# PAROLE AND PLEA BARGAINS: HEDGING YOUR BETS

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## *INTRODUCTION*

Defense attorneys are well aware that the great majority of criminal defendants who enter their office will ultimately resolve their case through a plea agreement. Most veteran defense attorneys have had numerous clients who, for whatever reason, and notwithstanding their initial protests of innocence and declarations to take their case all the way to the Supreme Court, eventually decide to "hedge their bets" and enter a plea of guilty. Usually, the plea is part of a plea agreement.

In those cases where a decision has been reached to plead guilty, generally the client's, and therefore the defense attorney's, concerns are, in descending order of importance: (1) preventing incarceration; (2) limiting incarceration; (3) limiting the duration of any probation, and the amount of any fees, fines, or restitution; and, (4) minimizing the number and seriousness of the offense(s) to which the client will plead. In cases involving sex offenses, avoiding sex offender registration can sometimes trump all of the above concerns.

It is the defense attorney's duty to advise the client as to the meaning and consequences of the plea agreement. It isn't very difficult to get the client to focus on the incarceration aspect of a plea agreement. Most clients will also want to discuss when they will be eligible for parole. Beyond those considerations, many clients are unaware of other collateral consequences that may attach to their entering a plea of guilty. Even factors that can affect the length of confinement are sometimes misunderstood, or simply overlooked, by client and attorney alike.

There are few things as frustrating for an attorney as having to retrieve a closed file to answer a client's questions about why the client was not advised of some unexpected consequence of the conviction. Not only is there no new fee related to these inquiries, there is little likelihood that anything you say to the client will leave them satisfied. Then there is that gnawing fear of a bar grievance or a writ alleging ineffective assistance.

The attorney's failure to properly advise the client of the meaning and affect of their guilty plea may also constitute ineffective assistance of counsel. Appellate courts have held that only the failure to advise a client of a direct consequence, as opposed to a collateral consequence, will render a plea involuntary. Regardless of whether the courts deem a particular consequence collateral or direct, you can be sure that the client will not think it is collateral when it affects them in what they consider a very direct way. When that happens, the client's first inclination is

to blame the defense attorney for not warning them in advance. They may even assert that refrain often heard by writ attorneys: "if my attorney had told me that, I never would have pled guilty."

This paper is designed to help limit those refrains. It cover the basics that all defense attorneys must know about parole law as they advise their clients on accepting a plea bargain that is under consideration. I have also addressed other issues that have arisen in the course of our parole representation that have created problems that were, for the most part, avoidable. Hopefully, the matters addressed will help prevent complaints from clients, and reduce the number of cases where old closed files have to be retrieved to answer questions that could have easily been explained or resolved at the time of the plea.

## I. Parole eligibility requirements in Texas.

### A. General.

One of the reasons trial attorneys need to be familiar with parole law is Ex Parte Moussazadeh, 361 S.W.3d 684 (Tex. Crim. App. 2012), where the CCA stated: "We now disavow our prior decisions in Ex parte Evans and Moussazadeh II to the extent that they (1) require *parole-eligibility* misinformation to form an essential part of the plea agreement in order to make a showing of an involuntary plea that resulted from ineffective assistance of counsel, based upon such misinformation and (2) fail to appropriately recognize the distinction between parole *eligibility* and parole *attainment."* The court then found that trial counsel's erroneous advice to his client regarding his parole eligibility constituted ineffective assistance of counsel and rendered his plea involuntary.

Trial attorneys must have a clear understanding of the parole law effecting their clients when they advise them on the effect of a plea agreement. In Ex Parte Patterson, No. AP-76,901-CR (Tex. Crim. App. October 31, 2012, *per curiam*, not designated for publication), the CCA also found defense counsel ineffective and granted relief where the applicant claimed his plea was involuntary "because trial counsel failed to advise him of the effects of the drug free zone allegation on his sentence." (Drug free zone convictions have their own special parole eligibility issues that will be discussed below.) See also, Ex Parte Fisher, No. WR-85,297-01 Tex. Crim. App. July 27, 2016, *per curiam*, not designated for publication (plea was involuntary where client was advised parole eligibility for Engaging in Criminal Activity was ¼ flat and good time, when actually it was ½ flat).

Not all cases involving ineffective assistance of counsel due to erroneous parole eligibility information will result in a determination that the plea was involuntary. In Ex parte Colquitt, No. WR-25237-04 (Tex. Crim. App. March 21, 2012, *per curiam*, not designated for publication), the CCA found counsel ineffective for incorrectly advising Colquitt that he would be eligible for parole in four years on his eight year sentence, as opposed to five years, but ruled

that Colquitt was not entitled to relief, since he had not established that he was prejudiced by the erroneous advice. Critical to the courts determination was the fact that as part of the plea agreement the State had waived five enhancement paragraphs and did not demonstrate "that he would not have pleaded guilty but for counsel's erroneous advice as to parole eligibility." (Drug free zone convictions have their own special parole eligibility issues that will be discussed below.)

Parole eligibility in Texas is governed by the law in effect at the time of the commission of the offense. Texas Government Code §508.145 establishes the eligibility for release on parole in Texas. The complexity of parole eligibility computations has increased dramatically over the years. The law governing parole for offenses occurring between January 1, 1966, through August 31, 1967 (59th Legislature), could be summed up in two sentences:

> All offenses are eligible for parole when calendar time plus good time credits equal 1/4, including any bonus and blood donation credits. The maximum time for parole eligibility is 15 years.

Each time the Legislature meets they cannot resist changing and complicating the parole eligibility laws. The 65th Legislature (1977) gave rise to a new creature called mandatory supervision (MS). Initially, all offenses were eligible for mandatory supervision. Over the years, the legislature has steadily added to the list of offenses not eligible for mandatory supervision. Effective September 1, 1996 mandatory supervision became discretionary, giving rise to the anomaly of "discretionary mandatory supervision." Today it takes four pages to summarize parole and mandatory supervision eligibility, and the Parole Board's current publication does not include any changes made after the 82nd Legislature. When the Legislature next meets, some of the information in this paper will likely be outdated.

Since one's parole and MS eligibility is determined by the law in effect at the time of the commission of the offense, the Texas Board of Pardons and Paroles and TDCJ Parole Division, have included a 42 page Parole and Mandatory Supervision Eligibility Chart for "easy" reference at: www.tdcj.texas.gov/documents/pd/PIT_English.pdf. As of the date of this article, the chart only reflects parole eligibility requirements through the 84th Legislature.

The Board's general web site is at: www.tdcj.state.tx.us/bpp. It contains a wealth of information on all matters related to pardons and paroles, including Parole Board policies and directives governing. It is a must read for anyone seriously interested in pursuing parole representation.

Statutes governing parole matters include Texas Government Code, Chapter 508, and Texas Administrative Code Title 37, Part 5.

### B. Offenses ineligible for parole.

Certain offenses are ineligible for parole pursuant to Tx.Govt.Code §508.145(a):

1. An inmate under sentence of death,
2. serving a sentence of life imprisonment without parole,
3. serving a sentence for an offense under Section 21.02, TPC, (Continuous Sexual Abuse of Young Child or Children), or
4. serving a sentence for an offense under Section 22.021, TPC, (Aggravated Sexual Assault) that is punishable under Subsection (f), i.e., where the minimum punishment is 25 years because the victim is under 6 or, where victim is under 14: SBI or attempt to cause death of the victim or another; victim placed in fear that any person will become victim for an offense under TPC §20A.02 (Trafficking of Persons), subsections(a)(3), (4), (7), or (8) or that death, SBI, or kidnapping of any person will be inflicted; deadly weapon used or exhibited; acting in concert with another who commits aggravated sexual assault with same victim and same criminal episode; or administers or provides flunitrazepam to facilitate the offense.

**C. Offenses eligible for parole after 40 calendar years.**

An inmate serving a life sentence for a capital felony under Section 12.31(a)(1), Penal Code (capital felony committed while the inmate was younger than 18 years of age), is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 40 calendar years. Tx. Gov't. Code §508.145(b).

**D. Offenses eligible for parole after 35 years.**

"An inmate serving a sentence under Section 12.42(c)(2), Penal Code (certain repeat sex offenders), is not eligible for release on parole until the actual calendar time the inmate has served, without consideration of good conduct time, equals 35 calendar years." Tx. Govt. Code §508.145(c).

This involves cases where **a defendant is sentenced to a mandatory life sentence under the habitual offender statute for:** Child Trafficking under TPC §20A.02(a)(7) or (8) (causing the victim to engage in or be a victim of sexual offenses, or benefiting from such conduct of another); Indecency with a Child by Contact (TPC §21.11(a)(1)); Aggravated Sexual Assault (TPC §22.021); Sexual Assault (TPC §22.011): Aggravated Kidnapping under TPC §20.04(a)(4), if there was intent to violate the victim sexually; Burglary under TPC §30.02(d), if the burglary involved a habitation and the intent to commit a sexual offense under TPC §20A.02(a)(7) or (8), TPC §21.11, TPC §22.021, TPC §22.011, or TPC §20.04(a)(4),

**AND**,

**the defendant was previously convicted of:** Sexual Performance of a Child (TPC §43.25); Possession or Promotion of Child Pornography (TPC §43.26); or Obscenity (TPC §43.23) punished under §43.23 (h), i.e., involving a child <18, an image of a child "virtually indistinguishable" from the image of a child <18, or "an image created, adapted, or modified to be an image of an identified child"; Trafficking of Persons (TPC §20A.02(a)(7) or (8) causing the victim to engage in or be a victim of sexual offenses, or benefiting from such conduct of another; Continuous Sexual Abuse of Young Child or Children (TPC §21.02); Indecency with a Child (TPC §21.11); Sexual Assault (TPC §22.011); Aggravated Sexual Assault (TPC §22.021); Prohibited Sexual Conduct (TPC §25.02); Aggravated Kidnapping under TPC §20.04(a)(4), if there was intent to violate the victim sexually; Burglary under TPC §30.02(d), i.e., if the burglary involved a habitation and the intent to commit a sexual offense under TPC §20A.02(a)(7) or (8), TPC §21.02, TPC §21.11 TPC §22.011; TPC §22.021, TPC § 25.02, or TPC §20.04(a)(4) if there was intent to violate the victim sexually; or, an offense under the laws of another state containing elements substantially similar to the elements of an of these offenses.

### E. Offenses Eligible after ½ Calendar Time Served.

An inmate serving a sentence for an offense described by Article 42A.054 (a), Code of Criminal Procedure (other than an offense under Section 19.03, Penal Code); an offense for which the judgment contains an affirmative finding under Article 42.A054 (c) or (d); an offense under 20A.03, Penal Code; or an offense under section 71.02 or 71.03, Penal Code, is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals one-half of the sentence or 30 calendar years, whichever is less, but in no event is the inmate eligible for release on parole in less than two calendar years." Tx. Govt. Code §508.145.

This is a provision with which most attorneys are intimately familiar. Offenses under this section that require completion of "one-half of the sentence or 30 calendar years, whichever is less, but in no event …less than two calendar years" include:

1. Murder, TPC §19.02;
2. Indecency with a Child by Contact, TPC §21.11(a)(1);
3. Aggravated Kidnapping, TPC §20.04;
4. Aggravated Sexual Assault, TPC §22.021 (unless enhanced under TPC §12.42(c)(4), i.e., LWOP.
5. Aggravated Robbery, TPC §29.03;
6. Offenses under Chapter 481, H&SC for which punishment is increased under §481.140 (use of a child in commission of certain H&SC offenses – no prior conviction required), or "Section 481.134 [Drug-Free Zones] (c), (d), (e), or (f)…if it is shown the defendant has been previously convicted of an offense for which punishment was increased under any of those subsections";
7. Sexual Assault, §22.011;

8. Injury to a Child, Elderly Individual, or Disabled Individual, TPC §22.04(a)(1) (i.e., involving serious bodily injury), if the victim is a child and the offense is punishable as a first degree felony, i.e., committed intentionally or knowingly;
9. Sexual Performance by a Child, TPC §43.25;
10. Criminal Solicitation, TPC §15.03, if punishable as a first degree felony, i.e., if the offense solicited is a capital offense;
11. Trafficking of Persons, TPC §20.A02
12. Continuous Trafficking of Persons §20.A03;
13. Compelling Prostitution, TPC §43.05;
14. Burglary, TPC § 30.02, if the premises are a habitation and there was an intent to commit a felony under TPC § 21.02 (Continuous Sexual Abuse of Young Child or Children), TPC § 21.11 (Indecency with a Child), TPC § 22.011 (Sexual Assault), TPC § 22.021 (Aggravated Sexual Assault), or TPC § 25.02 (Prohibited Sexual Conduct);
15. An offense for which the judgment contains an affirmative finding of a deadly weapon; and,
16. Engaging in Organized Criminal Activity, TPC §71.02 or Directing Activities of Criminal Street Gangs, §TPC 71.023.

It used to be that generally all aggravated offenses were subject to the ½ rule; however, §508.145(d) made no mention of the offenses listed in TCCP Art. 42.12(3)(g)(a)(1)(L) and (M), (Compelling Prostitution and Trafficking of Persons) until the 83rd Legislature. Also, the 83rd Legislature added TPC §71.02 and §71.023, and the 82nd Legislature added §20.A03, to the list of offense coming under the ½ rule, even though they are not aggravated offenses described in CCP, 42A.054 (formerly 42.12(3)(g). These kind of statutory disconnects are not uncommon which again is why one must understand what law applied at the time of the commission of the offense for which parole or MS is being considered.

**F. It doesn't pay to run.**

"[F]or every 12 months that elapse between the date an arrest warrant is issued for the inmate following an indictment for the offense and the date the inmate is arrested for the offense, the earliest date on which an inmate is eligible for parole is delayed by three years from the date otherwise provided by Subsection (d), if the inmate is serving a sentence for an offense under Section 19.02 (Murder), 22.011 (Sexual Assault), or 22.021 Aggravated Sexual Assault), Penal Code." Tx.Govt.Code §508.145(d-1).

**G. Drug Free Zone Cases.**

"An inmate serving a sentence for which the punishment is increased under Section 481.134, Health and Safety Code, is not eligible for release on parole until the inmate's actual

calendar time served, without consideration of good conduct time, equals five years or the term to which the inmate was sentenced, whichever is less." Tx. Gov't. Code §508.145(e).

As noted above, in Ex Parte Patterson, the CCA found defense counsel ineffective and granted relief where the applicant claimed his plea was involuntary "because trial counsel failed to advise him of the effects of the drug free zone allegation on his sentence." Therefore, it is important that trial counsel understand the complex sentencing scheme for drug free zone case.

This is no small challenge when one examines the complexity of the drug free zone statutes, particularly as they relate to parole. For example, §508.145(d)(1) establishes parole eligibility at one-half of the sentence or 30 calendar years, whichever is less, but in no event less than two calendar years for someone serving a sentence for an offense listed in TCCP 42A.054(a)(14) (an offense under Chapter 481 H&SC for which punishment is increased under H&SC § 481.140, or §481.134 (c), (d), (e), or (f), if it is shown that the defendant was previously convicted of an offense for which punishment was increased under any of those subsections); while Tx. Gov't. Code §508.145(e), establishes parole eligibility at a minimum of five years for someone serving a sentence "for which the punishment is increased under Section 481.134, Health and Safety Code."

When determining parole eligibility under §508.145(e), one must determine whether "punishment is increased under Section 481.134". The only provision of §481.134 that speaks of punishment being "increased" is 481.134(c). However, other sections permit certain offenses to be punished at a higher punishment range. For instance, 481.134(b) states that "an offense otherwise punishable as a felony of the second degree under [481.112, 481.113, 481.114] is punishable as a felony of the first degree" if it is shown at the punishment stage that the offense occurred in a drug-free zone. An argument can be made that only those cases where punishment was "increased" under 481.134 (c) is parole eligibility 5 years. However, reading the statutes in context, it appears the Legislature likely intended that by "increased" they also meant where the punishment range was increased. However, there does appear to be some room here to at least challenge the five year parole eligibility requirement in those cases.

The CCA has shown a willingness to split hairs over the wording of the Drug Free Zones statute. In Moore v. State, No. PD-0965-11 (Tx. Crim. App. June 20, 2012), the CCA analyzed the mandatory stacking provision in §481.134(h) which stated that punishment increased for a conviction under §481.134 "may not run concurrently with punishment for a conviction under any other statute. The court modified the judgment to delete the cumulation order finding that a conviction "under any other statute" does not include a conviction under §481.134.

**H. All other cases.**

"Except as provided by Section 508.146 (Medically Recommended Intensive Supervision), any other inmate is eligible for release on parole when the inmate's actual calendar

time served plus good conduct time equals one-fourth of the sentence imposed or 15 years, whichever is less." Tx.Govt.Code §508.145(f).

It is well established law that good time credits only serve to get one to their parole eligibility date sooner. They do not diminish the sentence length.

### I. Medically Recommended Intensive Supervision

Medically Recommended Intensive Supervision (MRIS) is addressed in §508.146. An individual may qualify for MRIS regardless of whether they have reached their initial parole eligibility date, except that offenders serving a sentence of death or life without parole are not eligible. Other offenders are eligible for MRIS if they are "identified by the Texas Correctional Office for Offenders with Medical or Mental Impairments (TCOOMMI) and Correctional Managed Health Care as being (a) elderly, physically disabled, mentally ill, terminally ill, mentally retarded, or having a condition requiring long-term care, or (b) in a persistent vegetative state or being a person with an organic brain syndrome with significant to total mobility impairment*." However, for offenders with* a reportable conviction or adjudication under Chapter 62, Code of Criminal Procedure, only those offenders qualify who are in a "persistent vegetative state" or suffering from "an organic brain syndrome with significant to total mobility impairment."

Once a determination is made that an individual meets the medical requirements for MRIS, there is a specially designated parole panel that votes whether to approve MRIS. The panel may only grant MRIS if they make a determination that the offender "does not constitute a threat to the public safety." TCOOMMI must then approve the supervision plan.

### J. Voting Procedures.

Parole cases are generally decided by a parole panel composed by a Parole Board Member and two Parole Commissioners. Those cases are decided by a majority vote. If the first two voters agree, the case does not go to the third voter. Certain offenses require consideration by all 7 Parole Board Members, and in those cases at least 5 of the Members must agree to a parole release. These cases are referred to as SB45 cases, and are described in Section 508.046 and Parole Board Policy BPP-POL.145.200. Those offenses requiring consideration by all 7 Parole Board Members include: TPC 20A.03 (Continuous Trafficking of Persons), TPC 21.02 (Continuous Sexual Abuse of Young Child or Children), 21.11(a)(1) (Indecency with a Child by Contact), and 22.021 (Aggravated Sexual Assault). Additionally, offenders convicted of a capital felony or required under Section 508.145(c) to serve 35 calendar years before becoming eligible for release on parole are subject to this voting procedure. See "Offenses eligible for parole after 35 years", above.

Where an offender is denied parole on a case that is eligible for mandatory supervision, the Board must reconsider the offender for parole "as soon as practicable after the first

anniversary of the date of the denial." Where an offender is denied parole on a case that is not eligible for mandatory supervision, and for an offense under TPC 22.04 (Injury to a Child, Elderly Individual or Disabled Individual) punishable as a second or third degree felony (committed intentionally or knowingly), the Board may set a next review for up to 5 years after the anniversary of the denial. Tx. Govt. Code §508.141(g) & (g-1). Cases voted under SB45 procedures were historically subject to an automatic 3 year set-off; however, effective October 2, 2015, the Parole Board authorized a next review for either 3 or 5 years, except that effective September 1, 2015, in HB 1914 the 84th Legislature also authorized the Board to set a next review for cases involving capital life sentences eligible for parole, and TPC §22.021 (Aggravated Sexual Assault) up to 10 years in the future. The Board recently implemented procedures authorizing a next review either 3, 5, 7, or 10 years in the future for those offenses.

The Parole Board is applying the new longer set-off provisions retroactively.

## II. Mandatory Supervision

Mandatory supervision (MS) was first implemented for offenses occurring on or after August 31, 1977. At that time MS was just that – mandatory. (There is no MS date for life sentences.) For offenders whose offenses occurred between August 31, 1977, and August 31, 1996, the Parole Board was required to order the release of an inmate to MS when the actual calendar time the inmate had served plus any accrued good conduct time equaled the term to which the inmate was sentenced. For eligible offenses committed on or after September 1, 1996, MS is actually discretionary. In those cases, the Board is still required to release an inmate to MS when the actual calendar time the inmate had served plus any accrued good conduct time equaled the term to which the inmate was sentenced; however, an offender may not be released to MS if a parole panel determines that the offender's accrued good conduct time is not an accurate reflection of rehabilitative potential, AND the offender's release would endanger the public. Tx. Gov't. Code §508.149.

For cases governed by the discretionary statute the Board is required to provide an offender with prior notice of the upcoming MS consideration. Failure to do so, or failure to timely make the findings required to deny MS means the offender must be released to MS. See Ex Parte Retzlaff, 135 S.W.3d 45 (Tx. Crim. App. 2004). Current policy is to notify an offender in writing about 90 days prior to the MS date, and to allow 30 days for the offender to submit materials to the Board for their consideration. Unlike Texas parole statutes, because of the way the MS statute is written, it creates a liberty interest, and thus the notice and opportunity to respond in MS cases.

When entering into a plea agreement for a client who will receive jail time credits, the attorney's understanding of Ex Parte Retzlaff can sometimes result in a windfall for the client. Because of the Ex Parte Retzlaff decision, the Texas Department of Criminal Justice policy is to

immediately release any offender who enters TDCJ past their MS date where the Parole Board has not made the necessary findings required by §508.149 and Ex Parte Retzlaff. Where an attorney can negotiate enough time credits such that their client will be at or past their MS date when they enter TDCJ, under current policy it will result in immediate release to MS. Generally, TDCJ will allow whatever jail time credits are awarded by the court, and which appear on the judgment; however, even where jail time credits are reflected on the judgment TDCJ will not compute jail time credits that predate the offense.

Knowledge of MS is also important because MS eligibility is one of two requirements that determine whether an individual is eligible for street time credit if their parole is revoked. Oftentimes, defense attorneys are representing clients who are also facing a parole revocation. Where a client has served years on parole supervision, they will want to know how much, if any, of that time they will be credited for. The street time credits can sometimes be a much larger concern for a client facing new charges than the problem posed by the new charges. This issue will be discussed in more detail later in this paper.

Unfortunately, the list of offenses that are ineligible for MS seems to grow each time the legislature meets. This was especially true between 1987 and 1995. Currently, the law states that an inmate may not be released to MS if they are serving a sentence for or have previously been convicted of:

1. An offense for which the judgment contains an affirmative finding under Article 42A.05 (c) or (d), Code of Criminal Procedure;
2. A first degree felony or a second degree felony under Section 19.02, Penal Code (Murder);
3. A capital felony under Section 19.03, Penal Code (Capital Murder);
4. A first degree felony or a second degree felony under Section 20.04, Penal Code (aggravated kidnapping);
5. An offense under Section 21.11, Penal Code (Indecency with a Child);
6. A felony under Section 22.011, Penal Code (Sexual Assault);
7. A first degree felony or a second degree felony under Section 22.02, Penal Code (Aggravated Assault);
8. A first degree felony under Section 22.021, Penal Code (Aggravated Sexual Assault);
9. A first degree felony under Section 22.04, Penal Code (Injury to a Child, Elderly Individual, or Disabled Individual) where the conduct was committed intentionally or knowingly;
10. A first degree felony under Section 28.02, Penal Code (Arson);
11. A second degree felony under Section 29.02, Penal Code (Robbery);
12. A first degree felony under Section 29.03, Penal Code (Aggravated Robbery);

13. A first degree felony under Section 30.02, Penal Code (Burglary);
14. A felony for which the punishment is increased under Section 481.134 or Section 481.140, Health and Safety Code;
15. An offense under Section 43.25, Penal Code (Sexual Performance of a Child);
16. An offense under Section 21.02, Penal Code (Continuous Sexual Abuse of Young Child or Children);
17. A first degree felony under Section 15.03, Penal Code (Criminal Solicitation);
18. An offense under Section 43.05, Penal Code (Compelling Prostitution);
19. An offense under Section 20A.02, Penal Code (Trafficking of Persons);
20. An offense under 20A.03 (Continuous Trafficking of Persons); or
21. A first degree felony under Section 71.02 (Engaging in Organized Criminal Activity) or 71.023 Directing Activities of Criminal Street Gangs.

When an offender is released to MS, they are required to serve the remainder of their sentence on supervision, without credit for any good time served.

## III. Sex Offenses – Minimizing Post Conviction Consequences of Sex Offenses

### A. Avoiding Sex Offender Registration

When it comes to "hedging your bets" in negotiating a plea for a sex offense; other considerations may enter the equation. Among the most onerous post-conviction consequence of a conviction for a sex offense is the stigma of having to register as a sex offender. What follows is a list of sex offenses in bold face print for which registration is required, and below each registration offense in italics is a list of non registration offenses that the defense attorney may try to negotiate in return for a plea of guilty. In most cases, the non registration alternative is not a lesser included offense. In those cases, the indictment will have to be amended, a new indictment will be necessary, or the defendant will have to agree to plea to information. The list is certainly not exhaustive, and the creative defense attorney can certainly come up with other possibilities.

If a pale bargain is negotiated to avoid a registration offense and there is no agreement as to punishment, or the agreement is for deferred adjudication, pay special attention to whether the non registration offense carries a more serious period of incarceration than the registration offense. The plea bargain will likely not be as desirable in such a case. Also, Article 62.001, TCCP, includes as registration offenses "an attempt, conspiracy, or solicitation, as described by chapter 15 Penal Code, to commit an offense or engage in conduct" involving most of the registration offenses.

**Continuous Sexual Abuse of Young Child or Children, TPC § 21.02**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

*Indecent Exposure, TPC § 21.08 (misdemeanor), or Indecent Exposure: if second violation and the offense results in deferred adjudication.*

*Aggravated Assault, TPC § 22.02*

*Unlawful Restraint, Kidnapping, or Aggravated Kidnapping - where the judgment or papers in the case do not contain an affirmative finding that the victim was younger than 17.*

*Injury to a Child, TPC § 22.04*

**Aggravated Kidnapping, TPC § 20.04(a)(4), if the actor committed the offense or engaged in the conduct with the intent to abuse the victim sexually.**

*Aggravated Kidnapping under a § other than 20.04(a)(4), or, if under 20(a)(4) be sure indictment does not allege intent to sexually violate or abuse the victim and that there is no affirmative finding under TCCP Art. 42.015 that the victim was younger than 17, and "the order in the hearing or the papers in the case" does NOT "contain an affirmative finding that the victim or intended victim was younger than 17." If possible, include a finding on the record by the State or the Court that there was no evidence of intent to abuse the victim sexually, and that sex offender registration does not apply.*

*Kidnapping, TPC § 20.03 and unlawful restraint, TPC § 20.02 with same caveats as for aggravated kidnapping above.*

**Unlawful Restraint, TPC § 20.02, Kidnapping, TPC § 20.03, and Aggravated Kidnapping §20.04 - where the judgment or the order in the hearing or the papers in the case contain an affirmative finding that the victim was younger than 17.**

*Unlawful Restraint; Kidnapping; or, Aggravated Kidnapping without such an affirmative finding in the judgment or an "order in the hearing or papers in the case" that the victim or intended victim was younger than 17.*

**Indecency With a Child, TPC § 21.11, Sexual Assault, TPC § 22.011, and Aggravated Sexual Assault, TPC § 22.021.**

*Aggravated Assault, TPC § 22.02.*

*Injury to a Child, TPC § 22.04.*

*Indecent Exposure, TPC § 21.08 (first offense or deferred adjudication if second offense;*

*Enticing a child, § 25.04;*

*Improper Relationship Between Educator and Student, TPC § 21.12 (in a proper set of facts).*

**Indecent Exposure, TPC § 21.08, second violation – no deferred adjudication.**

*Indecent Exposure, TPC § 21.08, second violation – where the second violation results in deferred adjudication.*

**Possession or Promotion of Child Pronography, TPC § 43.26.**

*Improper Photography or Visual Recording, TPC § 21.15 (SJF).*

*Sale Distribution or Display of Harmful Material to a Minor, TPC § 43.24.*

**Burglary of a Habitation, TPC § 30.02, when punishable under Subsection (d), and with intent to commit a sexual offense listed in CCP 62.001(5)(A) or (C).**

*Burglary of a Habitation under §30.02 <u>without</u> intent to commit a sexual offense listed in CCP 62.001(5)(A) or (C).*

**Online Solicitation of a Minor, TPC § 33.021.**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

**Sexual Assault of a Child under TPC § 22.011 or 22.021.**

*Aggravated Assault, TPC § 22.02, Injury to a child, TPC § 22.04, Improper Relationship Between Educator and Student, TPC § 21.12 (in a proper set of facts).*

**Trafficking of Persons, TPC § 20A.02(a)(3), (4), (7), or (8).**

*Trafficking of Persons, TPC § 20A.02(a)(1), (2), (5), or (6).*

**Compelling Prostitution, TPC § 43.05.**

*Prostitution, TPC § 43.02, (perhaps under the law of parties) but not under Subsection (c)(3), which requires registration.*

*Promotion of Prostitution, TPC § 43.03.*

*Aggravated Promotion of Prostitution, TPC § 43.04.*

*Trafficking of Persons, TPC § 20A.02, but not under (a)(3), (4), (7) or (8).*

*Employment Harmful to Children, TPC § 43.251.*

*Injury to a Child, TPC § 22.04.*

**Sexual Performance by a Child, TPC § 43.25.**

*Enticing a Child, TPC § 25.04 (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).*

*Injury to a Child, TPC § 22.04.*

**Prohibited Sexual Conduct, TPC § 25.02.**

*Aggravated Assault, TPC § 22.02.*

*Injury to a Child, TPC § 22.04 (if the victim was a child).*

Prosecutors are not typically inclined to negotiate deals in sex offense cases that will permit a sex offender to avoid registration; however, that is not always the case. Weaknesses in the State's case, reluctant witnesses and other concerns often lead the State to make deals they otherwise would never consider. In a proper set of facts, it may prove to be in everyone's best interest to consider a plea that will not include the requirement of sex offender registration.

Of course attorneys should advise their clients that over the years the legislature has added to the list of offenses requiring sex offender registration. (Eg., TPC § 33.021, Online Solicitation of a Minor, and TPC § 21.02, Continuous Sexual Abuse of Young Child or Children, added by the 80th Legislature; TPC § 20A.02, Trafficking of Persons (under (a)(3), (4), (7), or (8)., added by the 82nd legislature; and, TPC § 43.02, Prostitution (if punishable under (c)(3), where the person solicited is under 18), added by the 84th Legislature. Texas has included many felony sexual offenses under the registration statute; however, there are still some exceptions, as noted above. The next expansion of the registration statute could be directed at the pleadings or evidence, as with the Kidnapping and Burglary statutes. Some states already look at pleadings and evidence much more extensively than does Texas. Amendments to the Texas Statute for the Civil Commitment of Sexually Violent Predators already permit evidence of sexual motivation to be used as a basis for commitment in murder and capital murder cases, even where it was not alleged in the indictment. (See TEX. HEALTH & SAFETY CODE ANN., ch. 841).

TPC § 12.45, Admission of Unadjudicated Offense, provides another possible means of avoiding sex offender registration under current law. Where the State insists on some admission of guilt on one or more sex offense; a plea to a non registration offense with an agreement to take

into consideration at sentencing other sex offenses that would, upon conviction, require registration, may satisfy the State, and would not entail registration requirements.

### B. Limiting the Duration of Sex Offender Registration

Another consideration in sex offense cases concerns the duration of the registration. Where a client must accept a plea to a sex offense that carries a registration requirement, Article 62.101, CCP, should be consulted to determine whether a plea can be arranged to an offense carrying a 10 year registration requirement, rather than a lifelong registration requirement. Federal sex offender registration requirements differ from state law the requirements for certain offenses. When considering the possibility of future early termination of sex offender registration requirements pursuant to TCCP Art. 62.404, federal registration requirements should be consulted.

### C. Exemption from Registration

Article 62.301(b), CCP, authorizes young adult sex offenders who are required to register as a sex offender to petition for an exemption from the sex offender registration requirements, at any time after they are sentenced, or placed on deferred adjudication, under the following circumstances:

1. The person is required to register only as a result of a single reportable conviction or adjudication, other than an adjudication of delinquent conduct; and
2. The court has entered in the appropriate judgment or has filed with the appropriate papers a statement of an affirmative finding described by Article 42.017 or Article 42A.105.

The required affirmative finding must state that at the time of the offense the victim was at least 15; the defendant was not more than 4 years older than the victim at the time of the offense; and the conviction is based solely on the ages of the defendant and the victim. In the trial of any case under TPC §§ 21.11 (Indecency with a Child) or 22.011 (Sexual Assault) where the judge imposes community supervision, the judge is required to make and enter such an affirmative finding, if applicable. (Arts. 62.301 and 62.351, TCCP, set forth what the judge may consider and the burden of proof.)

Once the exemption order is entered, it does not expire. The court is required to withdraw the order if, after it is issued, the person receives a conviction or deferred adjudication for an offense requiring sex offender registration.

Art. 62.351, TCCP, provides for a hearing "During or after the disposition of a case under Section 54.04, Family Code…to determine whether the interests of the public require registration." Art. 62.355 states that the state may waive the hearing and agree that registration is not required.

### D. Avoiding Civil Commitment as a Sexually Violent Predator

An even more onerous consequence than registration is the prospect of civil commitment as a sexually violent predator. Any attorney negotiating a plea for a sex offense should understand that even the most favorable plea they may negotiate for their client in the case of certain sex offenses has the potential to become a life sentence. Even more disconcerting for defense attorneys is the fact that their client could face the prospect of lifelong civil commitment for a conviction of a **non**-sex offense.

The CCSVP law was initially passed in 1999. Act of June 1, 1999, 76th Leg., R.S., S.B. 365. § 4.01 (codified at TEX. HEALTH & SAFETY CODE ANN., ch. 841). It has been amended several times over the past decade. The shock of sex offenders who had the registration requirement levied on them long after the fact of their conviction pales in comparison to that of one who discovers that they have become eligible for lifelong civil commitment upon completion of their sentence.

Wherever possible, attorneys should attempt to structure plea agreement to avoid civil commitment eligibility. To do so, one must first understand what qualifies a person for civil commitment. Qualifying offenses are listed in § 841.002 TEX. HEALTH & SAFETY CODE ANN. They include:

1. §21.02: Continuous Sexual Abuse of Young Child or Children;
2. §21.11(a)(1): Indecency With a Child (sexual contact);
3. §22.011: Sexual Assault;
4. §22.021: Aggravated Sexual Assault;
5. §20.04(a)(4): Aggravated Kidnapping (intent to sexually abuse or violate);
6. §30.02: Burglary (if punishable under § 30.02(d), i.e. premises was a habitation and was entered with intent to commit (or did commit or attempt to commit) the offense listed in 1-5, above;
7. §§19.02 and 19.03: Murder and Capital Murder where, during the guilt or innocence phase or the punishment phase for the offense, during the adjudication or disposition of delinquent conduct constituting the offense, or subsequently during a civil commitment proceeding under Subchapter D, it is determined beyond a reasonable doubt to have been based on sexually motivated conduct;
8. Attempt, conspiracy, or solicitation to commit any offense in 1-7, above;
9. Offenses under prior state law with elements substantially like 1-8, above; and
10. Offenses under other state law, federal law, or the Uniform Code of Military Justice with elements substantially like 1-8, above. § 841.002(8).

Once a defense attorney determines if the current charges would qualify a client for CCSVP, they can try to structure the plea to take them out of the CC eligibility queue. One way

is to consider a plea to offenses that are not on the list of qualifying "sexually violent offenses." Reference to the above section on avoiding sex offender registration could be helpful to this end. Only "repeat" sexually violent offenders qualify under the CCSVP law, so a first conviction may not be problematic. However, multiple count indictments, and multiple indictments for related conduct, qualify one as a "repeat sexually violent offender" as long as a sentence was imposed for at least one of the offenses. Also, deferred adjudications and straight probations (even after successful completion of and discharge from the period of community supervision), and juvenile adjudications for delinquent conduct constituting a sexually violent offense where commitment to TYC is ordered, can result in CC if, thereafter, "the person commits a sexually violent offense for which the person is convicted, but only if the sentence for the offense is imposed." Section 841.003(b), Health & Safety Code, as amended by S.B. 746, 84th Legislature.

In a case of multiple counts or indictments for offenses that could qualify for civil commitment; defense attorneys should always try to negotiate a plea for a single count. Because of the prospect of civil commitment, in some cases it might even be tactically sound to negotiate more time for the client in return for a plea to a single count. Of course, that is a decision the client must make, but if the possibility of civil commitment is presented, the client may well prefer the longer sentence to avoid the prospect of lifelong civil commitment. (Of course, one can never discount the possibility that future amendments to the Civil Commitment statute will allow for commitment for a single offense.)

Once again, defense attorneys should consider using TPC § 12.45, Admission of Unadjudicated Offense, to avoid pleading to more than one count and thus qualifying for civil commitment.

Finally, in cases involving § 19.02, Murder, and § 19.03, Capital Murder, defense attorneys should be cognizant of the fact that any evidence that the crime was "based on sexually motivated conduct" could qualify their client for civil commitment under § 841.002(8), assuming another qualifying offense exists. In these cases, it is extremely important to collect all evidence that the conduct was not sexually motivated. Civil commitment in these cases usually does not become an issue until decades have passed. The more high profile or gruesome the case, the more likely the State will file a petition for civil commitment.

## IV. Practical considerations and problem areas related to parole.

### A. Time credit for time spent in jail awaiting a parole revocation on a new offense.

It is fairly well established that one is generally entitled to jail time credit for time spent in jail awaiting trial. However, there are cases where that may not be true. For example, if an individual on parole is arrested for a new offense, makes bond on that new offense, and is then arrested on a blue warrant and taken to jail; they will not be entitled to time credit towards any

sentence imposed as a result of the new offense unless and until the bond is relinquished. They will still be entitled to time credit towards the original sentence for which the blue warrant was issued, but not for any new sentence that may be imposed as a result of the new offense for which they posted bond.

That said, if the court can awards jail time, prison officials cannot deny the jail time credit where the time credits awarded do not exceed the time between the date of the offense and the date of sentencing. See, Ex Parte Harvey, 846 SW2d 328 (Tex. Crim. App. 1993); and Ex parte Thiles, 333 SW3d 148 (Tex. Crim. App. 2011). Therefore, in a case where the client made bond on a new offense, but was later jailed on a blue warrant and did not get off the original bond; although the client is not entitled to jail time credit for that time towards the sentence imposed for the conviction on the new offense, the attorney can try to negotiate to have the judge award that time credit in the judgment. If the time credit awarded is not for any period that predates the date of the new offense, the time credit should be accepted by prison officials.

**B. Street time eligibility.**

Oftentimes, clients facing new criminal charges are also on parole and face the prospect of parole revocation. In some cases, they have been on parole for years and they may be more concerned with what credit they will receive for the time spent on parole than they are with the sentence they may be facing on the new charge(s). Properly advising that client as to the consequences of any plea bargain will require an understanding of the law governing street time eligibility. Section 508.283, Tx. Gov't. Code, also known as the "street-time credit law", entitles offenders who are revoked on or after September 1, 2001 to credit for time served while on parole or MS if they meet two conditions: (1) the offender is not a person described in §508.149(a) as being ineligible for MS, and (2) on the date of the warrant or summons initiating the revocation process the remaining portion of the offenders sentence is less than the time the offender spent on parole, i.e., the offender has successfully completed more than half of his time required on supervision. For revocations occurring prior to September 1, 2001, there was no credit awarded for time served on parole or MS if an offender was revoked.

In Ex Parte Noyola, 215 S.W.3d 862 (Tx. Crim. App. 2007), the CCA ruled that eligibility for street time credit under 508.283 is controlled by the particular language of Gov't Code §508.149(a) in effect at the time of the parole revocation – not whether the offense was eligible for MS based on the MS law in effect when the offense was committed. This causes no end of confusion for offenders who are revoked after being on parole or MS for a MS eligible offense. Those offenders invariably believe that they should be entitled to street time credit if they met the ½ requirement. That is simply not the case. That application of 508.283 does not invoke an Ex Post Facto issue, as the MS statute and the street time statute are separate and distinct. The street time statute does not seek to deny the offender their MS eligibility. What it does do is define the class of offenders who are eligible for street time credits.

In those cases, the defense attorney should certainly consider this factor in advising the client of the consequences of a plea bargain. Where a client is on parole or has been released to MS, most new convictions will result in a revocation of that parole or MS. If the offense for which they were on parole or MS is no longer eligible for MS at the time of the revocation, they will not be entitled to credit for the time spent on parole. Where the client has been on parole or MS for a lengthy period, what may otherwise have seemed like a great plea bargain can instead result in a considerably more time than the client had bargained for. Furthermore, since an inmate may not be released to MS if they are serving a sentence for or have previously been convicted of an offense that is ineligible for MS; if a client pleads guilty to an offense that is not currently eligible for MS, the client will also not be eligible for MS on the original offense until they are no longer serving the sentence on the new offense.

The importance of understanding the law on street-time eligibility was evident in Ex Parte Brooks, No. WR-83,550-02 (Tex. Crim. App. October 25, 2017, not designated for publication). Brooks pleaded guilty to aggravated assault while on parole from a twenty-eight year sentence for possession of a controlled substance. He was sentenced to seven years in TDCJ and did not appeal his conviction. He later filed a writ of habeas corpus contending that his attorney advised him that the new seven year sentence would be Brooks' controlling offense and would "override" the remaining six years on his twenty-eight year sentence. However, when Brooks' parole was revoked, he forfeited 3,352 days he had spent on parole, substantially changing his discharge date. In its order, the court cited Strickland v. Washington in writing that Brooks "has alleged facts that, if true, might entitle him to relief."

### C. Avoiding Sex Offender Parole Conditions

Sometimes, even where a plea agreement is reached that does not subject a client to a conviction for a sex offense, it is important to consider the possibility that the client may one day be placed on sex offender conditions of parole. In Coleman v. Dretke, 395 F3d. 216 (5th Cir. 2005) reh'g and en banc denied, 409 F.3d 665 (5th Cir. 2005), the court recognized that sex offender conditions of parole could be imposed on individuals who had not been convicted of a sex offense. The court required that, in such cases, due process must be afforded prior to the imposition of such conditions. In that case, the court declined to specify the due process required. After Coleman, the Texas Board of Pardons and Paroles implemented a procedure whereby they simply notified an offender in writing that they were considering imposition of sex offender conditions and giving the offender 30 days to reply and tell the Board why such conditions should not be imposed. There was no notice of the evidence being considered, no right to a hearing, and no right to call or cross-examine witnesses.

In Meza v. Livingston, 09-50367 (5th Cir. 5-20-10), rehearing denied en banc, (5th Cir. 10-19-10), the court concluded that it was a denial of due process to, among other things: deny discovery; not allow the parolee and counsel to be present at the hearing before a disinterested parole panel; not allow sufficient time to review the evidence and to prepare to examine or cross

examine witnesses; not allow the parolee or his attorney to subpoena witnesses; not afford a written report stating the panel's decision. At the Coleman hearing, the state must now prove that an offender "constitutes a threat to society by reason of his lack of sexual control" before sex offender conditions of parole may be imposed on one who was never convicted of a sex offense.

Initially, the Parole Board chose to apply Meza only to those under old law MS. It was not applied to parole cases until Ex Parte Evans, 338 S.W.3d 545 (Tex. Crim. App. 2011) where the Court of Criminal Appeals held that, for individuals who have never been convicted of a sex offense, the Parole Board must provide due process (a Coleman hearing) before imposing sex offender conditions.

Coleman, Meza, and Evans have considerable implications for individuals who have been arrested for or charged with sex offenses, but have never been convicted of a sex offense. If such an individual is convicted of some other felony and then released to parole or MS, they will almost certainly be notified that the Parole Board is requiring them to undergo an evaluation and polygraph to determine if the Board will try to impose sex offender conditions of parole based upon the prior alleged sexual misconduct. Depending upon the results of the evaluation and polygraph, the Board may decide to notify the individual that they intend to pursue sex offender conditions. In those cases, they will notify the person that they are entitled to what has come to be called a Coleman hearing.

Individuals who have been the subject of deferred adjudication for a sex offense and cases involving a prior adjudication of delinquency for a sex offense under the Texas Family Code, are also entitled to a Coleman hearing if they do not have a conviction for a sex offense. Deferred adjudications successfully completed are not convictions, and the Family Code specifies in Section 51.13 (a) that *"An order of adjudication or disposition under the juvenile delinquency laws is not a conviction of a crime."* The Parole Board has been known to impose sex offender conditions of parole on these individuals without a Coleman hearing, despite the fact that they have not been convicted of a sex offense. That is typically due to the fact that the cases have not been properly screened. Parole Board policy is to provide a Coleman hearing in such cases, and the Board will provide for a Coleman hearing if they are advised that such a person has had sex offender conditions imposed without a hearing.

Coleman hearings can, and have, taken place decades after an alleged sexual act. Exculpatory evidence is near impossible to locate that long after the event. Attorneys who represent individuals who are placed on deferred adjudication or who are adjudicated delinquent for a sex offense under the Texas Family Code, and attorneys who are successful in getting dismissals or no bills in sex offense cases should warn the client of the importance of preserving any evidence in those cases, including, but not limited to polygraphs, police reports and DA files (if provided during discovery), and other mitigating evidence. (Since The Morton Act limits the release of discovery to a defendant, it is important for attorneys to preserve exculpatory evidence relating to a sex offense allegation.) Additionally, where there is a dismissal, getting the court or

the prosecutor to state on the record or in the dismissal order that there was no sexual component to an offense (where there is a conviction for a non sex offense as part of a plea bargain), or that the sex offense was dismissed for lack of evidence, can be extremely helpful if the client ever has to go through a Coleman hearing. Where the court or prosecutor makes such a statement on the record and there is no written documentation of the same, be sure to advise the client of the importance of ordering a copy of that portion of the record. Save it to the file and provide a copy to the client advising them of the importance of preserving the document.

Most importantly, remind your client to demand a Coleman hearing if the Parole Board attempts to impose sex offender conditions of parole where the client has not been convicted of a sex offense. Waiving the right to a Coleman hearing **greatly** increases the likelihood that sex offender conditions of parole will be imposed. In fact, the client should consult with an attorney as soon as the client is given notice that they will be evaluated for possible imposition of sex offender conditions of parole. If an attorney is timely retained, they can properly advise the client and may be able to arrange for an evaluation and polygraph using experts of their choosing. This can sometimes prevent the case from even moving forward to a Coleman hearing.

### D. Consecutive Sentences.

Consecutive or stacked sentences pose unique problems in determining parole eligibility. To properly advise a client on the benefit of their bargain when it comes to parole eligibility, it is essential to understand how parole eligibility is computed for stacked sentences. Whereas TDCJ, prior to September 1, 1987, routinely added stacked sentences together and computed parole eligibility based upon the total sentence length, the law changed in 1987. It took TDCJ a few years to comply with the new statute, but parole eligibility on consecutive sentences is now computed in accord with Tex. Gov't. Code §508.150. Parole eligibility is determined for the first case in the stacked series. When parole is granted on the first case (or the sentence is discharged - whichever occurs first), that sentence will be considered to have ceased to operate for purposes of beginning the running of the next sentence in the stacked series. A separate parole eligibility date will then be calculated for that offense, and the same process follows for the remaining stacked sentences. The offender is not released until parole is granted in the last of the stacked cases, or the offender reached their discharge date – whichever occurs. MS only applies to the last case in a stacked series, if that offense is otherwise eligible for MS.

## V. Conclusion.

Plea bargains are essentially an attempt to hedge one's bet. While there are a number of obvious considerations that go into a client's decision to accept or reject a plea offer or to plead open to the court, in light of Ex Parte Moussazadeh properly advising the client on parole eligibility is critical. Unfortunately, Texas parole law is a patchwork body of law. To determine a person's parole or MS eligibility one must refer to the statute in effect when the offense occurred. Considering the inclination of the legislature to regularly change parole law, that can

require considerable effort. The legislature changes the parole laws almost every session and it is likely that there will be additional changes in the next legislative session. The Court of Criminal Appeals decision in Ex Parte Moussazadeh makes it incumbent upon defense attorneys to be up to date on the current parole and MS law. Doing so will not only help defense attorneys negotiate the best possible plea bargain for their client, but it will also avoid the professional embarrassment and potential adverse consequences of a claim of ineffective assistance of counsel.

Beyond the issue of properly advising clients on parole eligibility in cases involving plea agreements, attorneys can minimize the post-conviction consequences for their clients by understanding laws related to such matters as mandatory supervision, sex offender registration, time credits, street time eligibility, imposition of sex offender conditions of parole, and civil commitment of sexually violent predators. As discussed in this paper, knowledge of those matters is essential to avoiding some extremely harsh post-conviction consequences that can have a dramatic impact on the quality of our clients' lives.