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OPINION COMMITTEE

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October 18, 2005

Gregg Abbot
Attorney General of Texas
Attorney General Opinion Division
300 W. 15th Street, Suite 205
Austin, Texas 78711-2548

General Abbot:

I request an opinion on the following matter:

Is a county sheriff operating jail inmate trustees under CCP Art. 43.101 required to follow the new provisions under CCP Art. 43.10(4) as outlined by H.B. 129 of the 79th Texas Legislature when working said trustees on projects for nonprofit organizations? Further, outside of CCP Art. 43.10, does a county sheriff have the legal authority to use jail inmate trustees on any projects, including those for nonprofit organizations?

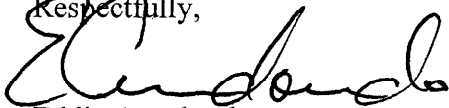
A dispute exists about whether or not CCP Art 43.101 is considered a subsection of CCP Art 43.10. My office believes that Art 43.101 expands the pool of potential jail inmates who may be trustees from those that are convicted of offenses and required to work as trustees to those awaiting trial and transfer to TDCJ-ID on a voluntary basis. Art. 43.101(a) states that jail inmates who are awaiting trial or transfer to TDCJ-ID, "may volunteer to participate in any work program operated by the sheriff that uses the labor of convicted defendants." My office believes that this quote is a direct reference to the work programs allowed for convicted defendants in Art. 43.10.

A second line of thought is held by the Sheriff's Association of Texas. Their belief is that Art. 43.10 and Art. 43.101 are separate and unrelated statutes. Since AG opinion GA-0261 and H.B. 129 of the 79th Texas Legislature refer to Art. 43.10 only, volunteer jail inmate trustees under Art. 43.101 may work on projects for nonprofit organizations without the involvement of a county commissioners' court. Further, because Art.

43.101 gives no specific guidance or reference to what constitutes a "work program operated by the sheriff," a county sheriff may create any type of volunteer work program he/she deems appropriate for persons awaiting trial or transfer to TDCJ-ID, including one which allows the work for nonprofit organizations without the involvement of a county commissioners' court.

Enclosed, please find all the relevant information and correspondence regarding this discussion. Chronologically, it begins with an opinion by Robert Klaeger, my predecessor in 2003. Next, is the opinion which I wrote in early October 2005 which is followed by a series of emails with Tom Bullington of the Sheriff's Association of Texas. It is my hope that your guidance will resolve many potential disputes which may arise across the State of Texas regarding the new change in the law by H.B. 129.

Respectfully,

A handwritten signature in black ink, appearing to read "Eddie Arredondo". The signature is fluid and cursive, with a large initial "E" and "A".

Eddie Arredondo
Burnet County Attorney



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October 6, 2005

TO: Burnet County Commissioner's Court
Burnet County Sheriff Joe Pollock
Hon. Gil Jones, District Judge

FROM: Eddie Arredondo

RE: 2005 HB 129 – An Act authorizing jail trustee manual labor for nonprofit organizations or any cemetery maintained by the county.

Gentlemen:

I am writing this memo to explain the status of the law on jail trustee labor for nonprofit organizations. As you know, a great controversy has existed in Burnet County as to the ability of trustee inmates to do this type of work. Currently in Burnet County, there are various types of trustee inmates. Among these trustees are the following:

- a. Persons residing in the Burnet County Jail accused of committing a crime, awaiting trial or probation revocation, and who have been given trustee status by Sheriff Pollock to perform work;
- b. Persons residing in the Burnet County Jail convicted of a crime, awaiting transport to another agency such as TDCJ-ID, and who have been given trustee status by Sheriff Pollock to perform work;
- c. Persons sentenced to terms of confinement in the County jail; and
- d. Persons who have been convicted of a crime in Burnet County and who have previously been sent to TDCJ-ID, but who have been bench warranted back to Burnet County Jail specifically to be a trustee inmate. The bench warrant is ordered by District Judge Gil Jones upon request from Sheriff Pollock.

JUDGE JONES' OPINION- BENCH WARRANTED TRUSTEES

In a recent appearance before Burnet County Commissioner's Court, District Judge Gil Jones spoke about this subject regarding his policy over inmates that have been bench warranted back to the Burnet County Jail from the Institutional Division of Texas Department of Criminal Justice to be trustees. As stated above, Judge Jones must bench warrant them to Burnet County because these inmates are already committed to confinement in TDCJ-ID. They are not present in Burnet County under any statutory authority, and for this reason, only the district judge has the authority to set all work conditions for these specific inmates. Judge Jones emphasized that the bench warranted inmates could not perform any work for nonprofit organizations, citing the principles derived from Attorney General Opinion GA-0261.

This AG opinion addressed the issue of inmate trustees under Code of Criminal Procedure Art. 43.10.¹ It prohibited them from working for nonprofit organizations. Judge Jones recognized the great contributions that trustee inmates added on projects for groups like volunteer fire departments and EMS barns. Reluctantly, Judge Jones concluded that this AG opinion prohibited Burnet County TDCJ-ID inmates from working on projects for these worthy organizations. Judge Jones offered some hope for the future, indicating that the Texas Legislature was in session and that the status of the law could change.

Due to Judge Jones' decision, the bench warranted TDCJ-ID inmates were no longer allowed to perform any work for any nonprofit organizations. Judge Jones gave no opinion as to whether any of the other types of trustee inmates could perform this type of work since he had no authority over them. However, as will be discussed below, it is my opinion that all types of trustees were barred from working for nonprofit projects.

SHERIFF'S DISAGREEMENT WITH JUDGE JONES' OPINION

Regarding the bench warranted TDCJ-ID inmates, Sheriff Pollock respectfully disagreed with Judge Jones' view. He believed that the AG opinion which Judge Jones cited only regarded trustees working under Art. 43.10.² He added that all of the inmate trustees in Burnet County operated under Art. 43.101, not Art. 43.10. Art. 43.101(a) authorizes a sheriff to allow any person confined in a jail awaiting trial, or waiting to be transferred to TDCJ-ID after a conviction of a crime or a revocation of a probation to "volunteer to participate in any work program operated by the sheriff that uses the labor of convicted defendants."

We must then determine what is "any work program operated by the sheriff," as described in Art. 43.101. Is it merely any work program he creates on his own? Or, must

¹ All references to "Art." Hereafter are to the Code of Criminal Procedure. All cited references are attached as an Appendix to this Memorandum.

² The Sheriff was actually correct to that extent, but drew the wrong legal conclusion from that.

it be one authorized and created otherwise? As discussed further below, my opinion is that it must be a program under Art. 43.10.

Art. 43.10 involves convicted individuals only. They “shall” be required to work in the county’s jail industries program or perform manual labor in accordance with the provisions of Art. 43.10, paragraphs numbered 1 - 6. Paragraph 1 of Art. 43.10 provides that:

1. Each commissioners court may provide for the erection of a workhouse and the establishment of a county farm in connection therewith for the purpose of utilizing the labor of said parties so convicted;

This type of program allows for the erection of a workhouse and/or county farm as provided by the county commissioners’ court. A sheriff has no authority to establish a workhouse or a county farm and none exists in Burnet County. The only other type of inmate work program authorized by statute is the “jail industries program” which may be established by the Commissioners Court pursuant to Local Gov’t Code §351.201. No such program has been established in Burnet County either.

Therefore, the only authority for a sheriff to put inmates to labor is derived from Art. 43.10, paragraph 4, which states in principle part as follows:

4. They (convicted persons in the jail) shall be put to labor upon public works and maintenance projects, including public works and maintenance projects for a political subdivision located in whole or in part in the county. (omitting the 2005 additions which will be discussed below)

That was the thrust of A.G. opinion GA-0261.

Since Sheriff Pollock asserted that his trustees fell under Art. 43.101, and not Art. 43.10, he believed that the limits imposed by the AG opinion³ did not apply in Burnet County. All of his trustees were volunteers, and neither a jail industries program nor workhouse or county farm had ever been set up by the Burnet County Commissioner’s Court. The Burnet County inmate trustees were composed of various types of inmates, including persons who had yet to be convicted of a crime. As a result, Sheriff Pollock concluded that all of his inmate trustees could work on projects for nonprofit organizations. Despite these thoughts, Sheriff Pollock recognized Judge Jones’ authority over the bench warranted TDCJ-ID inmates, and stopped the practice of Burnet County inmate trustees working for nonprofit organizations. The Sheriff’s new policy precluded all of the Burnet County trustees, not just the three bench warranted TDCJ-ID inmates from doing work for non-profit organizations. In my opinion, that was the legally correct thing for Sheriff Pollock to do under the state of the law as it then existed.

³ All references to the “AG opinion” are to GA-0261 unless otherwise noted.

WHY THE AG OPINION INCLUDED BURNET COUNTY TRUSTEES

Judge Jones concurred that the AG opinion specifically discussed Art. 43.10 only. However, the judge concluded that Art. 43.101 had to also follow the opinion because it regarded the same issue and was in fact an extension of Art. 43.10. The judge concluded that Art. 43.101 was a sub-part of Art. 43.10. The reference in Art. 43.101 that states, "any work program operated by the sheriff that uses the labor of convicted defendants" was a reference to a work program established pursuant to Art. 43.10.

As discussed above, there are only four types of work programs existing under Art. 43.10, those being:

1. A jail industries program under §351.201, Local Gov't Code;
2. A workhouse under Art. 43.10, paragraph 1;
3. A county farm under Art. 43.10, paragraph 1; or
4. The general authority under Art. 43.10, paragraph 4 (manual labor on government projects).

Thus the "work program" mentioned in Art. 43.101 can, in Burnet County, refer only to a program pursuant to Art. 43.10, paragraph 4. In no other place in the statutes can authority be found for a sheriff to work inmates, either mandatory or voluntarily.

The sole purpose of Art. 43.101, a sub-part of 43.10, is to expand the pool of inmate labor to certain qualified volunteers in addition to those who are required to do manual labor.

The judge's findings were in regards to the inmate trustees which he bench warranted from TDCJ-ID only. Since the other type of inmate trustees were not under his authority, he remained mute on their ability to work on nonprofit projects. I agreed with the judge's assessment. I went a step further, concluding that the AG opinion applied in principle to all of the different types of Burnet trustees for the reasons discussed above.

This analysis is shared by Mr. Jim Allison, General Counsel of the County Judges & Commissioners Association of Texas.

H.B. 129

The 79th Texas Legislature did address this issue during the last legislative term. H.B. 129 is the resulting legislation which now allows inmate trustees to work for nonprofit organizations. This legislation is a direct revision of the statute interpreted by the AG opinion. H.B. 129 amends Art. 43.10 only, not Art. 43.101. For the reasons I just explained, the AG opinion also governs the Art. 43.101 pool of volunteers.

Paragraph 4 of Art. 43.10 is amended to read as follows:

5. They shall be put to labor upon public works and maintenance projects, including public works and maintenance projects for a political subdivision

funds, county employees, or county equipment to maintain under Section 713.028, Health and Safety Code. They may also be put to labor providing maintenance and related services to a nonprofit organization that qualifies for a tax exemption under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code, and is organized as a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes), provided that, at the sheriff's request, the commissioners court determines that the nonprofit organization provides a public service to the county or to a political subdivision located in whole or in part in the county;

This work can occur under the general authority of a sheriff to work inmates, both mandatory or (via Art. 43.101) voluntarily, without the establishment of either a jail industries program, a workhouse, or a county farm operation. However, as can clearly be seen from the added text, work for nonprofits only if “the commissioners court determines that the nonprofit organization provides a public service to the county or to a political subdivision located in whole or in part in the county.”

CONCLUSION

Although HB 129 amends Art. 43.10 to permit working inmates on specified types of projects for a nonprofit organization, the organization must first be approved by the commissioners court. The crucial provision in that regard is that “...at the sheriff's request, the commissioners court determines that the nonprofit organization provides a public service to the county or to a political subdivision located in whole or in part in the county.”

Respectfully submitted,



Eduardo Arredondo
Burnet County Attorney

APPENDIX

Art. 43.10. Manual Labor (as amended by 79th Texas Legislature, HB 129 – additions shown by underlining)

Where the punishment assessed in a conviction for misdemeanor is confinement in jail for more than one day, or where in such conviction the punishment is assessed only at a pecuniary fine and the party so convicted is unable to pay the fine and costs adjudged against him, or where the party is sentenced to jail for a felony or is confined in jail after conviction of a felony, the party convicted shall be required to work in the county jail industries program or shall be required to do manual labor in accordance with the provisions of this article under the following rules and regulations:

1. Each commissioners court may provide for the erection of a workhouse and the establishment of a county farm in connection therewith for the purpose of utilizing the labor of said parties so convicted;
2. Such farms and workhouses shall be under the control and management of the sheriff, and the sheriff may adopt such rules and regulations not inconsistent with the rules and regulations of the Commission on Jail Standards and with the laws as the sheriff deems necessary;
3. Such overseers and guards may be employed by the sheriff under the authority of the commissioners court as may be necessary to prevent escapes and to enforce such labor, and they shall be paid out of the county treasury such compensation as the commissioners court may prescribe;
4. They shall be put to labor upon public works and maintenance projects, including public works and maintenance projects for a political subdivision located in whole or in part in the county. They may be put to labor upon maintenance projects for a cemetery that the commissioners court uses public funds, county employees, or county equipment to maintain under Section 713.028, Health and Safety Code. They may also be put to labor providing maintenance and related services to a nonprofit organization that qualifies for a tax exemption under Section 501(a), Internal Revenue Code of 1986, as an organization described by Section 501(c)(3) of that code, and is organized as a nonprofit corporation under the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes), provided that, at the sheriff's request, the commissioners court determines that the nonprofit organization provides a public service to the county or to a political subdivision located in whole or in part in the county;
5. One who from age, disease, or other physical or mental disability is unable to do manual labor shall not be required to work. His inability to do manual labor may be determined by a physician appointed for that purpose by the county judge or the commissioners court, who shall be paid for such service such compensation as said court may allow; and

6. For each day of manual labor, in addition to any other credits allowed by law, a defendant is entitled to have one day deducted from each sentence he is serving. The deduction authorized by this article, when combined with the deduction required by Article 42.10 of this code, may not exceed two-thirds (2/3) of the sentence.

Art. 43.101. Voluntary work

(a) A defendant confined in county jail awaiting trial or a defendant confined in county jail after conviction of a felony or revocation of community supervision, parole, or mandatory supervision and awaiting transfer to the institutional division of the Texas Department of Criminal Justice may volunteer to participate in any work program operated by the sheriff that uses the labor of convicted defendants.

(b) The sheriff may accept a defendant as a volunteer under Subsection (a) of this section if the defendant is not awaiting trial for an offense involving violence or is not awaiting transfer to the institutional division of the Texas Department of Criminal Justice after conviction of a felony involving violence, and if the sheriff determines that the inmate has not engaged previously in violent conduct and does not pose a security risk to the general public if allowed to participate in the work program.

(c) A defendant participating in a work program under this section is not an employee for the purposes of Chapter 501 or 504, Labor Code.

§ 351.201. County Jail Industries Program

(a) A commissioners court by order may establish a county jail industries program. The sheriff may allow inmate participation in the county jail industries program in carrying out his constitutional and statutory duties.

(b) The purposes for which a county jail industries program may be established are to:

- (1) provide adequate, regular, and suitable employment for the vocational training of inmates;
- (2) reimburse the county for expenses caused by the crimes of inmates and the cost of their confinement; or
- (3) provide for the distribution of articles and products produced under this subchapter to:
 - (A) offices of the county and offices of political subdivisions located in whole or in part in the county; and
 - (B) nonprofit organizations that provide services to the general public and enhance social welfare and the general well-being of the community.

(c) A commissioners court, in an order establishing a county jail industries program, shall, with the approval of the sheriff:

- (1) designate the county official or officials responsible for management of the program; and
- (2) designate the county official or officials responsible for determining which inmates are allowed to participate in a county jail industries program.

(d) An order of a commissioners court establishing a county jail industries program, though not limited to, may provide for any of the following:

- (1) an advisory committee;
- (2) the priorities under which the county jail industries program is to be administered;
- (3) procedures to determine the articles and products to be produced under this subchapter;
- (4) procedures to determine the sales price of articles and products produced under this subchapter; and
- (5) procedures for the development of specifications for articles and products produced under this subchapter.

(e) A county jail industries program may be operated at the county jail, work farm, or workhouse or at any other suitable location.

(f) An inmate does not have a right to participate in a county jail industries program, and neither the sheriff, county judge, or commissioners nor any other county official or employee may be held liable for failing to provide a county jail industries program.

Flow Chart Explanation

- I. Art. 43.10 gives two options to require inmates who have been convicted to be trustees and do work:
 1. As a part of a Jail Industries program (set up by commissioner's court and not currently existing in Burnet County); OR
 2. by doing manual labor that can take place in the form of the following:
 - a. a county farm (set up by commissioner's court and not currently existing in Burnet County), OR
 - b. a workhouse (set up by commissioner's court and not currently existing in Burnet County), OR
 - c. by work on public work projects (government projects) (how convicted inmate trustees in Burnet County currently operate under but on a voluntarily basis per Art. 43.101)
- II. Art. 43.101 allows for voluntary work by a wider range of jail inmates such as those awaiting trial or revocation of probation in addition to convicted persons. So, other types of inmates besides convicted persons can be inmate trustees on Art 43.10 work. This encompasses all of the types of trustee inmates in Burnet County.
- III. H.B. 129 allows for work for nonprofit organizations. No matter which method of work an inmate trustee follows above, the Burnet County Commissioner's Court must approve of the nonprofit organization.