

INTERSTATE COMMISSION FOR ADULT OFFENDER SUPERVISION

ADVISORY OPINION

At Issue

Whether ICAOS Rule 5.108(e) permits the use of 2-way video closed circuit television during probable cause hearings where necessary to protect a witness harm which might result from testifying in person.

Requesting State: Colorado

Issued By:

Harry Hageman, Executive Director
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Whether ICAOS Rule 5.108(e) permits the use of 2-way video closed circuit television during probable cause hearings where necessary to protect a witness from harm which might result from testifying in person.

Issued by: Harry E. Hageman, Executive Director and Richard L. Masters, Legal Counsel

Background

Pursuant to ICAOS Rule 6.101 the State of Colorado has requested whether ICAOS Rule 5.108(e) permits the use of 2-way video closed circuit television during probable cause hearings where necessary to protect a witness from harm which might result from testifying in person, such as a child who is a witness who might be traumatized by being required to testify in the presence of the supervised individual. In the request Colorado suggests that since the language of Rule 5.108(e) is similar to that of the *U.S. Supreme Court in Morrissey v. Brewer, 408 U.S. 471* (1972), that ICAOS "has extended the rights provided by the U.S. Supreme Court (in the *Morrissey* opinion) at a final parole revocation hearing to probable cause hearings as well."

Applicable Rules

Rule 5.108(e) Probable Cause Hearing in receiving state:

> (e) The supervised individual shall be entitled to the following rights at the probable cause hearing:
>
> 1. Written notice of the alleged violation(s);
> 2. Disclosure of non–privileged or non–confidential evidence regarding the alleged violation(s);
> 3. The opportunity to be heard in person and to present witnesses and documentary evidence relevant to the alleged violation(s);
> 4. The opportunity to confront and cross–examine adverse witnesses, unless the hearing officer determines that a risk of harm to a witness exists.

Analysis

As Colorado suggests, the language used by the Court in *Morrissey* regarding probable cause, “preliminary hearings”, in close geographic proximity to where the alleged violations occurred, is similar to that describing the due process requirements of formal revocation hearings. However, just because the language of ICAOS Rule 5.108(e) is similar to that used in *Morrissey* with respect to final revocation hearings does not mean that ICAOS Rules on retaking require either a ‘full blown’ revocation hearing or the same level of due process guarantees as those provided in a final revocation hearing once the supervised individual is returned to the receiving state. See *Morrissey v. Brewer, 408 U.S. 471, 487-489 (1972)*. In *Morrissey* the preliminary probable cause hearing in the receiving state, if needed, is clearly an ‘informal hearing’ which is not required to be conducted before a judge, at which time the supervised individual is afforded the opportunity to be present and present evidence on his own behalf as well as a “conditional right” to confront adverse witnesses. This is also the same standard later applied to probationers by the Court in *Gagnon v. Scarpelli, 411 U.S. 778 (1973)*.

Moreover, in *Morrissey* the Court observed that even in the ‘preliminary hearing’ conducted in the receiving state, while the parolee may request that the “person who has given adverse information on which parole revocation is to be based is to be made available for questioning in his presence . **. . . if the hearing officer determines that an informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination.”** See *Morrissey*, p. 487 (emphasis added). This language indicates that the Court does not regard the ability to “confront” a witness in person as absolute and that the hearing officer has discretion to limit or even dispense with this requirement if there is a ‘risk of harm’ to the witness.

Consistent with *Morrissey*, ICAOS Rule 5.108(e) expressly provides that the opportunity to confront and cross-examine adverse witnesses in a probable cause hearing is subject to the determination by the hearing officer “that a risk of harm to a witness exists”, in which case such a right may be limited.

Additionally, as Colorado points out, the U.S. Supreme Court has held that a criminal defendant’s due process right, under the Sixth Amendment to the U.S. Constitution, to ‘confront’ an adverse witness, even in a criminal trial, may be limited by allowing the use of 2-way video closed circuit television in circumstances where such a procedure is necessary to protect a child witness from the trauma of testifying in person in front of the defendant. See *Maryland v. Craig, 497 U.S. 836 (1990)*. In fact the Court specifically held that the ‘confrontation clause’ of the U.S. Constitution “does not guarantee criminal defendants an **absolute** right to a face-to-face meeting with the witnesses against them at trial.” *Id. at pp. 836-837*.

Based upon the above referenced guidance in these U.S. Supreme Court decisions, it seems clear that if the Sixth Amendment's confrontation clause allows the use of 2-way video closed circuit television in the actual trial of a criminal defendant in order to prevent harm to a witness which might result from testifying in person, such a procedure is also permissible, if determined by the hearing officer to be necessary, during the informal inquiry required at the preliminary hearing to determine probable cause under ICAOS Rule 5.108(e).

Conclusion

In summary, based upon the terms of the compact, the above referenced rules and the legal authorities cited herein, ICAOS Rule 5.108(e) permits the use of 2-way video closed circuit television during probable cause hearings where determined by the hearing officer to be necessary to protect a witness from harm which might result from testifying in person.