Opinion No. 2014-013

April 2, 2014

John Selig, Director
Arkansas Department of Human Services
Post Office Box 1437, Slot S201
Little Rock, Arkansas 72203-1437

Dear Mr. Selig:

I am writing in response to your request for my opinion on the following questions:

1. Does A.C.A. § 9-27-357 provide an exhaustive list of all offenses for which the Division of Youth Services is required to collect DNA samples from adjudicated delinquent juveniles committed to its custody?

2. Does the DNA Database Act, A.C.A. § 12-12-1101 *et seq.*, apply to require collection of DNA samples from juveniles adjudicated delinquent of any felony, misdemeanor sexual offense, or repeat misdemeanor offense involving violence?

You report the following by way of factual background:

> [T]he DHS Division of Youth Services has interpreted the Code as requiring DNA collection in all cases identified in statute – the ten offenses listed in the Juvenile Code, as well as the broader classes of felonies and misdemeanors designated as qualifying offenses in the DNA Database Act. This interpretation was challenged recently, and a Circuit Court Judge has ordered the destruction of one

> juvenile's DNA sample as unlawfully collected because the juvenile was not adjudicated of one of the ten offenses in § 9-2-357. It is not clear from the order whether the judge had the DNA Database Act before him in that case. The same was destroyed as ordered, so no further action is planned with respect to that order. After receiving that order DYS suspended collection of DNA samples under the DNA Database Act until that Act's application to juvenile cases can be clarified.

RESPONSE

In my opinion, the answer to your first question is "yes" and the answer to your second question is "no."

Question 1: Does A.C.A. § 9-27-357 provide an exhaustive list of all offenses for which the Division of Youth Services is required to collect DNA samples from adjudicated delinquent juveniles committed to its custody?

In my opinion, for reasons set forth in detail in the attached Op. Att'y Gen. No. 2003-227, the answer to this question is "yes." I will not here reproduce in detail my predecessor's analysis, with which I fully concur.

My predecessor's analysis is in all respects consistent with the following declaration by the Arkansas Court of Appeals:

> In 2003, the Eighty-Fourth General Assembly adopted two acts relevant to juvenile-delinquent DNA samples – Acts 1265 and 1470. Among other things, both acts amended § 12-12-1109(a) to eliminate all references to juveniles and to persons who have been adjudicated delinquent. *See* Act 1265 of 2003 and Act 1470 of 2003. ***Act 1265 also created a new statutory provision, Ark. Code Ann. § 9-27-357, to govern the ten offenses for which juveniles who are adjudicated delinquent must submit to DNA sampling.***[1]

I will address by way of supplement only your suggestion that subchapter 11 of title 12, chapter 12 of the Code in two instances refers to juveniles "required to

[1] *Hawkins v. State*, 2004 WL 848269, *1 (emphasis added). Although this opinion has been designated "Not for Publication," 86 Ark. App. xv (2004), its analysis is nevertheless instructive in confirming my predecessor's analysis.

provide a DNA sample **under this subchapter**"[2] – a fact you suggest supports characterizing as only partial the list of offenses set forth in A.C.A. § 9-27-357 as warranting DNA sampling of a juvenile "adjudicated delinquent." To my mind, this conclusion is flatly inconsistent with the provisions of A.C.A. § 12-12-1109, subsection (a), as amended by both Acts 1265 and 1470. As the Court of Appeals pointed out, both Acts 1265 and 1470 struck from this statute, which lists the individuals subject to the Convicted Offender DNA Data Base [sic] Act (the "Act"),[3] any reference to "juveniles" and to persons "adjudicated delinquent." Under the express terms of this amended legislation only "[a] person ***who is adjudicated guilty of a qualifying offense*** on or after August 1, 1997, shall have a DNA sample drawn" under the Act. As my predecessor pointed out, an "adjudication of guilt" as defined under the Act[4] does not include individuals merely "adjudicated delinquent."[5] The effect of deleting the latter term from subsection (a) of A.C.A. § 12-12-1109 was to leave no provision "under this subchapter" whereby juveniles might be "required to provide a DNA sample," irrespective of whether they have been adjudged delinquent based upon their commission of a "qualifying offense" as defined in the Act.[6] Given this fact, the two remaining statutory references to juveniles "required to provide a DNA sample under this subchapter" can only be described as vestigial, having no further practical function. The legislature's failure to repeal these provisions in my estimation constitutes no more than an inconsequential oversight.

I am reinforced in this conclusion by the fact that reading these provisions as triggering all the provisions of subchapter 11 would be impermissible because it would render the restrictions set forth in A.C.A. § 9-27-357 essentially

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[2] A.C.A. §§ 12-12-1105(b)(2) and -1111(c)(2) (emphasis yours).

[3] A.C.A. § 12-12-1101 through -1120 (Repl. 2009) (emphasis added).

[4] A.C.A. § 12-12-1103(1).

[5] *See, e.g., Vanesch v. State*, 343 Ark. 381, 389, 37 S.W.3d 196 (2001) ("[I]t appears that the General Assembly also recognizes a difference between an adjudication or finding of guilt and an adjudication of delinquency.") (citing pre-amendment version of A.C.A. § 12-12-1109(a) and (b) as separately listing these two types of adjudication).

0[6] *See* A.C.A. § 12-12-1103(9) (defining the term "qualifying offense").

meaningless.[7] I will also echo my predecessor's conclusion that A.C.A. § 9-27-357, which is exhaustive on its face, should be given exclusive effect as more specific legislation.[8] The legislation was further adopted later in time than the legislation authorizing juvenile DNA sampling under the Act.[9] The latter authorization, moreover, was itself expressly repealed in the same legislative session in which the more restricted authorization set forth in A.C.A. § 9-27-357 was enacted. The conclusion following from this legislative history is inevitable and succinctly set forth by the Court of Appeals in *Hawkins*: section 9-27-357 sets forth "the ten offenses for which juveniles who are adjudicated delinquent must submit to DNA sampling."

Question 2: Does the DNA Database Act, A.C.A. § 12-12-1101 et seq., apply to require collection of DNA samples from juveniles adjudicated delinquent of any felony, misdemeanor sexual offense, or repeat misdemeanor offense involving violence?

For reasons set forth in my response to your previous question, in my opinion, the answer to this question is "no."

The offenses recited in this question fall within the category of "qualifying offense" as defined in the Act.[10] However, the mere fact that a juvenile may have

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[7] I note in this regard that A.C.A. § 9-27-356 and A.C.A. § 12-12-1109 were respectively adopted and amended pursuant to Act 1265. As reflected in the following, newly adopted and newly amended legislation enacted together in the same act must be reconciled if at all possible:

> To determine the intent of the legislature we must look at the whole act. *First State Bank v. Arkansas State Banking Bd.*, 305 Ark. 220, 806 S.W.2d 624 (1991); *Cozad v. State*, 303 Ark. 137, 792 S.W.2d 606 (1990). As far as practicable, we must give effect to every part, reconciling provisions to make them consistent, harmonious, and sensible. *McGee v. Amorel Pub. Schools*,[309 Ark. 59, 827 S.W.2d 137 (1992)]; *Shinn v. Heath*, 259 Ark. 577, 535 S.W.2d 57 (1976).

Omega Tube & Conduit Corp. v. Maples, 312 Ark. 489, 493, 850 S.W.2d 317 (1993).

[8] *See R.N. v. J.M.*, 347 Ark. 203, 61 S.W.3d 149 (2001) (declaring that specific legislation will be given precedence over conflicting general legislation).

[9] *See Daniels v. City of Fort Smith*, 268 Ark. 157, 594 S.W.2d 238 (1980) (declaring that, ordinarily, the provisions of an act adopted later in time repeal the conflicting provisions of an earlier act).

[10] A.C.A. § 12-12-1103(8).

been adjudicated delinquent for having committed such an offense does not render him subject to the provisions of the Act, as you report the DHS Division of Youth Services has concluded.[11] Again, as the Arkansas Court of Appeals has acknowledged, the effect of the 2003 amendments discussed above was to remove the category of juveniles "adjudicated delinquent" from the scope of individuals covered by the Act, meaning that the definition of "qualifying offense" under the Act simply does not apply to them. This conclusion is in all respects consistent with my predecessor's conclusion that an "adjudication of guilt" as defined under the Act does not include individuals merely "adjudicated delinquent." The DYS policy consequently appears unwarranted, as the trial judge referenced in your factual recitation concluded.

[11] Significantly, the Arkansas Crime Lab likewise questions the Act's application and has accordingly declined to process DNA samples of juveniles adjudicated delinquent based upon their commission of offenses other than the ten recited in A.C.A. § 9-27-357.

Assistant Attorney General Jack Druff prepared the foregoing opinion, which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

DM/JHD:cyh

Enclosure