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OPINION COMMITTEE

October 16, 2012

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

R. SCOTT MCKEE

District Attorney
173rd Judicial District
Henderson County

FILE # ML-47158-12
I.D. # 47158

RQ-1094-GA

Re: Request for opinion regarding the constitutionality of HB 2649 82(R), amending Section 15(h), Article 42.12, Texas Code of Criminal Procedure.

General Abbott:

I am requesting your opinion regarding the constitutionality of HB 2649 82(R) which amended Section 15(h), Article 42.12, Texas Code of Criminal Procedure to require the facility director of a state jail felony facility in which a defendant is confined, not later than the 30th day before the date on which the defendant will have served 80 percent of the defendant's sentence, to report to the sentencing court on the defendant's conduct and programmatic progress while confined in the facility.

The bill and subsequent change to Art 42.12 requires the report to contain an indication of whether the defendant diligently participated in a substance abuse treatment program or a work, educational, or vocational program. It further authorizes a judge, based on that received report, to credit against any time a defendant is required to serve in a state jail felony facility an additional time for each day the defendant actually served in the facility while diligently participating.

The bill prohibits such a time credit from exceeding one-fifth of the amount of time the defendant is originally required to serve in the facility. The bill also prohibits a defendant from being awarded such a credit for any period during which the defendant is subject to disciplinary action.

QUESTION PRESENTED

1. Is Art. 42.12 Sec, 15(h) Texas Code of Criminal Procedure violative of the provisions of Article IV, Section 11, of the Texas Constitution which invests the Governor, acting upon the recommendation of the Board of Pardons and Paroles, with the power to grant reprieves, commutations of punishment and pardons and to remit fines and forfeitures?

2. Is Art. 42.12 Sec, 15(h) Texas Code of Criminal Procedure violative of the provisions of Article II, Section 1 of the Texas Constitution, by usurping the duties of the governor, bestowing the duty and power to grant clemency to the judiciary and interfering with the executive departments ability to carry out its functions?

We believe the answers to both of the questions are yes.

BACKGROUND

HB 2649 82(R) specifically amended Section 15(h) of Art. 42.12, Code of Criminal Procedure by amending Subdivision (1) and adding Subdivisions (4), (5), and (6) as follows:

(1) Provides that a defendant confined in a state jail felony facility does not earn good conduct time for time served in the facility but may be awarded diligent participation credit in accordance with Subdivision (6).

(4) Defines for purposes of Subdivisions (5) and (6), "diligent participation."

(5) Requires the Texas Department of Criminal Justice, for a defendant who has participated in an educational, vocational, treatment, or work program while confined in a state jail felony facility, not later than the 30th day before the date on which the defendant will have served 80 percent of the defendant's sentence, to report to the sentencing court the number of days during which the defendant diligently participated in any educational, vocational, treatment, or work program. Provides that the contents of a report submitted under this subdivision are not subject to challenge by a defendant.

(6) Authorizes a judge, based on the report received under Subdivision (5), to credit against any time a defendant is required to serve in a state jail felony facility additional time for each day the defendant actually served in the facility while diligently participating in an educational, vocational, treatment, or work program. Prohibits a time credit under this subdivision from exceeding one-fifth of the amount of time the defendant is originally required to serve in the facility. Prohibits a defendant from being awarded a credit under this subdivision for any period during which the defendant is subject to disciplinary action. Provides that a time credit under this subdivision is a privilege and not a right.

DISCUSSION

ART. 42.12 SEC, 15(h) TEXAS CODE OF CRIMINAL PROCEDURE IS VIOLATIVE OF THE PROVISIONS OF ARTICLE IV, SECTION 11, OF THE TEXAS CONSTITUTION

Article 4, Section 11, of the Texas Constitution, grants to the Governor the power, after conviction, and upon the recommendation of the Board of Pardons and Paroles to grant reprieves and commutations of punishments and pardons. He is also given the power to remit fines and forfeitures. This section reads in part as follows:

In all criminal cases, except treason and impeachment, the Governor shall have power, after conviction or successful completion of a term of deferred adjudication community supervision, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice

of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke conditional pardons. With the advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason. TEX. CONST. art. IV, § 11 (1876, amended 2011).

In *State ex rel. Smith v. Blackwell*, 500 S.W.2d 97 (Tex. Crim. App. 1973) the Court of Criminal Appeals faced an issue very similar to the questions presented for opinion. The Court was asked to rule on the constitutionality of a provision of the Health and Safety Code that would require judges to re-sentence certain drug offenders convicted under older, harsher penalties. The Court held this legislation to be an unconstitutional form of judicial commutation that violates the separation of powers doctrine. *Id.* at 104.

The Court in *Smith* citing *Ex parte Miers*, 124 Tex. Crim. 592, 64 S.W.2d 778, 780 (1933), further noted that “in drafting a constitution, the people of a state are at liberty to lodge this power in any branch of government that they may so desire.” *Id.* at 99. The Court also noted that throughout history, Texans placed almost complete pardoning power in the office of the Governor. *Id.*

The *Smith* Court was not alone in contemplating this separation of powers issue as it relates to the power to pardon and commute sentences. Throughout Texas jurisprudence, Courts have been consistent in striking down encroachments on the function of the executive branch by other branches of the government. In 1930 the Supreme Court of Texas in *Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930), declared unconstitutional an act passed by the legislature providing a pardon for a former impeached governor. In 1928, the Court of Criminal Appeals held that whenever the power to discharge convicts before they had served their terms was conferred upon officials outside of the executive branch, the statutes were invalid. *Ex parte Gore*, 109 Tex. Crim. 244, 4 S.W.2d 38 (1928).

In viewing these and other cases throughout our State’s history, it is clear that a grant of the pardoning and clemency power to the executive branch restrains the legislative or judicial branch from exercising it. *Ex parte Miers*, 124 Tex. Crim. 592, 64 S.W.2d 778 (1933). Therefore, the courts, unlike the Governor, do not have the power to remit fines that have been duly assessed. *Ex parte Thomas*, 108 Tex. Crim. 653, 2 S.W.2d 270 (1928). Article 4, Section 11, of the Texas Constitution places the pardoning power in the hands of the Governor and this power cannot be exercised by the legislature. *Ex parte Giles*, 502 S.W.2d 774 (Tex. Crim. App. 1973). Furthermore, it is not within the power of the legislature to enlarge or restrict the pardoning power vested in the executive. *Ex parte Redwine*, 91 Tex. Crim. 83, 236 S.W. 96 (1921), *aff’d*, 261 U.S. 608 (1923). The pardoning power is inherent in sovereignty, and may be lodged wherever the people determine. However, if once it has been conferred by the Constitution, it cannot be exercised by the Legislature. *Underwood v. State*, 111 Tex. Crim. 124, 12 S.W.2d 206 (1927); *Ex parte Muncy*, 72 Tex. Crim. 541, 163 S.W. 29. (1913).

Nowhere in the Constitution is there any remission of such power to the legislative or judicial branches of our government. It is observed that the power to pardon granted to the Governor is to pardon after conviction, and that the Legislature is without authority to give to others the power to pardon after conviction. *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162 (1912); *Ex parte Muncy* By enacting HB2649 82(R) the legislature has done that which it is precluded from doing.

HB 2649 82(R) placed this power to commute a state jail sentence in the hands of the District Courts of the State. Nowhere in the Constitution does the power to commute or “time credit” a sentence appear in the powers of the Judicial Branch.

Article 5, sec 8, of the Texas Constitution grants exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies to the District Courts of the State **except where these powers are conferred to some other entity**. District Court judges also have the power to issue writs necessary to enforce their jurisdiction. This section reads in part as follows:

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction. TEX. CONST. art. V, § 8 (1876, amended 1985).

Article 4, Section 11A of the Texas Constitution also gives the courts of the State the power after conviction to suspend the imposition or execution of sentence and reimpose such sentence. This section reads in part as follows:

The Courts of the State of Texas having original jurisdiction of criminal actions shall have the power, after conviction, to suspend the imposition or execution of sentence and to place the defendant upon probation and to reimpose such sentence, under such conditions as the Legislature may prescribe. TEX. CONST. art. IV, § 11A.

Under section 15(f)(2), Article 42.12, Texas Code of Criminal Procedure, a trial court retains jurisdiction over a defendant for the entire period for which he is incarcerated in a State Jail. However, under this provision of 42.12 and in accordance with the powers granted to the Courts under Article 4, Section 11A, a court retains this jurisdiction only so that it may suspend further execution of the sentence and place the defendant on community supervision. This retention of jurisdiction was not intended, nor would it be constitutional, to commute or “time credit” a sentence.

Reducing the amount of time a defendant serves in a State Jail by “time credit” is not a suspension of sentence. By whatever name the grant of clemency may be called, the substance of the act and not the name by which it is designated controls its effects. *See Ex parte Black*, 123 Tex. Crim. 472, 59 S.W.2d 828 (1933); *Ex parte Lefors*; *Ex parte Redwine*. Diligent participation credit is nothing more than a commutation or clemency. A “time credit” effectively reduces the time an inmate is confined, which makes a punishment less severe.

Although Article 5, § 8 gives the District Court exclusive, appellate and original jurisdiction, that power or jurisdiction is limited by the “except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. Furthermore, the Constitution under Article 4, §11A only gives the Courts the power to suspend the imposition of sentence and reimpose sentence, not the power to commute sentence.

Not only have Texas Courts struck down provisions that encroach on the executive branch duties of the Governor, they have also similarly struck down encroachments on the executive branch duties of County Sheriffs.

In a recent case, the 1st Court of Appeals contemplated a case where a trial court judge ordered that a particular defendant's sentence to county jail be served day for day. *Jones v. State*, 176 S.W.3d 47 (Tex. App.—Houston [1st Dist] 2004, no pet.). Texas Code of Criminal Procedure 42.032 provides, "The sheriff in charge of each county jail may grant commutation of time for good conduct, industry, and obedience." Tex. Crim. Proc. Code Ann. Art. 42.032 (Vernon 2011). The Court held that "by specifying that appellant serve his sentence day for day, the trial court essentially fixed the time for discharge. Although the trial court has the authority to pronounce the sentence, it does not have the authority to fix the time for discharge of the sentence." *Id.* at 52. The court further held that "[t]he trial court's attempt to influence the sheriff, a member of the executive branch, in carrying out the terms of a sentence may violate the separation of powers clause of the Texas Constitution. *Id.* at 52.

ART. 42.12 SEC, 15(h) TEXAS CODE OF CRIMINAL PROCEDURE IS VIOLATIVE OF THE PROVISIONS OF ARTICLE II, SECTION 1, OF THE TEXAS CONSTITUTION

By usurping the duties of the governor, bestowing the duty and power to grant clemency to the judiciary and interfering with the executive department's ability to carry out its functions, we believe Texas CCP Art. 42.12, § 15(h) is violative of the separation of powers provision of the Texas Constitution.

Article 2, Section 1 of the Texas Constitution divides the powers of government into three distinct departments, Executive, Legislative and Judicial, and further provides that each department shall not exercise the powers of another. This section reads as follows:

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted. TEX. CONST. art. II, § 1.

This clearly worded Article has been interpreted to mean that a power which has been granted to one department of government may be exercised only by that branch to the exclusion of the others. *Snodgrass v. State*, 67 Tex. Crim. 615, 150 S.W. 162 (1912). And any attempt by one department of government to interfere with the powers of another is null and void. *Ex parte Rice*, 72 Tex. Crim. 587, 162 S.W. 891 (1914).

The separation of powers provision of the Texas Constitution is violated in one of two ways: (1) if one branch of government assumes, or is delegated, a power that is more properly attached to another branch of government, or (2) one branch of government unduly interferes with another branch of government to the extent that it cannot effectively exercise its constitutionally assigned powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex.Crim.App. 1990). *State v. Williams*, 917 S.W.2d 417 (Tex. App.—Houston [14 Dist.] 1996). The power and authority of the legislature is plenary. It is limited only by the express or implied restrictions found in or arising from the Constitution. *Jones v. State*, 803 S.W.2d 712, 716 (Tex.Crim.App. 1991).

Art. 42.12, § 15(h) violates this provision of the Constitution in two ways. (1) By granting the Judicial Department the power to commute or "time credit" a sentence; and (2) by enacting law

that unduly interferes with the powers of the executive branch.

In summary, based upon the plain language of the Constitution and a history of case law throughout Texas Jurisprudence, we believe Art. 42.12, § 15(h) is violative of the provisions of Article IV, Section 11 and Article II, Section 1 of the Texas Constitution.

Thank you for your time and attention to this request. Please feel free to contact me or my staff if you have any questions or need an further information.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'R' followed by a smaller, more fluid signature.

R. Scott McKee
District Attorney, 173rd Judicial District
Henderson County, Texas
903-675-6100