

## Minimizing Post Conviction Consequences of Sex Offenses

### A. Avoiding Sex Offender Registration

When it comes to “hedging your bets” in negotiating a plea for a sex offense; other considerations may enter the equation. Among the most onerous post-conviction consequence of a conviction for a sex offense is the stigma of having to register as a sex offender. What follows is a list of sex offenses in bold face print for which registration is required, and below each registration offense in italics is a list of non registration offenses that the defense attorney may try to negotiate in return for a plea of guilty. In most cases, the non registration alternative is not a lesser included offense. In those cases, the indictment will have to be amended, a new indictment will be necessary, or the defendant will have to agree to plea to information. The list is certainly not exhaustive, and the creative defense attorney can certainly come up with other possibilities.

If a plea bargain is negotiated to avoid a registration offense and there is no agreement as to punishment, or the agreement is for deferred adjudication, pay special attention to whether the non registration offense carries a more serious period of incarceration than the registration offense. The plea bargain will likely not be as desirable in such a case. Also, Article 62.001, TCCP, includes as registration offenses “an attempt, conspiracy, or solicitation, as described by chapter 15 Penal Code, to commit an offense or engage in conduct” involving most of the registration offenses.

### **Continuous Sexual Abuse of Young Child or Children, TPC § 21.02**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

*Indecent Exposure, TPC § 21.08 (misdemeanor), or Indecent Exposure: if second violation and the offense results in deferred adjudication.*

*Aggravated Assault, TPC § 22.02*

*Unlawful Restraint, Kidnapping, or Aggravated Kidnapping - where the judgment or papers in the case do not contain an affirmative finding that the victim was younger than 17.*

*Injury to a Child, TPC § 22.04*

**Aggravated Kidnapping, TPC § 20.04(a)(4), if the actor committed the offense or engaged in the conduct with the intent to abuse the victim sexually.**

*Aggravated Kidnapping under a § other than 20.04(a)(4), or, if under 20(a)(4) be sure indictment does not allege intent to sexually violate or abuse the victim and that there is no affirmative finding under TCCP Art. 42.015 that the victim was younger than 17, and “the order in the hearing or the papers in the case” does NOT “contain an affirmative finding that the victim or intended victim was younger than 17.” If possible, include a finding on the record by the State or the Court that there was no evidence of intent to abuse the victim sexually, and that sex offender registration does not apply.*

*Kidnapping, TPC § 20.03 and unlawful restraint, TPC § 20.02 with same caveats as for aggravated kidnapping above.*

**Unlawful Restraint, TPC § 20.02, Kidnapping, TPC § 20.03, and Aggravated Kidnapping §20.04 - where the judgment or the order in the hearing or the papers in the case contain an affirmative finding that the victim was younger than 17.**

*Unlawful Restraint; Kidnapping; or, Aggravated Kidnapping without such an affirmative finding in the judgment or an “order in the hearing or papers in the case” that the victim or intended victim was younger than 17.*

**Indecency With a Child, TPC § 21.11, Sexual Assault, TPC § 22.011, and Aggravated Sexual Assault, TPC § 22.021.**

*Aggravated Assault, TPC § 22.02.*

*Injury to a Child, TPC § 22.04.*

*Indecent Exposure, TPC § 21.08 (first offense or deferred adjudication if second offense;*

*Enticing a child, § 25.04;*

*Improper Relationship Between Educator and Student, TPC § 21.12 (in a proper set of facts).*

**Indecent Exposure, TPC § 21.08, second violation – no deferred adjudication.**

*Indecent Exposure, TPC § 21.08, second violation – where the second violation results in deferred adjudication.*

**Possession or Promotion of Child Pornography, TPC § 43.26.**

*Improper Photography or Visual Recording, TPC § 21.15 (SJF).*

*Sale Distribution or Display of Harmful Material to a Minor, TPC § 43.24.*

**Burglary of a Habitation, TPC § 30.02, when punishable under Subsection (d), and with intent to commit a sexual offense listed in CCP 62.001(5)(A) or (C).**

*Burglary of a Habitation under §30.02 without intent to commit a sexual offense listed in CCP 62.001(5)(A) or (C).*

**Online Solicitation of a Minor, TPC § 33.021.**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

**Sexual Assault of a Child under TPC § 22.011 or 22.021.**

*Aggravated Assault, TPC § 22.02, Injury to a child, TPC § 22.04, Improper Relationship Between Educator and Student, TPC § 21.12 (in a proper set of facts).*

**Trafficking of Persons, TPC § 20A.02(a)(3), (4), (7), or (8).**

*Trafficking of Persons, TPC § 20A.02(a)(1), (2), (5), or (6).*

**Compelling Prostitution, TPC § 43.05.**

*Prostitution, TPC § 43.02, (perhaps under the law of parties) but not under Subsection (c)(3), which requires registration.*

*Promotion of Prostitution, TPC § 43.03.*

*Aggravated Promotion of Prostitution, TPC § 43.04.*

*Trafficking of Persons, TPC § 20A.02, but not under (a)(3), (4), (7) or (8).*

*Employment Harmful to Children, TPC § 43.251.*

*Injury to a Child, TPC § 22.04.*

**Sexual Performance by a Child, TPC § 43.25.**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

*Injury to a Child, TPC § 22.04.*

**Prohibited Sexual Conduct, TPC § 25.02.**

*Aggravated Assault, TPC § 22.02.*

*Injury to a Child, TPC § 22.04 (if the victim was a child).*

Prosecutors are not typically inclined to negotiate deals in sex offense cases that will permit a sex offender to avoid registration; however, that is not always the case. Weaknesses in the State's case, reluctant witnesses and other concerns often lead the State to make deals they otherwise would never consider. In a proper set of facts, it may prove to be in everyone's best interest to consider a plea that will not include the requirement of sex offender registration.

Of course attorneys should advise their clients that over the years the legislature has added to the list of offenses requiring sex offender registration. (Eg., TPC § 33.021, Online Solicitation of a Minor, and TPC § 21.02, Continuous Sexual Abuse of Young Child or Children, added by the 80<sup>th</sup> Legislature; TPC § 20A.02, Trafficking of Persons (under (a)(3), (4), (7), or (8).), added by the 82<sup>nd</sup> legislature; and, TPC § 43.02, Prostitution (if punishable under (c)(3), where the person solicited is under 18), added by the 84<sup>th</sup> Legislature. Texas has included many felony sexual offenses under the registration statute; however, there are still some exceptions, as noted above. The next expansion of the registration statute could be directed at the pleadings or evidence, as with the Kidnapping and Burglary statutes. Some states already look at pleadings and evidence much more extensively than does Texas. Amendments to the Texas Statute for the Civil Commitment of Sexually Violent Predators already permit evidence of sexual motivation to be used as a basis for commitment in murder and capital murder cases, even where it was not alleged in the indictment. (See TEX. HEALTH & SAFETY CODE ANN., ch. 841).

TPC § 12.45, Admission of Unadjudicated Offense, provides another possible means of avoiding sex offender registration under current law. Where the State insists on some admission of guilt on one or more sex offense; a plea to a non registration offense with an agreement to take into consideration at sentencing other sex offenses that would, upon conviction, require registration, may satisfy the State, and would not entail registration requirements.

### **B. Limiting the Duration of Sex Offender Registration**

Another consideration in sex offense cases concerns the duration of the registration. Where a client must accept a plea to a sex offense that carries a registration requirement, Article 62.101, CCP, should be consulted to determine whether a plea can be arranged to an offense carrying a 10 year registration requirement, rather than a lifelong registration requirement. Federal sex offender registration requirements differ from state law the requirements for certain offenses. When considering the possibility of future early termination of sex offender registration requirements pursuant to TCCP Art. 62.404, federal registration requirements should be consulted.

### **C. Exemption from Registration**

Article 62.301(b), CCP, authorizes young adult sex offenders who are required to register as a sex offender to petition for an exemption from the sex offender registration requirements, at

any time after they are sentenced, or placed on deferred adjudication, under the following circumstances:

1. The person is required to register only as a result of a single reportable conviction or adjudication, other than an adjudication of delinquent conduct; and
2. The court has entered in the appropriate judgment or has filed with the appropriate papers a statement of an affirmative finding described by Article 42.017 or Article 42A.105.

The required affirmative finding must state that at the time of the offense the victim was at least 15; the defendant was not more than 4 years older than the victim at the time of the offense; and the conviction is based solely on the ages of the defendant and the victim. In the trial of any case under TPC §§ 21.11 (Indecency with a Child) or 22.011 (Sexual Assault) where the judge imposes community supervision, the judge is required to make and enter such an affirmative finding, if applicable. (Arts. 62.301 and 62.351, TCCP, set forth what the judge may consider and the burden of proof.)

Once the exemption order is entered, it does not expire. The court is required to withdraw the order if, after it is issued, the person receives a conviction or deferred adjudication for an offense requiring sex offender registration.

Art. 62.351, TCCP, provides for a hearing “During or after the disposition of a case under Section 54.04, Family Code...to determine whether the interests of the public require registration.” Art. 62.355 states that the state may waive the hearing and agree that registration is not required.

#### **D. Avoiding Civil Commitment as a Sexually Violent Predator**

An even more onerous consequence than registration is the prospect of civil commitment as a sexually violent predator. Any attorney negotiating a plea for a sex offense should understand that even the most favorable plea they may negotiate for their client in the case of certain sex offenses has the potential to become a life sentence. Even more disconcerting for defense attorneys is the fact that their client could face the prospect of lifelong civil commitment for a conviction of a **non**-sex offense.

The CCSVP law was initially passed in 1999. Act of June 1, 1999, 76<sup>th</sup> Leg., R.S., S.B. 365. § 4.01 (codified at TEX. HEALTH & SAFETY CODE ANN., ch. 841). It has been amended several times over the past decade. The shock of sex offenders who had the registration requirement levied on them long after the fact of their conviction pales in comparison to that of one who discovers that they have become eligible for lifelong civil commitment upon completion of their sentence.

Wherever possible, attorneys should attempt to structure plea agreement to avoid civil commitment eligibility. To do so, one must first understand what qualifies a person for civil commitment. Qualifying offenses are listed in § 841.002 TEX. HEALTH & SAFETY CODE ANN. They include:

1. §21.02: Continuous Sexual Abuse of Young Child or Children;
2. §21.11(a)(1): Indecency With a Child (sexual contact);
3. §22.011: Sexual Assault;
4. §22.021: Aggravated Sexual Assault;
5. §20.04(a)(4): Aggravated Kidnapping (intent to sexually abuse or violate);
6. §30.02: Burglary (if punishable under § 30.02(d), i.e. premises was a habitation and was entered with intent to commit (or did commit or attempt to commit) the offense listed in 1-5, above;
7. §§19.02 and 19.03: Murder and Capital Murder where, during the guilt or innocence phase or the punishment phase for the offense, during the adjudication or disposition of delinquent conduct constituting the offense, or subsequently during a civil commitment proceeding under Subchapter D, it is determined beyond a reasonable doubt to have been based on sexually motivated conduct;
8. Attempt, conspiracy, or solicitation to commit any offense in 1-7, above;
9. Offenses under prior state law with elements substantially like 1-8, above; and
10. Offenses under other state law, federal law, or the Uniform Code of Military Justice with elements substantially like 1-8, above. § 841.002(8).

Once a defense attorney determines if the current charges would qualify a client for CCSVP, they can try to structure the plea to take them out of the CC eligibility queue. One way is to consider a plea to offenses that are not on the list of qualifying “sexually violent offenses.” Reference to the above section on avoiding sex offender registration could be helpful to this end. Only “repeat” sexually violent offenders qualify under the CCSVP law, so a first conviction may not be problematic. However, multiple count indictments, and multiple indictments for related conduct, qualify one as a “repeat sexually violent offender” as long as a sentence was imposed for at least one of the offenses. Also, deferred adjudications and straight probations (even after successful completion of and discharge from the period of community supervision), and juvenile adjudications for delinquent conduct constituting a sexually violent offense where commitment to TYC is ordered, can result in CC if, thereafter, “the person commits a sexually violent offense for which the person is convicted, but only if the sentence for the offense is imposed.” Section 841.003(b), Health & Safety Code, as amended by S.B. 746, 84<sup>th</sup> Legislature.

In a case of multiple counts or indictments for offenses that could qualify for civil commitment; defense attorneys should always try to negotiate a plea for a single count. Because of the prospect of civil commitment, in some cases it might even be tactically sound to negotiate

more time for the client in return for a plea to a single count. Of course, that is a decision the client must make, but if the possibility of civil commitment is presented, the client may well prefer the longer sentence to avoid the prospect of lifelong civil commitment. (Of course, one can never discount the possibility that future amendments to the Civil Commitment statute will allow for commitment for a single offense, although that seems unlikely.)

Where a prosecutor is insistent on admission to more than one sex offense, Defense attorneys may want to suggest using TPC § 12.45, Admission of Unadjudicated Offense, to avoid pleading to more than one count and thus qualifying for civil commitment.

Finally, in cases involving § 19.02, Murder, and § 19.03, Capital Murder, defense attorneys should be cognizant of the fact that any evidence that the crime was “based on sexually motivated conduct” could qualify their client for civil commitment under § 841.002(8), assuming another qualifying offense exists. In these cases, it is extremely important to collect all evidence that the conduct was not sexually motivated. Civil commitment in these cases usually does not become an issue until decades have passed. The more high profile or gruesome the case, the more likely the State will file a petition for civil commitment.