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strued,[45] adhere to the cardinal rule of statutory construction that statutes be given a reasonable interpretation that will effectuate legislative intent.[46] Thus, there is really no difference in result between a strict and liberal interpretation. Before *Nepstad* the Supreme Court of South Dakota not only declared the guest statute's purpose to be to abolish or minimize collusion against liability insurers,[47] but also favored a liberal interpretation to effectuate the legislative intent.[48] The majority opinion in *Nepstad* disregards this prior interpretation.

It appears that the court in *Nepstad* has disregarded several of the fundamental rules of statutory construction in holding its guest statute inapplicable. With the growing use of motor driven golf carts and other non-highway vehicles, actions arising from circumstances similar to those in *Nepstad* may be expected to increase. Absent explicit language or more convincing reasons than those contained in *Nepstad* the location of the motor vehicle at the time of the accident should not be controlling in determining guest statute applicability.

HARRY C. ROBERTS, JR.

FUTURE IRREPARABLE HARM: A GROUND FOR RELEASE IN FEDERAL EXTRADITION HABEAS CORPUS PROCEEDINGS

The Federal Constitution provides that when a person who has been charged with a crime in one state flees to another state, the executive authority of the state in which the fugitive has sought asylum shall, upon demand, deliver him up to the first state.[1] Accord-

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[45]Harrell v. Gardner, 115 Ga. App. 171, 154 S.E.2d 265 (1967); State v. Taylor, 49 Hawaii 624, 425 P.2d 1014 (1967); Mahney v. Hunter Enterprises, Inc., 426 P.2d 442 (Wyo. 1967).

[46]Nielsen v. Kohlstedt, 254 Iowa 470, 117 N.W.2d 900 (1962); Lloyd v. Runge, 186 Kan. 54, 348 P.2d 594 (1960); Cappellano v. Pane, 178 Neb. 493, 134 N.W.2d 76 (1965); Naphtali v. Lafazan, 8 App. Div. 2d 22, 186 N.Y.S.2d 1010 (1959); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948); Peterson v. Snell, 80 S.D. 496, 127 N.W.2d 142 (1964); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963); Andrus v. Allred, 17 Utah 2d 106, 404 P.2d 972 (1965); Jensen v. Mower, 4 Utah 2d 336, 294 P.2d 683 (1956).

[47]Kilgore v. U-Drive-It Co., 149 Ohio St. 505, 19 N.E.2d 908 (1948); Kitchens v. Duffield, 83 Ohio App. 41, 76 N.E.2d 101 (1947), *aff'd*, 149 Ohio St. 500, 79 N.E.2d 906 (1948).

[48]Peterson v. Snell, 80 S.D. 496, 127 N.W.2d 142 (1964); Schlim v. Gau, 80 S.D. 403, 125 N.W.2d 174 (1963).

[1]U. S. Const. art. IV, § 2. This constitutional mandate has been codified by statute which provides that upon production of an authentic indictment or affi-

ingly, all jurisdictions have statutes outlining the procedure for interstate rendition of fugitives.[2] A fugitive who wishes to contest the rendition order can appeal in the state courts of the asylum state;[3] if unsuccessful, he may then seek federal habeas corpus relief there.[4] Traditionally, a federal court's scope of inquiry in such habeas corpus cases has been limited to a determinaion of whether the extradition request is in order.[5] This inquiry involves only three questions: (1) whether a crime has been charged under the laws of the demanding state; (2) whether the fugitive in custody is in fact the person charged; and (3) whether the fugitive was in the demanding state at the time the alleged crime was committed.[6] The inquiry has been so limited even where the fugitive has alleged that he will be subjected to irreparable harm if he is returned to the demanding state.[7]

The District Court for the Eastern District of Michigan recently departed from tradition and made a full inquiry into the allegations of prospective irreparable harm in *In re Hunt*,[8] where habeas corpus relief was sought to defeat extradition to Arizona, the demanding state. While awaiting retrial[9] on charges of assault and battery, peti-

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davit by the executive authority of the demanding state charging the person demanded with having committed a felony or other crime, the executive authority of the asylum state shall cause said person to be delivered up to an authorized agent of the demanding state. 18 U.S.C. § 3182 (1964).

[2]The procedure for interstate rendition of fugitives was established in the *Uniform Criminal Extradition Act of 1936* which, as of 1965, had been adopted by all jurisdictions except Louisiana, Mississippi, North Dakota, South Carolina, Washington, and the District of Columbia. *See, e.g.*, 25 MICH. STAT. ANN. §§ 28.1285(1)-(31) (1954). Those states which have not adopted the Act, however, do have similar extradition statutes. *See, e.g.*, MISS. CODE ANN. § 3981 (1942); D.C. CODE § 23-401 (1967).

[3]Roberts v. Reilly, 116 U.S. 80, 94 (1885); Robb v. Connolly, 111 U.S. 624, 637 (1884). *See* 25 MICH. STAT. ANN. § 28.1285(9) (1954).

[4]Roberts v. Reilly, 116 U.S. 80, 94 (1885); *see* 31 AM. JUR. 2d *Extradition* § 64 (1967).

[5]5 R. ANDERSON, WHARTON'S CRIMINAL LAW AND PROCEDURE 483 (1957).

[6]*Id.*

[7]Drew v. Thaw, 235 U.S. 432 (1914); United States *ex rel.* Tucker v. Donovan, 321 F.2d 114 (2d Cir. 1963); Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950); Person v. Morrow, 108 F.2d 838 (10th Cir. 1940); Kyles v. Preston, 253 F. Supp. 628 (D.D.C. 1966).

State courts similarly limit their inquiry. *E.g.*, Chase v. State, 93 Fla. 963, 113 So. 103 (1927); Commonwealth *ex rel.* Flower v. Superintendent of Philadelphia County Prison, 220 Pa. 401, 69 A. 916 (1908); *Ex parte* Massee, 95 S.C. 315, 79 S.E. 97 (1913); State *ex rel.* Lea v. Brown, 166 Tenn. 669, 64 S.W.2d 841 (1933).

[8]276 F. Supp. 112 (E.D. Mich. 1967).

[9]Petitioner had originally been convicted of assault and battery and contributing to the delinquency of a minor in Arizona. On appeal the conviction was reversed and the cause remanded for new trial. Pending the second trial, petitioner was freed on appeal bond and subsequently left the jurisdiction. 276 F. Supp. at 113.

tioner left Arizona and established residence in Michigan. Arizona's attempts to secure petitioner's presence for trial were unsuccessful so extradition papers were forwarded to the Governor of Michigan. However, Arizona did not wait for the results of the extradition hearing in Michigan but proceeded to convict the petitioner of the offenses charged in an *in absentia* proceeding.[10] Subsequent to that proceeding Michigan notified Arizona that its rendition request would be honored.[11] Petitioner unsuccessfully appealed the rendition order in the Michigan state courts and then petitioned for federal habeas corpus relief in the Michigan federal district court. The question presented was whether the court might examine the extradition proceeding to see if it would result in irreparable harm to the petitioner or whether such inquiry was foreclosed if the extradition request were found to be in order.

The district court recognized the traditional limitation on the scope of inquiry in federal extradition habeas corpus proceedings.[12] However, it noted that recent Supreme Court decisions in every area of criminal law and procedure have emphasized the vindication of individual rights.[13] Therefore, upon finding that the Arizona *in*

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[10]Arizona Rule 231 which authorizes the *in absentia* proceeding provides:

A. In a prosecution for a felony the defendant shall be present:
   1. At arraignment.
   2. When a plea of guilty is made.
   3. At the calling, examination, challenging, impaneling and swearing of the jury.
   4. At all proceedings before the court when the jury is present.
   5. When the evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of the evidence before the jury.
   6. At a view by the jury.
   7. At the rendition of the verdict.

B. If the defendant is voluntarily absent, the proceedings provided by this rule, except in paragraphs 1 and 2 of subsection A, may be had in his absence if the court so orders.

ARIZ. S. CT. (CRIM.) R. 231.

[11]The petitioner had contended that the extradition request should not be honored since she now stood *convicted* rather than *charged* in Arizona and Article IV, section 2 of the Constitution uses only the term "charged." The district court rejected this contention since the Governor's extradition hearing took cognizance of the change in the petitioner's status and the hearing was conducted in light thereof.

[12]The court cited Marbles v. Creecy, 215 U.S. 63 (1909); Sweeney v. Woodall, 344 U.S. 86 (1952). See text accompanying notes 5 and 6 *supra*.

[13]As examples the court cited *In re* Gault, 387 U. S. 1 (1967); Brookhart v. Janis, 384 U.S. 1 (1966); Miranda v. Arizona, 384 U.S. 436 (1966); Pointer v. Texas, 380 U.S. 400 (1965); Malloy v. Hogan, 378 U.S. 1 (1964); Douglas v. California, 372 U.S. 353 (1963); Mapp v. Ohio, 367 U.S. 643 (1961). Particular emphasis was

absentia proceeding violated the petitioner's federal constitutional rights and that the petitioner had not made an effective waiver of these rights,[14] the court felt compelled to abandon precedent and inquire into the future plight of the petitioner. The court noted that it would be a matter of months, and perhaps years, before petitioner would be able to appeal her conviction through the Arizona state courts and that even if admitted to bail, she would not have the "freedom of action enjoyed by a citizen not so beclouded"[15] by a prior conviction. This inhibition on freedom of action was found to be an irreparable injury. Accordingly, the court granted the writ and ruled that the petitioner be returned to Arizona only upon the condition that she get a new trial.

The question of the scope of inquiry into future irreparable harm in extradition habeas corpus proceedings has generally been raised by escaped prisoners who have claimed that they would be subjected to cruel and inhuman punishment by the prison officials of the demanding state if forced to return.[16] The leading authority is *Sweeney v.*

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placed on *Fay v. Noia*, 372 U.S. 391 (1963), where the Supreme Court held that the doctrine of exhaustion of state remedies, required as a prerequisite to federal habeas corpus relief, applied only to those remedies still open to the petitioner at the time petition was made for federal habeas corpus relief.

[14]The rights found to have been violated by the *in absentia* proceeding were presence at trial, confrontation and cross-examination of witnesses, and effective assistance of counsel. Also, the court found that under the circumstances, petitioner's voluntary absence from trial did not constitute an *effective* waiver of rights. 276 F. Supp. at 120. This comment assumes these findings are correct and deals only with the extradition issue.

[15]276 F. Supp. at 121.

[16]*E.g.*, Sweeney v. Woodall, 344 U.S. 86 (1952); Marbles v. Creecy, 215 U.S. 63 (1909); Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951), *cert. denied*, 342 U.S. 862 (1951); Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950), *cert. denied*, 341 U.S. 941 (1951); Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 828 (1950); United States *ex rel.* Jackson v. Ruthazer, 181 F.2d 588 (2d Cir. 1950); *cert. denied*, 339 U.S. 980 (1950). Gerrish v. New Hampshire, 97 F. Supp. 527 (D. Me. 1951); *Ex parte* Marshall, 85 F. Supp. 771 (D. N.J. 1949). Frequently, when state prisoners have sought habeas corpus relief on grounds of mistreatment, the writ has been denied unless the prisoner would be entitled to absolute release if his claims were proved. This result is based on the theory that the function of habeas corpus is not to correct a practice but rather to provide a remedy for unlawful detention. Williams v. Steele, 194 F.2d 32 (8th Cir. 1952), *cert. denied*, 344 U.S. 822 (1952); Taylor v. United States, 179 F.2d 640 (9th Cir. 1950), *cert. denied*, 339 U.S. 988 (1950). That is, it was often thought that habeas corpus is a remedy which offers only complete relief or nothing. *See* Note, *Constitutional Rights of Prisoners: The Developing Law*, 110 U. PA. L. REV. 985, 1006 (1962). However, the modern trend seems to be that there are other forms of relief than complete release. *See* Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951); Miller v. Overholser, 206 F.2d 415 (D.C. Cir. 1953); Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944); *In re* Riddle, 57 Cal. 2d 848, 372 P.2d 304, 22 Cal. Rptr. 472 (1962), *cert. denied*, 371 U.S. 914 (1962).

Woodall,[17] where future cruel and inhuman treatment was alleged by an escaped convict who sought to defeat his extradition from Ohio to Alabama. The Supreme Court denied the writ, saying that both the scheme of interstate rendition and considerations fundamental to our federal system demanded the prompt return of the fugitive to the demanding state (Alabama) and required that the alleged unconstitutional treatment be tested there.

The traditional limitation on the scope of inquiry in federal habeas corpus proceedings, manifest in *Sweeney*, is consistent with the principle of comity which has always required an exhaustion of state remedies as a prerequisite to *any* federal habeas corpus relief.[18] In the extradition context, comity has required that the courts of the demanding state be given the first opportunity to pass upon alleged denials of constitutional rights within their jurisdiction.[19] Consequently, both prior and subsequent to *Sweeney*, the overwhelming majority of federal courts has refused to hear allegations of unconstitutional treatment suffered in the demanding state when remedies had not been exhausted in that state.[20]

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[17]344 U.S. 86 (1952).

[18]*Ex parte* Hawk, 321 U.S. 114 (1944). The exhaustive doctrine of *Hawk* was later codified:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1964) (1948 version), *as amended*, (Supp. II, 1966).

[19]Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951), *cert. denied*, 342 U.S. 862 (1951).

[20]*E.g.*, Marbles v. Creecy, 215 U.S. 63 (1909); United States *ex rel.* Vitiello v. Flood, 374 F.2d 554 (2d Cir. 1967); Smith v. Idaho, 373 F.2d 149 (9th Cir. 1967), *cert. denied*, 388 U.S. 919 (1967); Malory v. McGettrick, 318 F.2d 816 (6th Cir. 1963), *cert. denied*, 375 U.S. 935 (1963); Brown v. Ward, 275 F.2d 884 (D.C. Cir. 1960); Davis v. O'Connell, 185 F.2d 513 (8th Cir. 1950), *cert. denied*, 341 U.S. 941 (1951); United States *ex rel.* Brown v. Cooke, 209 F. 607 (3d Cir. 1913); Cohen v. Warden, 252 F. Supp. 666 (D. Md. 1966); United States *ex rel.* Proctor v. New York, 229 F. Supp. 696 (S.D.N.Y. 1964). *Contra*, Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd per curiam*, 338 U.S. 864 (1949). The Third Circuit Court of Appeals granted the writ to the petitioner in *Dye* based on substantial evidence of *past* mistreatment by Georgia prison officials. The court reasoned that the doctrine of exhaustion of state remedies did not apply to extradition cases. On certiorari, the Supreme Court was presented with the precise question of the application of the exhaustion of state remedies rule to the extradition context. How-

The argument against *Sweeney* is that the doctrine of federalism, which is designed to promote efficacy between the states, should not bar federal habeas corpus relief where fundamental, constitutionally guaranteed rights are subject to being jeopardized in the demanding state.[21] The feeling is that when the concept of federalism and the fundamental rights of the individual petitioner are drawn in conflict, greater weight should be afforded the latter.[22] However, most cases have rejected this argument without comment.[23] One basis for the rejection is that there is no justification for assuming that the demanding state will unlawfully prevent the petitioner from testing his claim of unconstitutional treatment in the local and state or federal courts.[24]

The Supreme Court has not been presented with the precise question of the scope of inquiry into alleged irreparable harm in an extradition habeas corpus case since *Sweeney* in 1952. But, in 1963 a new element to the federal-state balance applicable to habeas corpus cases in general was added by the Court in *Fay v. Noia*.[25] *Noia* was a non-extradition case in which the petitioner was convicted of murder and then sentenced to life imprisonment after remarks by the trial judge indicating that the petitioner was lucky not to have received the death

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ever, the Court declined to answer the question fully, for in its *per curiam* reversal of *Dye*, the Court cited only *Ex parte Hawk*, 321 U.S. 114 (1944). *Hawk*, a non-extradition case, held that all state remedies must be exhausted as a prerequisite to federal habeas corpus relief. Thus, it was not clear whether the exhaustion doctrine would require an extraditee to go through the courts of two states before seeking federal habeas corpus relief. The formal proposition that habeas corpus tests only the legality of the present detention in the asylum state leads to the conclusion that only the remedies in the asylum state must be exhausted. However, *Sweeney* clearly requires that alleged violations of constitutional rights in the demanding state must be raised in the courts of that state before federal habeas corpus relief will be granted.

[21]Sweeney v. Woodall, 344 U.S. 86, 91 (1952) (dissenting opinion); Johnson v. Matthews, 182 F.2d 677, 684 (D.C. Cir. 1950) (dissenting opinion), *cert. denied*, 340 U.S. 828 (1950); Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd per curiam*, 338 U.S. 864 (1949); Commonwealth *ex rel.* Brown v. Baldi, 378 Pa. 504, 106 A.2d 777, 781 (1954) (dissenting opinion); Commonwealth *ex rel.* Mattox v. Superintendent of County Prisons, 152 Pa. Super. 167, 31 A.2d 576 (1943).

[22]Johnson v. Matthews, 182 F.2d 677, 684 (D.C. Cir. 1950) (dissenting opinion), *cert. denied*, 340 U.S. 828 (1950). *See* Sweeney v. Woodall, 344 U.S. 86, 91 (1952) (dissenting opinion); Commonwealth *ex rel.* Brown v. Baldi, 378 Pa. 504, 106 A.2d 777, 781 (1954) (dissenting opinion).

[23]*E.g.*, Ross v. Middlebrooks, 188 F.2d 308 (9th Cir. 1951), *cert. denied*, 342 U.S. 862 (1951); United States *ex rel.* Jackson v. Ruthazer, 181 F.2d 588 (2d Cir. 1950), *cert. denied*, 339 U.S. 980 (1950); United States *ex rel.* Proctor v. New York, 229 F. Supp. 696 (S.D.N.Y. 1964).

[24]Sweeney v. Woodall, 344 U.S. 86, 90 (1952) (concurring opinion); Johnson v. Matthews, 182 F.2d 677, 681 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 828 (1950); *see* Marbles v. Creecy, 215 U.S. 63 (1909).

[25]372 U.S. 391 (1963).

sentence. Because of these remarks Noia was afraid of receiving the death sentence upon retrial and did not exhaust the available state appellate remedies within the statutory time. Subsequently, he filed for habeas corpus relief on the ground that his conviction was based on a coerced confession. The Supreme Court held that the exhaustion of state remedies doctrine applied only to those remedies *still available* at the time petition was made for habeas corpus relief.[26] Since petitioner's remedies were no longer available, he could properly seek federal habeas corpus relief. The Court concluded that only where there has been a deliberate by-passing of state remedies should the federal court deny habeas corpus relief.[27]

In re Hunt relied upon a broad interpretation of Noia to justify its departure from *Sweeney* even though *Noia* was not an extradition case. No other extradition case even mentions *Noia*[28] and it may well be argued that the *Noia* exhaustion of state remedies rule is inapplicable to the extradition situation. Denial of habeas corpus relief in the non-extradition case leaves the petitioner without any state remedies. But denial of relief in the extradition context does no more than authorize the petitioner's return to the demanding state where he may pursue available state and federal remedies. Also, the Court in *Noia* clearly stated that it did not intend to disturb the exhaustion of remedies rule where there are *presently* available remedies.[29]

Notwithstanding this argument, *In re Hunt* applied *Noia* to the extradition situation, concluding that *Noia* went beyond the exhaustion rule and did more than just provide a remedy for the petitioner who had none other available at the time his petition for federal habeas corpus relief was filed. *Noia* was interpreted as giving federal courts a broad power to grant habeas corpus relief to any petitioner in any habeas corpus proceeding when it is found that the denial of such relief would work irreparable harm.[30]

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[26]372 U.S. at 399.

[27]372 U.S. at 438.

[28]The extradition cases since *Noia* have ignored *Noia* and have followed *Sweeney* or its reasoning. *E.g.*, United States *ex rel.* Vitiello v. Flood, 374 F.2d 554 (2d Cir. 1967); United States *ex rel.* Tucker v. Donovan, 321 F.2d 114 (2d Cir. 1963), *cert. denied*, 375 U.S. 977 (1964); Malory v. McGettrick, 318 F.2d 816 (6th Cir. 1963), *cert. denied*, 375 U.S. 935 (1963); United States *ex rel.* Proctor v. New York, 229 F. Supp. 696 (S.D.N.Y. 1964).

[29]372 U.S. at 435 n.3.

[30]The court in *Hunt* felt that *Noia* "was intended to strike down much of the prior law accommodating state criminal process to the doctrine of federalism...", and that it was no longer necessary to follow the *Sweeney* doctrine. 276 F. Supp. at 117.

Accordingly, under the *Hunt* interpretation of *Noia,* a federal court sitting in the asylum state can, for the first time, go beyond the traditionally limited scope of inquiry (*i.e.,* determining only whether the extradition request is in order) and inquire into the petitioner's allegations of future irreparable harm. *Hunt,* therefore, has adopted the frequently argued policy that rights of the individual should prevail over considerations of comity and federalism.[31]

Followers of the *Sweeney* doctrine might argue that a willingness to grant habeas corpus relief upon allegations of future irreparable harm in the demanding state will have the effect of placing judicial approval on acts of jail-breaking and bail-jumping.[32] They might also argue that demanding states will be put to the expense and inconvenience of sending representatives to any of the forty-nine other states to defend charges of alleged constitutional violations.[33] While there is some merit to these arguments, it should be noted that it was against just such considerations as these that *Noia* made a policy decision in favor of protecting the rights of the individual. Futhermore, it appears that these arguments are somewhat exaggerated. To begin with, the petitioner has an extremely difficult burden of proof in showing a denial of his rights and resulting future harm.[34] And, for relief to be granted, the future harm must be truly irreparable.[35] Consequently, there would be little encouragement to become a fugitive for purposes of seeking habeas corpus relief in an asylum state. Secondly, a state which does deny, irreparably, a petitioner's constitutional rights should not be heard to complain of any litigation expenses incurred as a result.

The only apparent danger of allowing broad inquiry in extradition habeas corpus is that the courts might grant relief on a showing of future harm which is less than irreparable. Such leniency could, as

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[31]*E.g.,* Sweeney v. Woodall, 344 U.S. 86, 90 (1952) (concurring opinion); Johnson v. Matthews, 182 F.2d 677, 681 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 828 (1950); *see* Marbles v. Creecy, 215 U.S. 63 (1909).

[32]Kyles v. Preston, 253 F. Supp. 628 (D.D.C. 1966).

[33]Johnson v. Matthews, 182 F.2d 677 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 828 (1950).

[34]Smith v. Idaho, 373 F.2d 149, 156 (9th Cir. 1967), *cert. denied,* 388 U.S. 919 (1967). In addition to the difficulty of proving some basis for his claim of *past* mistreatment which may have encouraged his escape (*i.e.,* his evidence of such mistreatment will normally be limited to his own personal scars, other escaped prisoner's testimony, or other evidence of equally dubious value), the prisoner must convince the court that his prediction of the future is accurate—"a hard burden even in the ordinary case." Note, *Extradition Habeas Corpus,* 74 YALE L.J. 78, 128 n. 207 (1964).

[35]It is clear in *Hunt* that future harm must be irreparable before relief can be granted. 276 F. Supp. at 117, 121.