presence of counsel to protect the individual's interests during the legal determination (*i.e.*, whether the accused has been substantially charged with a crime) and the factual determinations (*i.e.*, whether the accused is the person named in the demand and is a fugitive), would neither violate the principles of federalism and state integrity nor allow the asylum state to become a sanctuary for fugitives. These are issues reserved by the extradition process for determination in the asylum state. Similarly, since these determinations are required by the extradition process, the presence of counsel to ensure proper resolution of the issues would not slow the extradition process to an unreasonable extent.<sup>143</sup>

The state also has an economic interest in that it wishes the extradition determination "to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of lengthened proceedings his presence may cause."<sup>144</sup> *Lassiter* makes clear, however, that economy is not an overriding governmental inter-

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139. 420 U.S. 103 (1975).

140. *Id.* at 114 (citations omitted).

141. *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), indicates that the defendant's interest in personal freedom triggers analysis for the due process right to counsel. *Id.* at 25. Furthermore, *Bolling v. Sharpe*, 347 U.S. 497 (1954), intimates that the liberty interest entitled to due process protection is even broader than freedom from bodily restraint. *Id.* at 499.

142. *See supra* notes 10-12 and accompanying text.

143. Arguably, the presence of counsel at extradition could affect the "summary nature" of extradition proceedings. As explained in *Michigan v. Doran*, 439 U.S. 282 (1978), however, since extradition proceedings are summary they do not violate the purposes of the extradition clause. Because the presence of counsel would not violate these purposes, the issue cannot be disposed of simply by reference to a characterization derived from them.

144. *Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981).

est when important individual interests are at stake.<sup>145</sup> This is especially true when, as in the case of extradition,<sup>146</sup> the additional cost for providing counsel may be characterized as *de minimis*.<sup>147</sup>

At this point in the analysis, the individual's interest in protecting his liberty seems to outweigh any governmental interest in denying the right to counsel. The crucial inquiry for the due process right to counsel test as applied to extradition, however, lies in the remaining factor identified in *Lassiter*, *i.e.*, the risk of erroneous deprivation of liberty created by the procedures used.<sup>148</sup>

The only issues determined at extradition proceedings are whether the accused is the individual named in the demand, whether the accused is substantially charged with a crime in the demanding state, and whether the accused is a fugitive from justice. The nature of these issues presents a minimal risk of erroneous deprivation of liberty since they are easily determined by an examination of the submitted extradition papers. In essence, an accused may be extradited if the demanding state has charged the accused with a crime and alleges facts sufficient to constitute a crime in the demanding state. These determinations are not as intricate as those for which the Court has recognized only a limited due process right to counsel. For example, in *Gagnon* the Court indicated that counsel should be provided at probation or parole revocation proceedings if the accused denies committing the alleged violation or offers some justification which would make revocation inappropriate.<sup>149</sup> These contentions are analogous to determinations which may have to be made at trial. In contrast, the scope of extradition proceeding determinations cannot be analogized to most pretrial proceedings. Extradition proceedings conducted by the asylum state cannot be "the kind of preliminary inquiry traditionally intervening between the initial arrest and trial."<sup>150</sup> Since determinations made at extradition proceedings present a minimal risk of an erroneous deprivation of liberty,<sup>151</sup> the process due at extradition proceedings does not include the right to appointed counsel.

#### IV. CONCLUSION

Extradition is the process by which a fugitive is delivered up to the state charging him with a crime. In this process, the accused may be subjected to arrest, detention, and delivery to the demanding state. Despite this restraint of personal freedom, most courts have summarily

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145. *Id.*

146. *Utt v. State*, 293 Md. 271, 294, 443 A.2d 582, 593 (1982) (Eldridge, J., dissenting).

147. *Cf. Lassiter v. Department of Social Services*, 452 U.S. 18, 28 (1981).

148. *Id.* at 27.

149. *Gagnon v. Scarpelli*, 411 U.S. 778, 790-91 (1973).

150. *Michigan v. Doran*, 439 U.S. 282, 288 (1978).

151. It is important to bear in mind that the risk of erroneous deprivation refers to the nature and scope of the proceeding in question. Extradition is the proceeding at issue here, not the subsequent prosecution in the demanding state.

denied that an indigent has a constitutional right to appointed counsel during extradition proceedings. A close analysis of Supreme Court decisions regarding the right to counsel indicates that this conclusion is reasonable. There is no right to counsel at extradition under sixth amendment analysis since no determination made at those proceedings deprives the accused of his right to a fair trial in the demanding state. There is also no right to counsel at extradition proceedings under due process analysis because the issues determined present a minimal risk of erroneous deprivation of liberty.

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