



**Office of the Attorney General  
State of Texas**

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ATTORNEY GENERAL

October 20, 1993

Honorable James Warren Smith, Jr.  
County Attorney  
Frio County  
P.O. Box V  
Pearsall, Texas 78061-1138

Letter Opinion No. 93-95

Re: Whether a policy requiring certain probationers to conform to a dress and hair code is prohibited by either the Texas Constitution or the United States Constitution (RQ-560)

Dear Mr. Smith:

You state that a county judge in Frio County is requiring "male misdemeanant[s] and juvenile probationers performing community service" under article 42.12 of the Code of Criminal Procedure and section 54.04(d) of the Family Code to conform to a dress and hair code. You describe this code as follows: "no 'goatees,' hair not any further than collar length, no T-shirts with logos and keep shirt tails tucked in." You ask whether this policy is prohibited by either the Texas Constitution or the United States Constitution.

Before considering the constitutional question, we briefly examine the statutory basis for juvenile and adult probation. Section 54.04(d) of the Family Code authorizes a juvenile court to place a child on probation "on such reasonable and lawful terms as the court may determine."<sup>1</sup> A court may not make a disposition under section 54.04 of the Family Code unless it finds that the child is in need of rehabilitation or the protection of the public or the child requires that disposition be made. Fam. Code § 54.04(c).<sup>2</sup>

Probation of adult offenders is governed by the Code of Criminal Procedure. Article 42.12, section 11 of the Code of Criminal Procedure provides that the court having jurisdiction over a case shall determine the terms and conditions of probation, and sets forth numerous possible conditions the court may impose. Generally, a court is not limited to imposing the enumerated conditions, however. See Code Crim. Proc. art. 42.12

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<sup>1</sup>We assume for purposes of this opinion that section 54.04(d) of the Family Code authorizes a court to require a juvenile probationer to perform community service and to impose a dress and hair code as a term of probation.

<sup>2</sup>We assume for purposes of this opinion that the dispositions at issue were made in compliance with this provision.

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§ 11 ("Terms and conditions of probation may include, but shall not be limited to, [the following]"). A court may impose any terms or conditions, provided that they have a reasonable relationship to the treatment of the accused and the protection of the public. *Felder v. State*, 811 S.W.2d 131, 134 (Tex. Crim. App. 1991) (quoting *Hernandez v. State*, 556 S.W.2d 337, 342 (Tex. Crim. App. 1977)); *Simpson v. State*, 772 S.W.2d 276, 278 (Tex. App.--Amarillo 1989). In addition, because the court and the probationer have a contractual relationship, the conditions of the probation should be clear, explicit and unambiguous so that the probationer knows what is expected. *Simpson*, 772 S.W.2d at 278. Furthermore, due process requires that the terms of probation be specified in the court's written order granting probation. *Id.* The court in *Simpson* held that the condition that a defendant "maintain his hair in a 'neat and orderly manner'" was impermissible because it required a subjective judgment as to what was "neat and orderly," and therefore fell short of the requirement that probation conditions be clear, explicit and unambiguous. *Id.* at 281.

Whether the dress and hair code you describe is "reasonable" as required by section 54.04 of the Family Code, or has a reasonable relationship to the treatment of a particular defendant and the protection of the public as required by article 42.12, section 11 of the Code of Criminal Procedure, will depend upon the circumstances of each individual case. Such factual determinations are beyond the purview of the opinion process. In addition, it is impossible for this office to determine whether the court has established this term of probation in clear, explicit and unambiguous language in each and every case, and has incorporated it into each written order. Therefore, this office cannot determine whether the court's policy of imposing the dress and hair code as a term of probation comports with the requirements of the Family Code or the Code of Criminal Procedure.

We now turn to your constitutional question. You appear to be concerned that the dress and hair code may run afoul of the Texas Constitution or the United States Constitution.<sup>3</sup> In particular, you appear to be concerned that the dress and hair code may infringe upon the probationers' right to free expression.<sup>4</sup> Although we are not aware of any cases developing an analytical framework for determining whether conditions imposed

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<sup>3</sup>You appear to assume that the provisions discussed in the foregoing text authorize a court to require a defendant to adhere to a dress and hair code in every case, an assumption we do not necessarily share. See discussion *supra*.

<sup>4</sup>We assume for purposes of this opinion that the dress and hair code implicates such rights. We also note that the dress and hair code appears only to be applied to male probationers. You do not ask, and we do not address, whether the fact that the dress and hair code is not applied to female probationers implicates male probationers' equal protection rights under the state or federal constitution.

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under Texas statutes violate the state or federal right to free expression,<sup>5</sup> there are numerous federal court cases which consider the constitutionality of probation conditions imposed under federal law.

Generally, a sentencing judge has broad discretion in setting probation conditions, including restricting fundamental rights. Restrictions on fundamental rights are valid if they 1) are primarily designed to meet the ends of rehabilitation and protection of the public and 2) are reasonably related to such ends. Applying this test, federal courts have rejected constitutional challenges to a variety of probation conditions which affect fundamental constitutional rights. See, e.g., *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991) (condition that probationer not participate in motorcycle club did not impermissibly restrict his freedom of association); *United States v. Peete*, 919 F.2d 1168, 1181 (6th Cir. 1990) (condition that probationer not seek elected office did not impermissibly restrict his freedom of speech and association); *United States v. Tolla*, 781 F.2d 29 (2d Cir. 1986) (condition that probationer not teach children in religious school did not impermissibly restrict her right to free exercise of religion). In each of these cases, the constitutionality of the sentence rested upon the specific nature and circumstances of the probationer's crime. This analysis is quite similar to Texas courts' approach to statutory challenges to probation conditions in the cases discussed above. See discussion page 2 *supra*. For this reason, we believe that both state and federal courts would apply a similar test to decide whether a probation condition imposed pursuant to Texas law runs afoul of the right to free expression under the state and federal constitutions.<sup>6</sup>

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<sup>5</sup>We are aware of three reported Texas cases in which probationers have challenged probation terms on the grounds that the terms violated their right to free expression under the state and federal constitutions. See *Bobv v. State*, 757 S.W.2d 58 (Tex. App.--Houston [14th Dist.] 1988), cert. denied, 490 U.S. 1066 (1989) (holding that term that probationer not picket or demonstrate outside an abortion clinic was not authorized by statute); *Crabb v. State*, 754 S.W.2d 742, 745 (Tex. App.--Houston [1st Dist.] 1988), cert. denied, 493 U.S. 815 (1989) (holding that term that probationers not demonstrate outside abortion clinic did not impermissibly restrict their right to free expression); *Hoffart v. State*, 686 S.W.2d 259, 264 (Tex. App.--Houston [14th Dist.] 1985), cert. denied, 479 U.S. 824 (1986) (holding that term that probationer "not enter upon the premises of any establishment" that he pickets was not an unconstitutional limitation on his right to free speech because it merely reflected law of trespass). None develops a general analytical framework. *Horner v. Reed*, 756 S.W.2d 34 (Tex. App.--San Antonio 1988, no writ), does not, as suggested in a brief submitted to this office, stand for the proposition that probation conditions must be narrowly drawn to minimize restrictions on probationers' liberty. In that case, the court merely held that the probation term at issue--that the defendant resign all elective offices and not run for any elective office for a year--was not reasonable and exceeded the trial court's authority under article 42.12 of the Code of Criminal Procedure.

<sup>6</sup>*Crabb* supports our belief that state courts would apply a test similar to that applied by federal courts. In that case, the court concluded that the term that probationers not demonstrate at an abortion clinic did not impermissibly infringe upon their right to free expression under the state and federal constitutions because the restriction was intended to protect the victim and increase the likelihood that the

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You suggest that imposing a dress and hair code as a term of probation is conducive to instilling discipline and is therefore reasonably related to rehabilitation and, for this reason, is constitutional in each and every case. Although we agree that the determination whether a condition of probation such as a dress and hair code violates the right to free expression under the state or federal constitution depends upon whether the condition 1) is primarily designed to meet the ends of rehabilitation and protection of the public and 2) is reasonably related to such ends, we cannot agree that the imposition of a dress and hair code will meet constitutional muster in each and every case. Whether the condition satisfies these criteria will depend upon the facts of each individual case.

### S U M M A R Y

The determination whether a condition of probation such as a dress and hair code violates the right to free expression under the state or federal constitution depends upon whether the condition 1) is primarily designed to meet the ends of rehabilitation and protection of the public and 2) is reasonably related to such ends. Whether the condition satisfies these criteria will depend upon the facts of each individual case. Such a condition is not necessarily constitutional in each and every case.

Yours very truly,



Mary R. Crouter  
Assistant Attorney General  
Opinion Committee

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(footnote continued)

probationers would successfully complete their probation terms. See *Crabb*, 754 S.W.2d at 745 (citing *United States v. Tonry*, 605 F.2d 144 (5th Cir. 1979)).