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OPINION COMMITTEE



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OFFICE OF THE DISTRICT ATTORNEY
216TH JUDICIAL DISTRICT
BANDERA, GILLESPIE, KENDALL, KERR COUNTIES

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February 18, 2014

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

RQ-1188-GA

Attention: Opinion Committee

**RE: Request for Attorney General's Opinion Concerning Sex Offender
Registration:**

If a person is granted an early termination of deferred adjudication community supervision for indecency with a child by contact under the 1988 version of article 42.12§5 of the Texas Code of Criminal Procedure, is that a *reportable conviction* for purposes of the current version of registration scheme of Chapter 62 of the Texas Code of Criminal Procedure?

Dear General Abbott:

I am requesting your opinion regarding the duty of a person to register as a sex offender in accordance with the provision of Texas Code of Criminal Procedure Chapter 62, and hence the possible commission of an offense for a failure to comply with those requirements, based upon the following facts and legal analysis as set forth in this letter.

Factual Background

On or about March 2, 1985, in the State of Texas, the defendant, who is more than seventeen (17) years of age, committed the offense of indecency with a child by contact against a victim under seventeen (17) years of age, was indicted for that offense on December 30, 1985, pleaded guilty to that offense, and received a sentence of two (2) years of deferred adjudication community supervision on September 22, 1986. On October 5, 1987, the defendant was granted an early termination of the deferred adjudication community supervision, and the court entered an order that states:

It is therefore ordered that the Defendant's probationary period be modified to one year and that said period be declared to have terminated and the Defendant discharged from probation, that the Defendant's plea be withdrawn, and that this prosecution be dismissed.

For purposes of this Request, please assume that the defendant has not been pardoned, nor appealed this sentence, nor had any other criminal charges since the discharge from probation, nor has ever been in prison or on parole, nor has the defendant ever been informed or notified previously of any duty to register under the provisions of Texas Code of Criminal Procedure, Chapter 62.

Legal Analysis

The offense of indecency with a child by contact that results in a judgment of deferred adjudication community supervision is a *reportable conviction* under the current version of Texas Code of Criminal Procedure, article 62.001(5)(A), and a *sexually violent offense* under 62.001(6)(A). Under the current version of the Texas Code of Criminal Procedure, article 62.002, any reportable conviction occurring on or after September 1, 1970, is subject to the provisions of Chapter 62; however, at the time of the discharge from probation, there was no duty to register at all. Under the provision of Texas Code of Criminal Procedure, article 62.101(a)(1), the duty to register does not expire until the death of the defendant for indecency with a child by contact.

Complicating the issue further is the requirement of *mens rea* because defendants who were neither on parole nor probation nor imprisoned would not usually have any notice of the duty to comply with the registration provisions of Chapter 62. Thus, if the defendant does not comply with the registration requirements of Chapter 62, the defendant could be prosecuted under Texas Code of Criminal Procedure, Article 62.102 so long there is evidence of *mens rea*.

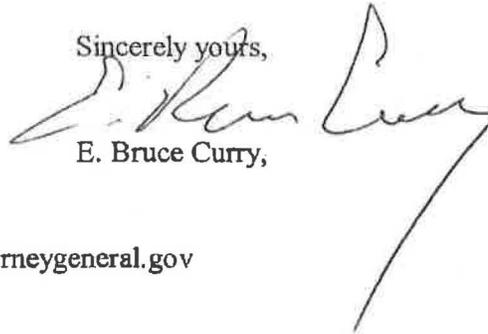
Texas Attorney General Opinion GA-0454 and *Reynolds v. State*, 385 S.W.3d 93 (Tex. App.-Waco, 2012, pet. granted) *aff'd*, No. PD-1369-12, 2014 WL 537075 (Tex. Crim. App. February 12, 2014) each provide a good history of the various modifications to the sex offender registration scheme in Texas. A related issue is *if* the defendant had a duty to register, it *may* have lapsed due to the application of the original registration provisions as discussed in *Ex Parte Harbin*, 297 S.W.3d 283, 286-287 (Tex. Crim. App. 2009). *See also*, *Stanley v. State*, No. 02-09-025-CR, 2010 WL 87184 (Tex. App.-Fort Worth, January 7, 2010, not designated for publication), but see *Reynolds*. The Court of Appeals in *Reynolds* also holds that the modifications to the sex offender registration is constitutional in the face of an *ex post facto* challenge as well, but does not seem to address any due process or similar challenge. The Texas Court of Criminal Appeals has held that the changes in the registration statute does not implicate the *ex post facto* prohibition. *Rodriguez v. State*, 93 S.W.3d 60, 79 (Tex. Crim. App.2002). Thus, there does not appear to be prohibition in applying the registration scheme of Chapter 62 so long as there is a reportable conviction.

There does not appear to be any authority addressing the issue of whether a *deferred* adjudication terminated early under the provision of the previous version of article 42.12§5 of the Texas Code of Criminal Procedure will or will not be a *reportable conviction* for purposes of Chapter 62. *Hall v. State*, ___ S.W.3d ___, No. 06-12-00091-CR, 2013WL441007 (Tex. App.-Texarkana, February 6, 2013, pet. ref'd) is quite similar, but this case addresses the situation of a regular conviction, not a deferred adjudication community supervision case, and so the case arose under 42.12§7 of the Texas Code of Criminal Procedure.

The language of the previous §5 and §7 of 42.12 are quite similar. By analogy, in the context of felon in possession of a firearm, the courts have held that a conviction set under the provisions of §7, although again not under §5, is a not predicate conviction for making a person a felon. *Cuellar v. State*, 70 S.W.3d 815, 816 (Tex. Crim. App.2002).

Thank you for your assistance in this matter. If you need any further information, please do not hesitate to contact me..

Sincerely yours,

A handwritten signature in black ink, appearing to read "E. Bruce Curry". The signature is fluid and cursive, with a long, sweeping tail that extends downwards and to the right.

E. Bruce Curry,

Via email to: Opinion.Committee@texasattorneygeneral.gov