

INTERSTATE COMMISSION FOR
ADULT OFFENDER SUPERVISION

HEARING OFFICERS GUIDE

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Introduction

This guide outlines due process procedures for retaking under the Interstate Compact for Adult Offender Supervision (ICAOS). This guide is not an exhaustive legal review given the unique nature of violation cases. Each state may have procedural variations requiring consultation with local legal counsel to ensure compliance with state laws and fair application of due process. However, this guide will assist hearing officers with the complex issues that may arise and the critical steps that must be followed to ensure a supervised individual is afforded appropriate due process.

Hearing officers, legal counsel, and supervised individuals must understand the differences between "retaking" and "revocation." Retaking is the act of a sending state physically removing a supervised individual from a receiving state while revocation is the course of action by a court, sentencing authority or paroling authority to rescind a supervised individual's supervision term and impose a jail or prison sentence due to an act or pattern of behavior that could not be successfully addressed through documented corrective actions or graduated responses in the community. The term "probable cause hearing" suggests supervised individuals subject to retaking must be granted the same comprehensive scope of probable cause determinations as mandated by the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requires a hearing before parole revoked) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (due process requires a hearing before probation revoked).

Courts do not universally agree on the appropriate process, with some arguing that a "probable cause hearing" in the retaking process is not remarkably distinguishable from the revocation process. Hence, this guide addresses several considerations to assist states in understanding the intent behind Rule 5.108. See the following applicable case law:

- When distance and geography inhibit a supervised individual's ability to present witnesses and exculpatory evidence. See e.g., *California v. Crump*, 433 A.2d 791 (N.J. Super. Ct. App. Div. 1981).
- Whether the officers from the sending state are acting within the scope of their authority and whether the supervised individual is the proper person to be retaken. See e.g., *Ogden v.*

Klundt, 550 P.2d 36, 39 (Wash. Ct. App. 1976).

- Supervised individuals who are not detained may not require preliminary hearings under Morrissey and Gagnon because no liberty interest is at stake. See *Smith v. Snodgrass*, et al. 112 Fed. Appx. 695 (10th Cir. 2004).
- Failure to conduct a probable cause hearing in the receiving state may prevent the use of those violations as grounds for revocation upon return to the sending state. See *Fisher v. Crist*, 594 P.2d 1140 (Mont. 1979).

Despite the differences between jurisdictions, fundamental due process considerations do apply to the ICAOS retaking process. Courts have recognized that conditions can be attached to supervision transfers under the compact. Violations of these conditions can serve as grounds for the supervised individual's return and ultimate revocation of their community supervision. Therefore, a hearing near the time and location where the violations occurred is required to ensure due process is upheld. While numerous courts have ruled that convicted individuals do not inherently possess the right to relocate from one state to another, they have also acknowledged that once relocation is granted, states should not lightly or arbitrarily revoke it.

I. When Is A Supervised Individual Entitled To A Probable Cause Hearing?

In *Morrissey* and *Gagnon*, the US Supreme Court established a two-step process for revocation proceedings.

Step 1: A preliminary hearing to determine the appropriateness of the individual's detention due to suspected violations of conditions of supervision.

Step 2: A proceeding to consider the merits of the actual revocation of supervised release.

This two-pronged hearing requirement is applicable prior to retaking when a supervised individual is detained in a receiving state, as distance or other factors may hinder their defense in future revocation proceedings.

The purpose of a due process hearing in the receiving state is to prevent arbitrary actions by state officials, such as detention or revocation of community supervision. The hearing aims to establish the facts and circumstances surrounding alleged violations, including validating the violations and creating an official record for the sending state’s subsequent revocation hearing.

Officials in the receiving state should consider whether revocation would occur in the receiving state for a similarly situated individual when deciding to detain an individual for retaking due to violations. If there is uncertainty about the sending state's intent to revoke, the supervised individual should be afforded a probable cause hearing as specified in Rule 5.108. Failure to do so may prevent the violations from being considered in subsequent revocation proceedings in the sending state.

A supervised individual is entitled to a probable cause hearing in the receiving state when:

1. The individual is in custodial detention in the receiving state due to supervision violations or a request from the sending state for their detention.
2. The alleged violations may lead to revocation of community supervision by the sending state and geographical distance prevents the supervised individual from adequately presenting a defense including calling witnesses or presenting exculpatory evidence.
3. The individual has been apprehended for absconding and the receiving state is invoking retaking pursuant to Rule 5.103-1.

II. Considerations For Probable Cause Hearings

Given modern court and correctional practices, probable cause hearings may occur in-person or through virtual means when consistent with due process protections. When a probable cause hearing is required, the following elements of due process apply:

Supervised individual's rights

Supervised Individuals are entitled to:

1. Clear, written notice of his or her rights for a PC hearing.
2. Understand the purpose of the PC hearing and details of the alleged violations of supervision against them. It is imperative the individual understands the basis of the allegations.
3. Be present (unless the hearing officer justifies the circumstances leading to the individual's absence from the proceedings.)
4. Present witnesses and other exculpatory evidence (e.g. documentary evidence.)
5. Confront and cross-examine witnesses.
6. Legal counsel, if the circumstances of the case are complex or difficult to develop and present without the aid of counsel and if their due process rights would be jeopardized.

Hearing officer requirements

A neutral and independent person must conduct the hearing within 30 calendar days upon a request by a sending state unless postponement is granted and within close proximity to the alleged violations.

1. The hearing officer does not have to be a judicial officer. However, to ensure an adequate and unbiased review of the allegations, they must be detached enough from the circumstances to lead a reasonable person to conclude that the hearing officer is genuinely independent.
2. Courts have not defined what constitutes a 'great geographical distance;' however, distances that hinder the supervised individual's ability to compel witness attendance or present evidence would violate fundamental principles of due process.
3. States should have policies and procedures in place for conducting probable cause hearings that specify who may conduct the hearing and the timeframe allowed.

Official report/record of the hearing

A written record of the proceedings must be created that articulates the facts and circumstances forming the basis of the retaking and the hearing officer’s conclusions. An official record of the hearing must:

1. Include time, date, location, parties present and summary of the testimony at the hearing.
2. Articulate the facts and circumstances forming the basis of the retaking and the hearing officer’s conclusions. This shall include documenting the alleged violations of conditions and the hearing officer’s findings on each violation.
3. Be provided to the sending state within ten business days of the hearing.

In summary, minimal considerations of due process include hearing the grounds for the alleged violations, appearing before an impartial individual, and having a written record of the findings. The hearing does not require a full adversarial process as it is not a revocation proceeding. In this context, the right to notice and be heard does not carry with it the presumptive right to legal representation and full confrontation of witnesses.

III. Probable Cause Hearing Waiver

Rule 5.108 allows a supervised individual to waive a probable cause hearing. However, no waiver can be accepted unless the supervised individual admits to one or more violations of their supervision that would result in the pursuance of revocation in the receiving state and require retaking. The components of such a waiver include informing the supervised individual of their right to a probable cause hearing, detailing the facts and circumstances justifying their retaking, and clarifying that the waiver forfeits their right to contest these facts and circumstances.

By waiving a probable cause hearing the supervised individual:

1. Forgoes entitlement to an on-site or virtual probable cause hearing where the receiving state is obligated to present evidence of the violations.
2. Admits in writing to one or more violations of their supervision to a degree serious enough it would warrant revocation had the supervised individual been under the exclusive control of the receiving state.

Officials in the receiving state must furnish written documentation to the supervised individual outlining the potential consequences of waiving the hearing. This will prevent any future doubts regarding the voluntary nature of the admission and waiver.

IV. Other Considerations

Authority of Officials

Officers from the sending state are required to establish their authority to retake the supervised individual. Sending and/or receiving state officials must demonstrate the supervised individual in custody and subject to retaking is indeed the correct person.

Due Process Violations

Allegations of due process violations in the actual revocation of probation or parole are matters properly addressed during proceedings in the sending state after the supervised individual's return. See the following applicable case law:

- *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)

Absconders

In situations involving supervised individuals who are apprehended for absconding, the provision for a hearing may be substantially less. States must recognize the crucial role of communication in assessing the need for a probable cause hearing and determining its level. Officials tasked with conducting the hearing must ensure, based on the documents presented, that an independent decision-maker in another state has preliminarily determined that there is probable cause to believe the supervised individual has committed a violation. This determination holds full faith and credit in the asylum state and can therefore serve as the basis for retaking by the sending state without necessitating additional hearings. Although entitled to a hearing, the supervised individual does not need to be physically present given the limited scope of the proceeding. See Hayes, 468 N.E.2d 1083 (Mass. Ct. App. 1984).

V. Frequently Asked Questions

Is there a standard waiver for a probable cause hearing?

- No. States should follow the elements of a waiver that inform the supervised individual of the consequences of a waiver in writing to prevent any question as to the voluntary nature of the admission and waiver.

What happens if probable cause is not established?

- A supervised individual cannot continue to be detained by the receiving state without probable cause.

Outside of obtaining a valid waiver or a new conviction prior to retaking, in what other instances are PC hearings not required?

- Considering the unique nature of violation cases, states should seek guidance from local legal counsel, especially when the necessity for a probable cause hearing or the appropriate level of such a hearing is unclear. In cases of uncertainty, particularly regarding the sending state's intention to revoke, the supervised individual should be granted a probable cause hearing, as outlined in Rule 5.108.

What may result from requiring retaking without enforcing strong documentation standards during a probable cause hearing?

- Hearing officers shall document their findings on each alleged violation. If probable cause is not established on a violation or no finding is listed on the report sent to the sending state, it may be barred from consideration during any subsequent violation proceedings. Inadequate documentation can lead the sending state to conclude that the record does not support retaking, either because the findings are incomplete, unclear, or fail to demonstrate sufficient evidence for each violation.

When a violation report requiring retaking is submitted by the receiving state per Rule 5.103, is it the receiving state's responsibility to conduct the probable cause hearing or, does the responsibility fall on the sending state to request the hearing?

- Effectively managing retaking procedures for technical violations and behavior deemed

revocable by a receiving state under Rule 5.103 necessitates substantial coordination and communication between the sending and receiving states to ensure thorough documentation and adherence to due process. When a receiving state submits a violation report requiring retaking, it is assumed, based on the provided documentation, that incarceration and revocation are warranted. Therefore, either state can initiate a probable cause hearing. In cases where the sending state's intent to revoke is not clear, the supervised individual should be afforded a probable cause hearing under Rule 5.108 before retaking occurs.

If a probable cause hearing is requested by the sending state per Rule 5.108 upon receipt of a violation report submitted per Rule 5.103, do the time frames outlined in Rules 5.103 and 5.108 start after receipt of the probable cause hearing results?

- When a probable cause hearing is requested upon receipt of a violation report requiring retaking for technical violations and behavior deemed revocable by a receiving state under Rule 5.103, the timeframes outlined in Rule 5.103 are suspended pending the probable cause hearing. Once the hearing is conducted or probable cause is established via waiver, the receiving state furnishes the probable cause documentation. Upon submission of the required documentation to the sending state, the supervised individual shall be deemed available for retaking. If probable cause is established, the sending state has 15 business days to notify the receiving state of their decision to issue a warrant for retaking or to order the individual to return to the sending state.

Are warrants for violation reports requiring retaking (including absconders,) supposed to be issued within 15 business days of receiving the violation report or violation report response? Additionally, how does this process apply to cases in which the sending state would like probable cause established for behavior requiring retaking?

- As outlined in each rule, warrants must be issued within 15 business days of receiving the violation report. The only exception to this rule occurs when behavior requiring retaking is reported, and the sending state requests probable cause in its initial response. In such cases, the warrant must be issued after probable cause is established for the revocable behavior, and the decision to retake is made by the sending state.

Is a probable cause hearing required when a sending state invokes Rule 5.101 Discretionary Retake by the sending state?

It is important to emphasize the distinction between retaking that may result in revocation and retaking that will not result in revocation. When there is no danger that the sending state will revoke the supervised individual's probation or parole supervision, the individual is not entitled to a probable cause proceeding prior to retaking.

- By contrast, however, if there is any question regarding the intent of the sending state to revoke a supervised individual's conditional release based on violations in the receiving state, they should be afforded a probable cause hearing as provided in Rule 5.108.

Is a hearing officer permitted to communicate with their state's Interstate Compact Office?

- An officer may communicate with their state's Interstate Compact office at any time before a supervised individual is retaken. Please use the directory for each state's Interstate Compact office located on the ICAOS website. The directory references each state's Commissioner, deputy compact administrator, and state council members who may be of assistance.
