

Opinion No. 53-5713

March 25, 1953

BY: RICHARD H. ROBINSON, Attorney General

TO: Mr. Joseph O. Walton Assistant District Attorney Fifth Judicial District Hobbs, New Mexico

{*106} This is in reply to your letter of March 5, 1953, in which you ask for information concerning extradition for the crime of non-support of a wife or children. You state that you have been informed that the Office of the Attorney General issued an opinion some time ago to the effect that a person cannot be extradited for the crime of failing to provide for the support of his wife or children.

A search of our files reveals no such opinion written by this office. It is our thought that you perhaps have reference to the case of **Ex Parte Dalton, 56 N.M., 407, 244 P. 2d 790**, which gave an answer to one phase of this problem. In that case Mr. Dalton left his children in California with their mother, from whom he had been divorced, and came to New Mexico. Subsequently, he was charged in California with the crime of intentionally neglecting, while in New Mexico, to support his children who were in California, and extradition was requested. In other words, extradition of Dalton was sought under § 6 of the Uniform Criminal Extradition Act (§ 42-1906 N.M.S.A.) which provides that the Governor of this state may surrender to the demanding state any person charged in the demanding state with {*107} committing an act in this state, or in a third state, intentionally resulting in a crime in the demanding state. The applicable section of the California Penal Code specifically provided that such failure to support occurring while an accused is outside of California constitutes a crime in California, if non-support of the children results in that state. The Supreme Court of New Mexico ruled that § 6 of the Uniform Act (§ 42-1906 N.M.S.A.) is constitutional and that the section is applicable to nonsupport cases. Therefore, it is our opinion that extradition demanded by another state for the crime of non-support, properly requested under § 6 of the Uniform Criminal Extradition Act, should be honored by New Mexico if the demanding state has a law making it a crime to fail to support a wife or child when the accused is outside the demanding state at the time of failure to support occurs.

The number of instances in which extradition will be granted by New Mexico, when requested by another state for the crime of non-support, will increase further as soon as House Bill No. 1 (Ch. 17, Laws of 1953) becomes effective on July 1, 1953. This legislative enactment marks the adoption by New Mexico of the Uniform Reciprocal Enforcement of Support Act, § 5 of which reads as follows:

"The governor of this state (1) may demand from the governor of any other state the surrender of any person found in such other state who is charged in this state with the crime of failing to provide for the support of any person in this state and (2) may surrender on demand by the governor of any other state any person found in this state

who is charged in such other state with the crime of failing to provide for the support of a person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or other state."

As has been noted in **17 Mo. Law Review 9**, the real effect of § 5 of this Act is to make § 6 of the UCEA specifically applicable to extradition for the crime of non-support. It is our opinion that under § 5, in considering a requested extradition, the Governor of this State need not look to see whether the demanding state has a specific statute making it a crime to fail to support a wife or child when the "failure" by the accused occurs when he is beyond the borders of the demanding state.

A somewhat different problem arises when it is the desire of this State to request extradition of a person who, while in the asylum state, or a third state, has failed to provide for the support of his wife or children in New Mexico. Sec. 41-203 N.M.S.A. reads as follows:

"Any person who abandons his wife or family, leaving her or them without sufficient means of support, or who, being able to work, fails to provide for the support of his wife or family, as far as his ability extends, and thereby leaves her or them destitute shall, on conviction thereof, {**108*} be imprisoned for such period not exceeding one (1) year, as the court may fix, and on a second or subsequent offense, the imprisonment may be for any period not exceeding two (2) years."

It will be noted that neither this statute, nor any other New Mexico law, specifically makes non-support a crime, as do California and several other states, when the failure to support occurs when the accused is outside of New Mexico. Argument could be made to the effect that § 41-203 contemplates the whole act taking place within New Mexico. In line with what has been said above, however, it is our opinion that when New Mexico requests extradition from one of the thirty-odd states that have the Uniform Reciprocal Enforcement of Support Act, such states, under § 5 of the Act, will not look beyond a properly drawn request for extradition to see what the specific law is, or should be, in New Mexico. In other words, if the accused were charged in the New Mexico requisition papers "failing, while in State X to support his children A, B and C in New Mexico, which intentionally resulted in the crime of non-support in New Mexico," it is our opinion that State X would grant extradition.

The obvious question arises, however, that even if such extradition should be granted and the accused returned to New Mexico, whether the accused should be prosecuted under § 41-203, having been in State X when the crime was supposed to have occurred. There is no New Mexico case directly in point, and this office will do no more than state the question, and not attempt to predict the view New Mexico courts might

take when and if the question arises. The language in Ex **Parte Dalton**, supra, is of no particular help on this point, since the court was concerned with the question of extradition rather than criminal law, and further, since the California statute under which Dalton was even though the accused be outside charged makes non-support a crime of that state when the non-support occurs.

The foregoing discussion is of course limited to those cases where extradition is either demanded by New Mexico or sought from New Mexico under § 6 of UCEA. Quite obviously, when the act of either non-support or abandonment occurs wholly within the demanding state and the accused thereafter becomes a "fugitive", extradition would be proper under § 3 of the UCEA. (§ 42-1903 N.M.S.A.)

The question posed in your letter was somewhat broad. If we have failed to answer any question you had in mind, please do not hesitate to call upon us for further advice.

By: W. F. Kitts

Assist. Attorney General