



**Interstate Commission
for Adult Offender Supervision
ADVISORY OPINION**

Opinion Number: 16-2006
Dated: October 31, 2006
Date Reissued: March 6, 2007

Issued by:
Don Blackburn, Executive Director
Richard L. Masters, Legal Counsel

State Requesting: Colorado

Description: The interpretation of the “physical harm” requirement of 2.105(a)(1).

Background

This advisory opinion is being reissued upon request from the Eastern Region for clarification of our original opinion. The phrase “too remote” as used in that opinion has caused confusion. The original opinion has been read to imply that states may look beyond the actual conviction and find eligibility under 2.105(1) if the harm caused was not found to be “too remote”; in effect, whether states can consider ancillary matters such as charging or plea bargain decisions in determining that an ineligible offender is eligible because of considerations beyond the offenses adjudicated.

Originally, the state of Colorado requested an Advisory Opinion pursuant to Rule 6.101 concerning the meaning of the “physical harm” requirement of 2.105 (a)(1).

Compact Rule 2.105 (a)(1) provides as follows:

Rule 2.105 Misdemeanants

- (a) A misdemeanor offender whose sentence includes one year or more of supervision shall be eligible for transfer, provided that all other criteria for transfer, as specified in Rule 3.101, have been satisfied; and the instant offense includes one or more of the following –
 - (1) an offense in which a person has incurred direct or threatened physical or psychological harm;

Colorado asked: “Does ‘(1) an offense in which a person has incurred direct or threatened physical or psychological harm’ mean that physical harm has to be physical touching of the offender to the victim or does it include a weapon being used?” Colorado also points out that the factual predicate leading to this opinion request involved injury by a vehicle in which the offender, during the commission of a criminal act, caused serious injury to three victims. He was convicted of Assault 3 reckless/cause injury.

Analysis and Opinion

The application of the compact and its rules to any particular offender is determined by the offense committed. The compact statute defines an offender as “an adult placed under, or subject to, supervision as a result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.” *See*, Art. II. Commission Rule 1.101 essentially adopts this



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definition with the added clause “and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision.” Those who are subject to the jurisdiction of the compact are offenders who have committed offenses and are under supervision for particular offenses. In previous advisory opinions we have opined that the compact covers a wide range of individuals and embraces offenders subject to traditional forms of supervision as the result of a “conviction” as well as offenders subject to innovative forms of supervision as the result of adjudications such as deferred sentencing. *See*, Advisory Opinion June 30, 2004 (in determining the application of the compact one must look to the nature of the legal action taken not exclusively the terminology attached to the action); Advisory Opinion 6-2005 (offender required to stipulate to the material facts of the offense as a condition of entering a deferred prosecution program is subject to the compact; deferred prosecution was in actuality more in the nature of a deferred sentence because offender was required to make material admissions and waive certain rights otherwise available to one in a pre-trial status).

Regardless of the method of adjudication, the consistent theme in our advisory opinions and reflected in the compact and Commission rules is the requirement of legal action in the form of some type of court determination that the offender committed the offense or offenses charged. Even with respect to parolees the compact requires that the offender be in fact and in law an “offender.” Altering the status of a person from innocent to that of an offender who has committed particularized criminal acts can only be accomplished through an adjudicatory process reaching a judicial determination. The requirement of specific legal action in the form of some type of adjudicatory action by a court merely recognizes the due process rights of individuals charged with criminal offenses and the right not be held accountable for crimes they did not legally commit. Thus, for example, an offender charged with both a felony offense and a misdemeanor offense not covered by Rule 2.105 (the misdemeanor rule) would not be subject to the compact *if the offender is adjudicated solely on the misdemeanor offense*. Adjudications, not charges, determine a person’s status as a criminal offender and, therefore, their eligibility under the compact.

It is not possible to address the application of each state’s criminal code and corresponding definitions within the context of Rule 2.105(a)(1). Neither the compact nor the rules defines “direct or threatened physical or psychological harm.” However, the Model Penal Code does provide insight into what circumstances might trigger compact requirements for misdemeanor offenses. The Model Penal Code “effects a consolidation of the common law crimes of mayhem, battery, and assault and also consolidates into a single offense what the antecedent statutes in this country normally treated as a series of aggravated assaults or batteries.” Commentary to Model Penal Code § 211.1. Thus, the traditional distinction



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between battery-type offenses (“direct harm”) and assault-type offenses (“attempted harm”) has largely eroded over the years with the adoption of the Model Penal Code by many states. Under the Model Penal Code simple assault, which may be considered in many states as misdemeanor-like conduct depending on its severity, covers those acts in which an offender “attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or (b) negligently causes bodily injury to another with a deadly weapon; or (c) attempts by physical menace to put another in fear of imminent serious bodily injury.” Model Penal Code § 211.1(1) (1962). The language of 2.105(a)(1) contemplates both assault offenses and battery offenses, without distinction.

In the instant matter, a person charged and adjudicated on a misdemeanor offense of assault would be subject to the compact pursuant to Rule 2.105(a)(1), assuming all other provisions of the compact and rules apply. The fact that the instrumentality of the harm was an automobile has no bearing on the determination of eligibility under Rule 2.105(a)(1). Each state establishes the elements of its own criminal laws. Rule 2.105(a)(1) addresses only the nature of the offense committed (“an offense in which a person has incurred direct or threatened physical or psychological harm”), not the particular instrumentality used in the commission of the offense. If the law of the sending state recognizes the use of an automobile as an element in an assault offense and the offender is so adjudicated, Rule 2.105(a)(1) applies.

Our opinion in this matter does not prevent states from exchanging information concerning underlying charges nor does it prevent a receiving state from taking such matters into consideration in determining supervision if such considerations are allowed by state law and applied equally to in-state and out-of-state offenders. *See*, Rule 4.101 (receiving state must supervise out-of-state offender in a manner consistent with similar offenders sentenced in receiving state). However, neither does our opinion mandate the exchange of charging information, particularly if disclosure is prohibited by law in the sending state. Our opinion reaches only the issue of eligibility to transfer supervision under the compact and affirms the principle that adjudication of an offense – not the offense charged or the instrumentality used in the commission of an offense – is what determines an offender’s status vis-à-vis the compact and its rules.

Summary

In summary, a person charged and adjudicated on a misdemeanor offense of assault would be subject to the compact pursuant to Rule 2.105(a)(1), assuming all other provisions of the compact and rules apply. The fact that the instrumentality of the



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