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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

FILE # ML 46171 09

I.D. # 46171

Re: Request for opinion regarding a parent's defense to prosecution under Section 43.24 of the Texas Penal Code when a parent shows pornographic or "harmful material" to his or her minor children.

Salutations Attorney General Greg Abbott:

As the elected District Attorney for Randall County, Texas, I seek your opinion in interpreting the defense listed in Section 43.24(c)(2) of the Texas Penal Code. The question is as follows: Can a parent can be prosecuted under Section 43.24 of the Texas Penal Code if the parent shows pornographic videos to his or her minor children for any reason or purpose; or, is it self-evident from the context and language of Section 43.24 subsection (c)(2) that a defense to prosecution was intended for a parent.

I.

FACTUAL BACKGROUND

The following report was submitted to our office by the local police department. Two divorced parents share custody of their three daughters, ages 9, 8, and 7. Upon returning from a visitation with the father, the children reported that the father had them watch pornographic videos on his computer and talked to them about the sexual acts they saw. The local police department asked our office to file a criminal charge against the father based on section 43.24 of the Texas Penal Code. We refused to file a case because our interpretation of this statute is that the father has a defense to prosecution under Texas Penal Code 43.24(c)(2). The mother of the victims and several interested members of the public have questioned our interpretation of this statute and so we are seeking an opinion from you office.

II.

DISCUSSION/ANALYSIS OF THE QUESTION PRESENTED

My office has concluded that a parent is not in violation of Section 43.24 of the Texas Penal Code when the parent displays "harmful material" to his or her minor children.

A. The Statute

The applicable statute provides that a person commits an offense if, knowing that the material is harmful: (1) and knowing the person is a minor, he sells, distributes, exhibits, or possesses for sale, distribution, or exhibition to a minor harmful material; or (2) he displays harmful material and is reckless about whether a minor is present who will be offended or alarmed by the display; or (3) he hires, employs, or uses a minor to do or accomplish or assist in doing or accomplishing any of the acts prohibited in Subsection (b)(1) or (b)(2). Tex.Pen.Code Section 43.24(b)(1)(2)(3). "Harmful material" is defined as material whose dominant theme taken as a whole: (A) appeals to the prurient interest of a minor, in sex, nudity, or excretion; (B) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and (C) is utterly without redeeming social value for minors. Tex.Pen.Code Section 43.24(a)(2)(A)(B)(C). A "minor" is defined as an individual younger than 18 years. Tex.Pen.Code Section 43.24(a)(1). Subsection (c) of Section 43.24 provides that it is a defense to prosecution if: (1) the sale, distribution, or exhibition was by a person having scientific, educational, governmental, or other similar justification; or (2) the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse. Tex.Pen.Code Section 43.24(c)(1) and (c)(2).

B. Rules of Statutory Construction

In order to discern the meaning of a statute, a court should focus initially "on the literal text of the statute in question" because "the text of the statute is the law." *Getts v. State*, 155 S.W.3d 153, 155 (Tex.Crim.App. 2005) (quoting *Boykin v. State*, 818 S.W.2d 782, 785 (Tex.Crim.App.1991)). A statute's words and phrases are to be read in context and "construed according to the rules of grammar and usage." *Sanchez v. State*, 995 S.W.2d 677, 683 (Tex.Crim.App. 1999) (citing Tex.Gov't Code Ann. Section 311.011(a)). If the language of a statute is clear and unambiguous, the statute is construed according to its plain meaning. *Getts*, supra, at 155. Certain "extra-textual factors" such as legislative history may be considered only when the language of the statute is ambiguous or when a literal interpretation of the language of the statute leads to absurd results. *Id.* at 155.

Our office has conducted a thorough search of both the case law and the Texas Attorney General opinions and were unable to find any Texas authorities that have discussed or interpreted the defenses set forth in Section 43.24(c)(1) or (c)(2) of the Texas

Penal Code. Mindful of the above rules of statutory construction, we conclude that the language in Section 43.24 (c)(2) of the Texas Penal Code is clear and unambiguous. Accordingly, this subsection should be construed according to its plain meaning. *Getts*, supra, at 155. For purposes of interpreting Section 43.24 (c)(2), we examined the two defenses under Section 43.24. Tex.Pen.Code Section 43.24(c)(1) and (c)(2). The first defense in subsection (c)(1) provides that is a defense to prosecution if a person sells, distributes, or exhibits "harmful material" to a minor if the said person has scientific, educational, governmental, or other similar justification for doing so. Tex.Pen.Code Section 43.24(c)(1). This exception can be interpreted to allow "harmful material" to be provided to minors for purposes such as sex education classes, human anatomy classes, etc. The second defense in subsection (c)(2) allows harmful material to legally be sold, distributed, or exhibited to a minor when they are accompanied by a consenting parent. Tex.Pen.Code Section 43.24(c)(2). This second defense specifically exempts a person from criminal prosecution under 43.24 if the person sells, distributes or exhibits these materials to a minor if a parent is present. It appears from the language of 43.24(c)(2) that the parent controls a minor child's access to "harmful material." Clearly, the language allows a parent to buy "harmful material" for a minor child or to observe this material with his or her child without violating Section 43.24 of the Texas Penal Code.

The argument could be made that since subsection (c)(1) allows a person to show "harmful material" to a minor only for specific purposes (scientific, educational or governmental), a parent is restricted to providing "harmful material" only for these specific purposes. According to this argument, if a parent exhibits "harmful material" to a minor child for any purpose other than the above listed purposes, the defense in subsection (c)(2) would not apply and the parent could be criminally prosecuted. However, under the rules of statutory construction, it is our opinion that subsection (c)(1) and subsection (c)(2) should be interpreted as two separate and independent defenses (the two provisions are separated by an "or" rather than an "and") and that the requirements set forth in subsection (c)(1) do not apply to a parent under subsection (c)(2).

III.

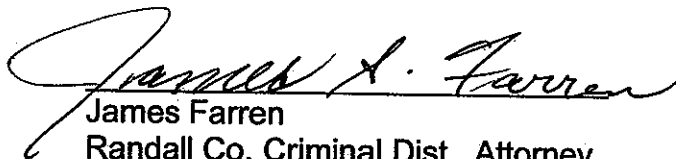
CONCLUSION

In light of the unambiguous language of Penal Code 43.24(c)(2), it is our interpretation that a parent is not criminally responsible under this statute for showing his or her minor children pornographic videos or other "harmful material."

Please issue an opinion on the above referenced question.

Thank you for your assistance in this matter.

Respectfully submitted,

A handwritten signature in cursive script that reads "James A. Farren". The signature is written in black ink and is positioned above the printed contact information.

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