

TEXAS DEPARTMENT OF PUBLIC SAFETY

5805 NORTH LAMAR BLVD • BOX 4087 • AUSTIN, TEXAS 78773-0001

512/424-2000

www.txdps.state.tx.us



THOMAS A. DAVIS, JR.
DIRECTOR

DAVID McEATHRON
ASST. DIRECTOR

FRANKIE WALLER
ASST. DIRECTOR

COMMISSION
COLLEEN MCHUGH
CHAIRMAN

ROBERT B. HOLT
JAMES B. FRANCIS, JR.
COMMISSIONERS

RECEIVED

JUL 22 2002

OPINION COMMITTEE

July 2, 2002

John C. Cornyn
Attorney General
Price Daniel, Sr. Building, 8th Floor
209 West 14th Street
Austin, Texas 78701

RQ-0578-2C

FILE # ML-42711-02

I.D. # 42711

Re: Request for Opinion

Dear General Cornyn:

The Texas Department of Public Safety requests an Attorney General opinion to clarify the duties imposed upon local law enforcement authorities by Chapter 62 of the Texas Code of Criminal Procedure with regard to the publication of registered sex offenders in the local newspaper. Is a local law enforcement authority required by art. 62.03(e) and 62.04(f) of the Texas Code of Criminal Procedure to publish notice of a person convicted of possession or promotion of child pornography (Penal Code Section 43.26) in the local newspaper?¹

Art. 62.03(e) and 62.04(f) of the Texas Code of Criminal Procedure require local law enforcement authorities to publish notice of certain registered sex offenders in the local newspaper. After receiving notice that a sex offender is about to reside within their jurisdiction, these provisions require the local law enforcement authority to, among other things, verify the age of the victim. *See TEX. CODE CRIM. PROC. ANN.* art. 62.03(e) and 62.04(f) (Vernon Supp. 2002). If the victim is a child younger than 17 years of age and certain other requirements are met, the local law enforcement authority must immediately publish notice in the newspaper of greatest paid circulation in the county in which the person subject to registration intends to reside. *See id.*

Whether or not a local law enforcement authority must publish a person convicted of possession or promotion of child pornography in the newspaper seems to turn on whether there is a victim who is a child under 17 years of age in a possession or promotion of child pornography case. For most sex offenses, there is no difficulty in identifying the victim and determining whether the victim is a child under 17 years of age. A possession or promotion of child pornography offense is different from other sex offenses in that the offender may not have had

¹ Penal Code Section 43.26 prohibits the possession or promotion of visual material that depicts a child younger than 18 years of age engaging in sexual conduct.

direct contact with the child depicted in the pornography. Further, law enforcement officials may not know who the depicted child is or the exact age of the depicted child at the time the possession or promotion of child pornography offense was committed.

Chapter 62 of the Code of Criminal Procedure does not define the term victim used in art. 62.03(e) and 62.04(f). However, Chapter 57 of the Code of Criminal Procedure, which deals with the confidentiality of identifying information of sex offense victims, does define victim for purposes of Chapter 57. Art. 57.01(4) of the Code of Criminal Procedure defines victim as "a person who was the subject of an offense the commission of which leads to a reportable conviction or adjudication under Article 6252-13c.1, Revised Statutes." The original definition of victim in Chapter 57 only included victims of sexual assault and aggravated sexual assault. See Act of 1987, 70th Leg., ch. 571, §1. In 1997, the legislature in S.B. 48 amended the definition of victim to its current form. See Act of 1997, 75th Leg., ch. 680, §1. The Senate Criminal Jurisprudence Committee's bill analysis of S.B. 48 states:

Currently, Texas law regarding the confidentiality of identifying information regarding sex offense victims includes victims of sexual assault and aggravated sexual assault, but does not include victims of other sex crimes. *S.B. 48 would include victims of child pornography, pedophilia, and other sex crimes in its definition of "victims," thereby giving these persons the same protections in regards to confidentiality under the law as victims of sexual assault and aggravated sexual assault.*

SENATE CRIM. JURIS. COMM., BILL ANALYSIS, Tex. S.B. 48, 75th Leg., R.S. (1997) (emphasis added). Thus, for purposes of Chapter 57, a child depicted in child pornography is considered a sex offense victim and entitled to Chapter 57's confidentiality protections. Chapter 57 and Chapter 62 deal with related subject matter. It may therefore seem reasonable to define the term victim in Chapter 62 in the same manner as victim is defined in Chapter 57. If this definition can be applied to art. 62.03(e) and 62.04(f), it may be argued that the child depicted in the pornography is the victim of a possession or promotion of child pornography offense because the depicted child is the person who is the subject of such an offense. If the depicted child is a child under 17 years of age, then the offender would be subject to publication in the newspaper.

One Texas court has recognized that the depicted child is the victim of a possession of child pornography offense. In *Vineyard v. State*, 958 S.W.2d 834 (Tex. Crim. App. 1998), the Texas Court of Criminal Appeals held that separate convictions for possession of a videotape and possession of a photograph, pursuant to Penal Code, Section 43.26 resulting from a single incident of possession did not violate appellant's protection against double jeopardy. As support for the conclusion that the legislature intended to allow multiple units of prosecution under Penal Code Section 43.26, the Court stated that "in cases like this . . . there are multiple victims; therefore, a separate prosecution for each victim should be permissible." *Vineyard*, 958 S.W.2d at 839 n. 7. The Court found support for this multiple victim rationale in the bill analysis by the Criminal Jurisprudence Committee of the House study group that studied adopting what is now Section 43.26. See *id.* This committee stated:

Child pornography is the worst type of pornography because it exploits defenseless and vulnerable members of society at a stage of life when they are profoundly impressionable. Even though it is a crime to produce, direct, or distribute child pornography, there is no law prohibiting its possession. It is

traumatic enough for children to be photographed, but it is even more traumatic for the child to know that at any given moment the photographs are being distributed for others to see. This bill would effectively curtail the circulation of such material, since people could be prosecuted and sent to prison for possessing it. By thus inhibiting the demand for child pornography, the bill would drastically reduce its production and promotion.

See id. (quoting Bill Analysis, Criminal Jurisprudence Committee, House Study Group (on a bill to prohibit the possession of child pornography) of HB 626, at pg. 25, April 23, 1985). Finding that the legislature in enacting Penal Code Section 43.26 sought to protect the exploited child, *Vineyard* recognized that violators of Penal Code Section 43.26 victimize the depicted child.

Several federal circuit courts of appeal have held that a person who possesses, distributes or receives child pornography primarily and directly victimizes the child depicted in the pornography. *See United States v. Shutic*, 274 F.3d 1123 (7th Cir. 2001); *United States v. Sherman*, 268 F.3d 539 (7th Cir. 2001); *United States v. Tillmon*, 195 F.3d 640 (11th Cir. 1999); *United States v. Hibbler*, 159 F.3d 233 (6th Cir. 1998); *United States v. Norris*, 159 F.3d 926 (5th Cir. 1998), *cert. denied*, 526 U.S. 1010, 143 L. Ed. 2d 219, 119 S. Ct. 1153 (1999); *United States v. Boos*, 127 F.3d 1207 (9th Cir. 1997), *cert. denied*, 522 U.S. 1066, 139 L. Ed. 2d 672, 118 S. Ct. 734 (1998); *United States v. Ketcham*, 80 F.3d 789 (3rd Cir. 1996); *United States v. Rugh*, 968 F.2d 750 (8th Cir. 1992); *but see United States v. Toler*, 901 F.2d 399 (4th Cir. 1990) (Primary victim of an interstate transportation of child pornography offense is society in general). These courts were faced with interpreting the term “victim” as used in the federal sentencing guidelines when determining whether to group multiple counts for sentencing purposes. In each case that held that the depicted child was the victim, the defendant was convicted of multiple counts of possession, distribution or receipt of child pornography and each piece of child pornography that was possessed, distributed or received depicted a different child. Under the federal sentencing guidelines, grouping multiple counts was appropriate only if each count involved the same victim. If each count did not involve the same victim, grouping was not appropriate. Whether or not to group multiple counts was significant because grouping resulted in a lesser sentence.

The defendant in each case argued that crimes prohibiting the possession, distribution or receipt of child pornography are victimless crimes much like drug and immigration offenses. Therefore, society at large being the primary victim of a possession, distribution or receipt of child pornography case, grouping was appropriate because the victim in each count, society, was the same. Each circuit court cited above, except the Fourth Circuit, rejected this argument and held that the child depicted in the child pornography is the direct and primary victim of a possession, distribution or receipt of child pornography offense.² Thus, if the defendant was convicted of multiple counts and each count was based on child pornography that depicted a different child, grouping was not appropriate because there were different victims.

² *United States v. Toler*, 901 F.2d 399 (4th Cir. 1990) presented a set of facts somewhat different from the other cases cited. In *Toler*, the defendant was convicted of one count of interstate transportation of child pornography and two counts of interstate transportation of a minor with the intent to engage in prohibited sexual conduct. All three counts involved the same child and all parties agreed the child was the victim in the two interstate transportation of a minor counts. The defendant argued that the same child was the victim in the child pornography count because she was the child depicted. The Fourth Circuit rejected this argument and held that society at large was the primary victim in the child pornography count. Since all counts did not involve the same victim, grouping was not appropriate.

The courts based their holding that the child depicted in the child pornography is the direct and primary victim of a possession, distribution or receipt of child pornography offense on several grounds. The Eighth Circuit in *Rugh* examined the legislative history of the statute that prohibited the receipt of child pornography to determine who the victim was. The Eighth Circuit determined that when Congress enacted this statute their primary aim was to protect the exploited child, rather than society at large. *Rugh*, 968 F.3d at 756-7. From this, the Eighth Circuit concluded that when this statute is violated the child depicted in the pornography is the one who is primarily victimized, not society. *Id.* at 757. To support the conclusion that the child depicted in the pornography was the direct victim of the crime of possession of child pornography, the Seventh Circuit in *Sherman* stated, “the possession, receipt and shipping of child pornography directly victimizes the children portrayed by violating their right to privacy, and in particular violating their individual interest in avoiding the disclosure of personal matters.” *Sherman*, 268 F.3d at 547-8. As support for this rationale, the Seventh Circuit cited *New York v. Ferber*, 458 U.S. 747, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982) where the United States Supreme Court delineated the harm that comes to the children depicted when pornography is possessed or distributed:

Because the child’s actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

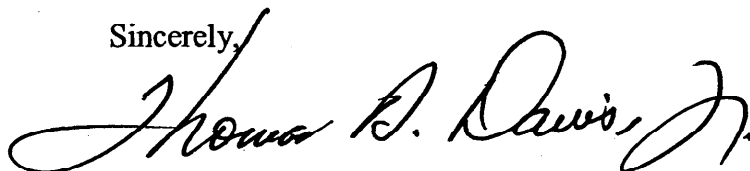
Id. at 548 (quoting *Ferber*, 458 U.S. at 759 n. 10 (citation omitted)). To counter the argument that it is only the production of the child pornography that directly victimizes the child, the Fifth Circuit stated that the distribution of child pornography perpetuates the abuse initiated by the producer of the material. *Norris*, 159 F.3d at 929. As support, the Fifth Circuit cited *Ferber* where the United States Supreme Court stated, “[t]he materials produced are a permanent record of the children’s participation and the harm to the child is exacerbated by their circulation.” *See id.* (quoting *Ferber*, 458 U.S. at 759). The Fifth Circuit concluded that a “passive” consumer who merely receives or possesses the images directly contributes to this continuing victimization. *Id.* at 930. Finally, in *Boos*, a distribution of child pornography case, the Ninth Circuit used a dictionary definition and stated that it was the children used in the production of the pornography who were injured, both physically and psychologically as a result of *Boos*’ patronage of the industry. *Boos*, 127 F.3d at 1211. This is the so called market-maker theory which says that possessors victimize exploited children by creating a market that encourages the production of child pornography. *See also Ketcham*, 80 F.3d at 794 (Prohibiting possession of child pornography discourages the production of the pornography by depriving the would-be producers of a market. Thus, the primary objective of both §2251 [production] and §2252 [possession] was the same, to protect children from exploitation by the producers of child pornography.).

Although there does not appear to be any direct authority that answers this question, there does seem to be some persuasive authority that supports the conclusion that a violator of Penal Code Section 43.26 victimizes the child depicted in the child pornography. If the child depicted in the pornography is the victim of a possession or promotion of child pornography offense, then the question is raised as to whether the victim is a child under 17 years of age. Is the age of the child as depicted in the pornography determinative of this question or is the age of the depicted child at the time of the possession or promotion determinative? If the age of the child as depicted in the pornography is determinative, the child pornography itself will help the law enforcement authority to verify the age of the victim. However, if the age of the depicted child at the time of

the possession or promotion is determinative, a law enforcement authority may have difficulty in verifying the age of the victim because the law enforcement authority may not know who the depicted child is. It is possible that the depicted child, although under 17 years of age at the time the pornography was produced, was at least 17 years of age at the time the possession or promotion of child pornography offense was committed.

The Department requests this opinion to aid law enforcement authorities in the administration of the Texas Sex Offender Registration Program. Please do not hesitate to contact me if we can be of any assistance.

Sincerely,

A handwritten signature in black ink that reads "Thomas A. Davis, Jr." with a stylized flourish at the end.

Thomas A. Davis, Jr.
Director