



TEXAS BOARD OF CRIMINAL JUSTICE

Carol S. Vance
Chairman
Houston

August 19, 1994

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AUG 22

RQ-734

The Honorable Dan Morales
Attorney General of Texas
Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Opinion Comm.
SJS
FILE # ML-28436-94
I.D.# 28436

RE: Opinion request on escape from a state jail felony facility.

Dear General Morales:

I am writing on behalf of Executive Director Andy Collins. An urgent issue has emerged as we prepare for implementation of the new Penal Code and the state jail felony system. The question is, would the use of deadly force be justified to prevent a state jail felon from escaping a state jail, or from leaving a work detail outside the state jail compound? This is just one of the many challenging issues generated by the creation of a hybrid, novel system of corrections for one class of felons. This is such an important question for our correctional personnel to have resolved that we are asking your office to expedite consideration of the issue.

The question whether deadly force is justified to prevent escape, based on the Penal Code that takes effect on September 1, 1994, begins with §9.52, which justifies the use by a guard of "any force, including deadly force, that he reasonably believes to be immediately necessary to prevent the escape of a person from a correctional facility." [Emphasis added.]

§38.01 defines "escape" as "unauthorized departure from custody or failure to return from custody following temporary leave for a specific purpose or limited period or leave that is part of an intermittent sentence, but does not include a violation of conditions of community supervision or parole." [Emphasis added.]¹ In the enclosed memorandum by the Counsel to the Community Justice Assistance Division of TDCJ, Mr. Jermstad argues that the last clause removes departure from a community corrections facility (which includes at least some state jails) from the coverage of escape. This argument is apparently reinforced by the creation, in this new Penal Code, of §38.113, Unauthorized Absence From Community Corrections Facility, which does not rely on the term "escape" and specifies the violations of conditions of probation represented by departure or unauthorized absence.

¹§9.01 provides a very similar definition of "escape" that is probably legally synonymous with that in §38.01.

The problem with the §38.01 definition of "escape," in the context of state jails, is that the population inside these facilities will be a mixture of confinees who are serving 'up-front' time as a condition of community supervision (probation), and confinees whose community supervision has been revoked.² In addition, confinees may be expected to perform in community service work details, under supervision but well beyond the confines of the facility. Short of legislation, reconciliation of this web of statutes in a fashion that will make operational sense to a correctional officer in a state jail is difficult. Although you may reach the conclusion that "escape" only applies to confinees whose community supervision has been revoked, this will be an unenforceable answer from the standpoint of use of force, for obvious reasons. In fact, the interchangeability of "escape" conduct is implied in the enabling language for state jails, Government Code §507.021(a): "The director of the state jail division...may authorize employees of the division...to apprehend escapees from any division of the department."

Penal Code §1.07(a)(14) defines "correctional facility" to include (B), "a confinement facility operated by the [TDCJ]," (C), "a confinement facility operated under contract with any division of the [TDCJ]," or (D), "a community corrections facility operated by a community supervision and corrections department." Some state jails--those run by a community supervision and corrections department--would fit the (D) description,³ and those are also covered by (C), because they are actually operated under contract with the Community Justice Assistance Division of TDCJ.⁴ All state jails fit at least one definition, thus the "correctional facility" factor is satisfied.

Note, however, the definition in §1.07(a)(45) of "secure correctional facility," which is a subset of the definition of "correctional facility." The subset eliminates only the "community corrections facility" description. This distinction comes into play in the offenses of Escape, §38.06, and Permitting or Facilitating Escape, §38.07, which are more serious if committed in the context of a secure correctional facility. I suggest that state jails be treated uniformly as "secure correctional facilities" with regard to the Penal Code, in spite of the inclusion of state jails in the list of community corrections facilities in the Code of Criminal Procedure, Art. 42.13(1)(b)(2). This conclusion is supported by the standards for state jails adopted by the Board of Criminal Justice, 37 TAC Chapter 157. For example, §157.77, Security, begins: "It is the policy of the TDCJ, with regard to design and engineering criteria, that security is paramount." A more detailed description of the physical plant is set out in §157.95 (also labeled "Security"), and includes requirements for a secure central control room, pedestrian and vehicle

²Cf. Code of Criminal Procedure, Art. 42.12, §15(d) and §15(f)-(h).

³Code of Criminal Procedure, Art. 42.13, §1(b)(2)(G) confirms that a state jail established by a judicial district and operated by a community supervision and corrections department can be characterized as a "community corrections facility."

⁴Government Code §§ 507.001(a) and 507.005 offer a variety of methods for contractually operating state jails. Most "Mode Two" state jails--those operated locally through a contract with CJAD--will actually be operated through a contract between the CSCD and a private vendor. One of the Harris County facilities will be operated by the CSCD. The Travis County state jail facility, while 'locally' operated like those run by CSCDs, will be operated under a contract with the county commissioners, rather than the CSCD, under yet another grant of authority, the pilot program language in Code of Criminal Procedure Art. 42.12, §24.

sallyports, a security perimeter, and a security equipment storage area for firearms, chemical agents, and so on. The standards are clearly describing secure facilities, unlike a halfway house or restitution center, and communities where state jails have been sited would be dismayed to learn that they are not deemed "secure."

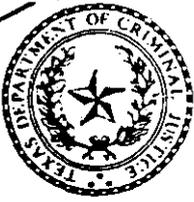
Ideally, TDCJ would like a *clean resolution of this complicated issue that allows for the very real potential that deadly force may be needed to prevent an escape.* Thank you in advance for your consideration of this pressing issue.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carl Reynolds', with a large, sweeping flourish at the end.

Carl Reynolds
Board General Counsel

c: Members, Board of Criminal Justice
The Honorable John Whitmire
The Honorable Allen Place
James A. Collins, Executive Director
Tom Baker, State Jail Division Director
Todd Jermstad, CJAD Counsel



TEXAS DEPARTMENT OF CRIMINAL JUSTICE
COMMUNITY JUSTICE ASSISTANCE DIVISION

Dimitria D. Pope
Division Director

MEMORANDUM

TO: All CSCD Directors
FROM: Todd Jermstad, General Counsel
RE: Changes in the Law Concerning Escape, Use of Force in a Correctional Facility, and Unauthorized Absence from a Corrections Facility
DATE: July 8, 1993

During the last legislative session, the Seventy-Third Legislature made several changes in the law regarding the escape from, use of force in, and unauthorized absence from a community corrections facility. In S.B. 1067, the Legislature made significant revisions to the penal code. Among the changes made to the Penal Code, the Legislature amended Section 9.52 to provide that the use of force to prevent the escape of an arrested person from custody is justifiable when the force could have been employed to effect the arrest under which the person is in custody, except that a guard employed by a correctional facility or a peace officer is justified in using any force, including deadly force, he reasonably believes to be immediately necessary to prevent the escape of a person from the correctional facility.

In addition S.B. 1067 amended Section 9.53 of the Penal Code to provide that an officer or employee of a correctional facility is justified in using force against a person in custody when and to the degree the officer or employee reasonably believes the force is necessary to maintain the security of the correctional facility, the safety or security of other persons in custody or employed by the correctional facility, or his own safety or security. Finally S.B. 1067 created a new penal offense of unauthorized absence from a community corrections facility. This bill added a Section 38.113 to the Penal Code to provide that a person commits an offense punishable as a state jail felony if the person is required as a condition of probation to submit to a period of detention or treatment in a community corrections facility and the person fails to report to or leaves the facility without the approval of the court, the community supervision and corrections department supervising the person, or the director of the facility.

These changes are particularly relevant to the operation of community corrections facilities because the legislature has defined a new category of confinement facilities; namely, correctional facilities. Formerly the penal provisions dealing with escape and use of force applied only to penal institutions. However, under the revisions to the penal code, these penal provisions apply to correctional facilities. S. B. 1067 amended Section 1.07(a)(14) of the Penal Code to define "correctional facility" as a place designated by law for the confinement of a person arrested for, charged with, or convicted of a criminal offense. The term includes:

- A) a municipal or county jail;

- B) a confinement facility operated by the Texas Department of Criminal Justice;
- C) a confinement facility operated under contract with any division of the Texas Department of Criminal Justice; and
- D) a community corrections facility operated by a community supervision and corrections department.

Consequently, these provisions of the penal code dealing with escape and use of force are equally applicable to community corrections facilities.

Nevertheless, an employee of a community corrections facility is without authority to use deadly force to prevent the escape of a probationer confined in said facility. Section 9.01(2) of the Penal Code, as amended by this bill, defines escape to mean the unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, "but does not include a violation of conditions of community supervision or parole," or following leave that is part of an intermittent sentence. Since the unauthorized departure of a defendant confined in a community corrections facility as a condition of community supervision does not constitute an escape, it follows that an employee or officer cannot use deadly force to prevent the person's departure.¹

The creation of a new criminal offense for unauthorized absence from a community corrections facility dispenses with the need for the court to order the arrest of a probationer for violating a condition of his community supervision in order for the defendant to be lawfully apprehended. Since the unauthorized absence from a community corrections facility constitutes an independent penal offense, a peace officer can arrest the individual without first having to obtain an order from the court in accordance with the revocation procedures found under new Article 42.12, Section 21 of the Code of Criminal Procedure. Moreover, once it is reported that a defendant has failed to return or has left a community corrections facility without permission, it would appear that a peace officer who finds the defendant outside the facility would have legitimate grounds to make a warrantless arrest.² These changes become effective September 1, 1994.

¹ See Grant v State, 753 S.W. 2d 185 (Tex.App.-Dallas, 1988) in which the court held that a defendant incarcerated in a county jail as a condition of probation who failed to return to jail from a work release program did not commit the offense of escape.

² See Vernon's Ann. C.C.P. Article 14.04 which provides that where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused.