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COUNTY ATTORNEY  
FRIO COUNTY

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Opinion Committee

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June 6, 1993

The Texas Attorney General's Office  
ATTN: Opinions Committee  
Post Office Box 12548  
Austin, Texas 78711-2548

Re: Request for attorney general's opinion pursuant to V.T.C.A.,  
Government Code, Section 402.043

Dear Sir:

Pursuant to referenced statute, I am requesting an attorney general's  
opinion concerning the following question:

QUESTION:

Is it an abridgment of the "constitutional rights" either under the  
Texas or U.S. Constitutions to require a male misdemeanor and juvenile  
probationers performing community service (herein after referred to as  
"CSR") pursuant to V.A.C.C.P., art. 42.12, Sec. 17 and V.T.C.A., Family  
Code, Sec. 54.04(b), respectively, to conform to hair and dress codes,  
i.e. no "goatees," hair not any further than collar length, no T-shirts  
with logos and keep shirt tails tucked in.

The Frio County Judge through court-ordered supervision is requiring  
misdemeanant probationers and juvenile probationers placed on probation  
and who are performing CSR to conform to dress and hair codes as  
stated, supra, in the "QUESTION."

APPLICABLE LAW:

Although there are no state appellate cases directly on point, I have  
found the following cases concerning probationary conditions and their  
reasonableness:

- a. Tamez, Crt. Crim. App. 534, S.W. 2nd 686, (1976), reh. den.;

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- b. Hernandez, Crt. Crim. app. 556, S.W. 2nd 337 (1977);
- c. Chacon, Crt. Crim. App. 558, S.W. 2nd 874 (1977);
- d. Johnson, CA-Corpus Christi, 672, S.W. 2nd 621 (1984), reh. den.; and
- e. Tovar, CA-Corpus Christi, 777 S.W. 2nd 481 (1989), reh. den., pet. ref.

In Tamez (headnotes 4 and 5), the Court held that in those cases where trial court grants probation the court is not limited to the statutory conditions of probation.

The Court further held that "the conditions imposed must be reasonable and the conditions must have a reasonable relationship to the treatment of the accused and the protection of the public."

This case obviously concerned a term and condition of probation that was violative of the 4th and 14th Amendments to U.S. Constitution and the applicable section of the Texas Constitution (i.e. Art. 1, Sec. 9): probationary condition which requires the probationer to submit his person, residence and vehicle to search by any peace officer at any time, day or night.

The Court discussed in Tamez previous cases in which terms and conditions of probation were upheld under the circumstances:

- a. Salinas, Crt. Crim. App. 514, S.W. 2nd 754 (1974): night curfew, upheld; and
- b. Reese, Crt. Crim. App., 320 S.W. 2nd 149 (1959); drug treatment at designated hospital then after being medically discharged report to probation officer, upheld.

Also discussed were a number of cases in which terms and conditions were either too indefinite and uncertain, were unreasonable or were not related to the rehabilitation and treatment of probationer:

- a. Glenn, Crt. Crim. App., 327 S.W. 2nd 763 (1959): condition that defendant's conduct must warrant confidence and esteem of law abiding citizens of State of Texas; and, if it doesn't, then probation was to be revoked, struck down as too indefinite and uncertain;
- b. People v. Peterson, 233 N.W. 2nd 250 (1975), Michigan Court held that blanket search and seizure provisions in order of probation was invalid as violative of probationer's right against unreasonable search and seizures;

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- c. U.S. ex. rel. Colemann v. Smith, 395, F. Supp. 1155 (W.D.N.Y. 1975), federal district court held that consent to search granted as a condition to parole was involuntary and parole officer's search of parolee's residence, without suspicion of parole violation, was unreasonable; and
- d. Springer v. U.S., 148 F. 2nd 411, 416 (9th Cir. 1945), 9th Circuit Court rejected the condition that probationer donate a pint of blood to Red Cross Blood Bank.

The Court held in Tamez that a condition that probationer consent to blanket search of his person and residence was too broad, too sweeping and infringed on probationer's rights under the 4th, 14th Amendments to U.S. Constitution and Art. 1, Sec. 9 of Texas Constitution, in a word, it was unreasonable.

On p. 692, Tamez, the Court held that a diminution of 4th Amendment protection and protection afforded by Art. 1, Sec. 9, Texas Constitution, can be justified only to the extent it was actually necessitated by legitimate demands of the probation process and can only be diminished to the extent necessary for his reformation and rehabilitation.

In Hernandez, a condition of probation was that probationer remain within limits of Hidalgo County, Texas, unless given permission by court to leave, that he must return to Mexico and not return to U.S. illegally during probationary term. The Court again reiterated that a trial court has wide discretion in selecting conditions of probation (Tamez and supra Salinas), conditions aren't limited to those suggested in statute, but the conditions should be "reasonable," and that the conditions should have reasonable relationship to treatment of accused and protection of public (Tamez, supra). Held: condition of probation that defendant not reenter U.S. illegally was reasonable. Probationer was convicted in U.S. Magistrate's Court of entering U.S. illegally and was deported by federal authorities; appellant's probation was not revoked because he refused to return to Mexico but because he reentered U.S. illegally.

Chacon is a case in which a term and condition of probation was that probationer avoid injurious or vicious habits (abstain from use of drugs, narcotics and intoxicating liquor); the Court held again that where probation has been granted by the court the court is not limited to the statutory terms and conditions of probation as long as they are reasonable (V.T.C.A., art. 42.12, Sec. 6; Peach v. State, Crim. App. 498 S.W. 2nd 192 [1973]; Salinas and Tamez, [supra]).

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In Johnson, the Court of Appeals held that a term and condition of probation "banishing" defendant from Gonzales County was held to be unreasonable, i.e not reasonably related to his rehabilitation and was unduly restrictive of his liberty, particularly where he was broke and unemployed.

In Tovar, the Court of Appeals held that requiring probationer to file an income and expense statement for any month showing money received and spent if he defaults in any payments required by the Court's judgment, contributed significantly to appellant's rehabilitation or society's protection. (Citing Hernandez, supra, and Pequeno v. State, 710 S.W. 2nd 709 CA-Houston [1st Dist.] 1986, pet. ref'd).

The Court went on to reason in Tovar that "reasonable conditions are those that contribute significantly both to the probationer's rehabilitation and to the protection of society." (Hernandez and Pequeno, supra).

In my opinion the requirements concerning the probations being required to:

- a. Not wear T-shirts with logos;
- b. Keep shirt tails tucked in at all times;
- c. Keep hair cut so as not to past shirt collars; and
- d. Shave "goatees"

must be viewed as to whether or not these are "reasonable" terms and conditions, i.e. do they contribute significantly to the probationer's rehabilitation and to society's protection?

Also, the question needs to be addressed: Does a probationer on CSR have constitutional "rights" to wear T-shirts with logos on them, to wear shirts with tails sticking out, to wear hair past their shirt collars and to wear "goatees?"

Furthermore, the appellate courts have held that a probation condition is invalid if it has all three of the following characteristics: (1) it has no relationship to the crime; (2) it relates to conduct that is not in itself criminal; and (3) it forbids or requires conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of probation (Simpson v. State, 772 S.W. 2nd 276, 280-281 (CA - Houston [1st Dist.] 1988, pet. ref.) Condition that defendant not picket at site of criminal trespass conviction upheld as protecting victim and insuring no probation violation without limiting First Amendment rights; but see Bobo v. State, 757, S.W. 2nd 58, 66 (CA - Houston [14th Dist.] 1988, pet. ref.) cert. denied, 490 U.S. 1066 (1989) - similar condition held invalid under theory that court can only impose statutory conditions when jury recommends probation in misdemeanor).

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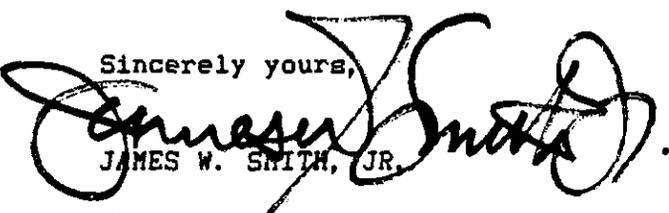
It may be argued that "discipline" is part of the probation process (i.e. learning to report to the community supervision and corrections officers, to pay fine, court costs and probation fees, to be gainfully employed, to support their dependants, refrain from drugs, etc. as ordered).

Certainly, these restrictions imposed upon CSR probationers are not so onerous as to be violative of any constitutional rights guaranteed by U.S. and Texas Constitutions. Probation is restrictive to a certain extent of a person's liberty. Learning "discipline" (i.e. among other things having to report for CSR at a certain time, work certain hours, do the work that the CSR probationer is ordered to do is certainly more restrictive than to abide by certain dress and hair codes) is certainly rehabilitative; and therefore as stated by the Court in Tovar, Hernandez and Pequeno, are "reasonable" terms and conditions of probation.

Hair and dress codes for CSR probationers, however, should be incorporated into judgments of probation as formal, written and definite terms and conditions thereof.

In summary: requiring hair and dress codes for community service probationers is conducive to disciplining themselves which in turn is rehabilitative of the probationers; and, therefore, are reasonable terms and conditions of probation.

Sincerely yours,



JAMES W. SMITH, JR.

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