

WHITE PAPER

DISCHARGE OF SENTENCES IN LIEU OF RETAKING IS A VIOLATION OF THE COMPACT AND THE ICAOS RULES

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The ICAOS Executive Committee has requested this 'white paper' resulting from several recent cases in which courts, prosecuting attorneys, and probation and parole officers have apparently lacked awareness or ignored the requirements of ICAOS and its rules in cases where retaking of a compact offender was mandated but instead the balance of the offender's sentence was discharged. The following legal analysis has been prepared in order to serve as a resource to document both the requirements of the retaking rules and the obligations of the compact states to do so because of the legal authority and binding nature of the compact and compact rules on the member states. This document was also prepared to emphasize that discharging a sentence of a compact offender instead of retaking and returning the offender to the sending state is a violation of ICAOS rules and as a reminder of the legal consequences of non-compliance and sanctions which the Commission is authorized to impose on an offending state under the terms of the compact for violation of **any** of the ICAOS rules, including those pertaining to retaking.

The Interstate Compact for Adult Offender Supervision (ICAOS) is a formal agreement between member states that seeks to promote public safety by systematically controlling the interstate movement of certain adult offenders. The Interstate Commission for Adult Offender Supervision (Commission) is charged with overseeing the day-to-day operations of the ICAOS and through its rule making powers, seeks to achieve the goals of the ICAOS.

The Commission is also empowered to monitor compliance with the interstate compact and its duly promulgated rules, and where warranted to initiate interventions to address and correct noncompliance.

In several recent cases while compact offenders were awaiting retaking in the receiving state, the sending state terminated supervision and discharged the offender from probation in lieu of retaking. In one such case a receiving state submitted a violation report and case closure for an offender under ICAOS supervision from a sending state who failed to complete jail time, failed to provide urinalysis, failed to attend group drug treatment sessions, made an unauthorized change of residence, and failed to perform community service. In response to these actions the sending state accepted the ICOTS notice of violation and file closure from the receiving state informing the receiving state that a motion to revoke was being prepared and that a warrant would be issued. The offender was subsequently taken into custody in the receiving state on a nationwide, no bail warrant issued by the sending state. However, instead of retaking the offender, the sending state notified the receiving state that it was terminating supervision of the offender and quashing the warrant.

ICAOS Rule 5.103-1(a) requires that, *"Upon receipt of an absconder violation report and case closure, the sending state shall issue a warrant and, upon apprehension of the offender, file a detainer with the holding facility where the offender is in custody."* Under subsections (b) and (c) provision is made for a probable cause hearing, if requested by the sending state, and upon such finding, *"the sending state shall retake the offender from the receiving state."*

Despite the above rule, during the period in which the offender was awaiting retaking in the receiving state, the sending state terminated supervision and discharged the offender from probation

in lieu of retaking. While the sending state acknowledged the course of events it asserted that this did not constitute ‘dumping’ or ‘abandoning’ the offender in the receiving state because the offender had completed three-quarters of her probation (18 months of a 24 month sentence); and that even if the offender had been retaken and returned to the sending state as required by the above rule, that the sentencing Court would still have terminated her probation as having been performed “unsatisfactorily” and the offender would have been discharged and still free to return to the receiving state where she resides and has family connections including a mother and two children. Notwithstanding this defense, retaking was not optional in this case and the failure to do so was in violation of ICAOS Rules and the Compact.

While judicial immunity applies to actions taken by courts and those court staff for liability which may arise in the performance of duties which are integral to the judicial function and qualified immunity provides some protection from civil liability for prosecutors and other state officials monitoring the compact; neither judges, prosecutors nor other state officials can immunize a state from liability which results from their actions arising under the terms of an interstate compact to which the state has bound itself by legislative enactment of the compact. See *Alabama v. North Carolina*, 560 U.S. 330 (2010), also *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

By entering into this compact, the member states contractually agree on certain principles and rules and all state officials and courts are required to effectuate the terms of the compact and ensure compliance with the rules. Once entered, the terms of the compact as well as any rules and regulations authorized by the compact supersede substantive state laws that may be in conflict. See *West Virginia ex rel. Dyer*, *supra* at 29. This applies to prior law (See *Hinderlider*, *infra*, 304 U.S. at 106) and subsequent statutes of the signatory states. See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92 (1823). It is well settled that as a congressionally approved interstate compact the provisions of the ICAOS and its duly authorized rules enjoy the status of federal law. See *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); *Carchman v. Nash*, 473 U.S. 716, 719 (1985) (“The agreement is a congressionally sanctioned interstate compact within the Compact Clause and thus is a federal law subject to federal constructions.” (Citation omitted)); see also *Alabama v. Bozeman*, 533 U.S. 146 (2001) and *Reed v. Farley*, 512 U.S. 339 (1994); *M.F. v. State of N.Y. Exec. Dept. Div. of Parole*, 640 F.3d 491, 494 (2nd Cir. 2011); and *Doe v. Pennsylvania Board of Probation & Parole*, 513 F.3d 95, 103 (3rd Cir. 2008).

All of the duly promulgated rules, including those pertaining to retaking, are equally binding upon the parties to the compact. One of the axioms of modern government is the ability of a state legislature to delegate to an administrative body the power to make rules and decide particular cases. This delegation of authority extends to the creation of interstate commissions through the vehicle of an interstate compact. *Alabama v. North Carolina*, 560 U.S. 330 (2010); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 30 (1951). It has been held that the states may validly agree by interstate compact with other states to delegate to interstate commissions or agencies legislative and administrative powers and duties. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); *Scott v. Virginia*, 676 S.E.2d 343, 346 (Va. App. 2009); *Dutton v. Tawes*, 171 A.2d 688 (Md. 1961); *Application of Waterfront Commission of New York Harbor*, 120 A.2d 504, 509 (N.J. Super. 1956). Thus, rules of the compact have been legally authorized and approved by the Commission and no state that is a party to the contractually binding provisions of the compact is permitted to unilaterally modify any of these requirements.

In *Dyer*, the Court also made clear that an interstate compact cannot be “... given final meaning by an organ of one of the contracting states.” Member states may not take unilateral actions, such as the adoption of conflicting legislation or the issuance of executive orders or court rules that violate the terms of a compact. See *Northeast Bancorp v. Bd. of Governors of Fed. Reserve System*, 472 U.S. 159, 175 (1985). See *Wash. Metro. Area Transit Auth. v. Once Parcel of Land*, 706 F.2d 1312, 1318 (4th Cir. 1983); *Kansas City Area Transp. Auth. v. Missouri*, 640 F.2d 173, 174 (8th Cir. 1981). See also *McComb v. Wambaugh*, 934 F. 2d 474, 479 (3rd Cir. 1991); *Seattle Master Builders Ass’n v. Pacific Northwest Electric Power & Conservation Planning Council*, 786 F.2d 1359, 1371 (9th Cir.

1986); *Rao v. Port Authority of New York*, 122 F. Supp. 595 (S.D.N.Y. 1954), *aff'd* 222 F.2d 362 (2nd Cir. 1955); *Hellmuth & Associates, Inc. v. Washington Metropolitan Area Transit Authority*, 414 F. Supp. 408, (Md. 1976).

The legal standing of compacts as contracts and instruments of national law applicable to the member states annuls any state action in conflict with the compact's terms and conditions. Therefore, once adopted, the only means available to change the substance of a compact (and the obligations it imposes on a member state) are through withdrawal and renegotiation of its terms, or through an amendment to the compact (or in this case, the administrative rules) adopted by all member states in essentially the same form.

The contractual nature of the compact controls over any unilateral action by a state; no state being allowed to adopt any laws "impairing the obligation of contracts," including a contract adopted by state legislatures pursuant to the Compact Clause. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall pass any bill of attainder, ex post facto law or law impairing the obligation of contracts ..."); *see also West Virginia ex rel. Dyer, supra* at 33; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 101 Colo. 73 (1937), *rev'd* 304 U.S. 92 (1938).

In interpreting and enforcing compacts the courts are constrained to effectuate the terms of the agreement (as binding contracts) so long as those terms do not conflict with constitutional principles. Once a compact between states has been approved, it is binding on the states and its citizens. *See, New Jersey v. New York*, 523 U.S. 767 (1998). Thus, "Unless the compact . . . is somehow unconstitutional, no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite." *New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, 260 (D. Mass. 1998), *aff'd*, 198 F.3d 1 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). For example, in *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) the Supreme Court sustained exceptions to a special master's recommendation to enlarge the Pecos River Compact Commission, ruling that one consequence of a compact becoming "a law of the United States" is that "no court may order relief inconsistent with its express terms." However, congressional consent may change the venue in which compact disputes are ultimately litigated.

Because congressional consent places the interpretation of an interstate compact in the federal courts, those same courts have the authority to enforce the terms and conditions of the compact. No court can order relief inconsistent with the purpose of the compact. *See, New York State Dairy Foods v. Northeast Dairy Compact Comm'n*, 26 F. Supp. 2d 249, *affirmed*, 198 F.3d 1, 1999 (1st Cir. Mass. 1999), *cert. denied* 529 U.S. 1098 (2000). However, where the compact does not articulate the terms of enforceability, courts have wide latitude to fashion remedies that are consistent with the purpose of the compact. The U.S. Supreme Court addressed this matter observing, "That there may be difficulties in enforcing judgments against States counsels caution, but does not undermine our authority to enter judgments against defendant States in cases over which the Court has undoubted jurisdiction, authority that is attested to by the fact that almost invariably the 'States against which judgments were rendered, conformably to their duty under the Constitution, voluntarily respected and gave effect to the same.'" *See, Texas v. New Mexico*, 482 U.S. 124,130, 131 (1987). "By ratifying the Constitution, the States gave this Court complete judicial power to adjudicate disputes among them . . . and this power includes the capacity to provide one State a remedy for the breach of another." *Id.* at 128.

Remedies for breach of the compact can include granting injunctive relief or awarding damages. *See e.g., South Dakota v. North Carolina*, 192 U.S. 286, 320-21 (1904); *Texas v. New Mexico*, 482 U.S. at 130 ("The Court has recognized the propriety of money judgments against a State in an original action, and specifically in a case involving a compact. In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."). The Eleventh Amendment provides no protection to states in suits brought by other states. *Kansas v. Colorado*, 533 U.S. 1, 7 (2001) (in proper original actions, the Eleventh Amendment is no barrier, for

by its terms, it applies only to suits by citizens against a state).

In its most recent pronouncement on the subject the U.S. Supreme Court unequivocally held that obligations imposed by a duly authorized interstate commission are enforceable on the states. Moreover, such commissions may be empowered to determine when a state has breached its obligations and may, if so authorized by the compact, impose sanctions on a non-complying state. See *Alabama v. North Carolina*, 560 U.S. 330 (2010).

In addition the Court made clear that an interstate compact commission composed of the member states may be a party to a compact lawsuit under the original jurisdiction of the U.S. Supreme Court if such claims are wholly derivative of the claims that could be asserted by the party states. *Id.* Moreover the Court held that when construing the provisions of a compact, in giving full effect to the intent of the parties, it may consult sources that might differ from those normally reviewed when an ordinary federal statute is at issue, including traditional canons of construction and the Restatement (Second) of Contracts. *Alabama v. North Carolina*, *supra*.

In light of the above authority, and the fact that the explicit language of the compact requires that **“the courts and executive agencies in each compacting state shall enforce this compact and shall take all actions necessary and appropriate to effectuate the compact’s purposes and intent”** makes it incumbent upon judges and other state officials to understand the requirements of the ICAOS and its rules as well as the consequences of non-compliance. Under Article I of the Compact, among the purposes of the Commission is to **“monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct noncompliance.”** Article V of the Compact provides that among the powers and duties of the Commission is **“to enforce compliance with the compact provisions, interstate commission rules and bylaws, using all necessary and proper means, including but not limited to, the use of judicial process.”** Article XIV (B.) provides that **“all lawful actions of the Interstate Commission, including all rules and bylaws promulgated by the interstate commission are binding upon the compacting states.”**

Moreover Article V also provides that the interstate commission has the power and duty “to establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions . . .” and “to perform such functions as may be necessary or appropriate to achieve the purposes of this compact.” Under Articles IX and XII the Compact authorizes the interstate commission, in the reasonable exercise of its’ discretion, to enforce the compact either through various means set out in Article XII, Section B which include required remedial training and technical assistance, imposition of fines, fees and costs, suspension or termination from the compact, and judicial enforcement in U.S. District Court against any compacting state in default of the compact or compact rules with the prevailing party being entitled to recover all costs of such litigation including reasonable attorney’s fees.

Under the above compact provision and pursuant to the delegated statutory authority of the compact, the Commission has also promulgated Rule 6.103 (a) under which the Interstate Commission is empowered with the authority and charged with the duty to determine whether “ . . . any state has at any time defaulted (“defaulting state”) in the performance of any of its obligations or responsibilities under this Compact, the by-laws or any duly promulgated rules . . .” and in the event such a determination is made **the Commission is empowered to “impose any or all” of the penalties set forth in that rule and for which authority is expressly provided in the above referenced provisions of the compact.**

The compact’s governing structure anticipates that enforcement of the compact through judicial process will be used only in those cases where training and technical assistance, alternative dispute resolution or fines fees and costs have been unsuccessful. However, where necessary the provisions for enforcement through federal court action to secure injunctive and other appropriate relief is a

powerful tool to secure compliance with the provisions of the compact and compact rules. Before the ICAOS statute was enacted by the states to replace the old Interstate Compact for Probationers and Parolees, the enforcement of the compact was generally left to either the goodwill of the member states or through an ill-defined and cumbersome process before the U.S. Supreme Court. Goodwill can only go so far, and the provisions of ICAOS clearly articulate a system of enforcement in which compliance with the compact can be obtained through an escalating series of alternatives culminating in federal litigation that can provide injunctive and monetary relief and recovery of attorney's fees and costs.

The judicial enforcement provisions of the compact have been utilized three (3) times since the enactment of ICAOS and activation of the Commission in 2002. Two of these cases were settled and in the remaining case, the U.S. District Court awarded attorneys' fees and costs after submission to the Court for a final decision resulting in the entry of a permanent injunction. See *ICAOS v. Tennessee Bd. of Probation and Parole*, No. 04-526 (E.D. Ky. 2005).

Citing several of the U.S. Supreme Court decisions referenced in this paper, the Court determined that jurisdiction was conferred to decide the **case "because the Compact, as a congressionally sanctioned interstate compact is federal as well as state law.** See *M.F. v. State of New York Executive Dept. Div. of Parole*, 640 F.3d 491, 75 A.L.R.6th 691 (2d Cir. 2011); *Doe v. Pennsylvania Bd. of Probation and Parole*, 513 F. 3d 95, 103 (3d Cir. 2008); *Doe v. Ward*, 124 F. Supp. 2d 900, 911-12 (W.D. PA, 2000); *Cuylar v. Adams*, 449 U.S. 433, 440 (1981)" and further held that, **"The administrative rules adopted by the Commission function as a law of the United States applicable to the member states under the terms of the Compact and through the operation of the Supremacy Clause.** *Carchman v. Nash*, 473 U.S. 716, 719 (1985). **Thus obligations imposed by a congressionally sanctioned compact and a duly authorized interstate commission are enforceable on the States.** See *West Virginia ex rel Dyer v. Sims*, 341 U.S. 22, 30 (1951). **Moreover, the terms of compacts and any rules and regulations authorized by compacts supersede substantive state laws that are conflicting.** *Id* at p. 29."

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