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Opinion Committee

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GOVERNMENT INQUIRY UNIT

Handwritten: RA 933

The Honorable Dan Morales
Texas Attorney General
Administration Office
P.O. Box 12548
Austin, Texas 78711

FILE # ML-39462-97
I.D. # 39462

Dear Attorney General Morales:

The following questions are presented for your consideration:

Does a judge have authority to order probation officers assigned to his court not to provide information regarding criminal activities by persons on probation to the District Attorney's office? Does a judge have authority to order a probation officer not to divulge information regarding violations of conditions of probation to the District Attorney?

BACKGROUND

The normal practice in most courts in Bexar County is for probation officers assigned to each court to provide information regarding violations of community supervision to the District Attorney's office in the form of a violation report. The information in these violation reports relate to technical violations (failure to report, failure to perform community service, etc.) and to violations of criminal law (new crimes, drug tests which can indicate recent possession of an illegal substance, etc.). Based on these violation reports, the District Attorney's office decides whether to file a motion to revoke probation.

Two district judges have ordered the probation officers assigned to those courts to not provide any information to the District Attorney's office regarding any violation of community supervision. Instead, the probation officer reports directly to the judge with the information. If the judge decides he wants a motion to revoke or enter adjudication filed, the judge instructs the probation officer to prepare such a motion and present the motion to the prosecutor's office for the attorney's signature.¹ The Chief Probation Officer is willing to provide the information regarding violations of community supervision to the District Attorney's office but believes the orders issued by the judges prevents him from doing so.

¹ The policy established by these judges includes some interesting provisions. Probation officers have been instructed not to report or file a motion to revoke probation if the probationer is accused of committing most class A & B misdemeanors. One judge has directed probation officers not to report violations to the judge until a probationer has failed to report at least three times.

DISCUSSION

The Code of Criminal Procedure § 42.12, Sec. 1 states the purpose of community supervision is "to place wholly within the State courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants, placed on community supervision..." and "to remove...barriers to effective systems of community supervision in the public interest." Some courts have referred to community supervision as a contract between the probationer and the judge. See, e.g. *DeGay v. State*, 741 S.W.2d 445, 449 (Tx. Crim. App. 1987); *Bradley v. State*, 564 S.W.2d 727, 729 (Tx. Crim. App. 1978); *Espinoza v. State*, 486 S.W.2d 315, 316 (Tx. Crim. App. 1972). However, the Court of Criminal Appeals acknowledges a probation proceeding to be a "criminal prosecution". *Champion v. State*, 590 S.W.2d 495, 497 (Tx. Crim. App. 1979). Even if community supervision is deemed a contract, the State of Texas has an interest in ensuring that the conditions of the contract are enforced.

Section 44.115 of the Government Code states as follows:

"The criminal district attorney of Bexar County shall attend each term and session of the district, county, and justice courts in Bexar County held for the transaction of criminal business and shall exclusively represent the State in all matters before those courts."

The District Attorney is the only party who can file a motion to revoke probation and is required to exercise proper prosecutorial discretion under Article 2.01 of the Code of Criminal Procedure. Atty. Gen. Opinion JM-194 (responsibilities of a District Attorney in a probation revocation hearing are essentially the same as those in a trial to determine criminal culpability); *Taylor v. State*, 670 S.W.2d 365 (Tx. App.-Tyler 1984, no pet.). Any attempt by the Court to limit the District Attorney's prosecutorial discretion is a violation of the separation of powers doctrine. *State v. Salinas*, 784 S.W.2d 421 (Tx. Crim. App. 1990); *State v. Denson*, 671 S.W.2d 896 (Tx. Crim. App. 1984).

In a different context, the Supreme Court has stated that "[s]ociety is owed a duty by all citizens to come forward with evidence to assist law enforcement. The public has a right to every man's evidence." *Piemonte v. U.S.*, 81 S.Ct. 1720, 1722 n.2(1961)(quoting Lord Hardwicke). Any prohibition on the flow of information to the District Attorney regarding violations of probation obstructs the public's interest in the probation contract and is contrary to sound public policy. By ordering probation to not forward information to the District Attorney, the Judge usurps the District Attorney's absolute discretion to file (or not file) motions to revoke probation and to represent the State of Texas at future hearings.

If I may provide you with further information, please do not hesitate to contact me.

Sincerely,


Steven C. Hilbig
Criminal District Attorney
Bexar County, Texas

SCH:clj

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