

# WHAT DEFENSE ATTORNEYS SHOULD KNOW ABOUT PAROLE IN TEXAS

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July 2016

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# What Defense Attorneys Should Know

## About Parole in Texas

### I. Parole eligibility requirements in Texas.

#### A. General.

Texas parole law does not create a reasonable expectation of a liberty interest in the granting of parole, as some other states do. As a result, due process rights do not attach to the granting of parole in Texas. See, Johnson v. Rodriguez, 110 F.3d 299 (5<sup>th</sup> Cir. 1997, cert denied). An inmate being considered for parole has no right to a hearing before the Parole Board, and boilerplate language used by the Board to notify an inmate of a parole denial complies with whatever due process rights an inmate may have to be informed of the reason for parole denial. Johnson v. Wells, 566 F2d. 1016 (5<sup>th</sup> Cir. 1978).

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 and August 31, 1967 (59<sup>th</sup> 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 65<sup>th</sup> 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, while adding to the complexity of parole eligibility laws. Effective September 1, 1996 mandatory supervision became discretionary, giving rise to the anomaly of “discretionary mandatory supervision.” In recent years, the legislature has added some non-aggravated offenses to the list of offenses for which the parole eligibility requirements are the same as for aggravated offenses under 42.12(3)(g). There is now even an offense for which one can become eligible for mandatory supervision before they become eligible for parole. Today it takes four pages to summarize parole and mandatory supervision eligibility. When the Legislature next meets, some of the information in this paper will likely be outdated.

Since one’s parole and MS eligibility dates are determined by the law in effect at the time of the commission of the offense, the Texas Board of Pardons and Paroles has included a Parole and Mandatory Supervision Eligibility Chart for “easy” reference at: [http://www.tdcj.state.tx.us/documents/parole/PIT\\_English.pdf](http://www.tdcj.state.tx.us/documents/parole/PIT_English.pdf). As of the date of this article, the chart only reflects parole eligibility requirements through the 82<sup>nd</sup> Legislature.

The Board's general web site is at: <http://www.tdcj.state.tx.us>. It contains a wealth of information on all matters related to pardons and paroles, including Parole Board policies and directives. 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.

This paper is designed to cover the basics that all defense attorneys should know about parole law. It is not intended to cover all matters related to parole in Texas, as that would require a seminar of its own. However, over the years, I have taken hundreds, if not thousands, of parole related calls where the caller has identified problems that were, for the most part avoidable. Beyond a discussion of parole eligibility requirements, this paper also discusses a number of those issues.

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 at least 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 Colquitt 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.)

**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(a)(1), 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 to violate or abuse 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 Section 3g(a)(1)(A), (C), (D), (E), (F), (G), (H), (I), (J), (K), (L), or (M), or (N), Article 42.12, Code of Criminal Procedure, an offense for which the judgment contains an affirmative finding under Section 3g(a)(2) of that article, an offense under Section 20A.03, Penal Code, or an offense under Section 71.02 or 71.023, 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(d).

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, TPC §20.A03;
13. Compelling Prostitution, §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;
16. Engaging in Organized Criminal Activity, TPC 71.02; and
17. 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 Sec. 3g(a)(1)(L) and (M), (Compelling Prostitution and Trafficking of Persons) until the 83rd Legislature. Also, the 83<sup>rd</sup> Legislature added TPC 71.02, 71.023, and the 82<sup>nd</sup> Legislature added 20.A03, to the list of offense coming under the ½ rule, even though none of those offenses are aggravated offenses described in TCCP, Art. 42.12 Sec. 3g(a)(1). 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 42.12 (3)(g)(a)(1)(G) (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 September 1, 2015, in HB 1914 the 84<sup>th</sup> 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 Section 3g(a)(2), Article 42.12, 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);
- (21) a first degree felony under Section 71.02 (Engaging in Organized Criminal Activity) (Offenses punishable as a second or third degree felony are eligible for MS; however, all 71.02 offenses are aggravated for parole purposes. Thus, one may become eligible for MS before being eligible for parole!); or
- (22) 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. Practical considerations and problem areas related to parole.**

#### **a. Appearing before the board in a parole case.**

Any person representing an offender before the Texas Board of Pardons and Paroles for compensation must be an attorney licensed in the State of Texas. They must also register with

the Parole Division, file a Fee Affidavit in each case, and a complete a yearly Summary Form by January 31 of each year. Persons who have served, within the previous two years, as a member or employee of the Board or TDCJ may not represent anyone before the Board or a Parole Panel or receive compensation for services rendered on behalf of anyone regarding matters pending before the Board or a Board panel. Failure to comply with the employment restrictions is a Class A Misdemeanor. It is a Class C Misdemeanor if one fails to comply with Fee Affidavit or Summary Form requirements, or represents an offender in a parole matter for compensation while not an attorney licensed in Texas. See Tx. Gov't. Code §§508.083-086

**b. How early can the Parole Board vote a case?**

While no inmate can be released prior to their statutory parole eligibility date, current Parole Board policy defines the parole “review period” as being “a period greater than two months but less than six months prior to the month of the next scheduled review.” See, 37 Tx. Admin. Code § 141.60 & §141.61 (Texas Board of Pardons and Paroles). That is the period during which the Board asks that any written materials be submitted to the Board. The Board votes most parole cases within a month or so of the scheduled parole eligibility or next review date; however, some cases are not voted until months after the parole review date. The Board has also been known to vote cases as early as two months prior to the month of scheduled review (the end of the “review period”). More than a few inmates have found themselves preparing to submit materials to the Parole Board for consideration only to find out their case has already been voted – and denied.

**c. Time credit for time spent in jail awaiting a parole revocation on a new offense.**

It is fairly well established that one is 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.

**d. You don't have to be a convicted sex offender to be placed on sex offender conditions of parole.**

In Coleman v. Dretke, 395 F3d. 216 (5<sup>th</sup> Cir. 2005) reh'g and en banc denied, 409 F.3d 665 (5<sup>th</sup> 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 (5<sup>th</sup> Cir. 5-20-10), rehearing denied en banc, (5<sup>th</sup> 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 has never been 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 later 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.

Board Policy BPP-POL. 148.200, Sex Offender Conditions – Releasee Not Convicted of a Sex Offense, states:

“It is the policy of the Texas Board of Pardons and Paroles (Board) to review and consider sex offender conditions as a special condition for releases who have not been convicted for a sex offense and are currently on parole or mandatory supervision (1) for an offense which contains a sexual element, or (2) has a past juvenile adjudication for a sex offense.”

“It is the policy of the Board to afford releases who have not been convicted of a sex offense or who have a past juvenile adjudication for a sex offense due process prior to the imposition of sex offender conditions.”

For those offenders who do not have a conviction for a sex offense but who were placed on parole with sex offender conditions without the benefit of a Coleman Hearing prior to the Meza and Evans decision, 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 helpful if the client ever has to go through a Coleman hearing. Where the court or prosecutor makes the make 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 a copy to the file, and provide a copy to the client advising them of the importance of preserving the document.

Most importantly, clients who have not been convicted of a sex offense should be reminded that it is in their best interest to demand a Coleman hearing when the Parole Board attempts to impose sex offender conditions of parole. Imposition of sex offender conditions in those cases will be preceded by imposition of Special Condition “O.33” calling for an evaluation to determine whether there is a need for sex offender counseling. If the evaluation determines there is such a need, the offender will be served with Parole Division “Notice of Sex Offender Conditions” that will advise the individual in writing of the right to either request or waive a

Coleman hearing. Waiving the 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. The Coleman Notice will also advise the individual that all documents must be submitted to the parole officer “not later than seven calendar days prior to the date of the scheduled hearing.”

**e. 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 his 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.

The wording of 508.283 does create special concerns for defense counsel who are representing clients on new criminal charges where their client is also on parole or MS for a MS eligible offense and who have successfully completed more than half of that parole or MS. Those individuals are potentially eligible for street time credit for the sentence for which they are on parole if revoked; however, that may depend on what occurs in their pending criminal case. If their client has their parole revoked, and at the time of the revocation the client “is serving a sentence for or has been previously convicted of” an offense listed in 508.149(a), then their client will not be eligible to receive street time credit. In those cases, the defense attorney should certainly consider this factor in any plea negotiations on the new pending charge, as a plea to an offense currently listed in 508.149(a) will disqualify the client for street time credit. Where the

client has been on parole or MS for a lengthy period, what may have seemed like a great plea bargain can instead result in a considerably longer sentence than the client had bargained for.

**f. Consecutive Sentences.**

Consecutive sentences pose unique problems in determining parole eligibility. 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 are 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 that case, 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 is followed for each remaining stacked sentence. 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.

**IV. Conclusion.**

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 the parole laws, that can require some 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.

Parole approval rates have also changed over the years. While it is doubtful that parole approval rates will ever return to what they were in the 1980's, they have shown an upward increase in the past 10 years. Recent increases in parole approval rates have been to a degree a result of increased emphasis on rehabilitative programs driven by fiscal considerations and the reluctance to continue expensive prison construction projects in what is already the largest prison system in the nation.

It is somewhat ironic that legislative concerns over Texas incarceration rates appear to be driving up parole approval rates and slowing down prison growth, while at the same time the legislature continues to limit those offenses eligible for mandatory supervision and require that certain offenders serve more time before becoming eligible for parole. Maybe that's just another sign of the complexity of the debate surrounding issues confronting criminal justice policies in Texas and around the nation, or maybe it's just politics!