

OPINION NO. 2002-002**Syllabus:**

In the case of a person who waives extradition to Ohio, a prosecuting attorney may use the United States Marshals Service to transport that person to either the prosecuting attorney's county or to a location where the county sheriff may obtain custody of the person, provided that the prosecuting attorney, in the exercise of a reasonable discretion, determines that such method of transport is appropriate in the circumstances.

To: Robin N. Piper, III, Butler County Prosecuting Attorney, Hamilton, Ohio
By: Betty D. Montgomery, Attorney General, February 19, 2002

You have requested an opinion concerning the interstate transportation of prisoners. Specifically, you ask:

Since funds have been appropriated, by the Board of County Commissioners, for my office to be used for the return of prisoners to Butler County from other states, may I use the U.S. [Marshals] Service to transport these prisoners either to Butler County, or to a location closer to Butler County from which the Butler County Sheriff may more conveniently retrieve the prisoners?

You have informed us that you are only concerned about the transportation of persons who have waived extradition.¹ We believe it helpful, however, to review initially the

¹Extradition is "[t]he official surrender of an alleged criminal by one state or nation to another having jurisdiction over the crime charged; the return of a fugitive from justice, regardless of consent, by the authorities where the fugitive resides." *Black's Law Dictionary* 605 (7th ed. 1999).

provisions of law that govern the extradition of persons before turning to your specific question.

The authority to extradite a person is set forth in U.S. Const. art. IV, § 2, cl. 2 and 18 U.S.C. §§ 3182 and 3194 (1994 & Supp. V 1999). *In re Rowe*, 67 Ohio St. 2d 115, 423 N.E.2d 167 (1981) (syllabus, paragraph one); see *Thomas v. Evans*, 73 Ohio St. 140, 143-44, 76 N.E. 862, 863 (1905) (“the right of one state to demand, and the duty of another state to award, extradition of fugitives from justice, rests primarily upon section 2 of article 4 of the constitution of the United States”); see also R.C. 2963.02. U.S. Const. art. IV, § 2, cl. 2 provides as follows:

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.

The United States Congress has enacted 18 U.S.C. §§ 3182 and 3194 (1994 & Supp. V 1999) to carry out the mandate set forth in U.S. Const. art. IV, § 2, cl. 2. 18 U.S.C. § 3182 (Supp. V 1999) states, in relevant part:

Whenever the executive authority of any State ... demands any person as a fugitive from justice, of the executive authority of any State ... to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State ..., charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State ... from whence the person so charged has fled, the executive authority of the State ... to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear.

18 U.S.C. § 3194 (1994) states that, “[a]ny agent appointed as provided in section 3182 of this title who receives the fugitive into his custody is empowered to transport him to the State ... from which he has fled.” Thus, in accordance with federal law, when a person is to be extradited to Ohio, the Governor appoints an agent to transport the person to Ohio. See R.C. 107.04; R.C. 2963.20; 2000 Op. Att’y Gen. No. 2000-024 at 2-164; 1993 Op. Att’y Gen. No. 93-080 (syllabus, paragraph six).

States may enact ancillary proceedings, which are consistent with the Constitution and laws of the United States, that provide for the extradition of persons from one state to another. *Innes v. Tobin*, 240 U.S. 127 (1916); 2000 Op. Att’y Gen. No. 2000-024 at 2-164; see, e.g., *English v. Matowitz*, 148 Ohio St. 39, 72 N.E.2d 898 (1947). In this regard, the General Assembly has enacted various statutory provisions that supplement the extradition provisions of the United States Constitution and the laws of the United States. 2000 Op. Att’y Gen. No. 2000-024 at 2-164. See generally R.C. Chapter 2963 (extradition).²

²Within R.C. Chapter 2963, the General Assembly has set forth provisions that govern the extradition of fugitives to and from Ohio. In this respect, the provisions of R.C. 2963.01-.19 generally concern the extradition of a person from Ohio to another state, while the provisions of R.C. 2963.20-.29 generally relate to the extradition of a person from another state to Ohio. R.C. Chapter 2963 also enacts into law in Ohio the Interstate Agreement on Detainers,

With respect to the extradition of a person from another state to Ohio, R.C. 2963.21 authorizes a prosecuting attorney to request the return to this state of a person who has fled to another state. R.C. 2963.21 thus provides, in pertinent part:

When the return to this state of a person charged with crime in this state is required, the *prosecuting attorney shall present to the governor a written application for a requisition for the return of the person charged....*

When the return to this state is required of a person who has been convicted of a crime in this state and has escaped from confinement or broken the terms of the person's bail, probation, parole, community control sanction, or post-release control sanction, the *prosecuting attorney of the county in which the offense was committed ... shall present to the governor a written application for a requisition for the return of the person.* (Emphasis added.)

Upon receiving an application from a prosecuting attorney for the return of a person from another state, the Governor may demand the Governor of another state to return the person to Ohio. U.S. Const. art. IV, § 2, cl. 2; 18 U.S.C. § 3182 (Supp. V 1999). R.C. 2963.05 and R.C. 3115.53 also authorize the Governor to agree to or demand the extradition of a person from another state to Ohio. 2000 Op. Att'y Gen. No. 2000-024 at 2-164. R.C. 2963.05 states that, when a person charged with a crime in Ohio is imprisoned or held under criminal proceedings in another state, the Governor may agree with the executive authority of that state for the extradition of that person to Ohio before the conclusion of any criminal proceedings or term of imprisonment. R.C. 3115.53(B)(1) authorizes the Governor to "[d]emand that the governor of another state surrender an individual found in the other state who is charged criminally in this state with having failed to pay support under a support order." Whenever the Governor demands from the executive authority of another state the extradition of a person charged with committing a crime, escaping from confinement, or breaking the terms of his bail, probation, or parole, the Governor may issue a warrant commanding an agent to receive and convey the person to the appropriate venue. R.C. 2963.20; *see* R.C. 107.04. *See generally* 2000 Op. Att'y Gen. No. 2000-024 at 2-164 ("when a person is to be extradited to Ohio, the Governor may issue a warrant commanding a county sheriff to transport the person to Ohio from another state").

It is well settled, however, that a person may waive extradition, and voluntarily consent to his transfer from one state to another. *See Buchanan v. City of Kenosha*, 90 F. Supp. 2d 1008, 1014-16 (E.D. Wis. 2000); *Smith v. McWeeny*, No. 89 C 1959, 1993 U.S. Dist. LEXIS 3890, at *9 (N.D. Ill. 1993) (unreported); *McBride v. Soos*, 512 F. Supp. 1207, 1211 (N.D. Ind. 1981), *aff'd*, 679 F.2d 1223 (7th Cir. 1982); *New Jersey v. Soto*, 340 N.J. Super. 47, 59-60, 773 A.2d 739, 745-46 (2001); *see also* R.C. 2949.14; R.C. 2963.23; R.C. 2963.24; R.C. 2963.26; R.C. 2963.30. *See generally* 1993 Op. Att'y Gen. No. 93-080 at 2-407 ("[b]ecause a request for final disposition made by a prisoner pursuant to article III of the [Interstate Agreement on Detainers] is deemed a waiver of extradition, it is unnecessary for the Governor to demand the executive authority of a sending state to deliver the prisoner into the custody of an official from the Department [of Rehabilitation and Correction]"). When such

which is a compact among the states, the District of Columbia, and the federal government that encourages the expeditious and orderly disposition of charges outstanding against a person already incarcerated in another jurisdiction, and the determination of the proper status of any and all detainees based on untried indictments, informations, or complaints. R.C. 2963.30-35.

a waiver is executed, it is unnecessary for the Governor to agree to or demand the extradition of a person from another state to Ohio.

The Governor also is not required to issue a warrant commanding an agent to receive and convey to Ohio a person who has waived extradition. Instead, a prosecuting attorney who seeks the person's return to Ohio may designate an agent to return the person to Ohio. *See* R.C. 307.50 (a board of county commissioners may pay the expenses of an agent designated by the prosecuting attorney to return a person to Ohio); R.C. 2963.21 (a prosecuting attorney may apply to the Governor for the return of a person from another state, and may include in the application the agent who will be responsible for transporting the person to Ohio); *Bell v. Board of Trustees*, 34 Ohio St. 2d 70, 75, 296 N.E.2d 276, 279 (1973) (“[w]hen the General Assembly enacts a law to accomplish some purpose it either gives express power to carry out that purpose, or the power is implied from the practical necessity of the situation”). *See generally* 1979 Op. Att’y Gen. No. 79-106 (syllabus, paragraph three) (“[i]f an accused arrested pursuant to a warrant in a county other than the county from which the warrant issued or an adjoining county is not released on bail, the political subdivision which has charged the accused with the offense must pick up the accused and deliver him to the court that issued the warrant, without unnecessary delay”). Any costs associated with transporting the person to Ohio are to be paid by the county. *See* R.C. 307.50; R.C. 2335.10; *Lapeer County, Mich. v. Montgomery County, Ohio*, 108 F. 3d 74 (6th Cir. 1997), *reh’g denied*, No. 96-1093, 1997 U.S. App. LEXIS 11342 (6th Cir. May 9, 1997) (unreported); 1972 Op. Att’y Gen. No. 72-105. *See generally* 18 U.S.C. § 3195 (1994) (“[a]ll costs or expenses incurred in any extradition proceeding in apprehending, securing, and transmitting a fugitive shall be paid by the demanding authority”).

No statute expressly prescribes the manner in which a prosecuting attorney may arrange for the transportation to Ohio of a person who has waived extradition. *See generally* Charles Emory Glander, *Practice in Ohio under the Uniform Criminal Extradition Act*, 8 Ohio St. L.J. 255, 255 (1942) (“[t]he extradition statutes are clear enough as to most formal requirements, but they afford little assistance with respect to procedure or practice generally”). It is, however, well established that, in the absence of specific direction regarding the manner and method by which a public officer is to perform his statutory duties and responsibilities, the officer has the implied authority to exercise a reasonable discretion in carrying out those duties and responsibilities. *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff’d sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916); *see Bell v. Board of Trustees*, 34 Ohio St. 2d at 75, 296 N.E.2d at 279; 1999 Op. Att’y Gen. No. 99-011 at 2-94 and 2-95. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) (a public officer is required to exercise an intelligent discretion in the performance of his official duties); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) (where a statute authorizes performance of a particular act, but does not specify how the act is to be performed, the implication is that it is to be carried out in a reasonable manner). Accordingly, a prosecuting attorney, who seeks the return of a person who has waived extradition, may exercise his discretion in arranging the person's transportation to Ohio.³

³2000 Op. Att’y Gen. No. 2000-024 advised that, when a court or the Governor issues a warrant requiring a county sheriff to transport to Ohio from another state a person who has been charged with, convicted of, or pleaded guilty to, an offense in Ohio, the sheriff may not use a private transportation agency to transport the person to Ohio. The opinion reasoned that insofar as “a county sheriff’s duty to transport prisoners under a warrant issued by a court or the Governor is not a purely ministerial duty, a county sheriff may not delegate this duty to a private entity,” unless the sheriff has statutory authority to do so. *Id.* at 2-166. The

See, e.g., 1987 Op. Att'y Gen. No. 87-051 (syllabus, paragraph two) (a township zoning commission "may exercise its discretion in choosing a [planning] consultant, and may, if the choice is reasonable, obtain the expert technical advice from another governmental agency, such as a city or a federal agency").

You have asked whether a county prosecuting attorney is authorized to use the United States Marshals Service to transport from another state to Ohio a person who has waived extradition. The United States Marshals Service is "a bureau within the Department of Justice under the authority and direction of the Attorney General." 28 U.S.C. § 561(a) (1994); *accord* 28 C.F.R. § 0.1 (2001); 28 C.F.R. § 0.5(a) (2001). The primary duty of the United States Marshals Service is to provide security for, and execute and enforce the orders of, the United States district courts, the United States courts of appeals, and the Court of International Trade. 28 U.S.C. § 566(a) (1994); *see* 28 C.F.R. § 0.111(b), (d) (2001). The United States Marshals Service is required to execute all lawful writs, process, and orders issued under the authority of the United States. 28 U.S.C. § 566(c) (1994); *see* 28 C.F.R. § 0.111(a)-(b), (d) (2001). The United States Marshals Service may also be required to provide for the personal protection of federal jurists, court officers, witnesses, and other persons, and investigate fugitive matters. 28 U.S.C. § 566(c)(1) (1994); *see* 28 C.F.R. § 0.111(e) (2001).

The duties of the United States Marshals Service are performed by United States marshals, deputy marshals, and other employees appointed by the Director of the United States Marshals Service. 28 U.S.C. § 561 (1994). United States marshals and deputy marshals are permitted to carry firearms and make arrests without a warrant for an offense against the United States committed in their presence or for a felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a felony. 28 U.S.C. § 566(d) (1994). United States marshals and deputy marshals, in executing the laws of the United States within a state, may exercise the same powers that a sheriff of the state may exercise in executing the laws thereof. 28 U.S.C. § 564 (1994). United States marshals may be required to attend any session of a United States district court, United States court of appeals, or the Court of International Trade. 28 U.S.C. § 566(b) (1994).

The duties of United States marshals and deputy marshals also include the transportation of federal prisoners. 18 U.S.C. § 3604 (1994); 18 U.S.C. § 3621(d) (1994); *see* 28 C.F.R. § 0.111(a) (2001); *see also Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 38 (1985) (United States marshals "must obey the mandates of federal courts and transport prisoners if the court so orders"). *See generally* 18 U.S.C. § 4008 (1994) ("[p]risoners shall be transported by agents designated by the Attorney General or his

statutes in effect at the time 2000 Op. Att'y Gen. No. 2000-024 was issued did not authorize a county sheriff to delegate to a private entity the duty to transport prisoners under a warrant issued by a court or the Governor. *But see* Sub. H.B. 661, 123rd Gen. A. (2000) (eff. Mar. 15, 2001) (amending, *inter alia*, R.C. 311.29 for the purpose of authorizing a county sheriff to contract with a private person or entity to return a prisoner to Ohio).

With respect to your specific inquiry, the prosecuting attorney, unlike a county sheriff who has been ordered by a court or the Governor to transport a person to Ohio, does not have a duty to transport from another state to Ohio a person who has waived extradition. Moreover, pursuant to R.C. 307.50 and R.C. 2963.21, a prosecuting attorney who seeks the person's return to Ohio has been granted the authority to arrange for the person's transportation to Ohio. Accordingly, a prosecuting attorney, who seeks the return of a person who has waived extradition, may designate an agent to transport the person to Ohio.

authorized representative"). In addition, United States marshals and deputy marshals may be required by a court or cooperative or intergovernmental agreement to transport state prisoners. See 28 U.S.C. § 566(a)-(c) (1994); see also 28 C.F.R. § 0.111(a)-(b), (j) (2001); *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. at 38; *Ford v. Allen*, 728 F.2d 1369 (11th Cir. 1984); *Ballard v. Spradley*, 557 F.2d 476 (5th Cir. 1977). See generally 42 U.S.C.A. § 13726 (West Supp. 2001) ("[c]ongress finds the following: (1) Increasingly, States are turning to private prisoner transport companies as an alternative to their own personnel or the United States Marshals Service when transporting violent prisoners"); Mark K. Dietrich, Note, *Transportation of State Prisoners to Their Federal Civil Rights Actions*, 53 *Fordham L. Rev.* 1211 (1985) (discussing the authority of a federal court to require a United States marshal to transport a state prisoner to the court in a federal civil rights case).

The United States Marshals Service thus transports federal and state prisoners between states. Accordingly, if a prosecuting attorney, in the exercise of a reasonable discretion, determines that the United States Marshals Service is an appropriate method by which to transport a person who has waived extradition to Ohio, he may use the United States Marshals Service to transport the person to his county or to a location where the county sheriff may obtain custody of the person.

Based on the foregoing, it is my opinion, and you are hereby advised that, in the case of a person who waives extradition to Ohio, a prosecuting attorney may use the United States Marshals Service to transport that person to either the prosecuting attorney's county or to a location where the county sheriff may obtain custody of the person, provided that the prosecuting attorney, in the exercise of a reasonable discretion, determines that such method of transport is appropriate in the circumstances.