

MINIMIZING POST-CONVICTION CONSEQUENCES OF PLEA BARGAINS

By:

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INTRODUCTION

Defense attorneys understand the great majority of criminal defendants they represent will ultimately resolve their case through a plea agreement – clients not so much. Notwithstanding the initial protestations of innocence and declarations to never enter a guilty plea, most eventually decide that a plea agreement is their least bad option.

In fact, studies show that over 90% of criminal cases are resolved with a guilty plea. A 2019 Pew Research Study found that only 2% of federal criminal defendants went to trial in 2017. State courts did little better, with “jury trials accounting for fewer than 3% of criminal dispositions in 22 jurisdictions with available data.” Gramlich, John, “Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty” *Pew Research Center*, June 11, 2019, <https://pewrsr.ch/2F1Qxn7>.

The National Association of Criminal Defense Lawyers reports that more than 97% of criminal cases are being resolved by plea. “The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It”, July 10, 2018, <https://www.NACDL.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>

In those cases where a decision has been reached to plead guilty, it is almost always the result of a plea agreement. Generally, in plea agreement negotiations the 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. Professional licenses, employment, and firearms may also be major concerns. In cases involving sex offenses, the possibility of civil commitment as a sexually violent predator and sex offender registration sometimes trumps all the above concerns.

It is the defense attorney’s duty to advise the client as to the meaning and consequences of the plea agreement. The Preamble to The Texas Disciplinary Rules of Professional Conduct clearly states: “As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.”

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 unanticipated consequence of the conviction. Not only is there no new fee related to these inquiries, but there is also little likelihood that anything you say to the client will leave them satisfied. There is also that gnawing fear of a bar grievance.

The attorney's failure to properly advise the client of the meaning and effect of their guilty plea may also constitute ineffective assistance of counsel. When a client is confronted with collateral consequences about which they have not been advised, often their 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 covers 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. It discusses recent case law that has expanded the defense attorney's responsibility to inform the client of the consequences of a guilty plea, as well as legislation that has made that more and more difficult. I have also addressed other issues related to mandatory supervision and time credit matters that can present problems that are, for the most part, avoidable, and which reasonably should be discussed as the attorney provides the client "with an informed understanding of the client's legal rights and obligations and explains their practical implications." Hopefully, the matters addressed will help prevent complaints from clients, claims of ineffective assistance, and the need to retrieve old files to answer questions that could have easily been explained to the client or resolved before they entered their plea.

I. Parole eligibility requirements in Texas.

A. The Importance of Understanding Parole Law

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.

Since Ex Parte Moussazadeh, there have been a number of other cases highlighting how important it is for trial attorneys to 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); Ex Parte Howard, No. WR-93,975-01 (Tex. Crim. App. August 24, 2022, *per curiam*, not designated for publication).

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 in a case involving possession of a controlled substance in a drug free zone case. Counsel had incorrectly advised Colquitt that he would be eligible for parole in four years on his eight year sentence, as opposed to five years, but the CCA ruled that Colquitt was not entitled to relief since he had not established that he was prejudiced by the erroneous advice. Critical to the court’s 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.”

In deciding Ex Parte Ward, No. WR-92,193-01 (Tex. Crim. App. February 24, 2021, *per curiam*, not designated for publication), the CCA declined to extend its holding in Ex Parte Moussazadeh to cases where counsel simply did not advise a defendant about parole eligibility. That was despite having previously stated: “When a serious consequence is truly clear, counsel has a duty to give correct advice. Both failure to provide correct information and providing incorrect information violate that duty.” Ex Parte Moussazadeh, at 691. The issue was again before the court just a few months later in Ex Parte Allen, No. WR-62564-01 (Tex. Crim. App. May 12, 2021, *per curiam*, not designated for publication) when the court cited the same exact language from Ex Parte Moussazadeh before sending the case back to the trial court for further development of the record. The takeaway from these cases is that simply choosing not to advise a client on parole eligibility may subject a defense attorney to an ineffective assistance claim.

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 since its inception in 1905. At that time, an inmate was eligible for parole after serving two years or ¼ of their sentence, provided they had a qualifying offense and were no repeat offenders. Parole eligibility law remained relatively simple over the next half century. The law governing parole for offenses occurring between January 1, 1957, and December 31, 1965, could still be easily 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.

Now, 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 oxymoron “discretionary mandatory supervision.” In recent years, the legislature has even added non-aggravated offenses to the list of offenses for which parole eligibility requirement are the same as for aggravated offenses listed in Article 42A.054, TX. CCP.

Parole and MS eligibility are determined by the law in effect at the time of the commission of the offense. Fortunately, the Texas Board of Pardons and Paroles has included a 58 page appendix to its “Parole In Texas” publication. Titled “Parole and Mandatory Supervision Eligibility Chart” the appendix provides parole and mandatory supervision eligibility criteria for all offenses committed since January 1, 1996. The publication is available at www.tdcj.texas.gov/bpp/publications/PIT_English.pdf. As of the date of this paper, it did not include changes made during the 89th 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 most aspects of parole and mandatory supervision. It is a must read for anyone seriously interested in pursuing parole representation.

Statutes governing parole matters can be found at Texas Government Code, Chapter 508, and Texas Administrative Code Title 37, Part 5.

B. Offenses NOT eligible for parole, Tx.Govt.Code §508.145(a).

Inmates sentenced to:

1. death,
2. life without parole,
3. **Effective September 1, 2025**, an offense under §15.01, TPC, (Criminal Attempt) if punishable under Subsection (e), i.e., attempted capital murder of a peace officer (a first-degree felony punishable by life or 25-99),
4. an offense under §21.02, TPC, (Continuous Sexual Abuse of Young Child or Children),
5. **Effective September 1, 2025**, an offense under §21.03, TPC, (Continuous Sexual Abuse),

6. an offense under §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; by acts or words places victim 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 engages in intentional or knowing sexual contact; or administers or provides to the victim any substance capable of impairing victim's ability to appraise or resist the nature of the act. See also TPC §71.02(b),
7. an offense under §20A.03, TPC, Continuous Trafficking of Persons), if the offense is based partly or wholly on conduct constituting an offense under 20A.02 (Trafficking of Persons), Subsections (a)(5), (6), (7), or (8),
8. an offense under §20A.02, TPC, (Trafficking of Persons), Subsections (a)(5), (6), (7), or (8),
9. **Effective March 25, 2024**, an offense under TPC §51.03, Illegal Reentry by Certain Aliens, and TPC §51.04, Refusal to Comply with Order to Return to Foreign Country.

*Although not covered in Tx.Gov't.Code §508.145, TPC §12.42(c)(4) describes certain repeat sex offenders >18 who shall be punished w LWOP (conviction under 20A.03 or any "sexually violent offense" and previous final conviction under 20A.03 or SVO in Texas, or another state with substantially similar elements). (See 62.001(6) for definition.) Also, LWOP for Engaging in Organized Criminal Activity, if the offense alleged to have been committed is Aggravated Sexual Assault, TPC §22.021, punishable under Subsection (f), or victim is <17 and suffered SBI.

C. Offenses eligible for parole after 40 calendar years Tx.Gov't.Code §508.145(b).

§12.31(a)(1), TPC (capital felony committed by one younger than 18 years of age).

D. Offenses eligible for parole after 35 years. Tx.Gov't.Code §508.145(c).

§12.42(c)(2), TPC Code (certain repeat sex offenders)

This involves cases where **a defendant is sentenced to a mandatory life sentence under the habitual offender statute for:** 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) if there was intent to violate the victim sexually.

AND,

the defendant was previously convicted of: Sexual Performance by 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 any of these offenses.

[But note the above mentioned “Offenses Ineligible for Parole” - §21-02, TPC, (Continuous Sexual Abuse of Young Child or Children), and offense under §22.021, TPC, (Aggravated Sexual Assault) that is punishable under Subsection (f), an offense under §20A.02, TPC, (Trafficking of Persons), Subsections (a)(5), (6), (7), or (8), and Aggravated Sexual Assault punished under 22.021(f).]

E. Offenses eligible for parole after 10 calendar years, Tx.Gov’t.Code §508.145(e)(1) (89th Legislature).

§49.09 (b-2) (2), TPC (previous conviction for operation of a motor vehicle, aircraft, watercraft, or amusement ride while intoxicated, and at the time of offense was in violation of Chapter 51, TPC (Illegal Entry Into This State).

F. Offenses eligible after ½ calendar time served. Tx.Gov’t.Code §508.145(d)(1).

Any offense described by Article 42A.054 (a), other than offenses under TPC §19.03 or Chapter 20A. Also, any offenses in which the judgment contains an affirmative finding of the use or exhibition of a deadly weapon in the commission of a felony under Article 42A.054 (c) or (d), and offenses under §71.02, TPC, Engaging in Organized Criminal Activity, or 71.023, TPC, (Directing Activities of Criminal Street Gangs or Foreign Terrorist Organizations), are 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.

Offenses under this § 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. Criminal Solicitation, TPC §15.03, if punishable as a first degree felony, i.e., the offense solicited is a capital offense
2. Murder, TPC §19.02;
3. Indecency with a Child, TPC §21.11;
4. Aggravated Kidnapping, TPC §20.04;
5. Aggravated Sexual Assault, TPC §22.021, unless punished under subsection (f);
6. Aggravated Robbery, TPC §29.03;
7. 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 “§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”;
8. Offenses under Chapter 481.1123, H&SC, (manufacture or Delivery of Penalty Group 1-B substance, if punishable under Subsection (d), (e), or (f)
9. Sexual Assault, §22.011;
10. 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;
11. Sexual Performance by a Child, TPC §43.25;
12. Possession of Child Pornography, TPC §43.26, **(88th Legislature)**;
13. Trafficking of Persons, TPC §20.A02; (but no parole eligibility if conviction based partly or wholly on conduct constituting an offense under (a)(5)-(8);
14. Continuous Trafficking of Persons §20.A03 (but no parole eligibility if conviction based partly or wholly on conduct constituting an offense under 20A.02(a)(5), (6), (7), or (8), and LWOP under 12.42 (c)(4), TPC, (certain repeat sex offenders >18);
15. Aggravated Promotion of Prostitution, TPC §43.04
16. Compelling Prostitution, TPC §43.05;
17. 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);
18. An offense for which the judgment contains an affirmative finding of a deadly weapon;
19. Engaging in Organized Criminal Activity, TPC §71.02 but LWOP if the punishable under subsection (b)(1);
20. Directing Activities of Criminal Street Gangs, TPC §71.023; and
21. Stalking, TPC §47.02 **(89th Legislature)**;

It used to be that generally all aggravated offenses were subject to the ½ rule; however, That is no longer the case: §508.145(d) made no mention of the offenses listed in TCCP Art. 42.12(3)(g)(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, although they are not in 42A.054, and the 82nd Legislature added §20.A03, to the list of offense coming under the ½ rule, even though it was not an aggravated offenses described in CCP, Art. 3g(a)(1) at that time.

These kinds of statutory disconnects are not uncommon which is another reason why defense attorneys must understand what law applied at the time of the commission of the offense for which parole or MS is being considered. These disconnects likely explain cases where the court has found ineffective assistance of counsel for erroneous parole advice in convictions for Engaging in Organized Criminal Activity under TPC §71.02. Ex Parte Colquitt, supra. 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); Ex Parte Phillips, No. WR-93,876-01 (Tex. Crim. App. July 27, 2022, *per curiam*, not designated for publication); Ex Parte Ross, No. WR-92,519-01 (Tex. Crim. App. July 27, 2022, *per curiam*, not designated for publication).

G. It doesn't pay to run, Tx.Govt.Code §508.145(d-1).

“[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 § 19.02 (Murder), 22.011 (Sexual Assault), or 22.021 Aggravated Sexual Assault), Penal Code.”

H. Drug Free Zone Cases, Tx.Gov't.Code §508.145 (e).

“An inmate serving a sentence for which the punishment is increased under § 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.”

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 cases.

I. All other cases, Tx.Govt.Code §508.145(f).

“Except as provided by §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.” State jail felonies are not eligible for parole.

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.

[Under a pilot vocational program, inmates serving a sentence under Chapter 481 H&SC, punishable as a 3rd degree felony, eligible for parole under §508.145(f), and not previously convicted of a felony under Title 5. Texas Penal Code (Offenses Against the Person), or under Chapters 43 (Public Indecency) or 71 (Organized Crime), may be released on parole “approximately 180 days before the date the inmate would have been eligible for release under §508.145(f). TX.Gov’t.Code §508.1455.

J. 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 who are not U.S. citizens or are serving a sentence of death or life without parole, are not eligible.

Offenders are eligible for MRIS if they are identified by the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) and Correctional Managed Health Care as being “elderly, physically disabled, mentally ill, terminally ill, intellectual or physical disability, having an organic brain syndrome with significant to total mobility impairment, being in a persistent vegetative state, having a condition requiring long-term care, or “having another eligible medical condition as prescribed by board rule.”

Offenders with an instant offense described in Article 42A.054, TCCP, only qualify if they have a condition requiring long-term care, or are terminally ill.

Offenders with an instant offense described in Chapter 62, TCCP, only qualify if they have an organic brain syndrome with significant to total mobility impairment, or if they are in a persistent vegetative state

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.

K. 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 prior to

September 1, 1987, TDCJ routinely added stacked sentences together and computed parole eligibility based upon the total sentence length, the law changed in 1987. 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 reaches their discharge date – whichever occurs sooner. MS only applies to the last case in a stacked series, provided that case is eligible.

State courts cannot usurp federal prerogatives with regard to consecutive sentences, In Ex Parte Benavides, No. WR-92,323-01 and WR-92,323-02 (Tex. Crim. App. July 27, 2022, *per curiam*, not designated for publication), the CCA found the plea involuntary and the state judgments were set aside where Benavides claimed, and the judgment reflected, he was advised his federal sentence would run concurrent with his state sentence in unrelated cases. In fact, he was not receiving credit on his federal sentence while serving time on his state conviction. See also, Ex Parte Villarreal, No. WR-93,645-01 (Tex. Crim. App. May 25, 2022) (relief denied where court determined applicant would have still pled guilty and not gone to trial had he been correctly advised the federal sentence could run consecutively).

II. Mandatory Supervision

A. Background

In some cases, it is necessary to understand the laws involving Mandatory Supervision to properly advise a client. 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 has served plus any accrued good conduct time equals the term to which the inmate was sentenced, unless, prior to the MS date, 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 §§508.147 & 508.149.

The Board is required to provide an offender with prior notice of the upcoming MS consideration. Failure to do so, or failure to make the findings required to deny MS *prior to the MS date* means the offender must be released to MS. Tx.Gov't.Code §§508.147 & 508.149. See

also 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 the MS statute creates a liberty interest, and thus the notice and opportunity to respond.

B. Negotiating a Plea Agreement that Frees Your Client

When entering into a plea agreement for a client who will receive jail time credits, the attorney's understanding of Tx.Gov't.Code §§508.147 & 508.149, and 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 is sentenced to TDCJ past their MS date where the Parole Board has not timely 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. For example, where a defendant has been confined for a year awaiting trial and accepts a plea agreement for two years confinement in TDCJ on a felony (other than a state jail felony), if they are MS eligible they will typically be past their MS eligibility date after about 11 months and 8 days. Since they are MS eligible when sentenced, and since there could not have been the timely findings required under §508.149 and Ex Parte Retzlaff, the person is immediately entitled to release on MS.

(Generally, TDCJ is required to credit an inmate with 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. They also almost certainly would not permit jail time credits if the judgment states that the time credit is for "home confinement" or "while on a monitor." Any language in the judgment indicating that the credit is for anything other than actual jail time should not be included in the judgment.)

C. Offenses NOT Eligible for MS, Tex. Gov't. Code §508.149

Unfortunately, the list of offenses that are ineligible for MS seems to grow each time the legislature meets. §508.149 currently, 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), TCCP;
- (2) a first degree felony or a second degree felony under §19.02, Penal Code (Murder);
- (3) a capital felony under §19.03, Penal Code (Capital Murder);

- (4) a first degree felony or a second degree felony under §20.04, Penal Code (aggravated kidnapping);
- (5) an offense under §21.11, Penal Code (Indecency with a Child);
- (6) a felony under §22.011, Penal Code (Sexual Assault);
- (7) a first degree felony or a second degree felony under §22.02, Penal Code (Aggravated Assault);
- (8) a first degree felony under §22.021, Penal Code (Aggravated Sexual Assault);
- (9) a first degree felony under §22.04, Penal Code (Injury to a Child, Elderly Individual, or Disabled Individual), i.e., where the conduct was committed intentionally or knowingly by a person, and resulted in SBI or serious mental deficiency, impairment, or injury, OR if an owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home, intermediate care facility for persons with intellectual or developmental disability, or other institutional care facility intentionally, knowingly, recklessly, or with criminal negligence by omission causes a child, elderly, or disabled resident of the facility to suffer SBI or serious mental deficiency impairment, or injury;
- (10) a first degree felony under §28.02, Penal Code (Arson) (BI or death, or property intended to be damaged or destroyed was a habitation or place of assembly or worship);
- (11) a second degree felony under §29.02, Penal Code (Robbery);
- (12) a first degree felony under §29.03, Penal Code (Agg. Robbery);
- (13) a first degree felony under §30.02, Penal Code (Burglary)(the premises are a habitation, and any party to the offense enters with intent to commit a felony other than felony theft, or attempted or committed a felony other than felony theft;
- (14) a felony for which the punishment is increased under Health & Safety Code §481.134 (DFZ) or § 481.140 (use of child in commission of certain H&S Code offenses);
- (15) an offense under §43.25, Penal Code (Sexual Performance of a Child);
- (16) an offense under §21.02, Penal Code (Continuous Sexual Abuse of Young Child or Children);
- (17) a first degree felony under §15.03, Penal Code (Criminal Solicitation of a Capital Offense);
- (18) an offense under §43.05, Penal Code (Compelling Prostitution);
- (19) an offense under §20A.02, Penal Code (Trafficking of Persons);

- (20) an offense under 20A.03 (Continuous Trafficking of Persons);
- (21) a first degree felony under §71.02 (Engaging in Organized Criminal Activity) or 71.023 (Directing Activities of Criminal Street Gangs or Foreign Terrorist Organizations - offenses punishable under 71.02 as a second or third degree felony are eligible for MS even though not eligible for parole until the lesser of 50% flat or 30 flat years, and in no event less than two years;
- (22) an offense under §481.1123, Health and Safety Code punished under subsections (d), (e), or (f);
- (23) a second degree felony §22.01, TPC (Assault);
- (24) an offense under §22.01, TPC, punished under (b)(2), (7), or (8), i.e., the offense is committed against a pregnant individual to force the individual to have an abortion or who the actor knows is pregnant, or the offense is committed against a person whose relationship with the defendant is described in 71.0021(b), 71.003, or 71.005, Texas Family Code, if it is shown at trial that the defendant was previously convicted of an offense against a person described in 71.0021(b), 71.003, or 71.005, Texas Family Code, of an offense under Chapter 22 (Assaultive Conduct), or 20.03 (Kidnapping), 20.04 (Aggravated Kidnapping), 21.11 (Indecency with a Child), or 25.11(Continuous Violence Against Family) or an offense under §25.07 (if based on 20A.02, 22.011 22.021, or 42.072, or the offense was committed impeding normal breathing or circulation by pressure to throat or neck or blocking nose or mouth;
- (25) **Effective September 1, 2025**, an offense under §15.01, TPC, (Criminal Attempt) punishable under Subsection (e) (attempted capital murder of a peace officer under TPC §19.03(a)(1)) - not eligible for parole,
- (26) **Effective September 1, 2025**, TPC §21.03, (Continuous Sexual Abuse) – not eligible for parole,
- (27) **Effective March 25, 2024**, an offense under TPC §51.03, Illegal Reentry by Certain Aliens, and TPC §51.04, Refusal to Comply with Order to Return to Foreign Nation – not eligible for parole.

Effective September 1, 2025, an inmate serving a sentence under TPC §49.09 (b-2) (2), is not eligible for release to MS until serving at least 10 calendar years. **Tex. Gov't. Code §508.147(a)(1).**

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. MS only applies to the last case in a stacked series, and only when the individual is otherwise eligible for MS.

D. MS Eligibility and Street Time Credit

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 represent 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. An understanding of the laws involving MS is critical when advising such a client.

§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 Tx.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 is define the class of offenders who are eligible for street time credits.

The wording of §508.283 creates 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, and whether the offense for which they are on parole or MS is currently eligible for MS.

If a person has their parole revoked, and at the time of the revocation they are “serving a sentence for or has been previously convicted of” an offense listed in 508.149(a), then that person 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 any new pending charge. Not only will a guilty plea that results in the client serving a new sentence for an offense ineligible for MS; but the client will also be ineligible for street time credit if the offense for which they are on parole or MS, is currently listed in §508.149(a) as ineligible for MS. 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.

This was exactly the case 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. Brooks thought that was a good deal – until he found out that his defense attorney was wrong when he advised Brooks that the new seven-year sentence would be Brooks’ controlling offense and would “override” the remaining six years on his twenty-eight year sentence. When Brooks’ parole was revoked, he forfeited 3,352 days he had spent on parole, substantially changing his discharge date. Brooks then filed a writ of habeas corpus seeking to have his plea declared involuntary alleging ineffective assistance of counsel. In its order, the court cited Strickland v. Washington in writing that Brooks “has alleged facts that, if true, might entitle him to relief.” Their use of the term “might” is consistent with the court’s rulings in In Ex parte Colquitt, that Applicant must show “he would not have pleaded guilty but for counsel’s erroneous advice.”

III. Avoiding Sex Offender Convictions on Those Not Convicted of a Sex Offense

No parolee wants to be subject to sex offender conditions of parole. Child safety zones, sexual history and monitoring polygraphs, job restrictions, and sex offender treatment are just some of the onerous conditions included in Special Condition “X” (Sex Offender Condition), BPP-POL. 145.263. While these conditions are certainly frustrating for a convicted sex offender, they are frustrating beyond the telling for one who has not even been convicted of a sex offense; yet that is exactly what many Texas parolees face since the Fifth Circuit held that under certain circumstances sex offender conditions of parole may be imposed on parolees that have not been convicted of a sex offense. Coleman v. Dretke, 395 F.3d 216 (5th Cir. 2005) reh’g en banc denied, 409 F.3d 665 (5th Cir. 2005).

The 5th Circuit required that, due process must be afforded prior to the imposition of sex offender conditions in such cases. 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 it was a denial of due process to, among other things: deny discovery; deny Meza's attorney a hearing before a disinterested hearing officer; not allow sufficient time to review the evidence and to prepare to examine or cross examine witnesses; not allow Meza or his attorney to subpoena witnesses; not afford a written report stating the panel's decision.

Meza had been released to mandatory supervision; however, Ex Parte Evans, 338 S.W.3d 545 (Tex. Crim. App. 2011), held that those released to parole who had never been convicted of a sex offense were also entitled to a hearing before imposition of sex offender parole conditions.

Coleman, Meza, and Evans have considerable implications for individuals who have ever been the subject of a sex offense allegation but have never been convicted of a sex offense. If such an individual is ever 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 possibly a 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 releasees who have not been convicted for a sex offense and: (1) who are currently on parole or mandatory supervision for an offense which contains a sexual element, or (2) have a past juvenile adjudication for a sex offense.”

For those offenders who do not have a conviction for a sex offense but who have been erroneously placed on sex offender conditions of parole without the opportunity for a Coleman Hearing, the Board will provide for a Coleman hearing when advised of that oversight.

Coleman hearings can, and have, taken place decades after an alleged sexual act for offense that contained “a sexual element” or resulted in a juvenile adjudication for a sex offense. Exculpatory evidence can be extremely difficult, if not impossible, to locate that long after the fact. Attorneys who represent individuals who are not facing conviction for a sex offense, but are looking at a conviction, probation, or deferred adjudication for an offense which contains a sexual element, should warn their 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. (To the extent that the Morton Act limits the release of discovery to a defendant, it is important for attorneys to preserve exculpatory evidence provided in discovery and relating to a sex offense allegation.) Additionally, 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 faces imposition of sex offender parole conditions. 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 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 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 be advised to 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 oftentimes prevent the case from even moving forward to a Coleman hearing. The Coleman Notice may also advise the individual that all documents to be introduced at the hearing must be submitted to the parole officer “not later than seven calendar days prior to the date of the scheduled hearing.”

IV. Sex Offender Registration

A. Avoiding the Registration Requirement

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. If a plea bargain is negotiated to avoid a registration offense or to limit the duration of registration and there is no agreement as to punishment, or the agreement is for deferred adjudication, special attention should be given to whether the non-registration offense carries a more serious period of incarceration than the registration offense. The plea bargain may 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, Texas Penal Code, “to commit an offense or engage in conduct” involving any of the offenses requiring registration, but not if the second violation results in a deferred adjudication.

B. Registration Offenses and Possible Alternatives

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 many 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 not intended to be exhaustive, and the creative defense attorney can probably come up with other possibilities. Also, for most registration offenses, registration is required for conviction of an attempt, conspiracy, or solicitation to commit the registration offense, and for a conviction in another jurisdiction of an offense with elements substantially similar to such an offense.

Continuous Sexual Abuse of Young Child or Disabled Individual, TPC §21.02, and Continuous Sexual Abuse, TPC §21.023

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

Aggravated Assault, TPC §22.02

**Unlawful Restraint (TPC §20.02) or Kidnapping (TPC §20.03) - where the judgment, or the order in the hearings or the papers in the case do not contain an affirmative finding that the victim was younger than 17.*

**Aggravated Kidnapping (TPC §20.04) where no intent to sexually violate or abuse the victim under (a)(4) and the judgment, or the order in the hearings or the papers in the case do not contain an affirmative finding that the victim was younger than 17.*

**Injury to a Child, Elderly, or Disabled Individual, TPC §22.04 .*

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

Aggravated Kidnapping, TPC §20.04

**Aggravated Kidnapping (TPC §20.04) where no intent to sexually violate or abuse the victim under (a)(4), and the judgment, or the order in the hearings or the papers in the case do not contain an affirmative finding that the victim was younger than 17.*

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

Unlawful Restraint, TPC § 20.02 & Kidnapping, TPC §20.03

Unlawful Restraint, Kidnapping, or Aggravated Kidnapping with same caveats noted above.

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.

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, (Class B Misdemeanor, or third degree felony if intent to commit a felony against the child).

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

Prohibited Sexual Conduct, TPC § 25.02

Indecent Exposure, TPC §21.08 (first offense or deferred adjudication if second offense).

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

Possession or Promotion of Child Pornography, 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. (Class A Misdemeanor or 3rd degree felony).

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

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

The underlying sexual offense, as long as it is not a registration offense.

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).

Solicitation of Prostitution, TPC § 43.021, if (V <18, represented being <18, or D believed V <18)

Prostitution, TPC §43.02.

Promotion of Prostitution, TPC §43.03.

Injury to a Child, TPC §22.04.

Aggravated Promotion of Prostitution, TPC § 43.04, & Compelling Prostitution, TPC § 43.05.

Prostitution, TPC §43.02,

Promotion of Prostitution, TPC §43.03.

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

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.

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

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

*Any offense listed above with an **

Continuous Trafficking of Persons, TPC §20A.03(a)(3), (4), (7), or (8), if based partly or wholly on conduct that constitutes an offense under §20A.02(a)(3), (4), (7), or (8).

Continuous Trafficking of Persons, TPC §20A.03(a)(1), (2), (5), or (6), OR not based on §20A.02(a)(3), (4), (7), or (8) conduct.

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

*Any offense listed above with an **

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.

Attorneys should also 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; TPC §43.021, Solicitation of Prostitution (if the person solicited is under 18, believed to be under 18, or represented themselves to be under 18), added by the 87th Legislature. Texas has included many 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 offenses; 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 does not require registration under current law.

C. 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. Most notably, Article 62.101 does not include attempts to commit a lifetime registration offense as requiring lifetime registration. 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 also be consulted.

When dealing with offenses that require sex offender registration, beware Ex Parte Covey, 2010 No. PD-0145-09 (Tex. Crim. App. March 31, 2010). The CCA found defense counsel

ineffective for erroneously advising his client that he qualified for early release from sex offender registration. Finding that Covey would not have pled nolo contender to a SOR offense, the court vacated the judgment. The court specifically stated that Trial counsel also “had a duty to correct the trial court when the trial court misadvised Covey regarding early release.”

D. Exemption from Registration

Article 62.301(b), TCCP, authorizes young adult sex offenders required to register as a result of a conviction under TPC §§21.11 (Indecency with a Child) or 22.011 (Sexual Assault), to petition for an exemption from the sex offender registration requirements, at any time on or 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 TCCP Article 42.017 or 42A.105(c).

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, TCCP Article 42.017 requires the judge to make and enter such an affirmative finding, if applicable. (TCCP Arts. 62.301 and 62.351, set forth what the judge may consider and the burden of proof.)

Once the exemption order is entered, it does not expire. The court “shall withdraw the order” if, after it is issued, the person receives a reportable conviction or adjudication for an offense under Chapter 62.

Art. 62.351, TCCP, provides that “During or after the disposition of a case under §54.04, Family Code...the court shall conduct a hearing 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.

V. 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 BRD 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 § 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.” §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. (One can never discount the possibility that future amendments to the Civil Commitment statute will allow for commitment for a single offense, although that appears unlikely.)

Where the client is charged with more than one offense that qualifies for civil commitment, defense attorneys may want to consider using TPC §12.45, Admission of Unadjudicated Offense, to avoid pleading to multiple counts that would qualify their client 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 many years have passed. The more high profile or gruesome the case, the more likely the State will file a petition for civil commitment. Where a plea bargain is agreed, attempt to, include a statement in the agreement that the offense was not based on sexually motivated conduct.”

VI. 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 jail time credit towards any sentence imposed on the new offense while on bond. 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. Defense attorneys should be aware of this and advise their clients not to post bond in such cases, or to get off the bond if it has already been posted.

That said, if the court awards jail time credit, 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.

Notwithstanding Ex Parte Harvey, a judgment that describes the jail time credit as being awarded for time spent on a monitor, or on “home arrest” will almost certainly be denied by TDCJ. Such descriptive language should be avoided.

VII. Conclusion.

Attorneys can minimize the post-conviction consequences for their clients by understanding laws related to such matters as parole, 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 a client’s life.

This paper has by no means covered all the post-conviction consequences clients may face. Others include the loss of a professional license, deportation, the right to possess a firearm, and many others. In those cases where attorneys may be able to negotiate a plea that avoids such consequences, they should certainly be discussing that with their client, as sometimes the post-conviction consequences can be extremely devastating to the client. By failing to discuss those consequences and possible options, the attorney is not only doing a disservice to the client. In some cases, failure to understand and address those consequences can also adversely impact the