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### Cates v. Sullivan

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FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO  
OCT 11 1984

No. 84SA265

David W. Brezina

IN THE SUPREME COURT OF THE STATE OF COLORADO

MARK WILLIAM CATES,

Petitioner-Appellant,

vs.

PATRICK SULLIVAN, Sheriff of  
Arapahoe County, State of  
Colorado,

Respondent-Appellee.

Honorable  
JOHN P. GATELY  
Judge

OPENING BRIEF

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PATRICK SULLIVAN, Sheriff of  
Arapahoe County, State of  
Colorado,

Respondent-Appellee.

DESIGNATION OF RECORD

The record on appeal consists of a Volume of pleadings (hereafter, Vol. I p. \_\_) and a transcript of the Hearing for Habeas Corpus (hereafter, Tr., p. \_\_).

STATEMENT OF CASE

This is an appeal from Honorable Judge John P. Gately, denial of a Writ of Habeas Corpus on May 24, 1984.

STATEMENT OF FACTS

Mark William Cates, petitioner-appellant, was arrested on February 6, 1984 by the Arapahoe County Sheriff's Office for failure to appear for misdemeanor charges. (Vol. 1, p.6) He was also held on a First Degree Murder warrant from Florida. (Vol. 1, p.6). On February 7, 1984, Mr. Cates gave notice that he was contesting

extradition. However, his case was not reviewed until March 13, 1984. (Vol. I, p. 12). On May 1, 1984, Mr. Cates was served with the Florida Governor's Warrant charging him with First Degree Murder in Broward County. (Vol. I, pp. 20-35). On May 9, 1984, Mark Cates filed a Petition for Writ of Habeas Corpus (Vol. I, p.4). At the hearing for the Habeas Corpus Petition, counsel for Mr. Cates questioned whether the Florida Governor's Warrant sufficiently identified him, (Tr., pp. 6-7) whether the Warrant was based on extraordinarily unreliable and incredible information (Tr., pp. 6-9; Vol. I, pp.32-35) which could not establish probable cause, and finally, that the documents certifying extradition were faulty. (Tr. p.11; Vol. I, p.35).

A number of documents were sent to Colorado by the State of Florida which sought the formal return of an individual named Thomas McDonald. The documents supporting the application for requisition include a capias, an affidavit purporting to show probable cause and a copy of an indictment. (Vol. I, pp. 28-34). Each and every one of these names only Thomas McDonald. Papers in the Arapahoe County, State of Colorado case of People v. Cates, 84CR152, asked for the extradition of Mark W. Cates. (Vol. I, p. 19). These documents also had an appended appellation, the alias of "Thomas McDonald." The national police teletype which was sent to the Arapahoe County Sheriff sought a person named Thomas McDonald. (Vol. I, p.18). The Colorado court documents had two birthdates, August 13, 1947 (which was the original entry in the Arapahoe County

Sheriff's booking records), and June 25, 1984 (which was entered above the earlier entry). (Vol. I, p.17; Tr. pp.5-6).

With respect to the affidavit purporting to show probable cause, it contains statements supposedly made to a Ft. Lauderdale detective by C.H. Parsons, who implicated Mr. McDonald in the crime charge. (Vol. I, p.32). According to the affidavit, Mr. Parsons, who was being held on unrelated charges, heard about McDonald's supposed criminal liability from McDonald's cohort in the crime, Jeff Pecor. On the basis of this information, Jeff Pecor was arrested. Mr. Pecor then implicated Thomas W. McDonald. (Vol. I, p.32). Mr. Pecor told the Florida Detective that "he just watched" the events, which included beating, sexual assaults and tying the victim with a cord in a hog tie position. The medical examiner described the body as recovered, which differed significantly from the injuries which the informant said that the victim had received. (Vol. I, pp.32-33). The description of the beating included several blows to the head and face with a black night stick. However, the medical examiner described the head of the bound drowning victim as having been struck "twice" in the left rear section of the head and as having evidence of a broken nose.

With respect to whether an offense was charged, the charge was First Degree Murder. The affidavit does not set forth any muniments of premeditation, previous animosity or plan. The affidavit states that "McDonald then entered the room where the victim and Mr. Pecor were arguing, and struck the victim...with a black night stick." (Vol. I, p.32).

The Florida extradition documents were certified by two individuals: Robert D. Lockwood, Clerk of the Circuit Court, and Arthur J. Franza, a judge of the Circuit Court. Each certified the other as having the capacity and position represented. (Vol. I, p.35).

### ISSUES

Whether the trial court erred when it found that Mark Cates was in fact the person identified as Thomas W. McDonald?

Whether the trial court erred when it found that Mark Cates was substantially and fairly charged with a crime in Florida as required by Colorado law?

Whether the trial court erred when it found that the extradition documents were technically sufficient and authenticated as required by 16-19-104, C.R.S.?

### SUMMARY OF ARGUMENT

The trial court should not have relied on appended notes made in the Arapahoe County Sheriff's Custody Report to provide the basis for the finding that Thomas McDonald and Mark Cates were the same person.

Thomas McDonald (who is not Mark Cates) was not fairly or substantially charged with the crime of First Degree Murder because the



victim's injuries do not conform to the description of the criminal episode and because that description does not typify the premeditation or deliberation required for First Degree Murder.

Finally, the Colorado judge should not have found that the extradition documents were reliably certified. This is because when a person purporting to be an out of state judge certifies that a clerk of the court is the clerk of the out of state court and the same clerk certifies that the judge is the judge, this circuitry provides no independent guarantee as to the authenticity and completeness of the extradition documents. This independent guarantee is required by the Uniform Criminal Extradition Act.

#### ARGUMENT

TRIAL COURT ERRED WHEN IT FOUND IDENTITY.

The respondent-appellee failed to establish a prima facie case of identity by entering Thomas McDonald's name and date of birth on the custody report above Mark Cates' name. This did not provide a sufficient link to the name on the Florida teletype to support a finding that Mark Cates is Thomas McDonald. Both the Colorado Governor's Warrant and the Florida demand for extradition name Thomas W. McDonald (See Vol. I P.25 and p.21). The absence of the correct surname, or substantial compliance therewith, (See Lucero v. Martin 660 P.2d 902 at 906) (Colo. 1983) renders the extradition documents void.

This is not a case like Richardson v. Cronin \_\_\_\_ Colo. \_\_\_\_ 621 P.2d 949 (1980) where there was sufficient identification evidence at the hearing. The District Attorney in this case relied on a weak link here - the insertion of Thomas McDonald's name on Mark Cates' custody report. There is no identity of name here (See Samples v. Cronin 189 Colo. 40, 536 P.2d 306 (1975) and thus no prima facie showing of similar identity which requires rebuttal. The trial court was incorrect in finding that Mark Cates is Thomas McDonald, and should not permit his extradition when there is no showing that Mark Cates "[w]as present in the demanding state at the time of the commission of the alleged crime..." 16-19-104 C.R.S. 1973.

TRIAL COURT ERRED WHEN IT FOUND THAT THOMAS MCDONALD COMMITTED ACTS WHICH ARE WORTHY OF THE SUBSTANTIAL CHARGE OF FIRST DEGREE MURDER.

16-19-104 C.R.S. 1973 requires that

The indictment, information or affidavit made before the magistrate must substantially charge the person demanded with having committed a crime under the law of that state.

Quite simply, the affidavit does not show how Thomas McDonald's alleged acts evidence:

premeditation, deliberation or plan

The Florida law of homicide requires that some premeditation, deliberation or plan to kill be present in order to justify the charge

of First Degree Murder, as filed against Thomas McDonald. [See, Fla. Stat. Ann. 782.04(1983)] However, the affidavit in support of extradition states quite clearly that McDonald "entered the room where Antone (victim) and Pecor were arguing and struck Antone across the face with a black night stick." This is not a premeditated act. The acts of Thomas McDonald (who is not Mark Cates) do not have the indicia of premeditation, deliberation or plan.

Because of the complete absence of premeditation, deliberation or plan in the criminal episode, the required substantial charge of a crime under 16-19-104 C.R.S. 1973 is not present, the extradition documents fail, and the trial court erred in denying the Writ of Habeas Corpus. Lucero, supra, at 905; Buhler v. Martin 151 Colo. 345, 377 P.2d 748 (1963) (warrant for arrest void where crime not charged by demanding state).

TRIAL COURT ERRED WHEN IT RELIED ON CIRCULAR AUTHENTICATION CERTIFICATE.

The Colorado extradition statute mandates authentication of the documents supporting the demand for extradition, 16-19-104, C.R.S. 1973.

The State of Florida included the required certification of authenticity for the Indictment, Capias and Affidavit as to Probable Cause. (Vol. I, p.35). However, there is a fatal flaw as to the

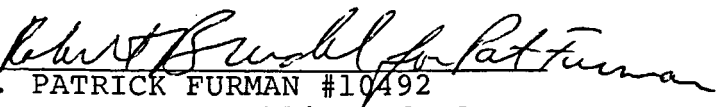
authentication of these documents. Simply put, the Florida County Court Clerk, Mr. Lockwood, said that Arthur Franza is a Florida judge, and then the Florida Judge said that Mr. Lockwood is the Clerk of the Florida County Court. This mirror image made of authentication and certification does not provide the independent, neutral and detached authentication sought by the Uniform Criminal Extradition Act. In essence, the statute says that the Colorado Governor shall not recognize documents making an extradition demand unless those documents are certified as authentic. The difficulty with this case is that the Florida authenticating officers are mutually dependent for certification of their respective position and authority. Plainly, this is contrary to the thrust of 16-19-104 C.R.S. 1973 which mandates a neutral authentication of demanding documents. This statute must be construed strictly because it is in derogation of constitutional guarantees of immunity from arrest. Mathews v. People 136 Colo. 102, 314 P.2d 102 (1957).

#### CONCLUSION

The trial court erred when it denied petitioner Cates' Writ of Habeas Corpus for the reasons stated above.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the within Opening Brief was mailed, postage prepaid, to the Honorable Duane Woodard, Attorney General of the State of Colorado, 1525 Sherman, Denver, Colorado 80203 this 11<sup>th</sup> day of October, 1984.

Gerie M. Tuttle