

**A CURRENT PRIMER OF SUBSTANTIVE  
RIGHTS, PROCEDURE, AND PRACTICAL  
EXPECTATIONS FOR PAROLE AND  
MANDATORY SUPERVISION IN TEXAS**

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# Parole Release in Texas

## An Outline of Substantive Rights, Procedure, and Practical Expectations

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### I. Introduction to Parole and “Mandatory Supervision” in Texas

In Texas, **Parole** is defined as the discretionary release of eligible offenders from prison by a Board of Pardons and Paroles decision, allowing an offender to serve the remainder of his sentence on supervision. Supplementing parole in Texas is a procedure called “**Mandatory Supervision**,” which, under current law, is the discretionary (*not* mandatory)<sup>1</sup> release of eligible offenders from prison when their calendar time served *plus* their good conduct time earned equals the total of their sentence, allowing an offender to serve the remainder of his sentence<sup>2</sup> on supervision. The law governing Parole and Mandatory Supervision is found in Chapter 508 of the Texas Government Code.

The Texas parole system, like other states’ regimes of post-incarceration supervised release, serves two overall purposes. Ostensibly first, parole supervision works as a valuable rehabilitative tool in the reintegration of offenders following a term in the penitentiary, which, at least theoretically, ultimately accrues to the mutual benefit of the public safety and the offenders. Of more practical importance, however, is the parole system’s function as a valve to regulate prison population for political purposes; by way of illustration, a liberalization of parole approval rates could be used to reduce prison population and thus avoid, for example, prison budgetary problems

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<sup>1</sup>Since September 1, 1996, Mandatory Supervision has been *discretionary*.

<sup>2</sup>For purposes of Parole and Mandatory Supervision alike, “the remainder” of an offender’s sentence upon release from custody is calculated by subtracting calendar time served from the total length of the sentence. All “good time” credit earned in custody applies solely to *eligibility* for release, and does not vest.

or unwanted legislative (or even judicial) oversight, while a tightening of parole approval rates could be implemented to increase prison population in order to, for example, communicate incumbent politicians' anti-crime philosophy to the public in a period of time preceding an election, or even to achieve adequate "staffing" of prison industries.

Regardless of what justification is used, the Texas parole system operates as a central and necessary element in the largest penal system in the United States. Since 2000, Texas has had the largest incarcerated population (approximately 150,000 state inmates) under the jurisdiction of its prison system. In addition to the prison population, Texas authorities supervise nearly 80,000 parolees. In fact, Texas has more people under criminal justice control (706,600) than the entire human populations of Alaska (619,500), Vermont (593,740), Washington, D.C. (519,000), or Wyoming (479,600).<sup>3</sup>

## II. Parole Eligibility

The following formulas dictate parole eligibility:

1. Offenders serving a **Life Sentence** for the following offenses are parole eligible upon serving 35 years calendar time.
  - a. 3(g) offenses
  - b. Aggravated Sexual Assault
  - c. Aggravated Kidnaping (with Intent to Violate or Abuse Victim Sexually)
  - d. Indecency with a Child
  - e. Burglary of a Habitation (with Intent to Commit a Felony other than Felony Theft)
  - f. Attempt to Commit a Felony other than Felony Theft, Sexual Assault, or Indecency with a Child.

For offenses that occurred prior to the current statutory scheme, consult the statutory scheme in place at the time of the commission of the first element of the offense.

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<sup>3</sup> Texas Tough? An Analysis of Incarceration and Crime Trends in The Lone Star State, Press Release, Center on Juvenile and Criminal Justice (2002).

2. Offenders serving sentences for the following **3(g) Offenses** are parole eligible upon serving  $\frac{1}{2}$  of their sentence (calendar time), with a minimum of 2 years and maximum of 30 years calendar time:
  - a. Aggravated Sexual Assault
  - b. Aggravated Kidnaping
  - c. Aggravated Robbery
  - d. Any Offense with Affirmative Finding of Deadly Weapon
  - e. Indecency with a Child (Sexual Contact 21.11 (a)(1) PC)
  - f. Sexual Assault (22.011 PC); all subsections

For offenses that occurred prior to the current statutory scheme, consult the statutory scheme in place at the time of the commission of the first element of the offense.

3. Offenders serving sentences for **all other 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Degree Felony Offenses** are parole eligible when their calendar time plus good time equals  $\frac{1}{4}$  of their sentence, or 15 years, whichever comes first. For offenses that occurred prior to the current statutory scheme, consult the statutory scheme in place at the time of the commission of the first element of the offense.
4. Offenders serving sentences for **all State Jail Felony Offenses** are not eligible for parole, and must serve their total calendar time in custody.

Again, an offender's parole eligibility is dictated by the law in effect at the time of the commission of the first element of the offense. For offenses occurring outside the parole eligibility law drafted in the 76<sup>th</sup> legislative session in place from September 1, 1999 through the writing of this paper in 2007, be sure to check the applicable statute.

### **III. The Parole Review Process**

The Parole Division of the Texas Department of Criminal Justice identifies parole-eligible offenders six months prior to their initial parole eligibility date, and four months prior to their subsequent eligibility date in cases where parole has been denied at least once before. At this time, the authorities send notice to the trial officials such as the District Attorney, as well as victims or

their families, to notify these parties of their right to lodge a protest against the granting of parole release. As the parole eligibility date approaches, an Institutional Parole Officer (IPO) interviews the offender at the unit of confinement and compiles a summary report to forward to the Parole Board. Once this is done, the offender's file is sent to the Parole Board office having administrative venue over the offender.

This administrative venue is determined by the geographic location of the offender's unit of confinement, in relation to one of the six Parole Board offices located around the State. Although the Texas Board of Pardons and Paroles is headquartered in Austin, the voting of cases takes place at one of the following Board offices:

1. Amarillo
2. Angleton
3. Gatesville
4. Huntsville
5. Palestine
6. San Antonio

Distributed among these Board offices are seven Parole Board members appointed by the Governor, and eleven Parole Commissioners who serve as employees of the Board members. In each Board office, one Board member and two Commissioners make up a 3-member voting panel.

Once an offender's file arrives at one of the Board offices, it will be subject to review and vote by the 3 parole panel members assigned to the office. The first panel member will review the case file and cast a vote. The file will then move down the hall to the second panel member, who will review the file and cast a vote. If the two votes cast thus far are consistent, then a majority of votes has been established, constituting the final vote on the case. If the first two votes differ, the file will move down the hall to the third panel member, who will review the case and vote to break the tie.

A parole panel does not simply vote "yes" or "no" for parole release; the panel has a number of options for structuring parole release or denial. A panel implements the following codes when

voting cases:

- FI-1: Release upon eligibility
- FI-2 Release on a specified month/year
- FI-3R: Transfer to a TDCJ rehabilitation program, then release to parole only after program completion and no earlier than 3 months from a specified date
- FI-4: Send to a pre-parole transfer facility prior to a specified release date
- FI-5: Release upon completion of the In-Prison Therapeutic Community Substance Abuse Prevention Program.
- FI-6R: Transfer to a TDCJ rehabilitation program, then release to parole only after program completion and no earlier than 6 months from a specified date
- FI-7R: Transfer to the Serious and Violent Offender Reentry Initiative (SVORI) program, then release to parole only after program completion and no earlier than 7 months from a specified date
- FI-9R: Transfer to a TDCJ rehabilitation program, then release to parole only after program completion and no earlier than 9 months from a specified date
- FI-18R: Transfer to a TDCJ rehabilitation program, then release to parole only after program completion and no earlier than 18 months from a specified date
- NR: Do not release, but set the next parole review month/year (the period of time before the next parole review is known as the “set-off”); does not foreclose an offender from being released on Mandatory Supervision, if eligible, in the interim.
- SA: Do not release, and require the offender to serve all his sentence (“serve-all”); does not foreclose an offender from being released on Mandatory Supervision, if eligible.

Certain offenses of conviction known as “Senate Bill 45 cases”<sup>4</sup> require an extraordinary

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<sup>4</sup>As defined by 508.046, Texas Government Code.

Board vote all seven appointed Parole Board members. In order to obtain parole release, an offender subject to Senate Bill 45 must obtain five positive votes from these seven Board members. Offenses subject to Senate Bill 45 are:

1. Life Sentence for Capital Murder
2. Aggravated Sexual Assault
3. Indecency with a Child by Contact
4. Aggravated Sexual Abuse / Aggravated Rape<sup>5</sup>

As a practical matter, obtaining parole for an offender subject to Senate Bill 45 vote is much more difficult than in cases where only a 3-member panel is involved. As with non-Senate Bill 45 cases, the Parole Board does not simply vote “yes” or “no.” The following codes are used to vote Senate Bill 45 cases:

- FI-1: Release upon eligibility.
- FI-18R: Place sex offenders into 18 month Sex Offender Treatment Program prior to release.
- NR: Do not release, but set the next parole review for three years in the future.
- SA: Do not release, and require the offender to serve all his sentence (“serve-all”).

#### **IV. Mandatory Supervision Eligibility**

An offender is eligible for release on discretionary Mandatory Supervision when his calendar time served, plus his good time earned, equals the total of his sentence. Offenders with the following convictions are *not* eligible for release on discretionary Mandatory Supervision, as set forth in §508.149(a) of the Texas Government Code:

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<sup>5</sup>Offense titles from prior legislative periods.

- Capital Murder
- Sexual Assault, 2<sup>nd</sup> Degree
- Aggravated Sexual Assault
- Robbery, 2<sup>nd</sup> Degree
- Aggravated Robbery
- Any Offense with an Affirmative  
Finding of Deadly Weapon
- Murder, 1<sup>st</sup> Degree
- Murder, 2<sup>nd</sup> Degree
- Injury to a Child or Elderly, 1<sup>st</sup> Degree
- Injury to a Disabled Individual
- Indecency with a Child, 2<sup>nd</sup> and 3<sup>rd</sup> Degree
- Burglary, 1<sup>st</sup> Degree
- Aggravated Kidnaping
- Any Felony Enhanced under Health and  
Safety Code (Drug Free Zone)
- Arson, 1<sup>st</sup> Degree
- Aggravated Assault, 1<sup>st</sup> and 2<sup>nd</sup> Degree

As with Parole eligibility, an offender's eligibility for release on Mandatory Supervision is dictated by the law in effect at the time of the commission of the first element of the offense. For offenses occurring outside the 76th legislative session in place from September 1, 1999 through the writing of this paper in 2007, be sure to check the applicable statute.

Finally, as with parole eligibility, an offender serving a sentence for a State Jail Felony is *not* eligible for Mandatory Supervision.



## V. Parole and Mandatory Supervision Statistics for FY 2005-2006

### A. Parole Approval Statistics

<u>Offense</u>	<u># Considered/Approved</u>	<u>% Approved</u>
Aggravated (non-sex offense)		
<i>considered</i>	8,677	
<i>approved</i>	1,711	19.72%
Aggravated Sex Offense		
<i>considered</i>	2,754	
<i>approved</i>	264	9.59%
Violent (non-sex offense)		
<i>considered</i>	12,330	
<i>approved</i>	2,159	17.51%
Non-Aggravated Sex Offense		
<i>considered</i>	2,260	
<i>approved</i>	221	9.76%
Nonviolent (non-sex offense)		
<i>considered</i>	45,748	
<i>approved</i>	14,613	31.94%
TOTALS		
<i>considered</i>	71,769	
<i>approved</i>	18,968	26.43%

B. Discretionary Mandatory Supervision Approval Statistics

<u>Offense</u>	<u># Considered/Approved</u>	<u>% Approved</u>
Aggravated (non-sex offense)		
<i>considered</i>	1	
<i>approved</i>	1	<b>100.00%</b>
Aggravated Sex Offense		
<i>considered</i>	36	
<i>approved</i>	5	<b>13.89%</b>
Violent (non-sex offense)		
<i>considered</i>	3,184	
<i>approved</i>	977	<b>30.68%</b>
Non-Aggravated Sex Offense		
<i>considered</i>	276	
<i>approved</i>	45	<b>16.30%</b>
Nonviolent (non-sex offense)		
<i>considered</i>	13,528	
<i>approved</i>	7,848	<b>58.01%</b>
TOTALS		
<i>considered</i>	17,025	
<i>approved</i>	8,876	<b>52.14%</b>

**VI. Note on Stacked Sentences**

An offender begins to accrue time credit on a stacked sentence when the underlying sentence is complete, or ceases to operate.<sup>6</sup> This occurs when the underlying sentence is served out day-for-day, or on the date the offender is “released” from the underlying sentence by a favorable Parole vote.

In this context it is important to distinguish Parole and Mandatory Supervision. Unlike Parole, an offender’s “release” on Mandatory Supervision does *not* complete, or cease to operate, an underlying sentence for purposes of stacked sentence calculations.<sup>7</sup>

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<sup>6</sup>See Article 42.08(b), Texas Code of Criminal Procedure.

<sup>7</sup>Ex parte Cowan, 171 S.W.3d 890 (Tex. Crim. App. 2005).

Stacked Texas state sentences are further complicated by the addition of a stacked federal sentence to the mix,<sup>8</sup> or when a Texas state sentence is stacked upon a sentence in another state.<sup>9</sup>

## **VII. Conditions of Parole and Related Civil Rights Issues**

### *A. Conditions of Parole Generally*

When offenders are released to Parole or Mandatory Supervision, they enter into a contract with the State whereby they enjoy the right to remain free in the community for the duration of their sentence in return for their compliance with conditions ordered by the Board of Pardons and Paroles.<sup>10</sup> The administration of these conditions of parole lies not with the Parole Board itself, but rather, with the Parole Division of the Texas Department of Criminal Justice.

Conditions of parole must be reasonable. A condition of parole can be challenged as unreasonable if it can be shown that: (1) the condition has no relationship to the underlying conviction; (2) the condition relates to conduct that is not in itself criminal; and (3) the condition forbids or requires conduct that is not reasonably related to future criminality or does not serve the statutory ends of probation or parole.<sup>11</sup>

### *B. Sex Offender Conditions*

When a parolee is subjected to sex offender conditions of supervision that are “qualitatively different” from the treatment characteristically given to a person convicted of a non-sex offense, the

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<sup>8</sup>Disiere v. Dretke, 115 Fed. Appx. 210 (5<sup>th</sup> Cir. 2004).

<sup>9</sup>Barela v. State, 180 S.W.3d 145 (Tex. Crim. App. 2005); Johnson v. State, 930 S.W.2d 589 (Tex. Crim. App. 1996).

<sup>10</sup>Morrissey v. Brewer, 408 U.S. 471 (1972)

<sup>11</sup>Richardson v. State, 957 S.W. 2d 854 (Tex. Crim. App. 1997). For invalid conditions of release, See also Lacy v. State, 875 S.W.2d 3 (Tex. App.–Tyler 1994); Johnson v. State, 672 S.W.2d 621 (Tex. App.–Corpus Christi 1984).

Fifth Circuit has held that he is entitled to due process prior to the imposition of the conditions.<sup>12</sup> The Fifth Circuit's position is based on the proposition that a parolee who is not a convicted sex offender has a limited liberty interest in freedom from the stigma of sex offender classification and compelled sex offender treatment, which was qualitatively different from the other usual conditions of release. As a result, a parolee subjected to sex offender conditions is entitled to notice and an opportunity to be heard prior to imposition.

This remains an area ripe for further litigation, however. Following the Fifth Circuit's mandate of notice and an opportunity to be heard, Texas instituted a procedure to ostensibly meet the new Due Process requirement. Pursuant to this procedure, an offender being considered for imposition of sex offender conditions is now sent a letter informing him of such, with a vague reference to the underlying basis, and including a request that the parolee respond in a show-cause fashion if he chooses to contest the imposition. Ultimately, in most cases these "paper hearings" amount to nothing more than a contest between the parolee's word (typically viewed by the parole authorities as categorically suspect) and the hearsay in an old police report or some other criminal history document (typically viewed by the parole authorities as inherently reliable). This regime clearly fails to provide adequate Due Process protection, and should be litigated again soon.

### *C. Challenging Parole Conditions in the Courts*

The Texas parole authorities are usually staunchly unwilling to remove or amend conditions of parole, even unreasonable ones that violate Due Process, upon the request of a parolee or his lawyer. As a result, the only realistic venue for timely relief from constitutional violations in this area is often the federal courthouse. These cases are filed as civil rights cases under 42 USC § 1983.

We recommend that before filing a federal lawsuit, a parolee one should exhaust his state administrative remedies. This can be done by making a written Motion to Amend Conditions of Parole and submitting it to the parole authorities. In general, do not expect much relief at the

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<sup>12</sup> Coleman v. Dretke, 395 F.3d 216 (5<sup>th</sup> Cir. 2004), 409 F.3d 665 (en banc. 5<sup>th</sup> Cir. 2005), cert denied.

administrative level. Then, assuming Federal Question jurisdiction<sup>13</sup> and the existence of a cause of action<sup>14</sup>, a federal claim seeking equitable, declaratory, and injunctive relief<sup>15</sup> will be ripe once the parole authorities have had a reasonable amount of time (as dictated by the circumstances) to act favorably on the Motion to Amend Conditions and have not, or have refused to do so. Complaints about conditions of parole are usually brought as procedural due process or equal protection claims, and always include a claim of “abuse of discretion”..

A parolee’s claim that he was denied procedural due process in the imposition of a condition of release will rest on two questions: (1) whether the parolee has a liberty interest in not having the condition placed on his release; and if so, (2) whether the state provided constitutionally sufficient procedures before imposing the condition.<sup>16</sup>

A parolee may bring a successful equal protection claim as a “class of one” where the parolee alleges that he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.<sup>17</sup>

When filing for federal relief, it is always preferable to include an Application for Temporary Restraining Order, along with an Application for Temporary Injunction. Doing this will speed up the time-table for potential judicial action, which burdens the State and increases the likelihood of obtaining reasonably rapid settlement relief in a single client’s case. It is important to recognize that while this strategy can be very effective at obtaining the desired state action, it is not an effective way

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<sup>13</sup>28 U.S.C. §1331.

<sup>14</sup>42 U.S.C. §§1983 and 1988.

<sup>15</sup>28 U.S.C. §§1343(a) and 2201.

<sup>16</sup>Wilkinson v. Austin, 125 S. Ct. 2384 (2005); Coleman v. Dretke, supra; Felce v. Fielder, 974 F.2d 1484 (7<sup>th</sup> Cir. 1992); Sandin v. Conner, 515 U.S. 472, 485 (1995); Vitek v. Jones, 445 U.S. 480, 491-92 (1980).

<sup>17</sup>Village of Willowbrook v. Olech, 528 U.S. 562 (2000)(plaintiff can allege an equal protection violation by asserting that state action was motivated solely by a “spiteful effort” to “get” her wholly unrelated to any legitimate state objective); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923); Allegheny Pittsburgh Coal Co. v. Commision of Webster Cty., 488 U.S. 336 (1989).

of obtaining money damages or attorneys' fees, as the state will simply "moot out" the cause of action by conforming to the demands prior to a court order. If money damages and attorneys fees are sought, a class action involving numerous affected parolees is a consideration.<sup>18</sup>

## VIII. Parole Revocation

### A. *Rights and Procedure*

Once an offender is released on parole, he enjoys a limited liberty interest in his release status; the State must provide substantial due process before revoking an offender's release status and returning him to prison.<sup>19</sup> The due process required does not rise to the full array of rights present when one is charged and tried for a criminal offense. The United States Supreme Court has defined these rights to include:<sup>20</sup>

1. Written notice of the alleged violation(s);
2. A preliminary hearing to establish whether there is probable cause that the parolee violated at least one condition of his parole;
3. Disclosure of the evidence against the parolee;
4. An opportunity to be heard, including the opportunity to present witnesses and documentary evidence;
5. The opportunity to confront and cross-examine witnesses (unless there is a specific

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<sup>18</sup>) The major case to review before filing federal civil rights litigation is *Wilkerson v. Dotson*, 125 US 1242 (2005). Note, this case holds that one cannot attack a prison or parole issue via civil rights litigation (42 U.S.C. § 1983) if the issue is directed at the length of the sentence or the fact of the conviction. In those cases a writ of habeas corpus is required.

<sup>19</sup>*Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972); *Gagnon v. Scarpelli*, 93 S.Ct. 1756 (1973).

<sup>20</sup>*Morrissey v. Brewer*, *supra*.

- finding of good cause to deny such confrontation);<sup>21</sup>
6. A neutral and detached body to hear the evidence;
  7. A revocation hearing to establish by preponderance of the evidence, whether the parolee violated at least one condition of his parole;
  8. An opportunity to offer evidence of an offender's overall conduct, or "adjustment" while on parole, even if a violation of parole has been established by preponderance of the evidence;
  9. A written statement by the fact finders as to the evidence relied upon for any revocation decision.

In these proceedings a parolee also has a limited right to counsel. Whether a parolee is entitled to counsel in a specific instance is determined on a case-by-case basis. Factors considered when making this determination include: (1) whether the parolee is indigent; whether the parolee lacks the ability to articulate or present a defense or mitigation evidence in response to the allegations; and (3) the complexity of the case and whether the parolee admits the alleged violations.<sup>22</sup> As a practical matter, no objective standards are in place for making this determination, and the assignment of appointed counsel in parole revocation hearings appears to be predominantly arbitrary. This is an area that may be ripe for future litigation under the right set of facts.

Parole revocation hearings are conducted by an administrative hearing officer who has the authority to administer oaths, examine witnesses, rule on the admissibility of evidence, maintain order and decorum, and make findings of fact, among other functions.<sup>23</sup> Hearing officers shall apply the Texas Rules of Evidence, with the caveat that "when necessary to ascertain facts not reasonably susceptible to proof under these rules, evidence not admissible thereunder may be admitted, except

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<sup>21</sup>This right has been further fleshed out by the Fifth Circuit in several cases. McBride v. Johnson, 118 F.3d 432 (5<sup>th</sup> Cir. 1997); Williams v. Johnson, 171 F.3d 300 (5<sup>th</sup> Cir. 1999)(finding of good cause to disallow confrontation requires a weighing of the parolee's interest in confronting the witness against the State's interest in denying that right); Barnes v. Johnson, 184 F.3d 451 (5<sup>th</sup> Cir. 1999).

<sup>22</sup>Gagnon v. Scarpelli, 411 U.S. 471, 93 S.Ct. 1756 (1973); Rule 146.3, Texas Board of Pardons and Paroles Rules.

<sup>23</sup>Rule 147.2, Texas Board of Pardons and Paroles Rules.

where precluded by statute, if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs.”<sup>24</sup> Defense counsel can minimize the potentially harmful effects of this provision by asserting constitutional or statutory—as opposed to rule-based—objections to inadmissible evidence whenever possible, and by using the flexibility of the provision to the client’s benefit by offering relevant evidence such as polygraph reports, which might normally be inadmissible. Hearing officers must also give effect to the rules and privileges recognized by law.<sup>25</sup>

It is important to recognize that the Fourth Amendment search and seizure protections, including the exclusionary rule, do not apply in parole revocation proceedings.<sup>26</sup> Also, a parolee subject to revocation proceedings does not enjoy a presumption of innocence.<sup>27</sup>

Following a parole revocation hearing, a 3-member parole panel will review the hearing record, along with the recommendations of the Administrative Hearing Officer and the offender’s Parole Officer, and order various actions that can include:

1. Non-Revocation, allowing the offender to continue on supervision, either with or without modification of conditions of release;
2. Non-Revocation, allowing the offender to discharge if the offender is past his discharge date;
3. Non-Revocation, ordering the offender transferred to an Intermediate Sanction Facility (ISF) or Substance Abuse Felony Program Facility (SAFPF); ISF typically runs about 90 days and SAFPF typically runs up to 7 to 9 months;
4. Non-Revocation, ordering the imposition of additional conditions of parole; and
5. Revocation, ordering the offender returned to the custody of TDCJ.

Parole revocation does not necessarily mean that an offender will have to serve the remainder of his sentence in custody. An offender whose parole has been revoked will become eligible again, and

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<sup>24</sup>Rule 147.22, Texas Board of Pardons and Paroles Rules.

<sup>25</sup>Rule 147.23, Texas Board of Pardons and Paroles Rules.

<sup>26</sup>Penn. Bd. Of Probation and Parole v. Scott, 524 U.S. 357, 118 S.Ct. 2104 (1998).

<sup>27</sup>Hamilton v. Lyon, 74 F.3d 99 (5<sup>th</sup> Cir. 1996).



may well be re-released on Parole or Mandatory Supervision.<sup>28</sup>

*B. The Effect of Revocation on an Offender's Time Credit*

While on parole an offender earns "Street Time" day for day, toward completion of his sentence. An offender discharges his sentence when his calendar time earned in prison, or "Flat Time," plus his "Street Time" earned on parole, combine to equal the total of his sentence. As a default rule, an offender forfeits his Street Time upon revocation of parole.<sup>29</sup> In such a circumstance, for example, an offender who has been on parole for 5 years with a future discharge date of 2015, will upon revocation lose his 5 years Street Time and be assigned a new discharge date of 2020. The offender will likely be re-released on parole after some period of time prior to 2020, but the forfeiture of Street Time nonetheless deals a serious blow to the offender's progress in completing his sentence.

Several years ago, the Texas Legislature amended this Street Time forfeiture rule to create an exception for some categories of offenders under certain circumstances. The amended rule applies to all offenders *except* those with convictions for the following offenses:

- Capital Murder
- Sexual Assault, 2<sup>nd</sup> Degree
- Aggravated Sexual Assault
- Robbery, 2<sup>nd</sup> Degree
- Aggravated Robbery
- Any Offense with an Affirmative
- Finding of Deadly Weapon
- Murder, 1<sup>st</sup> Degree
- Murder, 2<sup>nd</sup> Degree
- Injury to a Child or Elderly, 1<sup>st</sup> Degree
- Injury to a Disabled Individual
- Indecency with a Child, 2<sup>nd</sup> and 3<sup>rd</sup> Degree
- Burglary, 1<sup>st</sup> Degree
- Aggravated Kidnaping
- Any Felony Enhanced under Health and
- Safety Code (Drug Free Zone)
- Arson, 1<sup>st</sup> Degree
- Aggravated Assault, 1<sup>st</sup> and 2<sup>nd</sup> Degree

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<sup>28</sup>Rule 145.3, Texas Board of Pardons and Paroles Rules.

<sup>29</sup>508.283, Texas Government Code.

Incidentally, this is the same list of offenses that serves to disqualify offenders from eligibility for Mandatory Supervision. Under the amended rule, an offender whose parole is revoked will keep his Street Time if, at the time of the issuance of the parole violation warrant (Blue Warrant), he had earned at least one-half of the Street Time necessary to complete his parole term. Stated another way, an eligible offender will keep his Street Time if he made it at least halfway through his parole term before the Blue Warrant issued. A recent Court of Criminal Appeals decision shows just how complicated these street time issues can become.<sup>30</sup>

In regards to time credit, one rather unusual but possible scenario is worth mentioning. Once in a while, a parolee is arrested and charged with a parole violation, but his sentence expiration date, or discharge date, passes while he is awaiting a hearing. This can occur for a variety of reasons, but most commonly because the parolee is in jail awaiting trial on a new criminal offense while a Blue Warrant is lodged against him (the Parole Board will normally not initiate parole revocation proceedings against an offender until new criminal charges have been resolved). The Fifth Circuit has held that there is no constitutional violation when the Parole Board completes parole revocation proceedings after the original term of parole would have expired.<sup>31</sup> For obvious reasons, this situation will arise almost exclusively in cases where the offender, if revoked, will not be eligible to keep his Street Time.

### *C. Challenging an Adverse Decision following Revocation Proceedings*

If the Board's decision following revocation proceedings is to revoke the offender's parole, the offender may challenge the decision by filing a Motion to Re-open with the Board within 60 days of the Board's decision.<sup>32</sup> The Motion to Re-open can be brought:

1. For any substantial error in the revocation process; or
2. Upon newly-discovered information

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<sup>30</sup> Ex parte Noyola, # AP-75,428 (March, 2007).

<sup>31</sup> Morrison v. Johnson, 106 F.3d 127 (5<sup>th</sup> Cir. 1997).

<sup>32</sup> Rule 146.11, Texas Board of Pardons and Paroles Rules.

Arguably, but not explicitly, a Motion to Reopen would also be available in cases where the Board ordered some kind of sanction (such as ISF) short of revocation.

Procedurally, a Motion to Reopen is also the necessary mechanism for exhausting an offender's administrative remedies before proceeding to challenge revocation of parole through an Application for Writ of Habeas Corpus. If a writ is eventually filed, it should allege that the Parole Board *abused its discretion* in some way.

#### D. Note on Double Jeopardy / Collateral Estoppel - Type Claims

Many parolees each year are charged with new crimes while on parole. Sometimes these new charges are resolved through dismissals from the prosecution, acquittals by a judge or jury, or even no-bills by a grand jury. Unfortunately, even in cases where new criminal charges are dismissed, acquitted, or no-billed, the Parole Board is likely to nevertheless use the alleged factual basis of the defunct criminal charge to lodge a parole violation allegation. Double Jeopardy and Collateral Estoppel cannot be raised as defenses in this scenario.<sup>33</sup> Also, there is the problem that a revocation issue only requires the preponderance of evidence as a burden of proof. Therefore, one can be found "not guilty" when tried for a new offense while on parole and still be subject to having one's parole revoked.

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<sup>33</sup>Davenport v. State, 574 S.W.2d 73 (Tex. Crim. App. 1978); Chambers v. State, 700 S.W.2d 597 (Tex. Crim. App. 1985). See also *The Due Process Roots of Criminal Collateral Estoppel*, 109 Harv. L. Rev. 1729, 1740-45 (1996); *The Doctrine of Res Judicata or Collateral Estoppel as Barring Relitigation in State Criminal Proceedings of Issues Previously Decided in Administrative Proceedings*, 30 A.L.R. 4<sup>th</sup> 856.

## **IX. Conclusion**

We hope these materials are helpful to you. If you have questions that remain unanswered, please do not hesitate to give us a call. We have an open door policy for lawyers who may need a little guidance in this field from time to time. We can be reached at:

713-863-9400 (Houston Office)

936-435-1380 (Huntsville Office)

888-942-2376 (Toll free)

# PAROLE AND MANDATORY SUPERVISION ELIGIBILITY TIME FRAMES

This chart depicts when one is eligible for an initial parole or discretionary mandatory supervision date.

The following information is based upon laws currently in effect. Parole and mandatory supervision eligibility is determined by the laws in effect at the time an offense is committed. Refer to the Parole and Mandatory Supervision Eligibility Chart for detailed information regarding changes in legislation.

Yrs	PAROLE		MANDATORY	
	3(g) Offenses	All Other Offenses	3(g)/508.149 Offenses	All Other Offenses
1	N/A	1 mo 13 day	N/A	5 mo 21 day
2	N/A	2 mo 25 day	N/A	1 <sup>1</sup> / <sub>2</sub> mo 8 day
3	2 yrs	4 mo 8 day	N/A	1 yr 5 mo 2 day
4	2 yrs	5 mo 21 day	N/A	1 yr 10 mo 22 day
5	2 yrs 6 mo	7 mo 3 day	N/A	2 yr 4 mo 12 day
6	3 yr	8 mo 15 day	N/A	2 yr 10 mo 3 day
7	3 yr 6 mo	10 mo 0 day	N/A	3 yr 3 mo 20 day
8	4 yr	11 mo 8 day	N/A	3 yr 9 mo 16 day
9	4 yr 6 mo	1 yr 24 day	N/A	4 yr 3 mo 4 day
10	5 yr	1 yr 2 mo 8 day	N/A	4 yr 8 mo 24 day
15	7 yr 6 mo	1 yr 9 mo 9 day	N/A	7 yr 1 mo 6 day
20	10 yr	2 yr 4 mo 12 day	N/A	9 yr 5 mo 18 day
25	12 yr 6 mo	2 yr 11 mo 15 day	N/A	11 yr 10 mo
30	15 yr	3 yr 6 mo 18 day	N/A	14 yr 2 mo 12 day
35	17 yr 6 mo	4 yr 1 mo 21 day	N/A	16 yr 6 mo 24 day
40	20 yr	4 yr 9 mo	N/A	18 yr 11 mo 6 day
45	22 yr 6 mo	5 yr 4 mo 3 day	N/A	21 yr 3 mo 18 day
50	25 yr	5 yr 11 mo 8 day	N/A	23 yr 8 mo
55	27 yr 6 mo	6 yr 6 mo 11 day	N/A	26 yr 0 mo 12 day
60	30 yr	7 yr 1 mo 15 day	N/A	28 yr 4 mo 24 day
Life	30 yr	7 yr 1 mo 15 day	N/A	N/A

Note: Above timeframes are approximate calendar days based upon an offender's time-earning status upon entry and diligent participation in programs. Time may vary depending on promotion or demotion in time-earning status and program participation.

3(g) Offenses: Good time credits have no effect on an offender's sentence. Parole eligibility is based on calendar time. 3(g) offenders are not eligible for mandatory supervision. 3(g) offenses committed on or after 9-1-93 require an offender to serve half of their total sentence to become parole-eligible. The following is the current listing of 3(g) offenses:

Aggravated Sexual Assault	Aggravated Robbery	Murder
Aggravated Kidnapping	Indecency with Child - Contact	Sexual Assault of a Child
		Offense with Affirmative Finding of Deadly Weapon

Certain 3(g) offenses with life sentences carry unique initial parole eligibility requirement by statute:

- Capital Murder: 40 years calendar time (no longer current)
- Aggravated Sexual Assault with 2 prior felony convictions (1 sex-related): 35 calendar years
- Aggravated Kidnapping with Intent to Abuse Sexually with 2 prior felony convictions (1 sex-related): 35 calendar years
- Indecency with Child - Contact with 2 prior felony convictions (1 sex-related): 35 calendar years
- Burglary Habitation with Intent to Commit Sexual Assault or Indecency with Child with 2 prior felony convictions (1 sex-related): 35 calendar years

508.149 Offenses: Aside from the above-listed offenses, good time credits for offenses listed in this section of the Texas Government Code count toward offenders' parole eligibility. They do not count, however, toward release on mandatory supervision. If never approved for parole, offenders convicted of the following will serve their entire sentence:

Aggravated Assault 1st & 2nd degree	*Drug Free Zone Offenses (481.134)	Robbery
Arson, 1st degree	Indecency with Child-Exposure	Sexual Assault
Burglary Habitation, 1st degree	Injury to Child, Elderly, Disabled, 1st degree	Use of Child in Offense (481.140)

\*Drug Free Zone offenses carry a unique parole eligibility requirement. If convicted of such a crime, an offender must serve 5 calendar years to become parole eligible. Consequently, if an offender is sentenced to 5 years or less, he or she is not eligible for parole or mandatory supervision.