



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 7, 1996

Mr. Wayne Scott
Executive Director
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342

Letter Opinion No. 96-126

Re: Eligibility for mandatory release of inmates
convicted of indecency with a child under Penal
Code section 21.11(a)(1) (ID# 39210)

Dear Mr. Scott:

You ask whether inmates convicted of indecency with a child under section 21.11(a)(1) of the Penal Code¹ are eligible for mandatory supervision according to the terms of Code of Criminal Procedure article 42.18, section 8(c). "Mandatory supervision" means

the release of an eligible prisoner sentenced to the institutional division so that the prisoner may serve the remainder of his sentence *not on parole* but under the supervision and control of the pardons and paroles division. Mandatory supervision may not be construed as a commutation of sentence or any other form of executive clemency. (Emphasis added.)²

"Parole" is defined as

the discretionary and conditional release of an eligible prisoner sentenced to the institutional division so that the prisoner may serve the remainder of his sentence under the supervision and control of the pardons and paroles division. Parole shall not be construed to mean a commutation of sentence or any other form of executive clemency.³

As the definition of "parole" makes clear, an eligible inmate's release on parole is discretionary with the parole panel or with the Board of Pardons and Paroles, in cases where the full board must

¹A person commits indecency with a child as defined by section 21.11(a)(1) of the Penal Code by engaging in sexual contact with a child, where the child is younger than 17 years and not the spouse of the person. An offense under section 21.11(a)(1) is a second degree felony. Penal Code § 21.11(c). See Penal Code § 21.11(b) (affirmative defense on certain facts).

²Code Crim. Proc. art. 42.18, § 2(2).

³Code Crim. Proc. art. 42.18, § 2(1). Persons convicted of certain very serious crimes are not eligible for parole or mandatory supervision. *Id.* § 8(b)(1),(c).

consider an application for parole.⁴ The provisions applicable to parole decisions further illustrate this point. The institutional division of the Department of Criminal Justice must report the inmate's progress in the institutional division to the board before an inmate's release.⁵ The parole panel may also interview the prisoner. Finally, "[a] parole shall be ordered only for the best interest of society, not as an award of clemency."⁶

A prisoner released on mandatory supervision is subject to conditions similar to those of parole, but the release does not involve the exercise of discretion that a grant of parole does.⁷ The reasons for this difference can be explained by reference to the history and purpose of mandatory supervision. Before the mandatory supervision provision was adopted in 1977,⁸ a prisoner was discharged from prison when his actual time served plus good conduct time⁹ equaled the term of the sentence.¹⁰ You explain that the provision for mandatory supervision was adopted to address the problem of inmates who had been denied parole and who would have otherwise left prison with no oversight and no threat of revocation to influence their conduct. As the purpose clause of the 1977 enactment stated: "It is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for

⁴See Code Crim. Proc. art. 42.18, § 7(g) (board may grant parole only on two-thirds vote of entire membership to person convicted of a capital felony, indecency with a child under Penal Code 21.11(a)(1), and certain other offenses). The second degree felony of indecency with a child was added to this list in 1995 by a bill that was effective September 1, 1995. See Act of May 25, 1995, 74th Leg., R.S., ch. 250, §§ 2, 6, 1995 Tex. Gen. Laws 2176, 2177. The transition clause applicable to this amendment states that the amendment to section 7(g), article 42.18, Code of Criminal Procedure "applies to a defendant convicted of an offense committed before, on, or after the effective date of this Act." *Id.* § 5, 1995 Tex. Gen. Laws 2176, 2177.

⁵*Id.* § 8(e).

⁶*Id.* § 8(f)(5). Certain aspects of parole procedure under Code of Criminal Procedure article 42.18, section 8, have been held unconstitutional. See *Johnson v. Texas Dept. of Criminal Justice*, 910 F.Supp. 1208 (W.D. Tex. 1995) (appeal pending) (Board of Pardons and Paroles' consideration of protest letters without disclosure to inmates deprived inmates of equal protection; consideration of inmates' writ writing activities violated due process).

⁷A prisoner may not be released on mandatory supervision if a parole panel determines that the prisoner's accrued good conduct time is not an accurate reflection of the prisoner's potential for rehabilitation and that the prisoner's release would endanger the public. Code Crim. Proc. art. 42.18, § 8(c-1).

⁸Act of May 30, 1977, 65th Leg., R.S., ch. 347, § 1, 1977 Tex. Gen. Laws 925, 928 (formerly codified as Code Crim. Proc. art. 42.12 (1925); predecessor of Code Crim. Proc. art. 42.18).

⁹Section 498.003 of the Government Code provides for an inmate's accrual of good conduct time, which credits the inmate with additional days over the days actually served. Good conduct time applies only to eligibility for parole or mandatory supervision, and does not otherwise affect an inmate's term.

¹⁰Attorney General Opinion JM-202 (1984) at 2.

those prisoners not released on parole or through executive clemency. . . .”¹¹ The intent clause of article 42.18, in referring to “a program of mandatory supervision for those prisoners not released on parole,”¹² reflects this idea.

With this background in mind, we turn to the statutory construction issue raised by your question. Eligibility requirements for release on mandatory supervision are set out in section 8(c) of section 42.18, Code of Criminal Procedure, which provides in part:

(c) Except as otherwise provided by this subsection and Subsection (c-1), *a prisoner who is not on parole* shall be released to mandatory supervision by order of a parole panel when the calendar time he has served plus any accrued good conduct time equal the maximum term to which he was sentenced. A prisoner released to mandatory supervision shall, upon release, be deemed as if released on parole. . . . A prisoner may not be released to mandatory supervision if the prisoner is serving or has previously been convicted for an offense and the judgment for the offense contains an affirmative finding under Subdivision (2), Subsection (a), Section 3g, Article 42.12, of this code¹³ or if the prisoner is serving a sentence for or has previously been convicted of:

- (1) a first degree felony under Section 19.02, Penal Code (Murder);
- (2) a capital felony under Section 19.03, Penal Code (Capital Murder);
- (3) a first degree felony or a second degree felony under Section 20.04, Penal Code (Aggravated Kidnapping);
- (4) a second degree felony under Section 22.011, Penal Code (Sexual Assault);
- (5) a second degree or first degree felony under Section 22.02, Penal Code (Aggravated Assault);
- (6) . . . (Aggravated Sexual Assault);
- (7) a first degree felony under Section 22.04, Penal Code (Injury to a Child . . .);

¹¹Act of May 30, 1977, 65th Leg., R.S., ch. 347, § 1, 1977 Tex. Gen. Laws 925. This statement of intent has been carried forward in section 1 of article 42.18, Code of Criminal Procedure.

¹²Code Crim. Proc. art. 42.18, § 1; *see also id.* §§ 2(2), 8(c).

¹³You raise no question involving section 3g(a)(2) of article 42.12. An affirmative finding under this section requires a showing that the defendant used or exhibited a deadly weapon during a felony offense or was a party to the offense and knew a deadly weapon would be used or exhibited. Code Crim. Proc. art. 42.12, § 3g(a)(2).

- (8) a first degree felony . . . (Arson) . . . ;
- (9) . . . (Robbery);
- (10) . . . (Aggravated Robbery);
- (11) . . . (Burglary); or
- (12) . . . (Drug-Free Zones). (Emphasis added.)

This provision denies release on mandatory supervision to a prisoner who is serving a sentence for or has previously been convicted of one of a list of twelve specifically identified crimes. You note that the second degree felony of indecency with a child under Penal Code section 21.11(a)(1) is not included in the list quoted above, and ask whether inmates convicted of this offense are eligible for mandatory supervision according to the terms of Code of Criminal Procedure article 42.18, section 8(c).

Reading the quoted provision in isolation would lead to the conclusion that a prisoner serving a sentence for the second degree felony of indecency with a child must be released on mandatory supervision when calendar time served plus accrued good conduct time equal the maximum term.¹⁴ However, section 8(b)(3) of article 42.18 also has a bearing on this matter. It provides as follows:

If a prisoner is serving a sentence for the offenses described by Subdivision (1)(A), (C), (D), (E), (F), or (G) of Section 3g(a), Article 42.12 of this code, . . . he is not eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equals one-half of the maximum sentence or 30 calendar years, whichever is less, but in no event shall he be eligible for release on parole in less than two calendar years.

This section postpones parole eligibility for prisoners convicted of certain aggravated offenses, including indecency with a child under section 21.11(a)(1) of the Penal Code.¹⁵ Another section of article 42.18 provides that the Board of Pardons and Paroles "may grant parole to . . . a person

¹⁴We note that in some cases, release on mandatory supervision may be denied under article 42.18, section 8(c-1) of the Code of Criminal Procedure. See n. 7, *supra*.

¹⁵See Code Crim. Proc. art. 42.12, § 3g(a)(1)(C) (indecency with a child included among aggravated offenses that are not subject to probation).

convicted of an offense under Section 21.11(a)(1) . . . only on a two thirds vote of the entire membership of the board.”¹⁶ In such cases,

the entire membership of the board must vote on the inmate’s release on parole, and a member of the board may not vote on the release unless the member first receives a copy of a written report form the Texas Department of Criminal Justice on the probability that the inmate would commit additional offenses if released.¹⁷

These provisions show that the legislature intended that a person convicted of indecency with a child would not be eligible for release on parole until calendar time served, without credit for good conduct time, equals one-half of the maximum sentence or 30 calendar years, whichever is less. The legislature has also required extra board scrutiny of parole decisions involving such offenders.

If article 42.18, section 8(c), is read to require such prisoners to be released under mandatory supervision when calendar time plus any good conduct time equal the maximum term, they will routinely be released before ever becoming eligible for parole.¹⁸ This result would render meaningless the provisions that postpone parole eligibility for such offenders and mandate particular attention to parole decisions involving them. It is moreover so contrary to the relationship between parole and mandatory supervision as to be absurd.¹⁹

In construing section 8(c) of article 42.18, the Code Construction Act provides that we may consider the following matters, whether or not the provision is considered ambiguous on its face:

- (1) object sought to be attained;
- (2) circumstances under which the statute was enacted;
- (3) legislative history;

...

¹⁶Code Crim. Proc. art. 42.18, § 7(g).

¹⁷*Id.*

¹⁸You state that inmates who are compliant, as this group generally is, earn good conduct time at a rate that would trigger mandatory release at about one-third of sentence.

¹⁹You state that “[t]his result is so strange--mandatory release before first parole review--that it explains the [Department of Criminal Justice] Classification and Records staff’s prolonged assumption that Indecency inmates [whose offence was committed on or after September 1, 1993] must be ineligible for mandatory release.” See n. 22, *infra*. This assumption prevailed until recently.

(5) consequences of a particular construction²⁰

We have pointed out the consequences of a construction allowing this class of inmates to be released on mandatory supervision. When application of even the plain meaning of a statute's language would lead to absurd consequences that the legislature could not possibly have intended, the courts will seek to interpret it to carry out the legislative intent.²¹ An examination of section 8(c), article 42.18, in the context of other provisions relating to parole, mandatory supervision, and the effects of conviction of second degree indecency with a child, reveals a legislative intent that persons convicted of that offense should not be released on mandatory supervision. Evidence from legislative history confirms this conclusion.

Senate Bill 1067, adopted by the legislature in 1993, added indecency with a child to the offenses that delayed eligibility for release on parole until calendar time served equaled one-half of the maximum sentence or 30 calendar years.²² This bill also provided that community supervision, or probation, could not be granted for the offense of indecency with a child under section 21.11(a)(1) of the Penal Code.²³ Persons convicted of this offense were not only to spend time in prison, but to spend more time there than previously required of such prisoners before becoming eligible for release on parole.

Senate Bill 1067 was the result of a legislative program to revise the Penal Code and certain sentencing provisions of the Code of Criminal Procedure. In 1991, the 72d Legislature established the Texas Punishment Standards Commission (commission) to review sentencing and release laws,

²⁰Gov't Code § 311.023. As an aid in construing statutes, the Code Construction Act applies to the Code of Criminal Procedure. *Booker v. State*, 808 S.W.2d 141 (Tex. App.--El Paso 1991, no writ).

²¹*Baden v. State*, 897 S.W.2d 319, 321 (Tex. Crim. App. 1995), *cert. denied*, 116 S.Ct. 223 (1995). In *Baden*, two inmates had committed aggravated assault in prison while already serving time on the first of two consecutive sentences, and both courts imposed the third sentence to begin at the end of the second consecutive sentence in reliance on article 42.08(b) of the Code of Criminal Procedure. Article 42.08(b) required the sentence for an in-prison offense "to commence immediately on completion of the sentence for the original offense." The inmates argued that the third sentence must begin at the end of the first and run concurrently with the second, but the court stated that this construction of the statute "would lead to absurd consequences and contravene public policy" because the intent of article 42.08(b) was to deter inmates from committing crimes during their incarceration and to more harshly punish those inmates who were not deterred. *Baden*, *supra* at 321. The *Baden* court relied on rules of statutory construction applicable to civil statutes codified in section 311.023 of the Government Code and not on the rules establishing the standard of certainty and clarity that penal statutes must meet. See 18 TEX. JUR. 3D *Criminal Law* § 9 (1982).

²²Act of May 29, 1993, 73d Leg., R.S., ch. 900, §§ 4.01, 6.01, 1993 Tex. Gen. Laws 3586, 3718, 3761. The change in the law that lengthens the time to eligibility for release on parole for persons convicted of indecency with a child applied "only to a defendant sentenced for an offense committed on or after the effective date of this article." *Id.* § 6.04, 1993 Tex. Gen. Laws 3586, 3762. The effective date was September 1, 1993. *Id.* § 6.05, 1993 Tex. Gen. Laws 3586, 3761.

²³*Id.* § 4.01, 1993 Tex. Gen. Laws 3586, 3718 (amending Code Crim. Proc. art. 42.12, § 3g(a)(1)(C)).

target prison for the most dangerous felons, and to propose legislation in these areas.²⁴ Among other legislative mandates, the commission was to propose legislation that would revise probation and parole laws to ensure that:

(A) those defendants convicted of offenses that cause the greatest harm to society or pose the greatest threat of future harm to society serve a significant portion of their sentences in actual confinement²⁵

Senate Bill No. 1067, according to a bill analysis, had the following effect:

[P]arole is dramatically affected by . . . adding murder and second degree indecency with a child to the "aggravated" list, and requiring that aggravated offenders serve 50 percent of sentence or 30 years, whichever is less.²⁶

The bill analysis also stated that section 8(c) of article 42.18, the list of offenses for which release on mandatory supervision was not available, was amended to conform to the change described above.²⁷ Where the legislature's intent is clear, its will be given effect by the courts even to the extent of adding words to the language used by the legislature.²⁸ Although the offense of indecency with a child was not included in the section 8(c) list, we read this provision as if it were included in order to implement the legislative intent that appears in related provisions of the Code of Criminal Procedure and that is documented in the legislative history of Senate Bill 1067. Accordingly, inmates convicted of indecency with a child under section 21.11(a)(1) of the Penal Code are not eligible for mandatory supervision according to the terms of Code of Criminal Procedure article 42.18, section 8(c).

²⁴Act of August 25, 1991, 72d Leg., 2d C.S., ch. 10, § 11.14, 1991 Tex. Gen. Laws 180, 206; see House Comm. on Criminal Jurisprudence, Bill Analysis, S.B. 1067, 73d Leg., R.S. (1993).

²⁵Act of August 25, 1991, 72d Leg., 2d C.S., ch. 10, § 11.14, 1991 Tex. Gen. Laws 180, 206.

²⁶House Comm. on Criminal Jurisprudence, Bill Analysis, S.B. 1067, 73d Leg., R.S. (1993) at 3.

²⁷*Id.* at 31.

²⁸*State v. Shoppers World, Inc.*, 380 S.W.2d 107 (Tex. 1964).

S U M M A R Y

Inmates convicted of indecency with a child under section 21.11(a)(1) of the Penal Code are not eligible for mandatory supervision according to the terms of Code of Criminal Procedure article 42.18, section 8(c).

Yours very truly,

A handwritten signature in black ink that reads "Dan Morales". The signature is written in a cursive style with a large, stylized initial "D".

DAN MORALES
Attorney General of Texas