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State Requesting Opinion: Texas	Dated: July 7, 2008	
Description: Authority to Issue Travel Permits		

Background

The State of Texas has requested an advisory opinion pursuant to Rule 6.101 concerning the authority of its judges and probation or parole officers to permit certain offenders to travel outside of Texas who, by reason of the type of crime committed or the duration of the travel, are not eligible for transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision (“ICAOS”) or ICAOS administrative rules. Further, Texas asks whether its offenders whose offenses otherwise qualify for transfer of supervision under the provisions of ICAOS rules may be permitted to travel out of state for a period of forty-five (45) days or less?

In its request for an opinion Texas provides the following context in which this question arises:

1. Texas judges and probation officers are hesitant to allow misdemeanor offenders who apparently do not fall under the Interstate Compact misdemeanor rule, Rule 2.105, to leave the State of Texas after these offenders are placed under supervision. Because Rule 2.105 has been interpreted to make only those offenders who have committed four specified types of misdemeanor offenses eligible for transfer under the Interstate Compact; and because Rule 2.110 (b) states that “[a]n offender who is not eligible for transfer under this Compact is not subject to these rules and remains subject to the laws and regulations of the state responsible for the offender’s supervision,” a large class of misdemeanor offenders is created whose departure from Texas is the subject of this request as to whether it is lawfully authorized under this interpretation of the Rules.

Texas points out that if these offenders are not otherwise permitted to travel such a result appears to contradict the intent of the rule because these misdemeanor offenders were excluded from eligibility for transfer under the misdemeanor rule for the reason that their offenses were considered to be less of a threat to public safety than the four categories of offense that are enumerated in Rule 2.105.

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If offenders who are not subject to the provisions of the ICAOS rules are not permitted to travel under any circumstances, the result can be that “less serious” offenders, e.g., first-time D.W.I.s or bad-check writers, being placed in the anomalous position of being subjected to a more restrictive limitation of being unable to return to their home states or relocate during the term of their supervision than those offenders who have committed offenses more frequently or severely, e.g., second- or third-time D.W.I.s or domestic abusers.

If the ICAOS rules are construed to prohibit such offenders from travel outside Texas judges must choose between keeping the offenders in Texas for the length of their supervision or assessing a fine rather than placing the offenders under supervision, although the judge may feel supervision is warranted and is in the best interests of justice; or letting the excluded misdemeanants go to another state and risking potential personal liability for criminal acts of such offenders.

2. Similarly, Texas judges and probation officers are reluctant to issue travel permits to offenders who are not relocating but simply leaving the state of Texas for routine business travel, vacations, visits to family, medical appointments, and other such out-of-state travel normally undertaken in the activities of everyday life. Texas judges and probation officers clearly understand their obligation under the Compact to begin transfer proceedings on offenders who plan to leave Texas for more than 45 days. But neither the Compact nor its rules addresses out-of-state travel of offenders for 45 days or less except for those in victim-sensitive cases. There has been an increasing concern by judges and probation officers who issue such travel permits as to whether such travel is prohibited under the provisions of the Interstate Compact or its rules.

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Applicable Regulations

The regulations which are implicated in Texas' request include the following:

Rule 1.101 "Offender" means an adult placed under, or made subject to, supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies, and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision.

Rule 1.101 "Relocate" means to remain in another state for more than 45 consecutive days in any 12 month period.

Rule 1.101 "Supervision" means the authority or oversight exercised by supervising authorities of a sending or receiving state over an offender for a period of time determined by a court or releasing authority, during which the offender is required to report to or be monitored by supervising authorities, and includes any condition, qualification, special condition or requirement imposed on the offender at the time of the offender's release to the community or during the period of supervision in the community.

Rule 2.105 Misdemeanants

- (a) A misdemeanor offender whose sentence includes one year or more of supervision shall be eligible for transfer, provided that all other criteria for transfer, as specified in Rule 3.101, have been satisfied; and the instant offense includes one or more of the following –
- (1) an offense in which a person has incurred direct or threatened physical or psychological harm;
 - (2) an offense that involves the use or possession of a firearm;
 - (3) a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol;
 - (4) a sexual offense that requires the offender to register as a sex offender in the sending state.

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Rule 2.110 (b) “An offender who is not eligible for transfer under this Compact is not subject to these rules and remains subject to the laws and regulations of the state responsible for the offender’s supervision.”

Rule 3.101 Mandatory transfer of supervision

At the discretion of the sending state, an offender shall be eligible for transfer of supervision to a receiving state under the compact, and the receiving state shall accept transfer, if the offender:

- (a) has more than 90 days or an indefinite period of supervision remaining at the time the sending state transmits the transfer request; and
- (b) has a valid plan of supervision; and
- (c) is in substantial compliance with the terms of supervision in the sending state; and
- (d) is a resident of the receiving state; or
- (e)
 - (1) has resident family in the receiving state who have indicated a willingness and ability to assist as specified in the plan of supervision; and
 - (2) can obtain employment in the receiving state or has means of support.

Analysis and Conclusions

Question 1: Whether a Texas offender who has committed an offense not covered by the terms of ICAOS or its rules and who is not subject to the provisions of ICAOS may otherwise be permitted to travel to another state?

Based upon the provisions of the ICAOS rules, offenders not subject to ICAOS may, depending on the terms and conditions of their sentences, be free to move across state lines without prior approval from the receiving state and neither judges nor probation

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officers are prohibited by ICAOS from allowing such offenders to travel from Texas to another state.

It is not the intent of the ICAOS to dictate judicial sentencing or place restrictions on judicial discretion relative to sentencing. As evidenced by the above referenced ICAOS rules there are no provisions telling judges what sentences to impose in particular cases. Neither does the ICAOS alter individual state sentencing laws although there may be an impact on how those laws affect transfer decisions once the provisions of the ICAOS are determined to apply. See, e.g., Ad. Op. 6-2005 (deferred sentences); also Ad. Op. 7-2006 (second offense DUI).

Equally important is the clear expression of intent under the ICAOS rules that the provisions of the ICAOS are only activated when the Court determines that transfer of supervision of an offender to another state is warranted under the facts and circumstances of the particular case and the offense for which the offender has been convicted or to which a guilty plea has been accepted is an offense which is covered by the provisions of the ICAOS rules and the offender is eligible for transfer under the provisions of Rule 3.101. It should also be pointed out that as a general proposition, even if the offender's supervision is eligible to be transferred under the provisions of the ICAOS rules, there is no constitutionally guaranteed right of a convicted person to interstate travel or being supervised in another state. See *Williams v. Wisconsin*, 336 F.3d 576 (7th Cir. 2003); *Jones v. Helms*, 452 U.S. 412, 419-20 (1981); *O'Neal v. Coleman*, 2006 U.S. Dist. Ct. LEXIS 40702 (W.D. Wis., June 16, 2006) (offender has no 'right' to have supervision transferred pursuant to ICAOS).

To initially qualify for transfer of supervision under the ICAOS, the offender must (1) be subject to some form of community supervision, including supervision by courts, paroling authorities, probation authorities, treatment authorities, or any person or agency acting in such capacity or under contract to provide supervision services [See ICAOS Rule 1.101 'supervision,' and 'offender'], and (2) have committed a covered offense as defined by ICAOS rules [See ICAOS Rules 2.105 and 3.101 (a)].

As previously noted, even if the ICAOS is 'triggered' the decision to transfer supervision of an offender is purely within the discretion of authorities in the sending state. Rule

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3.101 neither creates nor grants to an offender a constitutionally protected right to travel. State judges have inherent discretionary authority to determine whether an offender whom they have sentenced should be permitted to travel outside the state where sentence is imposed. Once such discretion is exercised to allow such travel the provisions of ICAOS regulate the process by which covered offenders may relocate. However, an offender who is not subject to the ICAOS while not eligible to have supervision transferred to another state, absent a term or condition of the applicable sentencing order, is also not restricted from traveling across state lines. See *Sanchez v. N.J. State Parole Board*, 845 A.2d 687, 692 (N.J. Super. Ct. App. Div. 2004) ('New York cannot have it both ways. If CSL defendants do not fall within the purview of ICAOS, then New Jersey has no obligation to prevent them from moving to New York.').¹

Question 2: Whether Texas offenders whose offenses otherwise qualify for transfer of supervision under the provisions of ICAOS rules may be permitted to travel out of state for a period of forty-five (45) days or less?

The provisions of Rule 2.110 (a) limit the applicability of the ICAOS rules regarding transfer of supervision to eligible offenders who 'relocate' to another state. The term 'relocate' is defined by ICAOS Rule 1.101 as remaining in another state 'for more than 45 consecutive days in any 12 month period.' Based on this definition an offender who is not relocating but simply leaving the state of Texas (for a period not exceeding 45 consecutive days) for routine business travel, vacations, visits to family, medical appointments, and other such out-of-state travel normally undertaken in the activities of everyday life is not subject to the ICAOS rules concerning a transfer of supervision even if they are otherwise eligible to transfer supervision under the Compact.

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This decision is cited for the proposition that if an offender is not subject to the provisions of the Compact or rules at the time the travel occurs, based on the nature of the offense and the terms and conditions of the sentence imposed, such travel may be permitted. Subsequent to this decision it was determined that CSL offenders are subject to ICAOS. See Ad. Op. 9-2004

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This interpretation is further supported by examining the legislative history of the definition of the term “relocate” as adopted by the Commission in 2005. In its’ recorded deliberations the Commission debated the time period beyond which an offender’s presence in another state requires an application for transfer to that state. Thirty, forty-five and sixty days were debated, and the Commission decided that an offender’s absence from the state of supervision for a total of 45 days or more in a 12-month period triggered the application for transfer requirement. Any absence for less than 45 days was travel of the sort described above and was implicitly sanctioned by the Commission as being within the existing discretion of the states to decide whether to allow such travel. Thus, the issue of such travel permits was considered within the context of the definition of “relocate” , and the Commission has not chosen to take further action to regulate this type of travel with the exception of notification requirements in victim sensitive cases as provided in ICAOS Rules 3.108 (b)(1)(E) and 3.108-1.

Caution should be exercised in situations where the offender is eligible for transfer of supervision under ICAOS, intends to relocate, and has applied for a transfer of supervision to another state because the issuance of a travel permit for such an offender, in the absence of expedited reporting instructions under Rule 3.106, is sufficient grounds for rejection of the application for transfer of supervision under ICAOS Rule 2.110 until such an offender has returned to the sending state.

Summary

In summary, with regard to question 1, offenders not subject to ICAOS may, depending on the terms and conditions of their sentences, be permitted to move across state lines without prior approval from the receiving state and neither judges nor probation officers are prohibited by ICAOS from allowing such offenders to travel from Texas to another state.

With respect to question 2, an offender who is not relocating but simply leaving the State of Texas (for a period not exceeding 45 consecutive days) for routine business travel, vacations, visits to family, medical appointments, and other such out-of-state travel normally undertaken in the activities of everyday life is not subject to the ICAOS rules concerning a transfer of supervision, other than notification

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requirements in victim sensitive cases, even if otherwise eligible to transfer supervision under the Compact. Therefore such an offender may be permitted to travel and both courts and probation and parole officers are authorized to issue travel permits to such offenders.