

A HEARING OFFICER'S GUIDE TO THE RETAKING PROCESS



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Introduction

This guide is intended to provide hearing officers with basic guidance regarding the retaking procedures that may apply to offenders subject to the Interstate Compact for Adult Offender Supervision (ICAOS). Several cautionary notes should be understood in reading this guide. First, it is important to understand that this document is intended merely to provide guidance on due process retaking requirements. It is not intended to be an exhaustive legal opinion on such procedures as each state may have variations. Therefore, to the extent that a hearing officer is unclear on the application of due process procedures in a particular retaking proceeding, it is important to consult with local legal counsel to ensure compliance with the law.

Second, it is important that hearing officers, legal counsel and even offenders understand the distinction between “retaking” and “revocation.” “Retaking” is *a process* by which an offender is generally returned to the sending state. It is one of several mechanisms by which an offender can be returned to the sending state. Other mechanisms may include ordering the offender to return or seeking an offender’s voluntary return. By contrast, “revocation” is the process by which a sending state proceeds to terminate supervised release and incarcerate the offender. While this distinction may seem elementary, it is important to differentiate these two concepts when considering the applicable due process standards. The use of the term “probable cause hearing” has led some to believe that an offender subject to retaking must be afforded the same full breadth of probable cause determinations mandated by the U.S. Supreme Court in *Morrissey v. Brewer*, 408 U.S. 471 (1972) (fundamental due process requires a hearing before parole revoked) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (fundamental due process requires a hearing before probation revoked).¹ Both of these cases, however, applied to the revocation, not retaking, process.

Finally, while it is desirable to set bright lines and clear tests in the retaking context, unfortunately not even the courts universally agree on the appropriate process. Some courts appear to hold that a “probable cause hearing” in the retaking process is not remarkably distinguishable from the revocation process, particularly where concerns for distance and geography may inhibit an offender’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). Other courts have held that the only matter for consideration in the receiving state is whether the officers from the sending state are acting within the scope of their authority and whether the offender is the proper person to be retaken. *See e.g., Ogden v. Klundt*, 550 P.2d 36, 39 (Wash. Ct. App. 1976). At least one federal court has held that an offender who is not incarcerated need not be afforded the preliminary hearings mandated by *Morrissey* and *Gagnon* because no liberty interest is at stake. *See, Smith v.*

¹ In *Morrissey* and *Gagnon* the Supreme Court set forth a two step process applicable to revocation proceedings. The first step involves a preliminary hearing is whether the detention of the offender is appropriate because she or he has in all likelihood violated the terms and conditions of supervised release. The second hearing is a proceeding on the merits of actual revocation of supervised release.

Snodgrass, et al. 112 Fed. Appx. 695 (10th Cir. 2004). Thus, the most that can be said is that the law applicable to retaking is evolving.

Notwithstanding the lack of bright lines and firm clarity, fundamental considerations of due process do apply to some activities subject to retaking under ICAOS. The ICAOS recognizes that the transfer of supervision (and hence the relocation of an offender) is a matter of privilege subject to the absolute discretion of the sending state and, to a more limited extent, the discretion of the receiving state. Courts have also recognized that under an interstate compact, conditions can be attached to the transfer of supervision the violation of which can form the basis for return of the offender and ultimately revocation of their conditional release from incarceration. Yet, while numerous courts have held that convicted persons do not have a right to relocate from one state to another, courts have also recognized that once relocation is granted states should not lightly or arbitrarily revoke the relocation.

This guide summarizes the general principles now applied across the nation to the retaking process. Again, it is not a full analysis and hearing officers are encouraged to consult local legal counsel should they have particular concerns. Individual state laws, practices and traditions may dictate different approaches to resolving due process questions. Nevertheless, this guide should enable a hearing officer at the very least to understand some of the complex issues that can arise and the critical steps that must be observed to ensure that an offender is afforded appropriate due process.

I. When is an Offender Entitled to a Probable Cause Hearing?

An offender is normally entitled to a probable cause hearing in the receiving state when:

1. The offender is in custodial detention in the receiving state based on violations of supervision that occurred in that state or based on a request from the sending state that the offender be detained (*Cf. Smith v. Snodgrass, et al., supra*); or
2. The alleged violations of supervision in the receiving state may form the basis of revocation of supervised release by the sending state *and* geographical distance may prevent the offender from adequately presenting a defense including calling witnesses or presenting exculpatory evidence (*Cf., California v. Crump, supra.*)

Commentary

In the first circumstance, the inquiry is a very preliminary hearing as to whether the custodial detention is justified based on a “reason to believe” the offender violated the terms and conditions of their supervision. In the second case, the inquiry is more depth

and is in the nature of a probable cause, fact finding proceeding. It should also be noted, that the two prong hearing requirement of *Morrissey* and *Gagnon* may come into play where an offender is both detained in a receiving state and considerations of distance or other factors may prevent the offender from presenting an adequate defense in future revocation proceedings predicated upon violations that occurred in the receiving state. It is important to note, however, that notwithstanding a probable cause hearing being held in the receiving state, only authorities in the sending state can resolve whether the alleged violations amount to grounds for revocation of supervised release. Officials in a receiving state cannot, as a matter of law, determine that the offender's violation amount to grounds for revocation of supervised release. Thus, the probable cause hearing in the receiving state applies to test the validity of an offender's detention or to develop a record that may be used in the sending state during a revocation hearing on the merits of the violation.

If there is any question regarding the intent of the sending state to revoke an offender's conditional release based on violations in the receiving state, the offender should be given a probable cause hearing as provided in Rule 5.108. Failure to do so may act to bar consideration of those violations in subsequent revocation proceedings in the sending state.

II. Basic Considerations of a Due Process Retaking Hearing

Where a probable cause hearing is required, the following are elements of due process that are applicable in all circumstances:

1. The hearing must be conducted by a neutral and independent person reasonably close in time and place to the alleged violation leading to detention. The hearing officer does not have to be a judicial officer, but to ensure an appropriate review of the allegations the person must be sufficiently detached from the circumstances as to lead a reasonable person to conclude that the hearing officer was truly independent.
2. The offender is presented with notice of the hearing, the purpose of the hearing, and the allegations of wrongdoing.
3. The offender should have an opportunity to be present, unless the hearing officer articulates those circumstances that justify the offender's absence from the proceedings. For example, the offender does not necessarily have to be present when the only matter for determination is whether a sending state that already made a probable cause determination is presenting correct documentation. *See, Sec. III, infra.*
4. The officers from the sending state must be required to establish their authority to retake the offender.

5. Officials of the sending and/or receiving state must be required to show that the offender subject to retaking and in custody is the proper person.
6. A written record of the proceedings must be made.

Commentary

Purpose of affording an offender some type of due process hearing before an independent hearing officer is to ensure that state officials are not acting arbitrarily either in the detainment of an individual or in the revocation of an offender's supervised release. Minimal considerations of due process require that the offender have the opportunity to hear the basis of the alleged violations, the opportunity to appear before an independent person, and a written record of the findings. It should be noted that a written record of the proceedings does not mean a verbatim transcript of the proceedings. It is sufficient for the hearing officer to make a written record of the proceedings that articulates the facts and circumstances that form the basis of the retaking and the hearing officer's conclusions. Furthermore, the hearing to which an offender may be entitled does not require a full adversarial hearing. As previously noted, the retaking proceeding is not the revocation proceeding. For example, the right to notice and the opportunity to be heard in this context does not carry with it the presumptive right to legal representation and full confrontation of witnesses.

III. Retaking Based on Violations that Occur in the Receiving State

Where the retaking of an offender is based on a violation of the terms and conditions of supervision in the receiving state *and* such violation is likely to form the basis for revocation of parole or probation in the sending state, the following additional considerations may apply:

1. The hearing must be conducted reasonably close in time and proximity to where the offenses are alleged to have occurred.
2. Written notice of the claimed violation sufficiently clear as to enable the offender to understand the basis of the allegations.
3. Disclosure of the evidence against the offender.
4. The opportunity to be heard in person and to present witnesses and other exculpatory evidence, such as documentary evidence.
5. The right to confront witnesses and cross-examine witnesses.
6. The right to counsel, if the circumstances of the case are complex or difficult to develop and present without the aid of counsel and the offender's due process rights would be jeopardized.

Commentary

The retaking of an offender by a sending state based on alleged violations of the terms and conditions of supervision in a receiving state or other state present particularly complex issues. As noted, the ICAOS provides that states may enter another state and retake an offender at any time. Where the sending state intends to use the alleged violations as grounds for revoking supervised release, officials in the receiving state must be particularly cautious to ensure that a proper record is developed and that the offender's due process rights have been protected. Offenders have a right under *Morrissey* and *Gagnon* not to have their liberty interests – however limited – revoked arbitrarily. State officials must establish some grounds for revocation. Therefore, if violations that occur in a state other than the sending state will form the basis of revocation, the offender is entitled to more robust due process hearing that may be very similar to the revocation proceeding itself. However, even this statement must be qualified.

Considerations of geography may dictate the type of hearing to which the offender is entitled. For example, if great geographical distances separate the sending state from the receiving state, the offender may be entitled to a robust due process hearing. In such a case, it may be nearly impossible for the offender to present a meaningful defense in future revocation proceedings because distances will prevent the adequate presentation of favorable witnesses and exculpatory evidence. By contrast, where geographical distances are not a significant consideration and will not interfere with the ability of the offender to present witnesses and exculpatory evidence in a revocation proceeding, the hearing to which the offender is entitled may be significantly simpler. At least one court has held that the failure to grant an offender a probable cause hearing in the receiving state based on violations occurring in that state may preclude 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). However, where an offender admits to the violations during revocation proceedings in the sending state, the failure to provide an on-site probable cause hearing in the receiving state may be deemed harmless error. *Cf., Montana v. Hardy*, 926 P.2d 700 (Mont. 1996).

What constitutes “great geographical distance” for purposes of determining the elements of the hearing has not been defined by the courts. However, it is reasonable to conclude that distances that interfere with the offender's ability to compel the attendance of witnesses or presentation of evidence would offend fundamental principles of due process. For example, an on-site probable cause hearing may not be required where the geographical consideration is the distance between New York City and Newark, New Jersey, or between Cincinnati and Covington, Kentucky. By contrast, such a hearing may be warranted where the distance is between Los Angeles and New York, or between Seattle and Portland, Oregon. Therefore, where violations in a receiving state will form the foundation for revocation proceedings in the sending state and geography may present problems in such future proceedings, the hearing officer in the receiving state should err on the side of caution by providing the offender a *Morrissey/Gagnon* type probable cause hearing. *See, California v. Crump, supra*.

It should be noted that the actual decision to revoke the terms and conditions of supervision do not rest with officials in the receiving state but rather with officials in the sending state. The purpose of the hearing in the receiving state is to ascertain the facts and circumstances upon which the alleged violations occurred. The hearing is generally a fact finding hearing and not an adjudication of the merits of the alleged violations as grounds for revocation of probation, parole or other supervised release. 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).

IV. Retaking Based on Violations that Occur in another State

If the retaking of an offender is based on violations of the terms and conditions of supervision that occur in the sending state, the hearing to which the offender is entitled may be substantially less. In general, where the violation has occurred in sending state, for example during a visit, the hearing will generally consist of the following elements:

1. Notice of the hearing and the purpose of the hearing.
2. Presentation of the alleged violations.
3. Establishment that the officials from the sending state are acting within the proper scope of their authority and are authorized to retake the offender.
4. Establishment that the person sought by officials from the sending state is the person who is the subject of the hearing.
5. A review of documents presented by the officials of the sending state. These documents should establish:
 - a. The facts and circumstances of the alleged offense; and
 - b. Evidence that a determination was made by an independent hearing officer in the sending state that there is probable cause to believe the offender committed the alleged acts.

Commentary

When the demand for return of an offender is based on actions that occurred in another state, the scope of review receiving state officials must conduct is substantially narrowed. It is sufficient that officials conducting the probable cause hearing be satisfied on the face of documents presented that an independent decision maker in another state

has made a preliminary determination that there is probable cause to believe the offender committed a violation. 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. 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. *See, generally, In re Hayes*, 468 N.E.2d 1083 (Mass. Ct. App. 1984).

V. Waiver of Hearing

Rule 5.108 provides that an offender subject to retaking can waive a probable cause hearing. No waiver is to be accepted unless the offender admits to one or more significant violations of their supervision. The critical elements of such a waiver are:

1. The offender is apprised of the right to a probable cause hearing.
2. The offender is apprised of the facts and circumstances supporting retaking.
3. The offender is apprised that by waiving the right to a hearing, he or she is also waiving the right to contest the facts and circumstances supporting retaking.
4. The offender admits in writing to one or more significant violations of their supervision.
5. The offender is apprised in writing that by admitting to the offenses, supervised release may be revoked by the sending state based on the admissions.

Commentary

As noted, Rule 5.108 allows an offender to waive a probable cause hearing only upon the offender admitting to one or more significant violations of their supervision. The effect of waiving the probable cause hearing is twofold. First, the offender is not entitled to an on-site probable cause hearing at which the receiving state is required to present evidence of the violations. Second, and more important, the offender's waiver is in effect and admission that they have committed an offense of sufficient gravity as to justify revocation of release had the offender been under the exclusive control of the receiving state. Thus, by waiving the hearing the offender is implicitly admitting that their actions could justify revocation of supervised release. Therefore, it is incumbent upon officials in both the sending and receiving state to ensure that the offender is made aware of the possible grave consequences of waiving the hearing. In the interests of full disclosure, the offender should be made aware of these consequences in writing to prevent any future question as to the voluntary nature of the admission and waiver.