

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

APR -9 2013

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

KEVIN LAWRENCE JONES,	)	2 CA-HC 2012-0010
	)	DEPARTMENT A
Petitioner/Appellant,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 28, Rules of Civil
THE STATE OF ARIZONA,	)	Appellate Procedure
	)	
Respondent/Appellee,	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. FW20120184001

Honorable Roger Duncan, Judge Pro Tempore

AFFIRMED

Barbara LaWall, Pima County Attorney  
By Jacob R. Lines

Tucson  
Attorneys for Respondent/Appellee

Isabel G. Garcia, Pima County Legal Defender  
By Joy Athena

Tucson  
Attorneys for Petitioner/Appellant

H O W A R D, Chief Judge.

¶1 In this appeal from the trial court's order denying appellant Kevin Jones's petition for writ of habeas corpus, Jones contends the state failed to comply with the requirements of A.R.S. § 13-3845(B) sufficiently to justify his extradition to the State of Florida because the Governor's Warrant did not include a "photo affidavit." We will not

disturb the trial court’s decision whether to issue a writ of habeas corpus absent an abuse of discretion. *State v. Cowles*, 207 Ariz. 8, ¶ 3, 82 P.3d 369, 370 (App. 2004).

¶2 Jones was arrested in Arizona on June 22, 2012, pursuant to a warrant that had been initiated in Florida. On September 5, 2012, the governor of this state issued a Governor’s Warrant on Extradition, stating Jones had been charged in Florida with “sexual activity with a child.” Seeking to avoid extradition, Jones made an oral motion for a writ of habeas corpus. The transcript of the proceeding at which that motion was made is not before us, but Jones concedes he did not raise an issue about the lack of a “photo affidavit” below and has therefore forfeited all but fundamental error review.<sup>1</sup> *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005).

¶3 Jones maintains the lack of a “photo affidavit” does, however, constitute fundamental error because the “affidavit would have insured that it was indeed [he] who is charged with a Florida offense and not merely a person with the same name or not merely the person in the photograph.” Without the affidavit, he contends, the warrant is insufficient to identify him “as the fugitive charged with the offense.” He maintains “[t]here is . . . nothing to substantiate th[e] vital connection between [himself] and the offense he is alleged to have committed.”

¶4 Section 13-3845(B) provides, in relevant part, that:

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<sup>1</sup>Jones cites no authority to suggest that fundamental error review is appropriate in a habeas corpus proceeding, *see Sims v. Ryan*, 181 Ariz. 330, 331, 890 P.2d 625, 626 (App. 1995) (habeas corpus is civil proceeding), but we assume without deciding that it applies here.

[A] warrant of extradition shall not be issued unless the documents presented by the executive authority making the demand include:

1. A photograph and photo affidavit identifying the accused as the fugitive charged with the offense; or
2. Fingerprints certified by the issuing authority that can be used to identify the accused as the fugitive charged with the offense.

The statute does not further define “photo affidavit,” nor does it enumerate what information that affidavit is to contain other than that it must “identify the accused as the fugitive charged with the offense.” *Id.*

¶5 In this case, the Governor’s Warrant included multiple documents received from the governor of Florida in support of Florida’s request for extradition. Christopher Ferebee, the prosecuting attorney who filed the “Application for Requisition” asking the governor of Florida to seek extradition from Arizona, included in his application certified copies of the “charging affidavit” related to the incident, the information filed against Jones, a copy of a photograph of Jones together with personal information about him from the St. Johns County Sheriff’s Office, and a fingerprint card. The prosecuting attorney also verified, *inter alia*, “that all facts set forth in the foregoing certificate[—the Application—]are true.”

¶6 But even assuming that this averment was insufficient in itself to support the photograph as identifying the person who had committed the offense, *see* § 13-3845(B)(1), Jones has failed to establish he was prejudiced by the lack of a separate “photo affidavit.” *See Henderson*, 210 Ariz. 561, ¶¶ 20, 22, 115 P.3d at 607, 608.

Contrary to his argument, we cannot say the lack of such an affidavit in this case left open the possibility that Jones was not the person who had been charged with the offense. The trial court clearly identified him as the person pictured in the photograph. And, a partial Social Security number included on the record with the photograph also matches the number listed on the police report and information. The date of birth listed with the photograph and on the other documents match as well.

¶7 In view of this evidence, we cannot say Jones was prejudiced by the lack of a separate “photo affidavit,” and the trial court therefore did not abuse its discretion in denying his petition for a writ of habeas corpus. *Cf. Applications of Oppenheimer*, 95 Ariz. 292, 298, 389 P.2d 696, 700 (1964) (concluding “the affidavit of . . . [the] deputy sheriff . . . accompanying the requisition papers, photographs of John G. Oppenheimer, the defendant in the California proceedings . . . together with the similarity of names, was sufficient to establish identity by the Governor of Arizona.”). Therefore, the court’s order denying Jones’s petition for writ of habeas corpus is affirmed.

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller  
MICHAEL MILLER, Judge