STATE OF TEXAS
BOARD OF PARDONS AND PAROLES

Laura McElroy
General Counsel

RQ-0533-GA

September 20, 2006
VIA HAND DELIVERY

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

FILE # ML-45002-06
I.D. # 45002

Re: Whether the Board of Pardons and Paroles has authority under section 508.221 of the Texas Government Code and article 42.12 of the Texas Code of Criminal Procedure to impose child safety zone requirements as a condition of parole on offenders who have discharged their sex offense convictions and are serving sentences for non-sex offenses.

Dear General Abbott:

On behalf of Rissie Owens, Presiding Officer of the Texas Board of Pardons and Paroles ("Board"), I am writing to request your expedited opinion on the above referenced question. The question relates to public safety issues regarding sex offenders and restriction of their access to children.

The Board of Pardons and Paroles is governed by article IV, section 11 of the Texas Constitution and Chapter 508 of the Texas Government Code. *See* TEX. GOV'T CODE ANN., ch. 508 (Vernon Supp. 2005). Seven Board members and twelve parole commissioners have the discretionary authority to impose conditions of parole or mandatory supervision ("supervision") under sections 508.0441, 508.141, and 508.045 of the Texas Government Code.[1]

Child Safety Zone Statutes

The Board clearly has statutory authority to impose child safety zone restrictions on sex offenders as a condition of supervision on parole or mandatory supervision.

Child safety zone statutes provide a mechanism for the Board to place restrictions on sex offenders as to their access to places where children commonly gather. In the parole laws, there are two specific statutes providing authority for the Board to impose child safety zones. Section 508.187, TEX. GOV'T CODE ANN., is mandatory, and requires a parole panel to impose a child safety zone special condition on certain offenders whose

Price Daniel, Sr. Bldg. • 209 West 14th St., Suite 500 • Austin, TX 78701
Phone: (512) 463-1702 • Fax: (512) 463-8120 • Internet: laura.mcelroy@TDCJ.state.tx.us

victims were under 17 years of age.[2] Section 508.225, TEX. GOV'T CODE ANN.,[3] is discretionary, and provides for imposition of a child safety zone on violent ("3g") offenders.[4]

Sections 508.187 and 508.225, TEX. GOV'T CODE ANN., do not impose a specific distance limitation but leave that decision to the Board. The Board has set the distance at 500 feet by policy. *See* BPP-POL. 04-01.05 (adopted January 8, 2004), attached. The statute also provides the parole panels with the discretion to modify the distance on a case-by-case basis. *See* sections 508.187(d) and (e) and 508.225(b), TEX. GOV'T CODE ANN.

Sections 508.187 and 508.225, TEX. GOV'T CODE ANN., by their plain language limit the imposition of the child safety zone condition to releasees whose current offenses are on the list of eligible offenses. However, the Board believes it has the authority to impose child safety zone conditions when the offender has discharged the sexual offense and is currently serving a sentence for an offense which is not deemed a sex offense.

There is legal authority for the Board to impose sex offender conditions on offenders who do not have a current or prior conviction for a sex offense but whose past criminal conduct indicates the need for sex offender conditions such as treatment, once due process notice and opportunity to be heard is provided to the offender. *Coleman v. Dretke,* 395 F.3d 216, 223-24 (5th Cir. 2004), *reh'g en banc denied per curiam,* 409 F.3d 665 (5th Cir. 2005), *cert. denied,* 126 S. Ct. 427 (2005). "[I]n matters of rehabilitation of the prisoner and in concern for the safety of the public, Texas Board of Pardons and Parole [sic] is free to consider any history established in the inmate's record that it may determine requires treatment." *Johnson v. Johnson,* No. 4:00-CV-1889-A, 2001 U.S. Dist. LEXIS 13097, at *10 (N.D. Tex. July 2, 2001) (adopted by District Court on July 26, 2001, 2001 U.S. Dist. LEXIS 13334).

"States are not barred by principles of '*procedural* due process'" from making classifications between sex offenders and others. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 8, (2003) (quoting *Michael H. v. Gerald D.*, 491 U.S. 110, 120 (1989) (plurality opinion)). The Texas Legislature has promulgated a sex offender registration statute that applies to offenders who have received deferred adjudication, which is not considered a conviction under the law. *See* TEX. CODE CRIM. PROC. ANN., arts. 62.001(5) and 42.12 § 5 (Vernon Supp. 2006) ("TEX. CODE CRIM. PROC. ANN."). Under the sex offender registration law, article 62.051(a), TEX. CODE CRIM. PROC. ANN., a sex offender with listed reportable convictions "or who is required to register as a condition of parole, release to mandatory supervision, or community supervision" is required to register as a sex offender. The statute makes sex offender registration mandatory for sex offenders whose reportable convictions occurred on or after September 1, 1970, even after discharge. *Id.*[5] *See* Tex. Att'y Gen. Op. No. GA-0454 (2006).

Section 508.221, TEX. GOV'T CODE ANN., provides that the parole panel may impose any condition that a trial court may impose on a defendant under the community supervision (probation) law:

> Sec. 508.221. Conditions Permitted Generally
>
> A parole panel may impose as a condition that a court may impose on a defendant placed on community supervision under Article 42.12, Code of Criminal Procedure, including the condition that a releasee submit to testing for controlled substances or submit to electronic monitoring if the parole panel determines that without testing for controlled substances or participation in an electronic monitoring program the inmate would not be released on parole.

Id.

Community Supervision (Probation) Law

The authority of trial judges to suspend imposition or execution of sentences and place defendants on probation stems from article IV, section 11A of the Texas Constitution as amended in 1978. That provision states:

> "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 (1978)(emphasis added).

Community supervision, or probation,[6] is governed by article 42.12, TEX. CODE CRIM. PROC. ANN. (Vernon Supp. 2005). Community supervision means:

> "the placement of a defendant by a court under a continuum of programs and sanctions, with conditions imposed by the court for a specified period of time during which: (A) criminal proceedings are deferred without an adjudication of guilt; or (B) a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part."

See TEX. CODE CRIM. PROC. ANN., art. 2(2) (Vernon Supp. 2005).

During the period of community supervision, the defendant is subject to court-imposed conditions on behavior and activities. *See Id.* at § 11.

Section 11 provides a non-exclusive list of possible conditions and authorizes the judge to determine what conditions to place on the defendant placed on community supervision:

> "Sec. 11. Basic Conditions of Community Supervision
> (a) The judge of the court having jurisdiction of the case shall determine the conditions of community supervision and may, at any time, during the period of community supervision alter or modify the conditions. The judge may impose any reasonable condition that is designed to protect or restore the community, protect or restore the victim, or punish, rehabilitate, or reform the defendant. . . ."

See Id.

With certain exceptions, this authorization over the conditions of community supervision is vested only in the trial court. *See Id.* at § 10(a).

Judges have wide latitude under article 42.12, TEX. CODE. CRIM. PROC. ANN., to impose conditions of community supervision as long as the conditions are reasonable and are limited only by specific statutory prohibition. Section 1 of article 42.12, captioned "Purpose," provides:

> "It is the purpose of this article 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, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of community supervision in the public interest."

See Id. at § 1.

Sections 13B and 13D of article 42.12, TEX. CODE CRIM. PROC. ANN., provide for the imposition of child safety zone conditions by the judge upon granting a defendant community supervision. *See Id.* §§ 13B and 13D. Section 13B is mandatory when the victim is a child and includes the same offenses as those listed in section 508.187, TEX. GOV'T CODE ANN. Section 13D is discretionary for the same offenses listed in section 508.225, TEX. GOV'T CODE ANN. As does the language in sections 508.187 and 508.225 of the parole law, the language of sections 13B and 13D by express terms also applies only to offenders currently serving probation for the listed offenses.

Legal Analysis

When a trial court grants probation, it has wide discretion in selecting conditions of probation. *Tamez v. State*, 534 S.W.2d 686, 691 (Tex. Crim. App. 1976), *cited in Hernandez v. State*, 556 S.W.2d 337, 342 (Tex. Crim. App. 1977). Permissible conditions of community supervision should "have a reasonable relationship to the treatment of the accused and the protection of the public." *Id.* at 691 (quoting *Porth v. Templar*, 453 F.2d 330 (10th Cir. 1971)).[7]

"To be found invalid, a condition of community supervision must: (1) have no relationship to the crime; (2) relate to conduct that is not in itself criminal; and (3) forbid or require conduct that is not reasonably related to the future criminality of the defendant or does not serve the statutory ends of probation." *Belt v. State,* 127 S.W.3d 277, 281 (Tex. App.—Fort Worth 2004, no pet.) (citing *Marcum v. State*, 983 S.W.2d 762, 768 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd); *Lacy v. State*, 875 S.W.2d 3, 5 (Tex. App.—Tyler 1994, pet. ref'd); *Simpson v. State*, 772 S.W.2d 276, 280-81 (Tex. App.—Amarillo 1989, no pet.)).[8]

Your office has previously recognized that courts have wide latitude when imposing conditions of supervision. In Tex. Att'y Gen. Op. No. DM-437 (1997), your office decided that a condition of community supervision requiring a defendant to post a warning sign at his residence stating that he is a convicted sex offender is not per se unauthorized by article 42.12 or per se unconstitutional.

Texas courts have recently upheld the constitutionality of the child safety zone statutes. In *Belt,* 127 S.W.3d at 279-80, probationer was convicted of aggravated sexual assault of a child under fourteen and received deferred adjudication probation. The Court upheld the constitutionality of the 1000-foot child safety zone restriction placed on the probationer. *Id.* at 283-84. *See* also *Leach v. State,* 170 S.W.3d 669, 672-76 (Tex. App.—Fort Worth 2005, pet ref'd) (Legislature in using the term "including" in the listing of places where children commonly gather intended it as term of "enlargement"; statutory language "where children commonly gather" is not unconstitutionally vague or unconstitutional).

In *Rickels v. State*, 108 S.W.3d 900, 902-03 (Tex. Crim. App. 2003), the Court of Criminal Appeals held that a probation condition that a probationer, convicted of indecency with a child, "not go within three hundred (300) feet of any premises where children 17 years or younger congregate or gather" was not too vague to be enforced because of a lack of specification as to how the distance was to be measured.

Texas courts have interpreted the judges' supervisory power to impose conditions of probation under article 42.12, TEX. CODE. CRIM. PROC. ANN., in an expansive manner.

In *Ex parte Alakayi*, 102 S.W.3d 426 (Tex. App.—Houston [14th Dist.] 2003, pet. ref'd), the court considered defendant's arguments that the trial court had no authority to impose a child safety zone requirement under article 42.12, section 13B TEX. CODE CRIM. PROC. ANN., when the victim of defendant's offense was not a child. The court read section 13B together with section 13D, which allows the imposition of a child safety zone restriction on a defendant whose victims are not children, and decided that the statute does not act as a limitation on the trial court's discretion to impose a child safety zone in cases where the victim was not a child. *Alakayi* at 435. The Court stated, "This language [in section 13B] makes it mandatory for a trial court to impose a child-safety zone in the specified class of cases, but it does not limit the trial court's ability to impose a child safety zone in other cases." *Id.*

Most important, the Court in *Alakayi* reasoned that even if section 13D does not provide such authorization, then section 11(a) of article 42.12, TEX. CODE CRIM. PROC. ANN., does provide the judge the authority to impose a child safety zone restriction that falls outside the strict requirements of the statute. *Alakayi* at 435. The court took note of the plain language of the mandatory child safety zone statute but held that the trial judge had authority to impose the child safety zone restrictions under section 11(a). *Alakayi* at 435-36.

In *Fielder v. State*, 811 S.W.2d 131, 134 (Tex. Crim. App. 1991), the Court of Criminal Appeals upheld a court's authority to impose a condition of probation requiring the defendant, convicted of involuntary manslaughter, to be confined and undergo drug treatment in a non-statutory court-created drug treatment facility created by the then-Adult Probation Commission.[9] Were it not for the judge's order, the defendant would have been statutorily barred from attending a "Community Rehabilitation Center" under section 6e of article 42.12, TEX. CODE CRIM. PROC. ANN. There was evidence of drug and alcohol use by the defendant in connection with the offense. The Court of Criminal Appeals reiterated that courts have "wide-ranging authority" to impose conditions of probation which are reasonably related to the treatment of the probationer and the protection of the general public. *Fielder* at 134. The Court stated that the

> "conditions are not limited to those suggested in statute they should be 'reasonable' as expressly provided by the statute. And in light of the provisions of the statute, it would seem that permissible conditions should have a reasonable relationship to the treatment of the accused and the protection of the public."

Id. (citations omitted).

The Texas Court of Criminal Appeals recently upheld the trial judge's authority under article 42.12 of the Code of Criminal Procedure to impose two consecutive periods of 180-day confinement as a condition of supervision, when imposing two concurrent probation terms for two concurrent burglaries arising out of the same criminal episode. *Kesaria v. State*, 189 S.W.3d 279, 282 (Tex. Crim. App. 2006).

Courts have upheld probation conditions which restrict a probationer's business practices as reasonable. In *LeBlanc v. State,* 908 S.W.2d 573, 575 (Tex. App.—Fort Worth 1995, no pet.), the probationer was convicted of fraudulent transfer of a motor vehicle. The Court held that probation conditions requiring him to "cease and desist from conducting [his] business under previous contracts used" and to "notify all leinholders [sic] of all transactions and provide information asked by them" were reasonable. *Id.* at 575. *Cf. Horner v. Reed,* 756 S.W.2d 34, 35 (Tex. App.—San Antonio 1988, orig. proceeding) (condition requiring the probationer to give up his job for the period of probation is unreasonable per se). In *Iowa v. Winters,* 2005 Iowa App. LEXIS 147, at 5-6 (Iowa Ct. App. Feb. 24, 2005), the appellate court upheld the imposition of sex offender treatment conditions on a defendant upon a plea to a driving while intoxicated charge, on account of a 10-year old sex offense conviction, following a recommendation in the PSI (presentence investigation) report. The Court reasoned that "in Iowa, probationers are subject to any reasonable conditions the court may impose to 'promote rehabilitation of the defendant or protection of the community.'" *Id.* at *5-6 (citing *LeBlanc v. State,* 908 S.W.2d 573, 574-75 (Tex. App.—Fort Worth 1995, no pet).

It is significant that the Court of Criminal Appeals has held that probationers waive any complaints not urged before the trial court at the time of imposition of the probation conditions. *Speth v. State,* 6 S.W.3d 530, 534 (Tex. Crim. App. 1999), *cert. denied,* 529 U.S. 1088 (2000). In *Speth,* the trial judge imposed sex offender conditions on a probationer who, while on probation for aggravated assault on a police officer, was acquitted of indecency with a child. The trial judge during the revocation hearing found that the probationer had violated his probation by committing indecency with a child[10] but declined to revoke the probationer on the violation and imposed the sex offender conditions by way of modification. *Id.*[11]

Examples of other cases where courts have upheld the probation conditions as reasonable include: *Marcum v. State*, 983 S.W.2d 762, 768 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd) (conviction for aggravated sexual assault of a child, probation condition prohibiting contact with anyone under 17 years of age); *Lacy v. State*, 875 S.W.2d 3, 5 (Tex. App.--Tyler 1994, pet. ref'd) (DWI conviction; court upheld condition forbidding defendant to work in a bar); and *Todd v. State*, 911 S.W.2d 807, 817-18 (Tex. App.—El Paso 1995, no pet.) (probation condition requiring defendant convicted of criminally negligent homicide to send letters of apology to his victims constituted a reasonable exercise of discretion).

Limitations on the Trial Court's Authority to Impose Conditions of Supervision

The discretion granted to trial courts in imposing community supervision is not unfettered. There are certain conditions which the Courts have rejected as illegal.

In *Simpson v. State*, 772 S.W.2d 276, 280-81 (Tex. App.--Amarillo 1989, no pet.), defendant was convicted of sexual assault and the jury recommended probation. The reviewing court upheld the court-imposed conditions of thirty days in the Dallam County jail, 90 days in a residential work release center, and the requirement to undergo an

alcohol evaluation. *Id.* at 278-79. The appellate court rejected the court-imposed conditions requiring defendant not to change marital status without permission ("exceeds the limitation upon a judge's discretion"); the court held that the condition to maintain hair in a "neat and orderly manner" was vague and unenforceable. *Id.* at 281. *See also* Tex. Att'y Gen. Letter Op. No. 93-95 (1993).

In *Menchaca v. State*, No. 2-04-283-CR, 2005 Tex. App. LEXIS 909 at *4 (Tex. App.—Fort Worth, February 3, 2005), the appellate court rejected the condition requiring that defendant "not enter or go near Riverside Drive in Ft. Worth, TX" as vague and unenforceable.

Certain conditions are controlled by statute and are strictly construed.[12]

A trial court does not have the authority to place any condition on a convicted defendant's parole, including a condition that the defendant pay fees for appointed counsel. *Bray v. State*, 179 S.W.3d 725, 728-29 (Tex. App.—Fort Worth 2005, no pet.); *see also Campbell v. State*, 5 S.W.3d 693, 696-97 (Tex. Crim. App. 1999) (a trial court may fix the amount of restitution that is just, and the parole panel may use this amount in ordering restitution as a condition of parole).

The trial judge has no authority to require a convicted defendant to display, for the first two years of his incarceration, two photographs of the victim in his prison cell at a height 3 feet to 5 feet from the ground and in a location visible from his prison cell door. *Tufele v. State*, 130 S.W.3d 267, 272-74 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

In *Hollie v. State*, 962 S.W.2d 302, 304 (Tex.App.—Houston [1st Dist.] 1998, pet. dism'd) (en banc), the appellate court modified the trial court's sentence to 45 days in the county jail as a condition of community supervision because the statute provided a maximum of only 30 days in confinement as a condition of community supervision in misdemeanor cases.

Other States

Child Safety Zone statutes have survived constitutional challenges in several states:[13]

- Alabama, in *Lee v. State*, 895 So.2d 1038, 1041-44 (Ala. Crim. App. 2004), (2000-foot restriction on residency and workplace location);

- Arkansas, in *Weems v. Little Rock Police Dept.*, 453 F.3d 1010, 2006 U.S. App. LEXIS 17478 (8th Cir 2006) (2000-foot residency restriction);

- Illinois, in *People v. Leroy*, 357 Ill. App. 3d 530, 828 N.E.2d 769, 775, 293 Ill. Dec. 459 (Ill. App. Ct. 2005, pet denied) (500-foot restriction on residency);

- Iowa, in *Doe v. Miller*, 405 F.3d 700, 705, 710-16 (8th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3322 (U.S. November 28, 2005) (No. 05-428); and in *Iowa v. Seering*, 701 N.W.2d 655, 670-71 (Iowa 2005) (2000-foot residency restriction); and

- New Mexico, in *ACLU v. City of Albuquerque*, 2006 NMCA 78, 137 P.3d 1215, 2006 N.M. App. LEXIS 53, at *34 (N.M. Ct. App. 2006) (as reformed by district court, city ordinance prohibiting new acquisition of real property or residence within 1000 feet of school).

Conclusion and Request for Opinion

For the foregoing reasons, on behalf of the Presiding Officer of the Texas Board of Pardons and Paroles, I respectfully request an Opinion from your office on whether the Board has authority to impose child safety zone restrictions as a condition of parole on offenders who have discharged their sex offense convictions and are serving sentences for non-sex offenses.

Sincerely,

Laura McElroy
General Counsel

Attachment/BPP.POL. 04-01.05 (adopted January 8, 2004)

END NOTES

1. § 508.0441. Release and Revocation Duties

   (a) Board members and parole commissioners shall determine:

   (1) which inmates are to be released on parole or mandatory supervision;

   (2) conditions of parole or mandatory supervision, including special conditions;

   (3) the modification and withdrawal of conditions of parole or mandatory supervision;

   (4) which releasees may be released from supervision and reporting; and

   (5) the continuation, modification, and revocation of parole or mandatory supervision.

(b) The board shall develop and implement a policy that clearly defines circumstances under which a board member or parole commissioner should disqualify himself or herself from voting on:

(1) a parole decision; or

(2) a decision to revoke parole or mandatory supervision.

(c) The board may adopt reasonable rules as proper or necessary relating to:

(1) the eligibility of an inmate for release on parole or release to mandatory supervision;

(2) the conduct of a parole or mandatory supervision hearing; or

(3) conditions to be imposed on a releasee.

(d) The presiding officer may provide a written plan for the administrative review of actions taken by a parole panel by a review panel.

(e) Board members and parole commissioners shall, at the direction of the presiding officer, file activity reports on duties performed under this chapter.

The Board members and parole commissioners are also given statutory authority to consider and order release inmates on parole under section 508.141, TEX. GOV'T CODE ANN. (Authority to Consider and Order Release on Parole).

Under section 508.045, TEX. GOV'T CODE ANN. (Parole Panels), Board members and parole commissioners vote in panels composed of three ("parole panels"), except that under section 508.046, TEX. GOV'T CODE ANN. (Extraordinary Vote Required), at least two-thirds of the Board members must vote for the release of offenders who were convicted of certain more serious offenses (capital felonies committed before September 1, 2005, and certain aggravated sexual offenses).

2. § 508.187. Child Safety Zone

(a) This section applies **only to a releasee serving a sentence** for an offense under:

(1) Section 43.25 or 43.26, Penal Code;

(2) Section 21.11, 22.011, 22.021, or 25.02, Penal Code;

(3) Section 20.04(a)(4), Penal Code, if the releasee committed the offense with the intent to violate or abuse the victim sexually; or

(4) Section 30.02, Penal Code, punishable under Subsection (d) of that section, if the releasee committed the offense with the intent to commit a felony listed in Subdivision (2) or (3).

(b) A parole panel shall establish a child safety zone applicable to a releasee if the panel determines that a child as defined by Section 22.011(c), Penal Code, was the victim of the offense, by requiring as a condition of parole or mandatory supervision that the releasee:

(1) not:

(A) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or

(B) go in, on, or within a distance specified by the panel of premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility; and

(2) attend for a period of time determined necessary by the panel psychological counseling sessions for sex offenders with an individual or organization that provides sex offender treatment or counseling as specified by the parole officer supervising the releasee after release.

(c) A parole officer who under Subsection (b)(2) specifies a sex offender treatment provider to provide counseling to a releasee shall:

(1) contact the provider before the releasee is released;

(2) establish the date, time, and place of the first session between the releasee and the provider; and

(3) request the provider to immediately notify the officer if the releasee fails to attend the first session or any subsequent scheduled session.

(d) At any time after the imposition of a condition under Subsection (b)(1), the releasee may request the parole panel to modify the child safety zone applicable to the releasee because the zone as created by the panel:

(1) interferes with the releasee's ability to attend school or hold a job and consequently constitutes an undue hardship for the releasee; or

(2) is broader than necessary to protect the public, given the nature and circumstances of the offense.

(e) A parole officer supervising a releasee may permit the releasee to enter on an event-by-event basis into the child safety zone that the releasee is otherwise prohibited from entering if:

(1) the releasee has served at least two years of the period of supervision imposed on release;

(2) the releasee enters the zone as part of a program to reunite with the releasee's family;

(3) the releasee presents to the parole officer a written proposal specifying:

(A) where the releasee intends to go within the zone;

(B) why and with whom the releasee is going; and

(C) how the releasee intends to cope with any stressful situations that occur;

(4) the sex offender treatment provider treating the releasee agrees with the officer that the releasee should be allowed to attend the event; and

(5) the officer and the treatment provider agree on a chaperon to accompany the releasee, and the chaperon agrees to perform that duty.

(f) In this section, "playground," "premises," "school," "video arcade facility," and "youth center" have the meanings assigned by Section 481.134, Health and Safety Code. (emphasis added).

3. § 508.225. Child Safety Zone

(a) If the nature of the offense for which an inmate is serving a sentence warrants the establishment of a child safety zone, a parole panel may establish a child safety zone applicable to an inmate serving a sentence for an offense listed in Section 3g(a)(1), Article 42.12, Code of Criminal Procedure, or for which the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, Code of Criminal Procedure, by requiring as a condition of parole or release to mandatory supervision that the inmate not:

(1) supervise or participate in any program that includes as participants or recipients persons who are 17 years of age or younger and that regularly provides athletic, civic, or cultural activities; or

(2) go in or on, or within a distance specified by the panel of, a premises where children commonly gather, including a school, day-care facility, playground, public or private youth center, public swimming pool, or video arcade facility.

(b) At any time after the imposition of a condition under Subsection (a), the inmate may request the parole panel to modify the child safety zone applicable to the inmate because the zone as created by the panel:

(1) interferes with the ability of the inmate to attend school or hold a job and consequently constitutes an undue hardship for the inmate; or

(2) is broader than is necessary to protect the public, given the nature and circumstances of the offense.

(c) This section does not apply to an inmate described by Section 508.187.

(d) In this section, "playground," "premises," "school," "video arcade facility," and "youth center" have the meanings assigned by Section 481.134, Health and Safety Code.

4. *See* art. 42.12, section 3g, TEX. CODE CRIM. PROC. ANN., which contains a list of aggravated felony offenses. An offense classified as a "3g" offense also includes offenses where an affirmative finding is made that the defendant used or exhibited a deadly weapon during the commission of the offense.

5. The sex offender registration laws apply to sex offenders even if they receive a pardon. *See* art. 62.002(b)(2), Tex. CODE CRIM. PROC. ANN. The sex offender registration requirement is terminated only if the reportable conviction is set aside on appeal or if the Governor grants a pardon for innocence. *See* art. 62.002(c), TEX. CODE CRIM. PROC. ANN.

6. "The terms 'community supervision' and 'probation' share the same meaning and are generally used interchangeably." *Prevato v. State,* 77 S.W.3d 317, 317 n. 1 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

7. Appellate courts review a trial court's imposition of community supervision conditions under an abuse of discretion standard. *See McArthur v. State,* 1 S.W.3d 323, 331 (Tex. App.—Fort Worth 1999, no pet.), *cert denied,* 531 U.S. 873 (2000). If the court imposes an invalid condition, the proper remedy is to reform the judgment by deleting the invalid condition. *Martinez v. State*, 874 S.W.2d 267, 268 (Tex. App.—Houston [14th Dist.] 1994, pet. ref'd), (citing *Ex parte Pena*, 739 S.W.2d 50, 51 (Tex. Crim. App. 1987)).

8. The Court of Criminal Appeals has made it clear that community supervision is "an arrangement *in lieu of* the sentence, *not as part of* the sentence." *Speth v. State*, 6 S.W.3d 530, 532 (Tex. Crim. App. 1999). Therefore, any complaint on appeal related to the imposition of probation conditions is procedurally defaulted unless urged before the judge at the time of the imposition of the conditions. *Id.* at 535.

In 2003, the Court of Criminal Appeals distinguished its holding in *Speth* via *Rickels v. State*, 108 S.W.3d 900, 902 (Tex. Crim. App. 2003). Rickels was convicted of indecency with a child by touching and indecency with a child by exposure and placed on ten years probation. Several years later, the trial court modified his conditions of supervision, adding several new conditions, including one condition that dictated that Rickels "not go within three hundred (300) feet of any premises where children 17 years or younger congregate or gather." The new condition was imposed by way of amendment to the probation order without a hearing, and the Court ruled that Rickels should have been given an **opportunity** to object when the conditions were modified and therefore he did not waive consideration on appeal. *Id.* at 902.

9. Now the Texas Department of Criminal Justice – Community Justice Assistance Division.

10. The burden of proof in administrative probation revocation hearings is "preponderance of the evidence" and differs from the higher burden of proof (the "reasonable doubt" standard) that the State bears in criminal cases. *Cobb v. State,* 851 S.W.2d 871, 873-74 (Tex. Crim. App. 1993).

11. The Fourteenth Court of Appeals reversed the trial court on appeal and struck all the sex offender conditions except the condition that Speth attend psychological sex offender counseling. *Speth v. State,* 965 S.W.2d 13, 18 (Tex. App.—Houston [14th Dist.] 1998, pet. granted) (Speth had volunteered to attend sex offender counseling).

12. Your office has decided that the Legislature intended that any costs assessed to a defendant be expressly authorized by statute. In 1993, your office decided that article 42.12 does not authorize judges to require defendant's to reimburse a county for the cost of employing interpreters, either as a cost or as a condition of probation, because the imposition is not expressly authorized by law. *See* Tex. Att'y Gen. Op. No. DM-245 (1993). In 2003, your office decided that the statute provides no authority for a court requirement that a defendant charged with a drug offense to pay a "flat-rate" fee into a "special investigation fund" or other fund designated by the court, with the proceeds divided and used by prosecutors and local law enforcement agencies. This payment requirement was not expressly authorized by statute, nor would it qualify as a fine, court cost, restitution, or other payment "related personally" to the defendant's rehabilitation (as none of the money goes to entities that may assist in rehabilitating the defendant). *See* Tex. Att'y Gen. Op. No. GA-0095 (2003).

13. *See generally* Carroll J. Miller, J.D., Annotation, *Propriety of Conditioning Probation on Defendant's Not Entering Specified Geographical Area,* 28 A.L.R. 4th 725 (1984, updated 2002).

BOARD POLICY

SUBJECT: **DESIGNATION OF STANDARDIZED DISTANCE FOR CHILD SAFETY ZONES AND DETERMINATION OF A PERIOD OF TIME REQUIRED FOR SEX OFFENDER COUNSELING**

PURPOSE: To establish a standardized distance for child safety zones while maintaining a parole panel's flexibility to vary from the established distance on a case-by-case basis as appropriate to the offender's individual circumstances. It is further intended to determine the duration of time for psychological counseling of an offender, who has committed a sexual offense as defined in 508.187(a), against a victim who is identified as a "child" by Section 22.011(c) of the Penal Code.

AUTHORITY: §§508.0441, 508.045, 508.187, 508.221 and 508.225, Government Code

POLICY: A parole panel shall establish a child safety zone applicable to an offender. The Board adopts as its standardized distance for child safety zones the distance of five hundred (500) feet.

Parole panels shall require sex offenders to receive psychological counseling until such time as the treatment provider, in conjunction with the Parole Division, determines that treatment is no longer required. The Parole Division will submit a recommendation to withdraw the requirement to attend psychological counseling to the appropriate parole panel in those instances where such action is deemed appropriate.

DEFINITIONS: Child safety zone: the distance an offender must maintain between himself or herself and any location where children commonly gather, including but not limited to: schools, day-care facilities, playgrounds, public or private youth centers, public swimming pools or video arcade facilities.

Playground, premises, school, video arcade facility, and youth center: as defined by Section 481.134, Health and Safety Code.

Psychological counseling: counseling sessions with an individual or organization which provides sex offender treatment or counseling as specified in writing by the offender's supervising parole officer.

Standardized distance: the Board's established distance for child safety zones.

ADOPTED BY MAJORITY VOTE OF THE BOARD ON 8th DAY OF JANUARY, 2004.

Rissie Owens

RISSIE OWENS, PRESIDING OFFICER (CHAIR)