**Interstate Commission for Adult Offender Supervision**

# ADVISORY OPINION

**Opinion Number:** 2-2005
**Dated:** March 4, 2005
**Reviewed**: March 19, 2019

**Issued by:**
Don Blackburn, Executive Director
Richard L. Masters, Legal Counsel

**State Requesting:** Florida
**Description:** Arresting & Detaining Compact Probationers and Parolees.

## Background

Pursuant to Rule 6.101, the State of Florida requested an advisory opinion concerning the authority of its officers to arrest an out-of-state offender sent to Florida under the ICAOS on probation violations. Relying in part on a 1947 Florida Attorney General Opinion (Fla. Op. Atty. Gen. 047-371) and a legal memorandum entitled *Illegality of Florida Probation Officers' Arrest of Out-of-State Probationers or Parolees*, which we understand was prepared by a public defender, the question has arisen regarding the power of Florida officials to arrest and detain an offender whose supervision was transferred pursuant to the ICAOS. Both the 1947 Attorney General Opinion and the legal memorandum assert that because the Interstate Compact on Probation and Parole (the precursor to the ICAOS) and the ICAOS itself speak only to "supervision" of out-of-state offenders, and because Florida has no statute vesting its officers with arrest powers over such offenders, there is no authority for its officers to arrest and detain an out-of-state offender for violating the terms and conditions of their supervision. The legal memorandum in particular relies on several Commission rules noting the limited circumstances under which an offender is subject to retaking by the sending state and the process of retaking. The memorandum also relies generally on the U.S. Supreme Court's holding in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), which outlined limited due process requirements in probation revocation proceedings.

## Discussion

Initially, it is necessary to address the due process considerations raised by the reliance on *Gagnon v. Scarpelli, supra,* and to clarify its application to retaking (as distinguished from revocation) proceedings. The *Gagnon* decision has proved to be a source of confusion, which has led to an understanding of due process and implied rights, which may not be appropriate or necessary in this context. Although Rule 5.108 requires that the offender be afforded a probable cause hearing prior to retaking, the rule does not define the nature of that hearing. Several courts have, however, addressed the nature of the retaking hearing. For example, in *Ogden v. Klundt*, 550 P.2d 36, 39 (Wash. Ct. App. 1976), the court held that the scope of review in the receiving state in a retaking proceeding was limited to a determination of: (1) the scope of the authority of the demanding officers, and (2) the identity of the person to be retaken. Allegations of due process violations in the actual revocation of probation or parole are matters properly addressed during proceedings in the sending states after the offender's return. *See, People ex rel.* Crawford *v. State*, 329 N.Y.S.2d 739 (N.Y. 1972); *State ex rel. Nagy v. Alvis*, 90 N.E.2d 582 (Ohio 1950); *State ex rel. Reddin v. Meekma*, 306 N.W.2d 664 (Wis. 1981); *Bills v. Shulsen*, 700 P.2d 317 (Utah 1985).

While other courts have held that an offender subject to retaking may be entitled to a more robust due process hearing, those cases have generally dealt with circumstances where there is a great geographical difference between the sending and receiving states. In *California v. Crump*, 433 A.2d 791 (N.J. Super. Ct. App. Div. 1981), for example, the court held that before an offender could be returned to the sending state pursuant to the ICPP, the trial court was required – considering the distance between California and New Jersey – to conduct an on-site probable cause hearing and determine whether a *prima facie* case of violation was established. Relying on *Morrissey* and *Gagnon*, the court held that due process requires some minimal inquiry be conducted at or reasonably near the place of the alleged violation as promptly as possible while information is fresh and sources are available. The court noted that, "It may be that the evidence at the hearing will demonstrate that appellant at all times attempted to comply with the conditions of probation but was prevented from doing so by administrative confusion, as his attorney suggests. Or it may appear that appellant has been uncooperative and obdurate in performing his end of his bargain for his liberty. This may swiftly be determined and he will be fairly returned to the sending sovereign." *California v. Crump*, 433 A.2d at 794. *See also*, *Fisher v. Crist*, 594 P.2d 1140 (Mont. 1979); *State v. Maglio*, 459 A.2d 1209 (N.J. Super. Ct. 1979) (when a sentencing state is a great distance from a supervising state, an offender can request a hearing to determine if a *prima facie* case of probation violation has occurred; the hearing will save the defendant the inconvenience of returning to that state if there is absolutely no merit to a probation violation claim).

However, if the violation on which the claim was based occurred in a state other than the state in which the offender is held, the probable cause hearing may be substantially less than what is required in other contexts. In this latter situation, it is sufficient for officials conducting the probable cause hearing be satisfied on the face of any documents presented by the demanding state that an independent decision maker in that state has made a *preliminary* determination that there is probable cause to believe the offender committed a violation. *In re Hayes*, 468 N.E.2d 1083 (Mass. Ct. App. 1984). Such a determination is entitled to full faith and credit in the asylum state and can, therefore, form the basis of retaking by the sending state without additional hearings. *Id.* The offender is entitled to notice. The hearing may be non-adversarial. The offender, while entitled to a hearing, need not be physically present given the limited scope of the proceeding. *Id. Cf., Quinones v. Commonwealth*, 671 N.E.2d 1225 (Mass. 1996) (juveniles transferred under the interstate compact not entitled to a probable cause hearing in Massachusetts before being transferred to another state to answer pending delinquency proceedings when the demanding state had already found probable cause); *Doucette*, 676 N.E.2d 1169 (Mass. Ct. App. 1997) (once the governor of the asylum state has acted on a request for extradition based on a

demanding state's judicial determination that probable cause existed, no further judicial inquiry may be had on that issue in the asylum state; a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive).

In summary, these cases represent the proposition that, with a limited exception, an offender subject to retaking generally does not enjoy the same due process rights in the asylum state as those enjoyed in the sending state during the actual revocation proceedings. Therefore, to the extent that any party relies upon *Gagnon* or *Morrissey v. Brewer*, 408 U.S. 471 (1972) for the proposition that offenders subject to retaking enjoy the same due process rights as offenders subject to revocation, such a reliance is misplaced. To be clear, an offender subject to retaking is entitled to due process both under the Rule 5.108 and court precedence. However, the level of due process to which the offender is entitled may be less in the retaking context than in the actual revocation process. Offenders subject to revocation have a right to not to have their probation or parole arbitrarily revoked. Offenders subject to retaking enjoy Compact transfers purely as an exercise of discretion by the sending state; that is, there is minimal liberty interest involved because there is no "right" to transfer that creates a recognized liberty interest and there is no immediate danger of the offender's liberty interests will be irrevocably affected.

This discussion is important when considering the question: Do officers in a receiving state have the authority to arrest and detain an out-of-state probationer for probation violations that occur in that state? To answer this question, it is necessary to examine the nature of the relationship between the authorities in the sending state and receiving state and the three general circumstances under which an arrest can be made.

Courts define the relationship between sending state and receiving state officials as an agency relationship. Courts generally recognize that in supervising out-of-state offenders the receiving state is acting on behalf of and as an agent of the sending state. In *State v. Hill*, 334 N.W.2d 746 (Iowa 1983), the Iowa Supreme Court reversed a trial court decision admitting an out-of-state offender to bail. The Court found that the offender's status was not determined by Iowa's domestic law, but rather the Interstate Compact for Probation and Parole and the sending state's authorities. The Court further found that, "For purposes of determining appellee's status in the present case, we believe that the Iowa authorities should be considered as agents of the sending state." Other courts have similarly held. *See e.g.*, *State ex rel. Ohio Adult Parole Authority v. Coniglio*, 610 N.E.2d 1196, 1198 (Ohio Ct. App. 1993) ("For purposes of determining appellee's status in the present case, we believe that the Ohio authorities should be considered as agents of

Pennsylvania, the sending state. As such, the Ohio authorities are bound by the decision of Pennsylvania with respect to whether the apprehended probationer should be considered for release on bond and the courts of Ohio should recognize that fact."). Therefore, in supervising out-of-state offenders, officials in the receiving state do not act exclusively as authorities of that state and its domestic law, but also act as agents of the sending state and are, therefore limited to a certain extent by the decisions of sending state officials.

Arrests of out-of-state offenders generally occur under one of three broad categories. First, an out-of-state offender is clearly subject to arrest and detention for committing a new offense in the receiving state. Rules 5.101[1] and 5.102 recognize that an offender may be held in a receiving state for the commission of crime and *is not* subject to retaking unless the receiving state consents, the term of incarceration on the new crime has been completed, or the offender has been placed on probation. The authority to incarcerate an offender principally implies that the offender is subject to arrest for committing an offense.

Second, an out-of-state offender is subject to arrest and detention upon demand of the sending state based on its intention to retake the offender. This can occur based on a demand by the receiving state or because the sending state intends to revoke probation or parole. Under this circumstance, the sending state may issue a warrant for the offender and request that the receiving state arrest and detain the offender pending retaking. Courts have routinely recognized the right of a receiving state to arrest and detain an offender based on such a demand from a sending state. *See e.g., State ex rel. Ohio Adult Parole Authority v. Coniglio*, 610 N.E.2d 1196 (Ohio Ct. App. 1993) (offender cannot be admitted to bail pending retaking); *Crady v. Cranfill*, 371 S.W.2d 640 (Ky. Ct. App. 1963) (detention of offenders proper as only courts in the sending state can determine the status of their jurisdiction over the offender); *Stone v. Robinson*, 69 So. 2d 206 (Miss. 1954). The ICAOS recognizes the right of a sending state to retake an offender at any time. *See*, INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, ART. I, PURPOSE. The sending state's demand to retake an offender implies the power of receiving state officials to arrest and detain the offender pending the completion of retaking proceedings. Rule 5.111 recognizes this implied power by prohibiting receiving state officials from allowing bail or other release conditions to an offender.

The third circumstance under which officials in a receiving state may effectuate the arrest of an out-of-state offender is for probation violations that occurred in the receiving state. This third

[1] On August 28, 2013, the Commission adopted Rule 5.101-1, which now applies to pending felony or violent crime charges.

circumstance creates misunderstandings because the offender may or may not be charged with committing a new offense in the receiving state and the sending state may not have initiated retaking proceedings. Nevertheless, courts have recognized that out-of-state offenders are subject to arrest for probation violations that occur in the receiving state. For example, in *Kaczmarek v. Longsworth*, 1997 U.S. App. LEXIS 3406 (6th Cir. 1997), the Court of Appeals held that an out-of-state probationer was entitled to be released from detention for a probation violation under the standards set by Ohio *for its own probationers and parolees*. (Emphasis added). In that case, a Michigan probationer residing in Ohio was investigated for inappropriate conduct towards a minor. Ohio officials arrested the offender for violating his probation, conducted a probable cause hearing and found probable cause for repeated conduct constituting serious supervision violations. The probationer argued that his due process rights were violated and that it was cruel and unusual punishment for Ohio officials to incarcerate him after being informed by a Michigan probation officer that Michigan had not authorized a hold or detainer and was not currently seeking the probationer's extradition. In upholding the dismissal of the offender's § 1983 action, the court held:

> The Interstate Compact expressly provides that "each receiving state [Ohio, in this instance] will assume the duties of visitation of and supervision over probationers or parolees of any sending state [*i.e.* Michigan] *and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.*" (Citation omitted). There has been no showing that Mr. Kaczmarek was entitled to be released on April 1, 1994, under the standards set by Ohio for its own probationers and parolees.

Although the *Kaczmarek* decision occurred within the context of the Interstate Compact on Probation and Parole, the decision does purport that at least one federal court of appeals considers it permissible to arrest and detain an out-of-state probationer. The ICAOS rules require the receiving state to supervise out-of-state offenders under the same standards as it would supervise in-state offenders. *See*, Rule 4.101. Following the *Kaczmarek* reasoning, if an in-state offender is subject to arrest by a probation officer, an out-of-state offender would also be subject to arrest.

Additionally, there are public policy reasons under the ICAOS that support the power to arrest an out-of-state offender for violating the terms and conditions of supervision. The purpose of the ICAOS is not solely to regulate the *movement* of adult offenders across state lines. Rather, regulating the movement of adult offenders fulfills the critical purposes of promoting public safety and protecting the rights of crime victims. *See*, INTERSTATE COMPACT FOR ADULT

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OFFENDER SUPERVISION, ART. I. All activities of the Interstate Commission and the member states are directed at promoting these two overriding purposes. All member states, their courts and agencies, are required to take all necessary action to "effectuate the Compact's purposes and intent." *See*, INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, ART. IX, § A. It does not fulfill the purpose and intent of the ICAOS for a state to maintain that it has the power to arrest its own offenders for probation violations, but is powerless to arrest an out- of- state offender for similar violations, regardless of whether the latter threatens the safety of the community or disregards the direct purposes of probation supervision.

In seeking to have supervision transferred to another state, the offender accepts that a sending state can retake, that no formal extradition proceeds are required, and that he or she is subject to the same type of supervision as other offenders in the receiving state. *See,* INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION, ART. I. *See also*, Rules 3.109 & 4.101. The receiving state can even add additional requirements on an offender as a condition of transfer. *See*, Rule 4.103. In short, a probationer or parolee is subject to whatever reasonable conditions the sentencing court or corrections authority deems necessary to promote both community safety and offender rehabilitation. The offender accepts probation or parole on a conditional basis – fulfilling the requirements imposed upon him or her. Failure to comply with these requirements, whether in the sending state, receiving state, or third party asylum state, requires state officials to take all reasonable and necessary measures to ensure compliance or to return the offender to the same status held before probation or parole. If a receiving state fails to arrest and detain an out-of-state offender for probation violations that if committed by an in-state offender would warrant arrest, it does not promote community safety or comply with terms and conditions the offender agreed to when they accepted release and requested transfer.

Two final points should be noted. First, it is possible that certain officers in a receiving state charged with supervising offenders do not have the power to arrest. Such officers may, however, have the power to effectuate an arrest through an appropriate law enforcement agency. Therefore, even in the absence of the power to physically arrest an offender, officers may effectuate an arrest in cooperation with the appropriate local or state law enforcement officials. Second, officials in a receiving state should not confuse the power to arrest with the right of indefinite detention. When an out-of-state offender is arrested and detained for a probation violation, minimal due process considerations require that the offender's status be resolved reasonably quickly. Officials in the sending state should be notified and the offender given a preliminary hearing to determine whether the arrest is justified and whether the offender should be held pending retaking by the sending state. Officials conducting such a hearing can release the offender should the arrest prove unwarranted or the sending state deem the violations

insubstantial to justify retaking. Absent providing the offender with quick access to such a hearing, authorities in a receiving state could arbitrarily detain out-of-state offenders with little regards to the offender's liberty interests or the consequences of their actions. Such an arrest and detention policy would clearly be unconstitutional even under the most minimal standards of due process.

**Conclusion**

In supervising out-of-state offenders, authorities in a receiving state possess a dual status. First, they act to supervise such an offender under the same standards as any in-state offender. Second, they act as agents for the sending state to supervise and effectuate the purposes of the offender's supervision. Courts have unequivocally recognized that out-of-state offenders can be arrested and detained for (1) committing new crimes in the receiving state and (2) upon request of the sending state pending retaking. Additionally, out-of-state offenders may be arrested and detained for failing to comply with the terms and conditions of their supervision if such a failure would have resulted in an arrest of a similarly situated in-state offender. As noted above, these arrests can be effectuated by the supervising officer or, in absence of their arrest powers, in cooperation with local and/or state law enforcement.