WHAT DEFENSE ATTORNEYS NEED TO KNOW ABOUT PAROLE AND OTHER POST-CONVICTION ADMINISTRATIVE MATTERS

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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 (5th 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 (5th 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 (59th Legislature) could be summed up in two sentences: All offenses are eligible for parole when calendar time plus good time credits equal 1/4, including any bonus and blood donation credits. The maximum time for parole eligibility is 15 years.

Each time the Legislature meets they cannot resist changing and complicating the parole eligibility laws. The 65th Legislature (1977) gave rise to a new creature called mandatory supervision (MS). Initially, all offenses were eligible for mandatory supervision. Over the years, the legislature has steadily added to the list of offenses not eligible for mandatory supervision, 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 an individual 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.texas.gov/documents/pd/PIT_English.pdf (at Appendix A). As of the date of this article, the chart reflects parole eligibility requirements through the 84th Legislature.

The Board's general web site is at: http://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. 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 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 does not advise a defendant about parole eligibility." That despite stating in Ex Parte Moussazadeh that "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 to the same exact language before sending the case back to the trial court for further development of the record.

B. Offenses ineligible for parole.

Certain offenses are ineligible for parole pursuant to Tx.Govt.Code §508.145(a), & (c-1):

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),
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; 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) (Engaging in Organized Criminal Activity), LWOP if the offense alleged to have been committed is Aggravated Sexual Assault punishable under Subsection (f),
5. serving a sentence for an offense under Section 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),
6. serving a sentence for an offense under Section 20A.02, TPC, (Trafficking of Persons), Subsections (a)(5), (6), (7), or (8), unless there is a guilty plea and the judge makes an affirmative finding under Art. 42.01991, CCP, that the

prosecutor, defense attorney, and the defendant agree in writing the defendant will be eligible for parole after serving, without consideration of good time, one half of the sentence or 30 calendar years, whichever is less, but not less than two years.

*Although not covered In 508.145, Sec. 12.42 (c)(4), TPC, describes certain repeat sex offenders >18 who shall be punished w LWOP (conviction under 20A.03 or any "sexually violent offense" (See 62.001(6) for definition) and previous final conviction under 20A.03 or SVO in Texas, or another state with substantially similar elements).

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 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 an of these offenses.

[But as noted above in "Offenses Ineligible for Parole" if serving a sentence for an offense under Section 20A.02, TPC, (Trafficking of Persons), Subsections (a)(5), (6), (7), or (8), there is no parole eligibility unless there is a guilty plea and the judge makes an affirmative finding under Art. 42.01991, CCP, that the prosecutor, defense attorney, and the defendant agree in writing the defendant will be eligible for parole after serving, without consideration of good time, one half of the sentence or 30 calendar years, whichever is less, but not less than two years. Also, for Aggravated Sexual Assault punished under 22.021(f), there is no parole.]

E. Offenses Eligible after ½ Calendar Time Served.

An inmate serving a sentence for an offense described by Article 42A.054 (a), Code of Criminal Procedure (other than an offense under Section 19.03, Penal Code – Capital Murder, or Chapter 20A, Penal Code (Trafficking of Persons) if under subsections (a)(5), (6), (7), or (8), or is punished under 12.42(c)(2)); an offense for which the judgment contains an affirmative finding under Article 42.A054 (c) or (d) (the use or exhibition of a deadly weapon in the commission of a felony) or (d); 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.

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. 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 enhanced under TPC §12.42(c)(4), i.e., LWOP.
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 "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";
8. Sexual Assault, §22.011;
9. 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;
10. Sexual Performance by a Child, TPC §43.25;
11. Trafficking of Persons, TPC §20.A02 (except if under subsections (a)(5), (6), (7), or (8), where there is no parole, unless a Guilty plea and Affirmative Finding under 42.01991, CCP, in which case parole eligibility is the lesser of 30 flat years or ½, but not <2 years) ;
12. Continuous Trafficking of Persons §20.A03 (except 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):
13. Aggravated Promotion of Prostitution, TPC §43.04
14. Compelling Prostitution, TPC §43.05;
15. 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);
16. An offense for which the judgment contains an affirmative finding of a deadly weapon;
17. Engaging in Organized Criminal Activity, TPC §71.02 but LWOP if the offense alleged to have been committed is Aggravated Sexual Assault punishable under Subsection (f); and,
18. Directing Activities of Criminal Street Gangs, §TPC 71.023.

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

F. It doesn't pay to run.

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

G. Drug Free Zone Cases.

"An inmate serving a sentence for which the punishment is increased under Section 481.134, Health and Safety Code, is not eligible for release on parole until the inmate's actual calendar time served, without consideration of good conduct time, equals five years or the term to which the inmate was sentenced, whichever is less." Tx.Gov't.Code §508.145(e).

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

This is no small challenge when one examines the complexity of the drug free zone statutes, particularly as they relate to parole. For example, §508.145(d)(1) establishes parole eligibility at one-half of the sentence or 30 calendar years, whichever is less, but in no event less than two calendar years for someone serving a sentence for an offense listed in TCCP 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 in 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. Nonetheless, 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). 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 (Offenses Against the Person), Penal Code, or under Chapters 43 (Public Indecency) or 71 (Organized Crime), may be released "approximately 180 days before the date the inmate would have been eligible for release under §508.145(f). TX.Gov't.Code §508.1455.

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.

Inmates serving a sentence for an offense described in 42A.054, CCP, are eligible for MRIS only if they are identified by the Texas Correctional Office for Offenders with Medical or Mental Impairments (TCOOMMI) and Correctional Managed Health Care as being "elderly, physically disabled, mentally ill, terminally ill, mentally retarded, or having a condition requiring long-term care."

Inmates with a reportable conviction or adjudication under Chapter 62, CCP, are eligible for MRIS only if they are identified by the Texas Correctional Office for Offenders with Medical or Mental Impairments (TCOOMMI) and Correctional Managed Health Care as being in a "persistent vegetative state or being a person with 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.

Inmates who are not legal citizens of the United States may be released to MRIS if: not under a sentence of death or life without parole; their instant offense is not described in 42A.054, CCP; they do not have a reportable conviction or adjudication under Chapter 62, CCP; and, the parole panel determines the inmate would be deported and does not constitute a threat to public safety.

II. Mandatory Supervision

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

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

When entering into a plea agreement for a client who will receive jail time credits, the attorney's understanding of Ex Parte Retzlaff can sometimes result in a windfall for the client. Because of the Ex Parte Retzlaff decision, the Texas Department of Criminal Justice policy is to immediately release any offender who enters TDCJ past their MS date where the Parole Board has not made the necessary findings required by §508.149 and Ex Parte Retzlaff. Where an attorney can negotiate enough time credits such that their client will be at or past their MS date

when they enter TDCJ, under current policy it will result in immediate release to MS. Generally, TDCJ will allow whatever jail time credits are awarded by the court, and which appear on the judgment; however, even where jail time credits are reflected on the judgment TDCJ will not compute jail time credits that predate the offense.

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

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

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

(10) a first degree felony under Section 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 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)(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 Section 481.134 (DFZ) or Section 481.140, Health and Safety Code (use of child in commission of certain H&S Code offenses;

(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 of a Capital Offense);

(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) (degree of offense depends on the offense committed [one level higher] or conspired [same level]. <u>Offenses punishable as a second or third degree are eligible for MS even though not eligible for parole until the lesser 50% flat or 30 flat years, and in no event less than two years</u>; or

71.023 (Directing Activities of Criminal Street Gangs).

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

III. Practical considerations and problem areas related to parole and MS.

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

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

B. Sex offender conditions of parole aren't just for sex offenders.

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

In Meza v. Livingston, 09-50367 (5th Cir. 5-20-10), rehearing denied en banc, (5th Cir. 10-19-10), the court concluded that it was a denial of due process to, among other things: deny discovery; not allow the parolee and counsel to be present at the hearing before a disinterested parole panel; not allow sufficient time to review the evidence and to prepare to examine or cross examine witnesses; not allow the parolee or his attorney to subpoena witnesses; not afford a written report stating the panel's decision. At the Coleman hearing, the state must now prove that an offender "constitutes a threat to society by reason of his lack of sexual control" before sex

offender conditions of parole may be imposed on one who 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 any individual who has 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 have been placed on sex offender conditions of parole without the benefit of a Coleman Hearing, the Board will provide for a Coleman 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. (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, 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 oftentimes prevent the case from even moving forward to a Coleman hearing. The Coleman Notice will 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."

C. 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 Tx.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 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. 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.

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

D. Early Release from Parole Supervision.

Tx.Gov't.Code §508.1555, Procedures for the Early Release from Supervision of Certain Releasees, provides that the Parole Division may allow releasees to serve the remainder of their sentence without being required to report. The process is initiated by the parole officer and is limited to those releasees who:

1. have been under supervision for at least ½ of the time remaining on the sentence when the release was released from prison;
2. has not had a violation in the previous 2 years;

3. has not been revoked on the current parole; and,
4. the division finds a good faith effort to comply with any restitution order, and that it is in the best interest of society.

In determining recommendations for early release from supervision parole officers shall consider whether the release has a low risk of recidivism as determined by an assessment developed by TDCJ, and whether the release has made a good faith effort to comply with parole conditions.

E. 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 first. MS only applies to the last case in a stacked series, if that offense is otherwise eligible for MS.

F. Miscellaneous Considerations.

-Certain gang affiliations substantially diminish the prospect of parole. If an inmate belongs to a gang that appears on TDCJ's list of "security threat groups" the inmate will be placed in administrative segregation. The Gang Renunciation and Decertification (GRAD) Program is a lengthy process that allows willing participants to shed their gang tag. TDCJ examines inmates' tattoos for signs of gang membership.

-The Parole Board considers the entirety of an offender's criminal history, including arrest reports. Many inmates mistakenly expect that by pleading to a lesser offense the Parole Board will not be considering the specific facts of their offense.

-Attorneys should advise on parole eligibility and not a date certain when an inmate will be released to parole.

-Always try to get jail time credits stated on the record or in writing, especially where a client has been reindicted after serving jail time on a previous indictment. One is not entitled to time credit except for time spent incarcerated before trial on the offense for which they were convicted.

-Any plea agreement involving a sex offense should take into account Tex. Health & Safety Code, Chapter 841, Civil Commitment of Sexually Violent Predators. That provides for the Civil Commitment of repeat sexual offenders. A repeat sexual offender includes one convicted of multiple sexually violent offenses at the same court disposition, even if it is under multiple counts and not separate indictments. Even parole approval does not preclude civil commitment under this law.

-Certain individuals are eligible for up to 10 year set-offs if parole is denied, ie., Capital felons with a life sentence that is parole eligible, those convicted of Aggravated Sexual Assault under TPC 22.021. For inmates otherwise ineligible for MS, and for an offense punishable as a felony of the second or third degree under Section 22.04, Penal Code (Injury to a Child, Elderly Individual, or Disabled Individual) the set-off can be up to five years. For MS eligible offenses the maximum set-off is one year.

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 requires attorneys to be knowledgeable of current parole law, and in many cases prior parole law. Whereas parole law could be summed up in two sentences years ago, today it is ever changing and ever more complex. The legislature changes the parole laws almost every session and it is likely that there will be additional changes in the next legislative session. To properly advise a client on their options attorneys must be able to advise them on the parole implications of their decisions. Since Ex Parte Moussazadeh, failure to do so constitutes ineffective assistance of counsel and may render a client's plea of guilty involuntary. Beyond accurately advising a client on parole eligibility, attorneys must also be aware of other parole related matters, such as street time eligibility for those facing parole revocations. More and more, matters that have previously been considered by the courts to be collateral are now being considered essential to a voluntary plea of guilty.

Even where the courts have not yet determined that certain information is essential to the rendering of a voluntary plea, attorneys still have an ethical duty to advise their clients on other significant consequences that may attach to the client's decisions in a given case. Hopefully, this paper will be helpful in doing both.