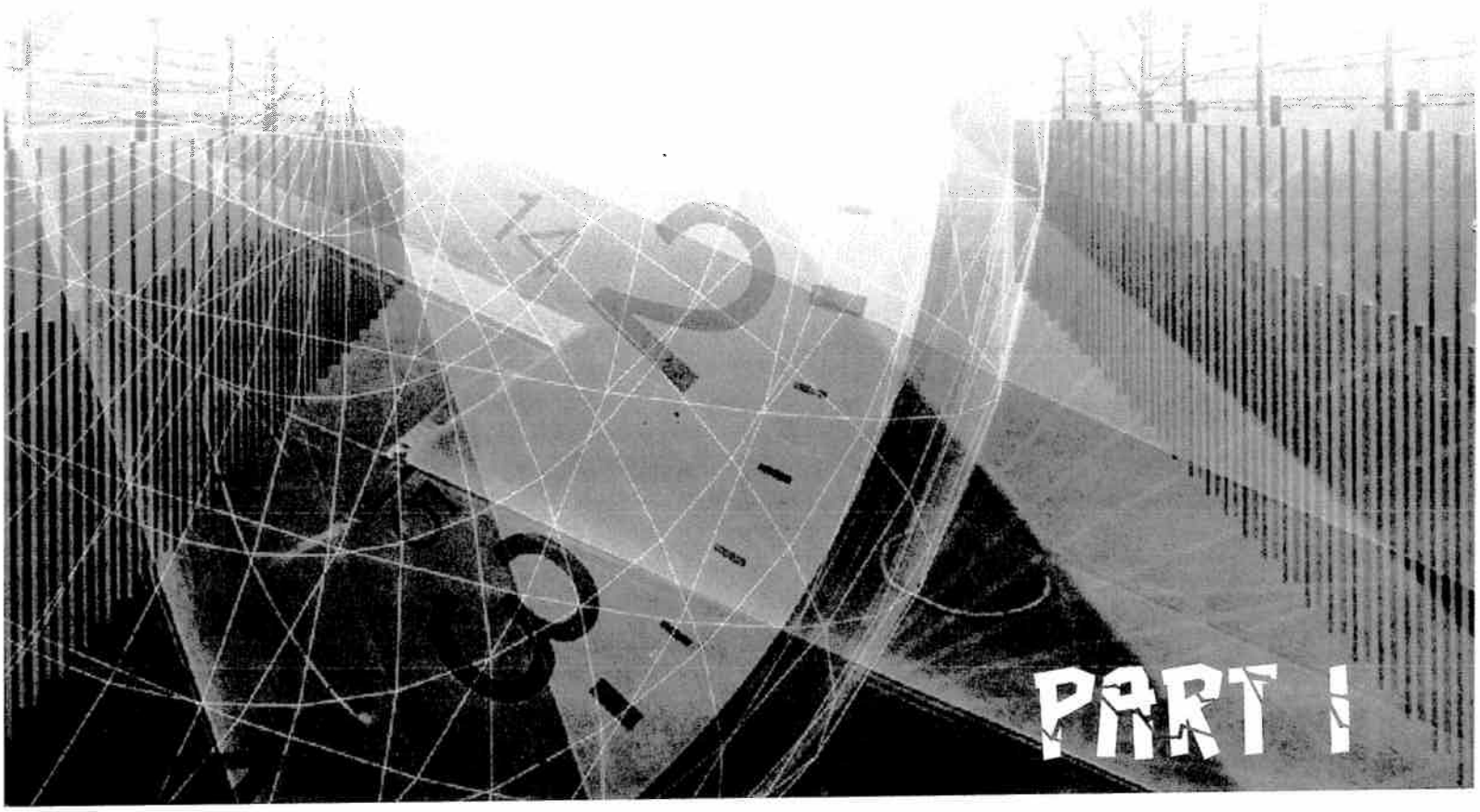


TIME CREDIT PROBLEMS

AND OTHER ISSUES IN

TEXAS PRISON AND PAROLE LAW

WM. T. HABERN & DAVID P. O'NEIL

For those not well-versed in the laws of sentencing in relationship to prison credit time problems, there is more than likely no other area of criminal law more dry and boring—not to mention extremely time consuming—in terms of researching this topic. Most states do not have the consistent legislative and court-imposed time credit changes as does Texas. Time credit and parole eligibility go hand in hand with prison discipline and parole release. In order to give the criminal bar a quick reference, or at least a starting point in this complex area of the law, David O'Neil and I have tried—within the scope of this article—to update both case and statutory laws that affect time credit, parole law, and developments in prison law that affect Texas inmates. This article was originally undertaken for a Dallas seminar earlier in the year, but since that time, there have been new developments, and we have tried to include these major developments. The primary target of this effort is directed at issues that inmates write to us about every day. As stated in a previous article published some years ago in the Voice, *"[T]he only thing that gets changed more frequently than a baby's diaper in the State of Texas is when the legislature meets or the Court of Criminal Appeals takes some action to amend the Texas time credit law." Frankly, this occurs much too often. We hope this article sheds some light on both the recent developments in Texas prison and parole law, as well as the current time credit issues that we suspect most criminal defense lawyers, at some point in time, must face. The scope of this article speaks to several of the corrections law topics our firm deals with everyday, including the issues of prison disciplinary procedures, parole/probation conditions and limitations, sex offender conditions, mandatory supervision issues, as well as a few other legal developments we think may be of interest to the criminal bar. It is our sincere hope that this information is of value to you all.*

Legislative Actions Affecting Parole-Related Issues as of September 1, 2007

No Parole Allowed

Under section 508.145 of the Texas Government Code, the continuous sexual abuse of a young child and "super aggravated sexual assault" are added to the list of crimes for which there is no parole. These crimes are also subject to the child safety zone law.

Sexual performance by a child is now a 3(g) offense, and one must serve one-half of the sentence as calendar time or thirty (30) years—whichever comes first—to be parole eligible. These crimes are not subject to mandatory supervision.

SAFP Time Credit

As of September 1, 2007, one does get credit for time spent in SAFP. The prison had originally adopted the policy that this applies only to SAFP time earned on or after September 1, 2007. However, the policy today is that if the judgment and sentence grant time spent in SAFP, then the prison will honor the court's finding. Keep in mind that under *Ex parte Harvey,* the prison is not to question time credit granted by a court *unless* the time predates the offense date. 846 S.W.2d 328 (1993).

Detained and Waiting for a Bed in SAFP

In *Ex parte Forooghi,* the applicant filed a writ claiming credit for time spent in SAFP, and also claiming credit for the time he spent while awaiting an opening in SAFP. 185 S.W.3d 498 (2006). It is a well-settled proposition of law that an inmate is *not* entitled to credit for time in custody if that time was a condition of probation. For example, an assignment to SAFPF as a condition of probation does not count towards time served because it *is* a condition of probation. *See Ybarra v. State,* 149 S.W.3d 147 (Tex. Crim. App. 2004). Under the finding of facts in *Ybarra,* the trial court indicated there that the time in SAFP was a condition of probation. *However, the time spent in jail*

awaiting a bed in SAFP was not *a condition of probation and, thus, time credit should be awarded.*

New Amendments to Statutes Relating to Crimes for Which Mandatory Supervision Is Not an Option

Senate Bill 877 provides that an offender who is serving a sentence for any offense set forth in article 42.12, section 3(g) of the Texas Code of Criminal Procedure (which includes a charge for murder, capital murder, indecency with a child, aggravated kidnapping, aggravated sexual assault, and aggravated robbery) is *not* eligible for release on parole until the actual calendar time served—without benefit of good time credit—equals one-half of the sentence or thirty (30) calendar years (whichever is less). But in no event is the inmate eligible for release on parole in less than two (2) calendar years.

An inmate may not be released to mandatory supervision if the inmate is serving a sentence for, *or has a prior conviction for the following*:

- murder;
- capital murder;
- aggravated kidnapping;
- indecency with a child;
- sexual assault;
- aggravated assault;
- aggravated sexual assault;
- injury to a child, elderly individual, or disabled individual;
- arson;
- robbery;
- aggravated robbery;
- sexual performance by a child;
- continuous sexual abuse of a young child, and super aggravated sexual assault

TEX. PENAL CODE ANN. §22.021(f)

Medically Recommended Intensive Supervision
(TEX. GOV'T CODE ANN. §508.146)

As amended, this section of the code prohibits the denial of mandatory supervision for "3(g)" offenders and permits their eligibility for release on medically recommended intensive supervision if a physician determines the person is "in a persistent vegetative state" or has "an organic brain syndrome with significant to total mobility impairment."

Completion of Parole Without Supervision
(TEX. GOV'T CODE ANN. §508.1555)

This amendment, which went into effect on June 15, 2007, expands the circumstances under which a releasee can serve the remainder of his sentence without supervision.

Under this section, a releasee can be granted early termination of supervision. Such termination does not, however, mean the balance of the releasee's sentence is dissipated.

To qualify for early termination under this section, an offender must:

1. have been under supervision for at least one-half the time that remained on the sentence when the releasee was released from imprisonment;
2. have incurred no violations of parole conditions during the previous two years;
3. never have had a parole or mandatory supervision revocation;
4. have made a good-faith effort to comply with any and/or all restitution orders; and
5. the release without supervision is in the best interest of society.

Consideration for release under this section commences with the recommendation of the parole officer. No doubt, any attorney fees under this section would be, by nature, minimal as this section dictates that the bulk of the recommendation and decision springs from the desire of the parole officer to aid the offender. After the process has commenced with the parole officer, the request then goes to that officer's supervisor, and then on up the chain of command.

What Is the Value of Good Time Credit?

The only real benefits to good time earned lie in the expedition of parole eligibility and in the advancement of one's mandatory supervision date—but only if one's particular conviction qualifies one for Discretionary Mandatory Supervision (DMS). Good time earned does *not* shorten the actual length of one's sentence, as it did prior to 1976. If a conviction gives rise to a five-year sentence, then the offender is going to be under some type of supervision for five calendar years. Good time earned means nothing if one is convicted of a 3(g) type of offense, or one whose conviction eliminates qualification for Discretionary Mandatory Supervision (DMS).

From the Prisoner's Perspective: "If Good Time Does Not Benefit Us, Then It Stands to Reason That We Should Be Compensated for Our Labor"

Frequently, we receive requests from inmates who receive no benefit from good time provisions due to the nature of their convictions. These inmates regularly want us to file a lawsuit claiming that the prison should not be able to force them to work without either some form of good time benefit or compensation. Texas law, however, does not support such suits. As noted by the *Draper v. Rhay* court, the Thirteenth Amendment suggests, "When a person is duly tried, convicted and sentenced in accordance with the law, no issue of peonage or involuntary servitude arises." 315 F.2d 193 (9th Cir.), *cert. denied,* 375 U.S. 915 (1963). In short, the prison *can* make an offender do hard labor. Neither making a prisoner work on prison property nor forcing a prisoner to work on private property without wages violates the Thirteenth Amendment. Prisoners have no right of claim for payment for work done in Texas *except* under one unique circumstance. That one exception is when an inmate is working outside the prison under a contract for a private enterprise. For this general rule, *see Ali v. Johnson,* 259 F.3d 317 (5th Cir. 2001). *Also see, Mikeska v. Collins,* 900 F.2d 833 (5th Cir. 1990); *Murray v. Miss. Dept of Corrections,* 911 F.2d 1167 (5th Cir. 1990). For the exception to this rule, *see Watson v. Graves,* 909 F.2d 1549 (5th Cir. ___ 1990).

Neither making a prisoner work on prison property nor forcing a prisoner to work on private property without wages violates the Thirteenth Amendment.

Disciplinary Actions and the Loss of Good Time Credit

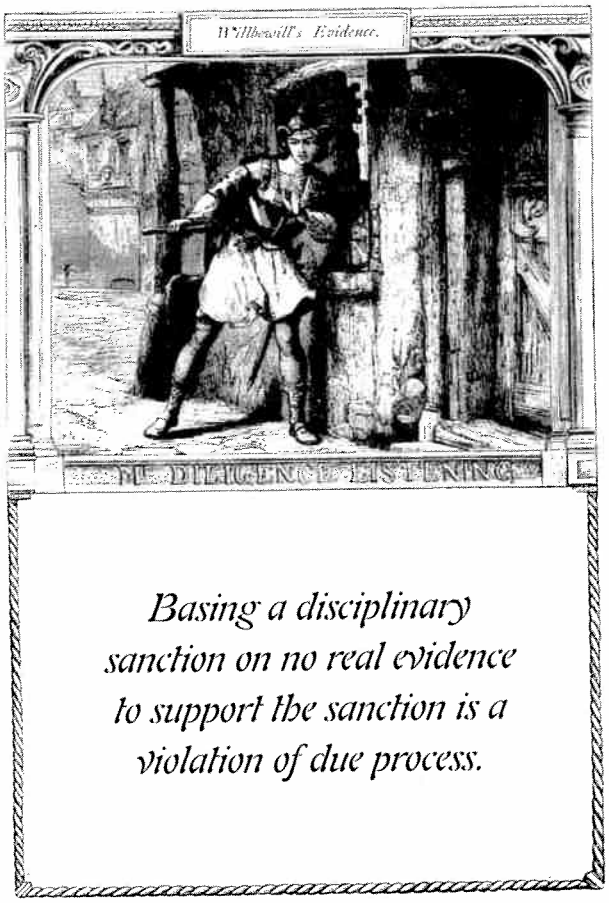
In attempting to overturn the loss of good time credit due to a finding of guilty in a prison disciplinary action, many a "jailhouse lawyer" has suffered great frustration. While admittedly it is not easy to get a prison or a court to overturn a prison's disciplinary action, it can be done.

The requisite procedure in federal court for attacking a disciplinary action was discussed in *Preiser v. Rodriquez,* 411 U.S. 475 (1973). The *Preiser* court holds that before being entitled to the right to pursue a writ, one must first exhaust all administrative remedies. Once all administrative remedies have been exhausted, then the right to file a writ of habeas corpus will lie. Under Texas law, when prison disciplinary actions involve lost time credit, whether or not that loss of that time affects one's mandatory supervision or discretionary mandatory release date, these actions *may be challenged directly in federal court* by writ. *See Ex parte Brager,* 704 S.W.2d 46 (Tex. Crim. App. 1986), wherein the Court of Criminal Appeals made clear it that such claims will *no longer be considered by the State's highest court. Also see Clarke v. Stalder,* 154 F.3d 186 (5th Cir 1998). To succeed in litigation regarding this issue, the defense bar needs to be aware that in order for the state to prevail in one of these claims, all the state needs to show is the existence of "some evidence." It is highly unlikely that one can bring a viable claim in these cases of this nature by filing a federal civil rights action under 42 U.S.C. 1983. *See Wilkinson v. Dotson,* 544 U.S. 74 (2005). However, in the unlikely event one *can* find a viable means by which to file to file such a civil action, then damages and attorney fees may be available. *Edwards v. Balisok,* 520 U.S. 641 (1997). On the other hand, since good time lost in Texas does *not* shorten the overall sentence imposed—unless a form of mandatory supervision is involved—then it is possible that a federal civil rights action might be filed *so long as one is not attempting* to attack the duration of a sentence nor attempting to directly attack a conviction. (*See Wilkinson,* 544 U.S. 74 (2005).

Causes of action that stem from violations of an inmate's due process rights that occur as the result of a disciplinary hearing are generally not brought under a 42 U.S.C. §1983 civil rights action, as usually any such alleged violations necessarily imply the invalidity of the discipline hearing result itself. The *only* exception to this rule is when the prisoner first has the adverse administrative decision reversed or expunged, or somehow manages to have the decision declared void by some administrative appeal decision. The most recent case to review

this issue is *Lockett v. Suardini,* 526 F.2d 866 (6th Cir. 2008). The *Lockett* court followed the dictates of *Heck v. Humphrey,* which require first that the loss be subject to the exhaustion of administrative remedies. 512 U.S. 477 (2005). The holding in *Wilkinson* cracked this wall in some instances, but did not offer much benefit to inmates in terms of prison disciplinary actions. 544 U.S. 74 (2005).

The *Heck* case controlled most prison inmate and parolee efforts to use the civil law to protect themselves from administrative, constitutional abuse and in order to commandeer more swift court attention along with damages and attorney fees. 512 U.S. 477 (2005). Then in 2005, the Supreme Court issued *Wilkinson v Dotson,* which allowed the use of federal civil rights statutes so long as the issue in litigation was not an attack on the duration of the sentence or the existence of the conviction itself. 544 U.S. 74 (2005). Thus, since loss of good time still falls within the duration of one's sentence, *Heck* can still present a problem for one seeking prompt judicial relief via a restraining order. 512 U.S. 477 (2005).



Basing a disciplinary sanction on no real evidence to support the sanction is a violation of due process.

There *are* some examples of successful challenges to disciplinary actions that warrant review. *Broussard v. Johnson* is one such case. There, the only evidence presented amounted to conclusions given by the investigating officer, who obtained these conclusions from listening to the warden's opinion. Thus, a hearsay problem was presented. Basing a disciplinary sanction on no real evidence to support the sanction is a violation of due process. In *Adams v. Gunnell,* the inmate prevailed where there was no notice of the infraction of which he was accused. 729 F.2d 362 (5th Cir. 1984). *Also see Reeves v. Pettcox,* 19 F3d 1060 (5th Cir. 1994). In *Cassels v. Stalder,* the inmate was disciplined for "spreading rumors." 342 F.Supp. 555 (M.D. La 2004). There, the inmate's mother put up an internet message claiming that her son, who was housed in Louisiana Prison, was not being given proper medical care. That case was reversed and the rule was removed from the prison's rule book. In *Morgan v. Dretke,* the evidence was not sufficient to support the loss of time credit. 433 F.3d 455 (5th Cir. 2005). Cases of this nature wherein the prisoner is litigating his own issue requires extreme diligence—to say the least—in order to prevail. *Houser v. Dretke,* 2006 WL 1307559 (5th Cir. 2006). The most recent positive case in this area is *Teague v. Quarterman,* 482 F3d 769 (5th Cir. 2007).

Rules for Litigation of Lost Time Credit from Prison Disciplinary Actions

Teague v. Quarterman, 482 F3d 769 (5th Cir. 2007)

Unconstitutional Disciplinary Actions and How to Attack Them

Until the early 1990s, the Texas Parole Board showed awareness of the fact that prison disciplinary actions were little more than "star chamber" proceedings, and up until that time, the parole board would not pay much attention to disciplinary actions. Once Ann Richards became governor, she appointed a new chairman of the Texas Parole Board and this all changed. *Ruiz v. Estelle,* 503 F.Supp. 1265 (S.D. Tex. 1980); 679 F.2d 1115 (5th Cir. 1982, *cert. denied*) (affirmed in part and reversed in part). The *Ruiz* court addresses the terrible inequities that have historically been present in Texas prison disciplinary proceedings. Many of these problems still exist today. The *Ruiz* case documents the extremely unfair direction Texas prison disciplinary actions have taken. Thus, until the 1990s, the parole board gave but a passing glance to the occasional disciplinary action. As discussed below, once Governor Richards took office, a major discipline case could have a devastating effect on an inmate's prospect for parole consideration.

The *Ruiz* case afforded inmates the right to help other inmates embroiled in disciplinary matters. However, in *Shaw vs. Murphy,* the U.S. Supreme Court disapproved of the *Ruiz* policy. 532 U.S. 223 (2001). In recent years, however, this heightened awareness seems to have dissipated. In order for an inmate to be eligible for review, he or she must maintain a clean disciplinary record for six months prior to the vote, and must have at least the same classification level as when entering the institutional division. The Parole Board has adopted an administrative reg-

ulation that suspends from the parole docket any case in which the inmate has been the subject of a "major" disciplinary action (a "major" case is one in which the inmate loses time credit or class ranking), and requires that the inmate maintain a clean disciplinary record for six months prior to the vote, and the inmate must have at least the same classification level as when entering the institutional division. Being removed from the review process due to disciplinary problems can result in a delay of up to eighteen months or more, and it will most certainly have a negative impact on the Board's ultimate vote.

One of the benchmark cases on prison disciplinary and due process is *Wolff v. McDonnell*, 418 U.S. 539 (1974). The *Wolff* court held that due process requires prisoners facing the loss of good time, or imposition of solitary confinement, be afforded advance, written notice of the claimed violation, as well as a written statement of fact findings, along with the right to call witnesses and present documentary evidence where such protections would not be unduly hazardous to institutional safety or correctional goals). Recently, the United States Supreme Court reduced the amount of due process protections required in prison disciplinary actions. *See Sandin v. Conner,* where the United States Supreme Court held that unless the disciplinary action results in the loss of class status or "good time" credits, and such loss would affect the length of one's punishment, no hearing is necessary. 515 U.S. 472 (1995). *Also see Madison v. Parker,* 104 F.3d 765 (5th Cir. 1997). *Sandin* is a major case in the area of corrections law, and its meaning has yet to be clearly defined to the satisfaction of those who closely follow this area of the law. *See* Correctional Law Reporter, Volume VII, No. 6 (April/May 1996). For a realistic view of how frustrating the *Sandin* decision can make an inmate's life, see *Wilson v. Harper,* 949 F.Supp 714 (S.D. Iowa 1996), also reported in Correctional Law Reporter, Vol. IX, No. 1, June/July 1997, at p.3.

Before good time credits can be taken away for a disciplinary violation, the inmate is entitled to certain limited due process rights. *See Murphy v. Collins,* 26 F.3d 541 (5th Cir. 1994). The *Murphy* case outlines the minimal due process that must be afforded an inmate, including—but not limited to—timely notice prior to any hearing (that is, written notice of the allegations and a written statement of the evidence used to find a rule violation). An inmate *should not be* placed in solitary confinement before being given a formal hearing; however, an inmate *may be* put in segregation prior to any such hearing. *See Walker v. Navarro,* 4 F.3d 410 (5th Cir. 1993). In *Broussard v. Johnson,* the prison officials were held to have violated due process, where the hearing officer simply accepted the conclusions of the investigating officer, who, in turn, had simply accepted the conclusions of the Senior Warden. 918 F.Supp. 1040 (E.D.Tex. 1996).

Recently, the Fifth Circuit issued *Teague v. Quarterman,* 482 F.3d 769 (5th Cir. 2007). A loss of good time—even a minor amount of good time—that arises from a disciplinary action is *not de-minimus* in nature. Further, the *Teague* holding makes clear that it no longer makes a difference if the time credit loss affects one subject to mandatory supervision (from 1976 to 1996) or discretionary mandatory supervision (from 1996 until today). Both forms of mandatory relief now have a limited protected liberty interest.

Some years ago, as the court-ordered supervision of disciplinary actions arising as a result of the *Ruiz* decision began to decline, our office observed enough ongoing, "questionable" major disciplinary actions affecting clients nearing parole eligibility that we started investigating. At times, our investigations led us to accept some of these prison disciplinary actions. We have not been surprised to discover that many of these cases are the result of abusive power plays by persons wishing to interfere with the inmate's parole eligibility date. For example, one inmate (or guard) will set up a fellow inmate for a disciplinary action to prevent his release on parole. Further, inmate administrative appeals from these actions are rarely given the "in-house" examination they deserve. Attacking a prison disciplinary action can be very time-consuming and costly. Of greater alarm is the manner in which some of these cases represent extreme due process violations that may ultimately result in delays that affect inmates anticipating their parole votes.

Not too many years ago, our office investigated a situation where one disciplinary hearing officer in a unit discipline section was allegedly told by the unit chief warden that his discipline decisions were far too liberal, and that going forward, no inmate with a "major" case could be found "not guilty." We turned this matter over to the prison's internal affairs division for further investigation. Of course, nothing happened.

We suggest that a substantial number of disciplinary actions escape error. Some of these actions, we have been successful in getting reversed. We have seen far too many cases where mid-level and administrative prison employees allow abuses of the disciplinary procedures to continue unchecked. These abuses might possibly decrease if more attention is paid to the disciplinary process. It is our observation that the units with fair disciplinary programs are usually the ones with the most enlightened administrative management.

If the Board is going to allow disciplinary actions to adversely affect an inmate's parole consideration, then fundamental fairness dictates that closer attention be paid to this aspect of a prisoner's life. AGAIN: If time credits are lost as a result of an unconstitutional disciplinary action, a Texas Code of Criminal Procedure, article 11.07, writ in state court is *not* the proper method of seeking relief. *See Ex parte Brager,* 704 S.W.2d 46-A (1986). *Brager* makes clear that the state courts no longer en-

tertain such claims or writs based on such claims. Once all administrative remedies are exhausted, the proper venue is to file a writ directly in the federal courts.

Difficulties Confronted by Lawyers Who Become Involved in Institutional Appeals of Disciplinary Actions

Due to time deadlines imposed in the administrative appeals of disciplinary actions under current prison administrative rules, it is difficult to represent an inmate during the administrative appeals stage of a disciplinary action. However, if you diligently and carefully take on such an effort, and if you know what you are doing, it can be very worthwhile financially, not to mention extremely beneficial to the client. Taking these actions on as writs may also prove to be worthwhile. For example, for a thorough examination of the typical problems that can result in an effort to reverse one of these actions, review *Broussard v. Johnson,* where the *only* evidence presented were conclusions given by the investigating officer—which were derived from the warden's opinion. 918 F. Supp. 1040 (D. Tex. 1996). Thus, a not-so-small hearsay problem was presented. *Also see Morgan v. Dretke,* where the evidence was not sufficient to support the loss of time credit. 433 F.3d 455 (5th Cir. 2005). All the Fifth Circuit requires to uphold a disciplinary action against a writ action is some evidence to support the disciplinary findings. *Id.*

The Law of Mandatory Supervision Prior to *Teague v. Quarterman,* 482 F3d 769 (5th Cir. 2007)

Mandatory supervision, as set forth in article 42.18, section 8(c) of the Texas Code of Criminal Procedure, was adopted by the Texas Legislature in 1976 for two reasons: first, to address a serious overcrowding problem at TDCJ, and second, to ensure that those inmates with serious criminal histories were not released from prison without some period of supervision. Initially, any inmate could gain mandatory supervision except one convicted of capital murder serving a life sentence. To obtain such supervision, all the inmate had to do was to earn flat time plus good time equaling the entire sentence. Upon reaching that total, an offender would be released on mandatory supervision. Once released, the offender would be required, while under supervision, to pay back—to the state—an amount of time equal to the good time credit earned that initially led to the release on mandatory supervision. Tex. Gov't Code §508.001(5).

In 1987, there began a series of amendments to mandatory supervision intended to limit access to this form of "early release"[1] for those inmates convicted of specifically identified violent crimes and sexual offenses. Of course, these were the same inmates who were telling the parole board, "To hell with supervision. I'll just do the whole sentence." Mandatory supervision was instituted, in part, to ensure that these inmates were supervised for at least some period of time upon release.

Inmates subject to mandatory supervision do not have to sign an agreement to comply with release conditions. Inmates who are released on parole, however, must sign such an agreement. With mandatory supervision, the parole board will not force the inmate to sign an agreement to release conditions. They simply release the offenders. Then, if a particular offender fails to meet the written terms imposed upon that offender's release, the board simply revokes parole.

On September 1, 1996, the mandatory supervision law was again amended, and the legislature created what is now called *discretionary* mandatory supervision (DMS). Cases prior to that date still retain the benefits of mandatory supervision. Under the discretionary mandatory supervision concept, before one can be released to mandatory supervision, any such offender must first seek and acquire the approval of the parole board. This was not the case under straight mandatory supervision. Certain due process protections attach to mandatory supervision of either type. *See Ex parte Geiken,* 22 S.W.3d 553 (Tex. Crim. App. 2000) (en banc). *Also see Teague v. Quarterman,* 482 F3d 769 (5th Cir. 2007).

In *Madison v. Parker,* 104 F3d 765 (5th Cir. 1997), the court first recognized that where good time credit had been taken as the result of a prison disciplinary action, one did have a "liberty interest" at stake and could, therefore, file to challenge the disciplinary action and loss of time credit so long as the inmate filing the action was eligible for release under mandatory supervision. Discretionary mandatory supervision was not addressed by the *Madison* court. The *Madison* rule has now been expanded. In March 2007, the Fifth Circuit revisited the *Madison* case in *Teague v. Quarterman,* 482 F3d 769 (5th Cir. 2007).

Prior to the *Teague* case, Fifth Circuit decisions bounced around the issue of discipline time credit loss and liberty interests. Under *Malchi v. Thaler,* 211 F.3d, 953 (5th Cir. 2000), *Richards v. Dretke,* 394 F.3d 291 (5th Cir. 2004), and *Madison v. Parker,* 104 F.3d 765 (5th Cir. 1997), when an inmate lost good time due to a prison disciplinary offense, there was little recourse unless that offender was subject to release under mandatory supervision *and* his release date had been adversely affected. In an opinion that brought significant relief to Texas inmates, *Teague* held that not only was the loss of an unconstitutional taking by discipline of time credit a loss; the court also expanded those covered by the "liberty interest" concept to include both mandatory supervision and discretionary mandatory supervision.

Beware of Plea-Bargaining Away Jail Time Credit!

The recent case of *Collins v. Texas* presents a new awareness for criminal defense lawyers. 240 S.W.3d 925 (Tex. Crim. App. 2007). There, the defendant agreed to a plea bargain wherein a certain number of days in jail was to be credited to the judgment and sentence as jail time credit.

For some reason not stated in the opinion, Collins had spent over two hundred days in jail in Louisiana, and a Texas detainer had been filed. This period of days subject to the detainer was not mentioned in the judgment or sentence, and the court, at the time of the plea, had acknowledged the requested jail time in the county of conviction *without* the Louisiana time being included.

Once in prison, Collins realized he was entitled to the additional time credit, and a nunc pro tunc was filed seeking that Louisiana time. The state objected to the nunc pro tunc on grounds that in this case, there was no "clerical error" to be corrected. The time granted was a part of the plea bargain. Sadly enough, the state won on this argument.

The lesson from this case is that when discussing jail time credit at the time of a plea, the defense lawyer should make clear—on the record—that his/her client's understanding of the plea agreement is that he gets every day of back jail time the laws of Texas allow . . .

The lesson from this case is that when discussing jail time credit at the time of a plea, the defense lawyer should make clear—on the record—that his/her client's understanding of the plea agreement is that he gets every day of back jail time the laws of Texas allow him to have. Do not get hung up on a specific number of days without the record reflecting the understanding that the client wants to make clear he expects *every day* of back jail time to which he is entitled.

Heads Up! Be Careful When Selecting the Proper Remedy to Recover Lost Time Credit (Do NOT file a writ! Instead, file a mandamus!)

When to Use a Nunc Pro Tunc

A judgment is rendered when the trial court officially announces its decision—either in open court or by written memorandum filed with the clerk—and the matter is submitted for adjudication. *Wittau v. Storie,* 145 S.W.3d 732 (Tex. App.—Ft. Worth 2004, no pet). Once the trial court loses plenary power over a judgment, only clerical errors may be corrected by judgment nunc pro tunc. *Escobar v. Escobar,* 711 S.W.2d 230, 231 (1986). When a prior judicial determination is evidenced, but the signed judgment inaccurately reflects the true decision of the court, the error is clerical and may be corrected. *Andrews v. Koch,* 702 S.W.2d 584 (1986). Although the question of whether a purported error in a judgment is judicial or clerical is a question of law, we must give deference to the trial court's factual determination regarding whether it previously rendered judgment and the judgment's contents. *Escobar,* 711 S.W.2d at 232. If the written judgment accurately reflects the judgment actually rendered by the trial court, then the written judgment *cannot* be corrected through judgment nunc pro tunc signed after the trial court's plenary powers expire. *In re Dickerson* holds that because the trial court *could* find that the judgment entered accurately reflected the judgment rendered in the case, it could deny Dickerson's motion for entry of the nunc pro tunc. 259 S.W.3d 299 (Tex. App.—Beaumont 2008).

Aside from the problem with plea bargaining presented in cases such as *Collins,* when attempting to collect jail time credit not included in an inmate's time calculations, the inmate should file, under the cause number of the conviction, a nunc pro tunc[2] motion in the convicting court where the time credit is sought. *McGregor v. State,* 145 S.W.3d 820 (Tex. App.—Dallas 2004). If the nunc pro tunc is denied, it should be litigated only by mandamus. Do *not* attempt to claim such time credit by writ of habeas corpus.

When to Use an Appeal, Mandamus, Writ, or a Motion for a Nunc pro Tunc

When to use the mandamus and when to use the remedy of appeal was raised in *Abbott v. State,* 245 S.W.3d 19 (Tex. App.—

Waco 2007). There, the jury awarded probation to a sex offender and the judge gave him 180 days in jail. (Abbott spent 720 days in jail while the appeal was pending.) Prior to filing his appeal, Abbott filed a motion with the court seeking credit for the 180 days he had already served. The court refused to grant him that time credit. Abbott filed an appeal on the case that included the issue of time credit.

In *Abbott,* the state argued the court had no jurisdiction. The state also argued the proper remedy was nunc pro tunc, followed by the filing of a mandamus if the nunc pro tunc was denied. The court addressed these issues and cited *Watson v. State,* 942 S.W.2d 723 (Tex. App.—Houston [14th Dist.] 1997, no pet.), and article 42.03, section 3 of the TEXAS CODE OF CRIMINAL PROCEDURE. The *Watson* case was cited as authority by the *Abbott* court. The *Watson* court pointed out that mandamus only applied if no other remedy was available. Here, appeal was available, and there was little to no difference in a nunc pro tunc, and a motion for time credit is little different from a motion to amend probation conditions in this case. The motion was denied, and the court held that an appeal was the proper remedy. Time credit was granted. The court agreed that Abbott could obtain relief by appeal. Thus, section 3(a) of article 11.072 of the Texas Code of Criminal Procedure precluded Abbott from filing a writ.

The remedy of mandamus for jail time credit is specific. For example, one cannot combine issues in a writ of habeas corpus by first challenging a conviction and then including, in that same writ, a claim that one's time credit has been wrongly calculated. The time credit issue for jail time can be directly sought via a nunc pro tunc motion. Otherwise, if trying to deal with the time credit issue through the prison administrative procedure—unless the inmate is within six months from release—this issue *must be* dealt with through a specific administrative approach. Most commonly, it is attempted via a nunc pro tunc or, once administrative efforts are exhausted, by mandamus. *Ex parte Deeringer,* 210 S.W.3d 616 (Tex. Crim. App. 2006).

As the *Deeringer* case reflects, the appeals courts have become very particular about the claiming of time credit via habeas corpus. *Do not use a writ of habeas corpus.*

The correct approach is to first, marshal your evidence; then, file a nunc pro tunc in the convicting court using the original cause number. *If this approach fails, then file your writ of mandamus.*

Mandamus actions can be tricky for indigent inmates representing themselves, and the rules in these types of actions are very specific. *See In re Watson,* 2007 WL 270418 (Tex. App.—Amarillo 2007).

Ex parte Dunlap provides yet another example of an endeavor couched in improper pleading to recover jail time credit. 166 S.W.3d. 268 (2005). Dunlap was in jail in Austin for over three years before his case was resolved. Finally, he was sentenced to a three-year sentence. From the offender's standpoint, he had earned the necessary time served. It appears Dunlap did not file a judgment nunc pro tunc, which should have been done. Instead, he just filed a direct writ of habeas corpus with the trial court.

However, TX. GOV'T CODE, section 501.0081, requires that an "inmate who alleges that time credit on his sentence is in error" must first present his claim to the TDCJ office of time credit so that the issue can be considered in terms of an administrative resolution. There is an administrative procedure for this action (Administrative Directive AD-04.83). Here, Dunlap filed a writ of habeas corpus seeking credit for his three years in jail—which, if granted, would have terminated his sentence. He claimed that for purposes of the statute, he served his prison time and was no longer "an inmate." After reviewing several sources to determine the meaning of the term "inmate," the court determined that Dunlap was, indeed, an inmate. (*See* TEX. GOV'T CODE §508.081(2)(C)(I).) Therefore, he had to first exhaust *all* of his administrative remedies; or, instead, he could have filed a motion for judgment nunc pro tunc in the trial court. If he had not succeeded at this point, then his next step, in order to recover his claimed time credit, should have been to file a Writ of Mandamus.

Good Time Benefits Arising from Time Spent in Jail

Misdemeanor Time Issues

In *Jones v. Texas,* the Houston Court of Appeals held that a court cannot control good time credit as pertaining to misdemeanor

jail terms. 176 S.W.3d 47 (Tex. App.—Houston [1st Dist] 2004). Jones was on probation for a Class "A" misdemeanor charge of theft by check. The state filed a Motion to Revoke Probation, subsequently granted. Jones then received a sentence of 180 days in county jail. The Houston court also ordered Jones to serve the 180 days on a day-by-day basis with *no* good time credit. The court held that under article 42.032 of the TEXAS CODE OF CRIMINAL PROCEDURE, the sheriff in charge of each county jail may grant commutation of time for good conduct, industry, and obedience deduction, not to exceed one day for each day of the original sentence (assuming no misconduct on the part of the inmate). The *Jones* court further held that the trial court has no authority to limit the sheriff's authority. *See Bell v. State,* 881 S.W.2d 794 (Tex. App.—Houston [14th Dist.] 1994) and *Kopeski v. Martin,* 629 S.W.2d 685 (Tex. App.—Houston [1st Dist.] 1982). The sheriff has sole discretion to award good conduct credit. A sheriff is a member of the executive branch, and any attempt on the court's part to interfere in this area could possibly result in a violation of separation of powers. *Ex parte Hall,* 838 S.W.2d 674, 676 (Tex. App.—Dallas 1992).

Plea Bargains

Ex parte Olivares, 202 S.W.3d 711 (2006): The court upheld a plea deal wherein Olivares, as part of a plea bargain, originally agreed to waive his jail time credit. He then attempted to reclaim this time. Here, the court held that no jail time credit would be afforded where a plea deal included a waiver of such time credit.

For an informative review of when jail time credit is permissible, mandatory, or optional according to the court's discretion, *see Broussard v. State,* 2007 WL 841029 (Tex. Crim. App. 2007).

Ex parte Harris holds that an inmate who cannot make bond gets his jail time credit. 946 S.W.2d 79 (1997); *see also Ex parte Bates,* 978 S.W.2d 575 (1998). The *Bates* case held that to deny a defendant credit for a period of confinement between arrest and judgment on a motion to revoke community supervision would violate due course of law under the Texas Constitution. TEX. CONST. art. I, §19.

Credit for Time Spent on an American Fugitive Warrant in Another Country Before Extradition to the United States[3]

Ex parte Rodriguez, 195 S.W.3d 700 (2006): An inmate may now get credit for time served in a foreign country when Texas requests the assistance of the United States government in obtaining the arrest and extradition of an offender from that foreign country. In *Rodriguez,* Texas sought assistance from the U.S. Department of Justice in arresting Rodriquez, who was hiding out in another country. Federal officers filed a fugitive warrant in the other country, and Rodriquez was subsequently arrested and held in jail for quite a while. Upon his return to Texas and his incarceration, Rodriguez claimed the fugitive warrant issued by the feds was an action filed by an arm of the State of Texas. The state argued that the action was not a detainer. The court ruled in favor of Rodriguez. Steve Lieberman, a Houston TCDLA member, filed this writ after going through all the crap required to obtain evidence to prove his case. It appears that in foreign jurisdictions, gathering proof sufficient to uphold cases of this nature is, inherently, a problem. Lieberman needed the warrant, the arrest records, the time in spent in a foreign jail, and anything else he could find in order to meet his burden of proof. Lieberman told us this was easier than he had anticipated: Once he had a handle on the matter, the federal government had most of this information, acquired as the result of executing its fugitive warrant.

Rodriguez is also important because the court also indicated any valid "hold" is sufficient to serve as a "detainer" for purposes of the jail time credit issue.

Special Problems with Time Credit Issues, Stacked Sentences, and Multiple Jurisdictions

Disiere v. Dretke, 2004 WL 2913352 (5th Cir. 2004): In 1999, Disiere was serving a state burglary sentence. In 2000, he was charged with the federal offense of making a threat against the president. The feds imposed a sentence of thirty months, stacked on top of the state case. After receiving his federal sentence, Disiere, while still in state custody, was then charged with possession of a deadly weapon and given an additional four-year state sentence. This sentence was automatically stacked under Texas law. Thus his sentences were

1. State burglary (1999); and
2. Threat against the President (2000) stacked on the burglary; and
3. a stacked possession of a deadly weapon charge in a prison facility.

Upon completion of his first state sentence, Disiere was not transferred to federal custody. He then filed a writ. The Fifth Circuit held he had to remain in state custody, and then he had to do his federal time upon completion of the two state sentences.

Which Jurisdiction Gets Priority Custody When a Defendant Is Charged with Dual Crimes and Subsequently Faces State and Federal Prosecutions?

United States v. Hernandez Jr., 234 F3d 252 (5th Cir. 2000): Hernandez was charged and subsequently arrested by the State of Texas. The general rule here is that the jurisdiction of the initial arresting agency has the first claim for imprisonment when the accused is involved in multi-jurisdictional charges (*i.e.*, state *and* federal charges are pending). While Hernandez was in state custody awaiting state trial, he was charged on a separate federal charge. Hernandez then filed a habeas corpus *ad prosequendum* seeking to have the federal charges disposed of prior to the state charges being heard. On September 19, 1994, he was sentenced to a federal term of 188 months. At sentencing, the federal court did not indicate if the sentence was to be concurrent or stacked, in terms of his pending state offense (*see* 18 U.S.C. §3584). On October 5, 1994, Hernandez was given a twenty-year state sentence. Via a *clear* agreement with state prosecutors, the state sentence was to run concurrently with the previously imposed federal term. Hernandez next filed a motion asking the federal court to transfer him to federal custody so that he could reap the benefit of the federal time that was to run concurrently with his state sentence. Hernandez thought that since he was sentenced in the federal system, first and foremost, he would be sent to federal prison; then, once the state filed its detainer with the feds for the state sentence, he would get concurrent time on both sentences. Unfortunately, Hernandez thought wrong: His motion was denied. The court held that at a federal sentencing, there is no obligation to admonish the defendant that his sentences on multi-sovereign cases are stacked. In this fact pattern, *unless* the federal court orders the sentence to run concurrent with that of the other jurisdiction, and if the judge does not indicate the sentences are to run concurrently, the result is that the sentences will be stacked.[4] *See* 18 U.S.C. §3584.

It is imperative to note that in these joint jurisdiction cases, where the arresting *jurisdiction gets the first shot at prison assignment, the jurisdiction of arrest can change.* For example, where a defendant who makes bond on a federal indictment and then gets arrested (while on federal bond) on a new state case—and no bond is made from the state arrest—the jurisdiction of arrest can change. In such a case, the defendant could very well go to state prison first *before* he serves his federal sentence, *even if* he is sentenced in federal court first. The theory is that when bond was granted, the feds forfeited their claim of first jurisdiction.

There is another exception to this rule: In *United States v. Lynch,* pursuant to 18 U.S.C. §922(g)(1), the defendant was subject to a fifteen-year mandatory minimum. 378 F.3D 445 (5th Cir. 2004). Lynch also had state charges filed for behavior arising from the same factual allegations as the federal case. Under 18 U.S.C. §924(e)(1), the federal court imposed a 210-month sentence that was to run consecutively with any state sentence that might be imposed. Lynch appealed, and successfully argued, that the federal court failed to apply USSG, section 5G1.3(b), which prohibits stacked sentences that result from "offenses that have been fully taken into account in the determination of the offense level" for the federal offense. The case was returned to the federal court for resentencing.

Retaining Street Time Credit on Parole After Revocation

Ex parte Noyola, 215 SW3d 862 (2007): Here, the issue was Noyola's right to keep street time earned from 2002 to 2004 while on parole. Noyola was serving a fifteen-year sentence for burglary of a habitation. He also had a 1992 sentence for aggravated assault on a peace officer (a third-degree felony). Under §508.283(c) of the Texas Government Code, the dates of the convictions here are important: Noyola's eligibility for street time credit is controlled by the particular language of the Texas Government Code, section 508.149(a), in effect at the time the blue warrant for revocation was issued. At the time of Noyola's 1992 conviction for aggravated assault of a peace officer in the third degree, this offense was not one of the enumerated offenses in section 508.149(a). Also, when his parole was revoked, Noyola's offense was not a precursor offense to the first- and second-degree felony offenses listed in §508.149(a). (In 1992, under §22.01 of the Texas Penal Code, aggravated assault on a peace officer required the showing of a weapon.)

Finally, the remaining portion of Noyola's paroled sentence was less than the amount of time he spent on parole (he had done over 50% of his parole time.) Therefore, he got street time credit for the period of time he spent on parole between the years 2002 and 2004.

The point here is that the controlling issue is *not* what was on the list *at the date of conviction*, but what was on the list of section 508.149(a) of the Texas Government Code at the time the blue warrant was issued.

In a Stacked Sentence, When Does One Sentence "Cease to Operate" and When Does the Second Sentence Begin to Run?

When an inmate is simultaneously incarcerated on more than one case prior to conviction on a subsequent case that has been ordered stacked, there are problems in awarding presentence credits. *See* article 42.08 of the Texas Code of Criminal Procedure; *Ex parte Bynum,* 772 S.W.2d 113 (1989); *Ex parte*

Hernandez, 845 S.W.2d 913 (1993).

In *Bynum*, the court indicated when an inmate is given stacked sentences, he is entitled to jail time credits on *each* sentence where he was simultaneously held on two or more indictments resulting in stacked sentences. *See Bynum* and *Ex parte Voelkel*, 517 S.W.2d 291 (1975). For example, assume a defendant is jailed after an initial arrest and cannot make bond. Then, thirty days later—after his initial indictment—he is charged with a second offense. A year later, this defendant goes to trial on the first offense and is convicted. A month later, he enters a plea on the second charge. The judge stacks the sentences. The offender is entitled to jail time credit from the date of his original arrest as to his first conviction. He is also entitled to receive jail time credit on the second offense from the date charges are filed on the second offense. Thus, he gets jail time credit applied to *each* case at the time the sentences are stacked. This is known to the classification department at the prison as "Bynum time credit."

If a defendant is convicted on the initial sentence and sent to prison, and then is returned to face his pending second charge upon which he is subsequently convicted, he gets all time credited on both sentences up to the time of the imposition of sentence on the second case. These types of time credit issues are regular problems in the prison's classification department.

Credit for Time in Prison Prior to a Case Being Reversed and Prior to You Client Being Resentenced to Probation

Consider this situation: A sentence is imposed and the client serves several years. Much later, the sentence is reversed and probation is granted, but the court orders 180 days of jail time as a condition of probation. Can the client be credited for 180 days based upon the time he spent incarcerated prior to being resentenced? Yes, that credit *can* apply. *Ex parte Abbott*, ___ S.W.3d ___, 2008 Tex. Crim. App. LEXIS 856 (Tex. Crim. App. No. 1816-07 (Tex. Crim. App. 2007)

When a Sentence "Ceases to Operate" Can Be a Complicated Issue

For the basic rules related to when a sentence "ceases to operate," see *Ex parte Kuester*, 21 S.W.3d 264 (2000); *Ex parte Hale*, 117 S.W.3d 866 (2003); *Ex parte Ruthart*, 980 S.W.2d 469 (1998); *also see Ex parte Salinas*, 184 S.W.3d 240 (Tex. Crim. App. 2006).

Relevant Background Information

In September 1987, following a legislative change regarding the law of time credit, the prison determined *incorrectly* that it could continue to calculate parole eligibility on stacked sentences as it always had. Calculating parole eligibility was determined by adding the two or more stacked sentences together (*i.e.*, the first sentence was for seven years, the second sentence five years, stacked for a total of twelve years). The prison would then take the sum of the two stacked sentences and, to determine a parole eligibility date, figure a quarter of it to determine when the initial parole eligibility date would be. (In the above example, one fourth of twelve years would mean three years before this particular inmate was eligible for parole.[5]) While this is how the prison was applying the new law, this was *not* what the legislature intended when it amended this law in September 1987.

Finally, in 1993, this error was corrected when the Court of Criminal Appeals considered *Ex parte Wickware*, 853 S.W.2d 571 (1993) (en banc). After the *Wickware* decision, each sentence in a stacked order had to be separately considered for purposes of parole.

Under the *Wickware* rule, before one could start earning time credit on the second sentence (except for "Bynum jail time"), one had to parole or terminate the first sentence. Until recently, the rule was that one could not obtain mandatory supervision on any sentence in a stacked order except the final sentence in a series of convictions. The *Wickware* court ruled—in a nutshell—that when an inmate who has received stacked sentences is simultaneously confined on more than one sentence, the prison can implement time credit only on the first sentence in a stacked sequence. Then, the prison must recalculate the "calculated begin date" (CBD) and "maximum expiration date" (MED) each time that subsequent stacked sen-

tence commences. Or. the prison can retain CBD for the first sentence in sequence, classify pre-sentence credit on subsequent sentences as "bonus time" (under the law then in effect, which is no longer good law), and reduce the MED by the amount of that bonus time. This latter method, however, also requires recomputation of the CBD each time a subsequent stacked sentence commences since pre-sentence credit also affects the date that inmate becomes eligible for parole. (TEX. CODE CRIM. PROC. art. 42.03, Sec 2[a]). This became a real nightmare for the prison system. However, recent reconsiderations deal with cases where a series of stacked sentences include both pre- and post-1987 convictions, most notably *Ex parte Forward,* 258 S.W.3d 151 (Tex. Crim. App. 2008)) and *Ex parte Williams,* 257 S.W.3d 711 (Tex. Crim. App. 2008). These can be complicated issues and require serious review, as to when does one of these old stacked sentences "cease to operate." Under the *Williams* case, there may be a means by which your client can be granted mandatory supervision on the initial pre-1987 sentence *before* serving the post-1987 case. Both *Forward* and *Williams* are addressed in the conclusion of this article.

As mentioned above, at the time of the *Wickware* case, TDCJ was treating inmates with consecutive ten- and two-year sentences as a single twelve-year. In the case of Wickware, his calculated begin date (CBD) was April 30, 1990, and the prison indicated his sentence was twelve years with a maximum expiration date of April 30, 2002. The judgment reflected that credit was to begin from September 24, 1990 (the date of the commission of the offense) until the date of sentence, January 25, 1991. The second judgment reflects that Wickware was sentenced on June 25, 1990, with fifty-five days of "Bynum jail credit." The change in the law from 1987 resulted in little benefit to Wickware because the sum of the calculation did not total sixty years or more. The court pointed out, "[T]he requirement that parole eligibility be calculated separately for consecutive sentences, art. 42.18 Sec. 8(d), does not affect eligibility calculations unless the sum of the stacked sentences exceeds sixty years, as the date of eligibility on the final sentence is the same under either method of calculation above discussed." *Id.*

Part II of this article will conclude in the January issue.

Notes

1. Mandatory supervision has long been referred to by the media in Texas as "early release."

2. One should clearly understand the limitations that arise from the use of a nunc pro tunc. *Johnson v. State* provides a good review of the use of nunc pro tunc. 233 S.W.3d 420 (Tex. App.—Ft. Worth 2007).

3. Usually, the State Department will have the records as to dates of detention in foreign countries.

4. If the defendant was sent to federal prison, it is common practice for Texas to file a detainer against the defendant while she is still in federal prison. The filing of this detainer results in time credit being granted on the Texas sentence at jail time rates, unless the Texas sentence is specifically ordered to be stacked upon the federal sentence.

5. One had to earn one-fourth of the total sentence to be parole eligible.

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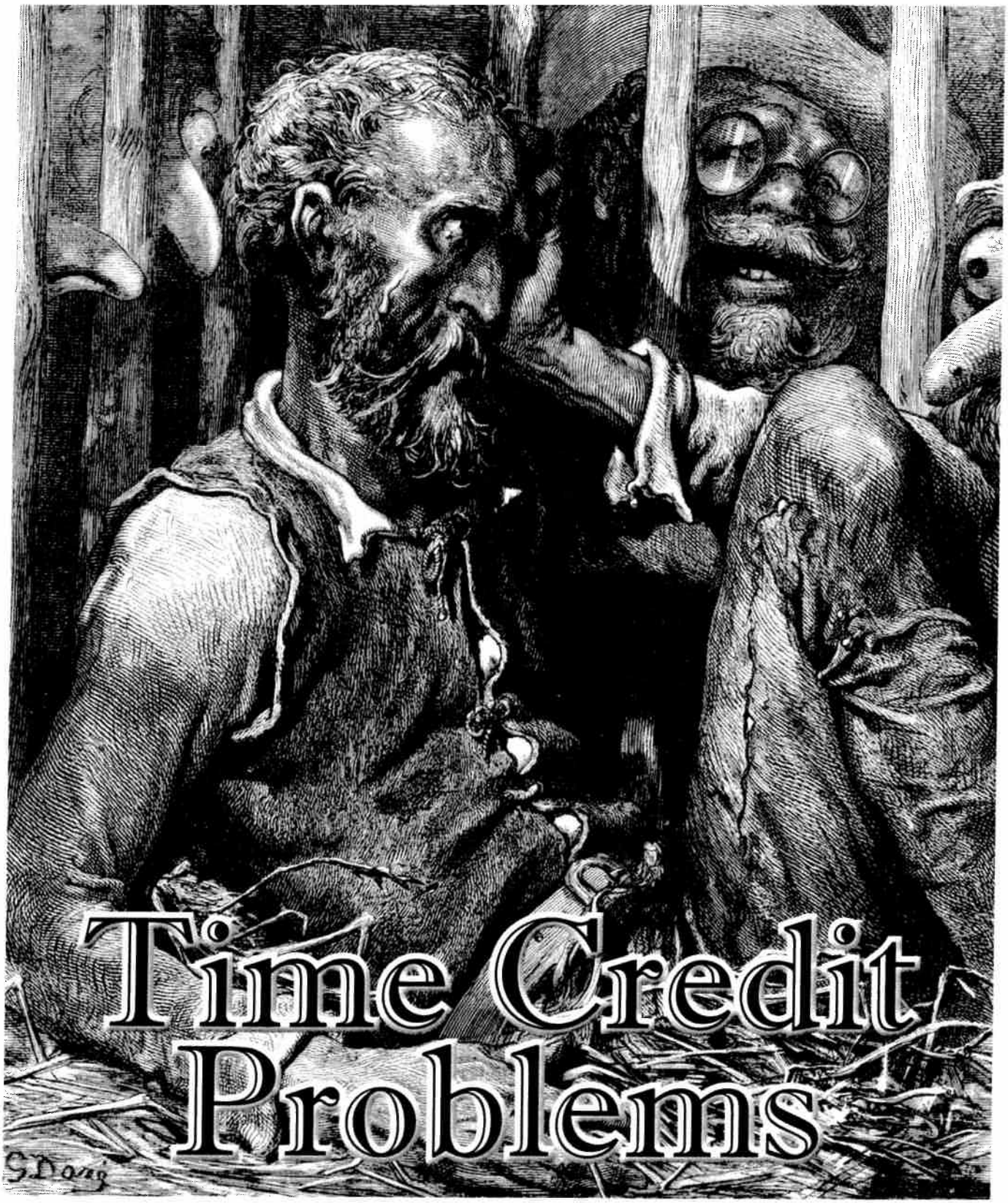


Time Credit Problems

& Other Issues in Texas Prison & Parole Law

~ Part 2 ~

Wm. T. Habern & David P. O'Neil

Handling Stacked Sentences When One or More Sentence Was Rendered Prior to 1987 (in Accordance with the *Forward* and *Williams* Cases)

Prior to September 1, 1987, for the purpose of determining eligibility for release on parole and mandatory supervision, and for the purpose of determining an inmate's final discharge date, consecutive sentences were "added together and treated as one sentence." *Ex parte Forward*, 258 S.W.3d 151, 155 (Tex. Crim. App. 2008). "This treatment was based on the definition of 'term' found in article 6181-1." *Id.* at 152.

The court in *Forward* addressed the complexity involved in dealing with stacked sentences:

> This case presents a complex problem involving the stacking of sentences and eligibility for mandatory supervision. What is important to keep in mind as we wade through a series of "savings clauses" is not to confuse the *when* of eligibility for release with the *whether* of eligibility for release. Running a sentence for a pre-1987 offense consecutively with a sentence for a post-1987 offense affects *when* an inmate is eligible to be released on mandatory but it does not affect *whether* the inmate is eligible on that sentence for mandatory supervision. Because the applicant in this case is ineligible for mandatory supervision on his second sentence, he cannot ever be released to mandatory supervision on that sentence.

Id. at 152–53.

In 1986, Forward committed an aggravated robbery. He was not convicted until 1992, when he was sentenced to 8 years. At the time Forward committed the robbery, this particular crime was subject to mandatory supervision. Forward was subsequently granted this relief. Then, in 1999 while on mandatory supervision, Forward was again arrested and convicted of being a felon in possession of a firearm. He subsequently received a stacked 10-year sentence for this second offense.

Considering the mandatory supervision release date for aggravated robbery as an *isolated* issue, TDCJ arrived at Forward's release date and then added the *entire* term of the second sentence (felon in possession of firearm) to the aggravated robbery sentence to arrive at an overall mandatory supervision release date. Thus, *TDCJ treated the second sentence as ineligible for mandatory supervision by delaying mandatory supervision release on the first sentence until the entire period of the second sentence had passed.*

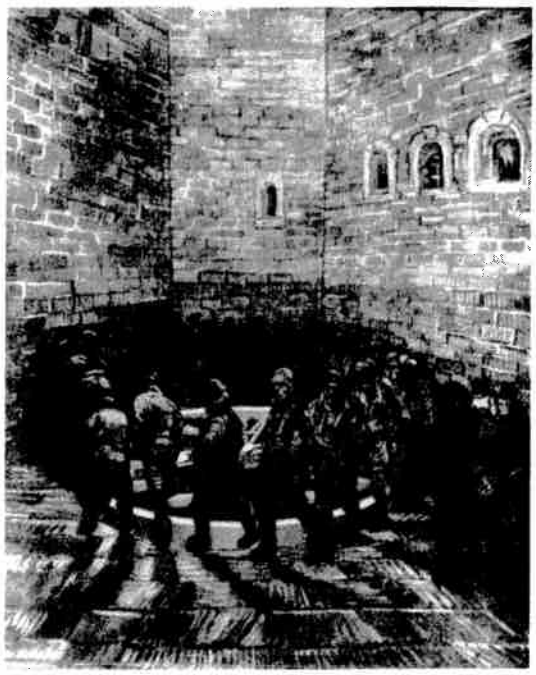
Forward claimed that both of his sentences should be added together and treated as a single 18-year sentence, making him immediately eligible for mandatory supervision. The *Forward* court notes that a "trial judge who stacks a sentence does so to punish the defendant more harshly than if the sentences were to run concurrently." *Id.* at 155. If Forward's position were adopted, the reverse would be true. *Id.*

In reaching its holding, the *Forward* court went through the progression of savings clauses that attached to the various amendments to the statutes that address stacking sentences and eligibility for mandatory supervision from 1987 through the post-1987 period. The court suggests these cases should be treated as though the defendant had a subsequent conviction while in prison, which would always result in sentences being stacked.

As it did in Forward's case, TDCJ should first calculate a release date for mandatory supervision for all mandatory supervision-eligible sentences as a unit, and then add to this date the length of any sentences that are ineligible for mandatory sentences to arrive at a final mandatory supervision date.

In *Ex parte Williams*, the appellant was first convicted for a murder that was committed in 1982; he was later convicted and sentenced to 10 years for possession of a weapon that occurred in a prison facility on August 19, 1988. 257 S.W.3d 711 (Tex. Crim. App. 2008). The weapon charge was stacked onto the murder charge. *Id.* at 711. Williams was later convicted of an August 13, 1990, aggravated assault on a corrections officer, for which he received another 5 years stacked on top of the prior 10-year sentence. *Id.* TDCJ took the position that Williams was not eligible for mandatory supervision on *any* sentence because of the aggravated assault on the corrections officer. *Id.* at 712. However, it is critical to note here that after 1976 and through the end of August 1987, only those convicted of capital murder

were exempt from mandatory supervision. Therefore, in this fact situation, Williams was eligible for mandatory supervision based on the murder charge. Here, in order to arrive at the overall, mandatory supervision release date for the first offense, the mandatory supervision date for the murder should be considered in isolation; then, the entire term of the second and third sentences should be added to this date in order to arrive at an overall mandatory supervision release date for the first offense. In this case, Williams did get mandatory supervision for the 25-year sentence he received in the murder case. Stated in its simplest terms, this is how TDCJ's classification department's formula worked: For the murder charge, 25 years + 10 years for the possession of a weapon in a prison + 5 years for the assault on corrections officer = 40 years. As of October 2008, Williams had served almost 20 years. Williams is also getting *Bynum* jail time credit on the stacked sentences and earning good time from the 1982 conviction, as per the law in effect at that time. *Ex parte Bynum*, 772 S.W.2d 113 (Tex. Crim. App. 1989). Even though Williams has lost over 1,700 days of time credit due to disciplinary actions, he will qualify for mandatory supervision in September 2009.



In *Ex parte Kuester*, the appellant was originally sentenced to a 10-year sentence for a 1988 burglary. 21 S.W.3d 264 (Tex. Crim. App. 2000). On September 1, 1989, while serving his time for the burglary sentence, Kuester struck a correctional officer. *Id.* at 265. On July 25, 1991, Kuester was convicted of aggravated assault. *Id.* Since all prison crimes are required to be stacked, this new 4-year sentence was to begin when the prior 10-year sentence "ceased to operate." *See* Tex. Crim. Pro.Art. 42.08(b). *Id.* at 271. From the date of his arrest *or* the date of his indictment, Kuester did get *Bynum* jail time credit for that time in prison from the date of the arrest or indictment on the second offense resulting in the 4-year sentence as "*Bynum* time credit." *Id.*

However, at the time of Kuester's second conviction on July 25, 1991, TDCJ was still miscalculating stacked sentence time. Thus, the miscalculation at that time read as follows: A 10-year sentence plus a 4-year sentence equaled a total of 14 years, divided in quarters to determine parole eligibility. Based on this miscalculated, stacked sentence, Kuester was released on parole on September 8, 1992. *Kuester*, 21 S.W.3d at 271.

Then in 1993, the Court of Criminal Appeals issued its ruling in *Ex parte Wickware:*

> (1) [The] practice of Texas Department of Criminal Justice, Institutional Division(TDCJ), in treating inmate's consecutive 10- and 2-year sentences as single 12-year sentence did not affect computation of his parole eligibility or deprive him of any right, notwithstanding statutory requirement that parole eligibility for stacked sentences be computed separately, and (2) when inmate was entitled to presentence credit for periods he was simultaneously confined on more than one cause, and when TDCJ chose for bookkeeping purposes to treat stacked sentences totaling no more than 60 years as single sentence equaling sum of their terms, TDCJ could not properly compute "maximum expiration date" (MED) by simply adding sum of stacked sentences to "calculated begin date" (CBD) for first sentence of stacked sentence.
> *Ex parte Wickware*, 853 S.W.2d 571 (Tex. Crim. App. 1993).

In spite of the *Wickware* holdings handed down in 1993, it was not until 1997 that the Prison Board finally became aware that since 1987, stacked sentences had been incorrectly calculated to the benefit of many inmates.

The *Kuester* decision has caused much concern for both defense lawyers and prison administration officials. *Kuester* may cause even more problems for parole agencies. While *Kuester* presents a complicated set of facts, it also provides some valuable lessons that demonstrate how the law in this area has developed. Even though the *Kuester* ruling was rendered in 2000, it has only been recently that the prison's classification department has taken *any* policy action pursuant to this critical ruling. So far, the new *Kuester* policy has affected over 400 inmates either on parole or who are still in prison.

In accordance with the *Kuester* holding, TDCJ is required to award all inmates pre-sentence jail time credits as reflected in their judgments, provided such credits do not pre-date the commission of the offense. *Ex parte Harvey*, 846 S.W.2d 328 (Tex. Crim. App. 1993). *See also Ex parte Hayward*, 711 S.W.2d 652 (Tex. Crim. App. 1993); *Harrelson v. State*, 511 S.W.2d 957 (Tex. Crim. App. 1974); *Ex parte Bynum*, 772 S.W.2d 113 (Tex.

Crim. App. 1989).

In the *Kuester* case, the rules set forth above became much clearer. On September 8, 1992, Kuester was released on parole from his 14-year sentence. He remained at liberty until August 29, 1993. On that date, a blue warrant was issued, his parole was revoked, and he returned to continue to serve his combined 14-year sentence.

In 1997, the Texas Prison Board realized stacked sentences committed after September 1, 1987, had been incorrectly calculated: The classification department had been treating these sentences under the old cumulative calculation rule rather than treating them as two separate sentences. In *Kuester*, the sentence should have been 10 years followed by a 4-year sentence and not a single 14-year sentence. *Id.* at 271. From 1997 forward, the prison was no longer permitted to accrue time credit for a consecutive sentence until the prior or original sentence "ceased to operate"—which meant either on a day-to-day calculation or until the first sentence was subject to a parole date so the second sentence could begin. *Id.*

Upon recalculating Kuester's sentence in accordance with these guidelines, it was determined that his 10-year sentence terminated on May 2, 1999. *Id.* at 265. Kuester claimed his parole release in 1992 was erroneous since the prison failed to correctly apply the law of stacked sentences. His second sentence—the 4-year one—was to be discharged on April 27, 2003. However, this date failed to credit Kuester with any *Bynum* time credit on the second sentence prior to being convicted on that offense, failed to grant him time served in prison before his initial release to parole, and failed to grant time spent while released on parole and/or much of the time he has served since parole revocation, as Kuester claimed his parole release in 1992 was erroneous since the prison failed to correctly apply the law of stacked sentences correctly.

The *Kuester* Court Discusses the Definition of "Ceases to Operate"

The *Kuester* Court concluded that the language of article 42.08(b) of the Texas Code of Criminal Procedure is ambiguous. In an effort to resolve this ambiguity, the court consulted extratextual factors. The *Kuester* court held there are two ways to "complete a sentence":

1) by serving it day for day, or
2) by having a parole date set that terminates the first sentence in order for the second sentence to commence—a decision made by a parole panel. *Id.* at 271.

Addressing Kuester's Erroneous Release

Kuester claims he should not have been paroled in 1992, but instead, should have been allowed to commence serving his second sentence. His parole was revoked on August 29, 1993. He then filed his writ seeking day-for-day credit for the time he was released due to the prison's incorrect application of the time calculations. Since he was legally paroled on September 8, 1992, Kuester argued that his initial 10-year sentence "ceased to operate" at the time he was paroled. He further contended he should be given credit for time served after his indictment on the second crime as *Bynum* time credit. Following this logic, his second judgment granted him 552 days of pre-conviction time credit, and he needed one-fourth the second sentence (4 years) to be parole eligible. *Id.* at 268. With 552 days of pretrial time credit, he would have been eligible for parole. However, he is not yet entitled to any post-sentence time credit on the second sentence.

Time credit problems arising from the *Kuester* ruling continued until recently. In 2007, due to the number of inmate lawsuits, the prison finally realized it had to adopt a different policy. In March 2007, a computer run showed over 400 inmates or parolees affected by the prison's belated compliance with the *Kuester* holding.

A critical issue in *Kuester* is the court's indication that if the inmate ends up being on parole for consecutive sentences, the prison must calculate the balances of any such sentences as if both were running at the same time. Under current TDCJ policy, the period of time on release to parole for both sentences will be served concurrently. It cannot be reiterated enough: Time calculations are very complicated matters.

In studying the *Kuester* case, it would be prudent to give due diligence to Justice Keller's dissent.

Credit After Revocation

Texas law is well established that a defendant cannot be forced to serve a sentence in a piecemeal fashion. *See Ex parte Morris,* 626 S.W.2d 754 (Tex. Crim. App. 1982); *Ex parte Bates,* 538 S.W.2d 790 (Tex. Crim. App. 1976).

House Bill 1649 (Sec 508.283(c)) Tx Gov't Cd (time credit while on parole before revocation)

***Ex parte Spann,* 132 S.W.3d 390 (Tex. Crim. App. 2004).** An inmate may be able to keep his street time if he has served over 50 percent of his parole term—but only if the crime committed is not specifically excluded by statute. However, this possibility applies only to those whose crimes are not discovered. This case applies to the Texas parole statute found at section 508.283(c)

of the Texas Government Code (also known as "HB 1649"), which went into effect on September 1, 2001. This statute does *not* apply to an offender who has a past or present conviction for any of the following offenses:

murder (first- or second-degree)
injury to a child, elderly, or disabled
arson
robbery (second-degree)
aggravated robbery
burglary (first-degree)
drug-free zone
any affirmative finding of a deadly weapon
capital murder
aggravated kidnapping (first- or second-degree)
indecency with a child (second- or third-degree)
sexual assault aggravated assault (first- or second-degree)
aggravated sexual assault
sexual performance by a child
continuous sexual abuse of a young child
super aggravated sexual assault

When parole is granted, and then later revoked prior to imposition of a stacked second sentence, upon revocation, the offender must begin serving that first sentence.

In *Ex parte Wrigley*, the issue considered was: Does an original sentence reach completion and a second stacked sentence begin to run at the time the defendant makes parole on the original sentence if parole is revoked before the trial court sentences the defendant to the second sentence? 178 S.W.3d 828 (Tex. Crim. App. 2005). The answer is "*No, it does not.*" In citing the *Kuester* case, the *Wrigley* court stated that "completion of sentence" under Tex. Code Crim. Proc. Art. 42.18(b) is the same as when a sentence "ceases to operate" under article 42.08(a). *Id.* at 272.

Under article 42.08(b), if a defendant's parole is revoked before the defendant is sentenced for the subsequently imposed stacked sentence, the stacked sentence does *not* begin to run on the date the defendant makes parole on the original offense. Thus, Wrigley's 7-year stacked sentence for the aggravated assault did not begin to run on his parole date of November 12, 1993 because his parole was revoked *before* his stacked sentence was imposed. Wrigley also claimed that under his plea bargain, the 7-year stacked sentence was to begin on the date his parole commenced. However, the court's record made no mention of any such agreement incident to the plea. In order for a defendant to show the plea was involuntary, he or she must show that the element of the failed plea was negotiated and that the element of the failed plea became a substantial part of the plea bargain.

***Ex parte Snow*, 899 S.W.2d 201 (Tex. Crim. App. 1995)** Snow was convicted, imprisoned, and then paroled. While Snow was in prison, a detainer for another pending crime was filed. Once paroled, Snow was tried on the detainer and was convicted. The court held that since the detainer was in place at the time of parole, Snow's parole could not be "revoked solely because the releasee was convicted of an offense committed prior to release." *Id.* at 202.

When considering stacked sentences, the Court of Criminal Appeals has determined that per article 42.08(a) of the Texas Code of Criminal Procedure, once a first sentence is paroled or terminated, the second sentence begins. If the offender is later revoked on the first sentence, the sentences begin to be served concurrently.

***Ex parte Ethridge*, 899 S.W.2d 206 (Tex. Crim. App. 1995)** While on parole, Ethridge was convicted of a new offense. However, the board chose not to proceed with a revocation hearing. Nonetheless, when Ethridge reached TDC, the prison classification department took it upon themselves to process Ethridge as an offender whose probation had been revoked. And, of course, this meant he lost his street time as well as his other good time credit. The court held that only the parole board can revoke parole, and thus, the prison's erroneous processing of Ethridge as having been revoked was without authority.

***Ex Parte Millard*, 48 S.W.3d 190 (Tex. Crim. App. 2001) (*en banc*)** Like *Kuester, Millard* deals with the complications that may be incurred when dealing with erroneous releases in stacked sentence cases. Millard had a stacked sentence and, prior to the beginning of his second sentence, was erroneously released from prison. In no way was Millard's early release due to any fault of his own. The court held that Millard was to receive day-for-day time credit *on both* of his stacked sentences equal to the amount of time he was released due to the prison's mistaken early release.

The *Millard* holding was later overruled by the court's ruling in *Ex parte Means*, 2004 WL 948379 (Tex. Crim. App. 2004) (unpublished opinion). Means, like Millard, was wrongfully released through no fault of his own. Millard claimed—in accordance with what had been the prevailing law in Texas for years—that he was entitled to time credit while he was released. The Court changed this rule and held that once a person begins serving a sentence, he or she continues to serve the sentence—either in prison, on parole, or mandatory supervision—until the sentence is discharged because no one gets day-for-day credit when released from prison erroneously.

***Ex parte Gabriel*, 56 S.W.3d 595 (Tex. Crim. App. 2001)** This case provides an example of how confusing the calculation of

time credit on stacked sentences can be after the *Kuester* and *Millard* rulings. The issue in *Gabriel* arose from the prison's miscalculation—by 17 days—of a stacked sentence. In a nutshell: Once parole is granted on a primary offense, then the balance of the time is calculated as if the sentences were concurrent. It is conceivable that this decision may be interpreted as a separation of powers problem due to the fact that if the board grants parole on the initial sentence, it then alters the "color" of the sentence from a stacked sentence to a concurrent sentence.

***Beedy v. Texas*, 250 S.W.3d 107 (Tex. Crim. App. 2008)** Beedy, a sex offender, faced multiple indictments. He entered into a plea bargain agreement and was sentenced to 12 years with a 10-year deferred adjudication stacked onto the 12-year prison sentence. The Houston Court of Appeals held the trial judge erred in ordering the deferred adjudication community supervision term to begin after the prison sentence ended. 194 S.W.3d 595 (Tex. App.—Houston [1st Dist.] 2006). The *Beedy* court deleted the cumulation order. The Texas Court of Criminal Appeals affirmed the lower court and held the state would fail in seeking to re-sentence Beedy. A deferred adjudication is *not* a conviction, and no re-sentencing would be had on grounds that an unlawful cumulation order does not constitute "reversible error" under article 44.39 of the Texas Code of Criminal Procedure. Instead, the cases were ordered to run concurrently.

Eligibility for release to mandatory supervision is governed by the law in effect at the time the first element of the offense was committed.

***Ex Parte Cowan*, 171 S.W.3d 890 (Tex. Crim. App. 2005)** Cowan was imprisoned on an 8-year term that began on April 30, 1984. During his 8-year term, Cowan was convicted of an offense in prison. As previously noted, all prison-related offenses are automatically stacked. He was given a stacked, 15-year sentence over his 8-year term. But for his new conviction, Cowan's 8-year term would have terminated with mandatory supervision on December 18, 1990. By the time his case reached the Court of Criminal Appeals, Cowan had completed his 8-year term by receiving day-for-day credit.

Cowan claimed that because his first sentence (the 8-year sentence that began in 1984) was subject to a *mandatory* supervision release (as opposed to *discretionary* mandatory supervision), his mandatory supervision date was December 18, 1990. Thus, according to Cowan's argument, his first sentence should "cease to operate" on the December mandatory supervision date, and his second sentence should begin to run on that same date. Under the *Ruthart* case, the Court of Criminal Appeals "rejected the claim that mandatory supervision is an an event which causes an inmate's first sentence to cease to operate." *Id.* at 893 (*citing to Ex parte Ruthart,* 980 S.W.2d 469, 471–74 (Tex. Crim. App. 1998)). Cowan was denied all relief.

The court's reasoning for denying Cowan's relief was predicated upon section 508.150(b)—the stacked sentence statute—of the Texas Government Code, which provides that a sentence "ceases to operate" when it is served out day-for-day or on that date when a parole panel designates relief from that sentence by granting a parole date. *Ex parte Ruthart* rejected the claim that mandatory supervision is granted on the first of a stacked sentence. 980 S.W.2d 469 (1998). Reaching a mandatory supervision date on the first sentence in a stacking order will not cause that first sentence to "cease to operate."

Mandatory Supervision vs. Discretionary Mandatory Supervision[1]

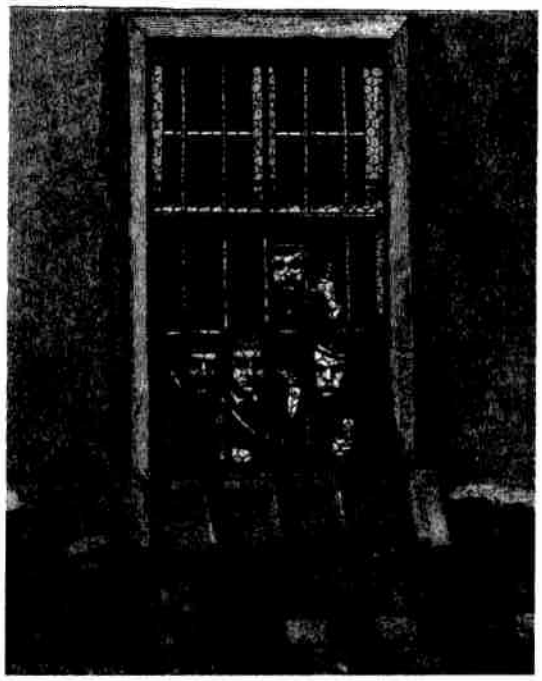
***Jackson v. Johnson*, 475 F.3d 261 (5th Cir. 2007)** After his mandatory supervision was granted and he was released to a halfway house, Johnson filed what was later held to be a frivolous federal civil action. Dismissing Johnson's claim as frivolous, the court imposed sanctions for Johnson's violation of the "three strikes and you're out" rule: The Prisoner Litigation Reform Act's "three strikes" provision prohibits an inmate from filing three baseless or malicious actions and/or three cases that fail to state a claim—unless the prisoner is in immediate danger. (This provision, of course, does not apply to writs.) Jackson claimed that since he was released on mandatory supervision, he is not a "prisoner" as that term is defined under the Prisoner Litigation Reform Act (PLRA) and he should, therefore, not be punished under the "three strikes and you're out" provision. The court held that as long as one is serving a Texas prison sentence, he is a "prisoner."

Burglary of a Habitation and Mandatory Supervision

***Ex parte Lindsey*, 226 S.W.3d 433 (Tex. Crim. App. 2007)** Whether or not an inmate convicted of burglary of habitation is eligible for mandatory supervision depends upon the date the first element of the offense was committed. In 1997, Lindsey was

convicted of aggravated assault under section 22.02 of the Texas Penal Code. Then, on October 10, 1994, Lindsey was convicted of burglary of habitation under Texas Penal Code section 30.02. As a result of this latter conviction, Lindsey was assessed 10 years in TDCJ. In 2003, Lindsey was released on mandatory supervision. Lindsey's supervision was later revoked and he returned to prison.

In 2005, TDCJ determined that Lindsey was statutorily ineligible for mandatory release because of the nature of his convictions, and thus, he was denied release. Upon this denial, Lindsey filed suit.



Eligibility for release to mandatory supervision is governed by the law in effect at the time the first element of the offense was committed. *Ex parte Coleman,* 59 S.W.3d 676 (Tex. Crim. App. 2001). In Lindsey's case, the law in effect at the time stated a prisoner could not be released to mandatory supervision if the prisoner was serving a sentence for a second-degree or first-degree felony under section 22.02 of the Texas Penal Code (aggravated assault). Lindsey, however, was convicted of a third-degree aggravated assault causing bodily injury. *See* Tex. Code Crim. Proc. Art. 42.18, §8(c)(5) as well as Tex. Penal Code §22.02 (a)(1), (c) (Vernon 1994).

The trial court determined Lindsey committed the burglary of a habitation on October 26, 1994. The findings of fact in this matter reflected that Lindsey had entered "a habitation . . . with the intention to commit a felony other than theft, namely, sexual assault." 226 S.W.3d at 434. While the burglary would have exempted Lindsey from mandatory supervision under the then-current statutory scheme, this law did not go into effect until 1996. *See* Tex. Gov't Code Ann. §508.149(a)(13) and Tex. Pen. Code Ann. §30.02(a), (d)). Therefore, *unless* Lindsey was convicted of a first-degree felony under section 30.02 of the Penal Code (burglary), the 1994 statute did not prohibit Lindsey from mandatory supervision if the offense was punishable under subsection (d)(2) or (d)(3) of that section. *See* Tex. Code Crim. Proc. Art. 42.18 §8(c)(11) (1994). *Id.* at 435.

Subsection (d) of the 1994 version of section 30.02 of the Texas Penal Code read as follows:

d) An offense under this section is a felony of the first degree if:

1) the premises are a habitation; or
2) any party to the offense is armed with explosives or a deadly weapon; or
3) any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building.

On remand, the trial court found that [Lindsey] had been convicted under Subsection (d) (1) and [was], therefore, eligible for mandatory supervision.
Id.

***Ex parte Thompson*, 173 S.W.3d 458 (Tex. Crim. App. 2005)** The issue of this case was "whether applicant's previous first-degree-felony burglary conviction makes him ineligible for release on mandatory supervision for his 2002 second-degree-felony burglary conviction." *Id.*

Prior to *Thompson:*

". . . all burglaries of a habitation were first-degree felonies . . . , but only those punished under Penal Code Subsections 30.02(d) (2) ('any party to the offense is armed with explosives or a deadly weapon'), or (d) (3) ('any party to the offense injures or attempts to injure anyone in effecting entry or while in the building or in immediate flight from the building'), were ineligible for mandatory supervision." *Id.* at 459 (citing to Tex. Code Crim. Proc. art. 42.18, §8 (c) (1987) (*repealed*); Tex. Code Crim. Proc. art. 42.12, §3(g) (1987).

In this case, Thompson had a prior burglary, and he had his current burglary (in TDCJ terms, the current offense being served is the holding offense). The "controlling statute" is the one in effect when the holding offense (here: second-degree burglary) is committed, and this determines an inmate's eligibility for release on mandatory supervision or parole. In this case, the holding offense was committed on October 10, 2002. Section 508.149(a) of the Texas Government Code was in effect and applied to Thompson. An inmate may not be released to mandatory supervision if the inmate is serving a sentence for, or has been previously convicted of, a first-degree felony under section 30.02 of the Texas Penal Code. In 2002, the holding offense in the *Thompson* case was not on the list. Only burglary of a habitation with intent to commit some felony other than theft was classified

as a first-degree felony. In this case, it is the 2002 list—and *not* the 1987 list—that determines an inmate's eligibility for mandatory supervision.

Current policy of TDCJ is to now look at the overall circumstances of the conviction. TDCJ has indicated this case affected some 4,000 inmates. Over 700 have already been released as a result of this case.

There are a series of cases similar to the *Thompson* issues of stacked or multiple sentences. Two such cases are noted below:

1) ***Ex parte Keller*, 173 S.W.3d 492 (Tex. Crim. App. 2005)** The issue here was whether or not, under section 508.283, a subsequent conviction for indecency with a child rendered Keller ineligible for "street time" credit for his earlier burglary offense. In holding that Keller's subsequent conviction did not render him ineligible for "street time" credit for his earlier burglary offense, the court concluded Keller was eligible for street time credit for the time he spent on mandatory supervision due to the nature of his holding offense. Keller's eligibility was due to the statute in effect at the time his burglary of a vehicle offense was committed.
2) ***Ex parte Mabry*, 137 S.W.3d 58 (Tex. Crim. App. 2004)** Because he was convicted in 1990, Mabry claimed he was not barred from mandatory supervision by section 508.149 of the Texas Government Code. "At the time of [Mabry's] conviction, all burglaries of a habitation were classified as first-degree felonies, regardless of the underlying offense, but only offenses punished under sections 30.02(d)(2) and (d)(3) [of the Texas Penal Code] . . . were bars to release on mandatory supervision." The saving clause of the amendments reflected a clear intention by the legislature to apply the old law to prisoners serving a sentence for an offense committed prior to the date this amendment went into effect, which was September 1, 1996. At the time of Mabry's offense, burglary was a first-degree felony *if* the premises were a habitation, or *if* any party to the offense was armed with explosives or a deadly weapon, or *if* any party to the offense injured or attempted to injure anyone in effecting entry, or while in the building or in immediate flight from the building. TEX. PENAL CODE §30.02 (1990) (amended by Acts 1993, 73rd Leg., ch. 900, §1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 318, §8, eff. Sept. 1, 1995; Acts 1999, 76th Leg., ch. 727, §1, eff. Sept. 1, 1999).

When Is It "Too Late" to File a Motion to Revoke?

Nesbit v. State*, 277 S.W.3d 64 (Tex. Crim. App. 2007)** The rule of this case is that the date probation is imposed is the date that probation starts to run. Thus, once a sentence of one year of probation is imposed, the probation runs until midnight 365 days later. In other words, the date probation is imposed is ***not excluded from that calculation.

Early Termination of Probation, Pardons, and Expungements

***Cuellar v. Texas*, 40 S.W.3d 815 (Tex. Crim. App. 2002)** This opinion stems from a PDR. *See* 40 S.W.3d 724 (Tex. Crim. App. 2001). Cuellar was placed on probation and subsequently received an early discharge pursuant to article 42.12 §20 of the Texas Code of Criminal Procedure. The Cuellar trial court ordered the defendant's conviction "set aside" and the charging instrument dismissed. 40 S.W.3d at 815. Later, after early discharge from probation, Cuellar was arrested in a hunting incident and was subsequently charged as a felon in possession of a firearm. *Id.* at 816–17. This opinion results from Cuellar's challenge of his *second* arrest on grounds that the action by the court—in dismissing him early from his previous probation under article 42.12, section 20—amounted to a judicial pardon.[2] In a decision with both significant concurring and dissenting opinions, the court held that article 42.12, §20, authorizes the trial court to grant clemency that releases the defendant from all penalties and disabilities stemming from the conviction. The *Cuellar* court points out there are two types of discharges under section 20. The type of discharge in the *Cuellar* case is referred to as a "judicial clemency." *Do not cite this case without first reading all the opinions by* all *of the justices.* Also *see Ex parte Murchison*, 560 S.W.2d 654 (Tex. Crim. App. 1978); *Ex parte Langley*, 833 S.W.2d 141 (Tex. Crim. App. 1992); *State v. Jimenez*, 987 S.W.2d 886, 888 n.2 (Tex. Crim. App. 1999); *Boykin, v. State*, 818 S.W.2d 782 (Tex. Crim. App. 1991).

In his dissenting opinion in *Cuellar*, Judge Keasler notes that an early discharge, under article 42.12, section 20, of the Texas Code of Criminal Procedure, *does* carry with it certain limitations. For example, a defendant released on judicial clemency cannot:

1) change his name until two years after community supervision has expired (TEX. FAM. CODE ANN. §45.103 (Vernon 1996));
2) practice law until five years after his community supervision has expired (TEX. R. GOV'T Bar Adm'n IV (West 2001) Rule IV(d)(2));
3) work at a bingo establishment until ten years after his community supervision has expired (TEX. OCC. CODE ANN. §2001.105(a)(6) (Vernon 2000);

4) obtain a lottery license until ten years after his community service has expired (Tex. Gov't Code Ann. §§411.171(4) and 411.172(a)(3) (Vernon 2001); *Tune v. Texas Dept. of Public Safety*, 23 S.W.3d 358, 362 (Tex. 2000))
5) be a corrections officer until ten years after the supervision has expired (Tex. Occ. Code Ann. §1701.312(b), 1702.371 (Vernon 2000));
6) and, in addition, may be denied a license as a speech pathologist or audiologist. (Tex. Occ. Code Ann. §401.453(a)(3) (Vernon 2001)).

Additionally, a defendant discharged under a judicial clemency may not, for the rest of his life:

1) work as a bail bond surety (Tex. Occ. Code Ann. §1704.153 (Vernon 2001); *Smith v. Wise County Bail Bond Bd.*, 995 S.W.2d 881, 883–84 (Tex. App.—Fort Worth1999, writ denied);
2) work as a peace officer (Tex. Occ. Code Ann. §1701.312 (b)(1) (Vernon 2001); Op. Tex. Att'y Gen. No. MW-148 (1980)), (*see Welch v. Texas ex rel, Frank Long, District Attorney*, 880 S.W.2d 79 (Tex. App.—Tyler 1994);
3) get the record expunged (*State v. Gamble*, 692 S.W.2d 200, 202 (Tex. App.—Ft. Worth 1985, no pet.);
4) obtain a license to carry a concealed handgun (Tex. Gov't Code Ann. §§411.171 (4), 411.172(a)(3) (Vernon 2001); *Tune v. Texas Dept. of Public Safety*, 23 S.W.3d 358, 362 (Tex. 2000));
5) avoid registration as a sex offender, if so convicted, and can still be subject to civil commitment if a sex offender (Tex. Crim. Proc. Code Ann. arts. 62.06, 62.10, 62.12 (Vernon Supp. 2001)).
6) refuse to inform an employer of any such conviction when asked about a criminal history (Op. Tex. Att'y Gen. No. JM-1237 (1990)).

Finally, the following consequences may also apply to any defendant discharged under a judicial clemency:

1) Under federal law, may be deported if an alien (*State v. Jiminez*, 987 S.W.2d 886, 889 n.2 (Tex. Crim. App. 1999));
2) the entire alleged criminal incident is still admissible at sentencing in a future trial (*Glenn v. State*, 442 S.W.3d 360, 362 (Tex. Crim. App. 1999)). In certain cases, the incident can be used to mandate a life sentence (Tex. Penal Code Ann. §12.42(c)(2), (g) (Vernon Supp. 2001); *Price v. State*, 35 S.W.3d 136 (Tex. App.—Waco 2000, no writ);
3) the entire alleged criminal incident may also be used to enhance an assault conviction from a class "A" misdemeanor to a third-degree felony (Tex. Penal Code Ann. §22.01 (b)(2), (f) (Vernon Supp. 2001));
4) such release serves to prohibit the pardoned defendant from receiving community supervision upon a future conviction (*Taylor v. State*, 612 S.W.2d 566, 571 (Tex. Crim. App. 1981)); and
5) the pardoned defendant may not be serve as an executor of a will under section 78 of the Texas Probate Code.

Footnotes 87 through 93 of the *Cuellar* opinion list some statutes that provide certain rights that shall be reinstated to any defendant who successfully completes community supervision. For example:

1) any such defendant may serve on a jury (*Walker v. State*, 645 S.W.2d 294, 295 (Tex. Crim. App. 1983); *Payton v. State*, 572 S.W.2d 677, 679 (Tex. Crim. App. 1978); Op. Tex. Att'y Gen. No. M-640 (1970). *But see R.R.E. v. Glenn*, 884 S.W.2d 189, 194 (Tex. App.—Fort Worth 1994, writ denied));
2) any such defendant can vote (Tex. Elec. Code Ann. §13.001 (a)(4) (Vernon Supp. 2001);
3) any such defendant can hold elected office (Tex. Elec. Code Ann. §141.001 (Vernon 1986);
4) any such defendant can be a notary public (Tex. Gov't Code Ann. §406.009 (e) (Vernon 1998); and
5) any such criminal incident may *not* be used for impeachment of any future testimony proffered by the defendant (*Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Trippell v. State*, 535 S.W.2d 178, 180 (Tex. Crim. App. 1976); *Parker v. State*, 384 S.W.2d 712, 714 (Tex. Crim. App. 1964). *But see Etheridge v. State*, 903 S.W.2d 1, 20 (Tex. Crim. App. 1994));
6) nor may any such criminal incident be used to enhance the punishment range pursuant to section 12.42 in any future trial (*Jordan v. State*, 36 S.W.3d 871 (Tex. Crim. App. 2001); *Ex parte Langley*, 833 S.W.2d 141, 143 (Tex. Crim. App. 1992)) (except for the mandatory life sentence provided for in subsection (c)(2).) (Tex. Penal Code Ann. §12.42 (g) (Vernon Supp. 2001)).

Sex Offenders and the Right to Be Parents

Last year, I spoke on the topic of our filing of a civil rights action in federal court in Austin. In this matter, we represented a parolee who had been convicted of possession of child pornography. This action was brought in accordance with the United States Supreme Court holding in *Wilkinson v. Dotson*, 125 S.Ct. 1242 (2005). On behalf of our client, we sued the Parole Board and

Parole Division because they would not allow our client to live at home with his wife and child due to the child pornography conviction. Our client was prohibited from living at home in spite of the fact that we had two psychiatrists who had executed affidavits suggesting that due to the facts of this case and their personal experience with this man, they deemed him absolutely no threat to children. The basis of our lawsuit was that prior to the board terminating our client's parental rights, he was afforded no right to due process. We prevailed in this matter (*Grant v. Owens,* No. A-05-CA-316-LY Western Dist. of Texas, Austin Div.), and we did so in the following manner: Before we put on any witnesses, the Board agreed to give us everything we sought. Not only did we win, but our suit also prompted the Parole Division to institute a new policy requiring due process rights be afforded before a termination of the parent-child relationship can be imposed. However, once the new due process policy was in place, we discovered that the new policy was seriously flawed. Furthermore, in our opinion, the new policy does not pass the constitutional muster of due process. We anticipate future civil rights litigation is necessary in order to address the sufficiency of due process in regards to the termination of parental rights.

Our client was prohibited from living at home in spite of the fact that we had two psychiatrists who had executed affidavits suggesting that they deemed him absolutely no threat to children.

The same due process procedures mandated by the *Grant* case were also previously mandated by *Coleman v. Dretke,* 409 F.3d 665 (5th Cir. 2005) (*en banc*) (also known as "*Coleman II*"). In *Coleman,* the issue was the level of due process that must be afforded to one who has no sex offense convictions but is, nonetheless, placed on sex offender supervision. We are now challenging this due process procedure in the case of *Graham v. Owens* currently pending in the Austin, Texas, federal court, Cause No. 1:08CV66-SS. During a temporary restraining order hearing conducted by Judge Sam Sparks, the Court stated the following in its order concerning Texas' Parole Board's policy regarding the *Coleman* due process as set forth in the *Graham* case:

> [T]he record establishes a panel of two Board members imposed Condition X (sex offender conditions) on the parolee, based on a 27-year-old charge on which Graham was never convicted and a psychological evaluation which Graham never saw, at a proceeding in which the Parole Division was allowed to present argument but Graham was not, with no assurance Graham's defense was actually reviewed by the voters. The Court has grave concerns over the fundamental fairness of these proceedings, in particular the Parole Division's policy of refusing to provide the parolee and/or his counsel with the parolee's psychological evaluation, which the Parole Division required and which may well serve as the basis for the imposition of condition "X."

Order signed January 23, 2008 in *Graham v. Owens,* Cause 1:08CV66-SS, case pending in Federal District Court, Western District of Texas, Austin Division)

We are hopeful that with the *Graham* case and the two other cases currently headed to trial in Austin, we will prevail in getting the current due process policy of these matters amended so that they afford *real* due process.

There are a string of cases about the termination of the parental rights of inmates. The two-year statute of limitations on these cases must be based on a specific event. The Amarillo Court of Appeals has now ruled that the two years starts to run after the petition to terminate has been filed. (*In the Interest of TBD,* 223 S.W.3d 515 (Tex. App.—Amarillo 2006, no pet.)

Defending the Non-Sex Offender Who Is Placed on Condition "X" in Spite of Current Due Process Dictates

Our firm is challenging the degree of due process afforded parolees who have no sex offense history, but are nonetheless placed on condition "X" (sex offender conditions). Currently, the Parole Board gives such a parolee a document that explains that the offender has thirty (30) days to provide, in writing, the reasons why the offender should *not* be placed on condition "X." The offender is ordered to submit to a psychological evaluation; yet neither the offender nor his counsel is allowed to see the results of that evaluation prior to the offender presenting his written statement. Neither are they allowed to be present when the Parole Board reviews the file. The state, however, *is* permitted to have a representative present from its sex offender division. As stated above, the validity of the current due process afforded in these cases is currently being challenged in cases pending in the Austin, Texas, federal court. (*Graham v. Owens,* #A08-CA-006-SS West. Dist. of Texas, Austin Division.)

A second, underlying issue currently pending before the

same Austin court addresses the issue of the offender who—in many years past—committed a sex offense and has no additional adverse sexual history. Then later, this same defendant is charged with theft, returns to prison, and is paroled. The issue here is whether or not the board can automatically place such a defendant on condition "X" simply because of an ages-old conviction for a sex offense. There is authority that suggest that such conditions not be imposed absent evidence that the offender has an ongoing sexual history. (*See United States v. Scott*, 270 F.3d 632 (8th Cir 2001); *United States v. Jimenez*, 275 Fed. Appx. 433 (5th Cir. 2008)(unpublished); *Williams v. Ballard*,466 F.3d 330 (5th Cir. 2006).[3]

Inmates and HIV Testing

Many inmates write our office to complain about having to be tested for HIV. Inmates *can* be forced to be tested for HIV. *See* section 501.054(i) of the Texas Government Code. *See also* Op. Tex. Att'y Gen. No. GA-0512 (2007). There is also a new rule that went into effect September 1, 2007, requiring inmates to provide samples of DNA before release. *See* section 411.148, Tex. Gov't Code. It is critical to note that this rule has been upheld. (*See Green v. Boyd*, slip op., 2008 Westlaw 2117671 (N.D. Tex. May 16, 2008); *Holliman v. TDCJ-ID*, not reported in F.Supp.2d, 2001 WL 167847, N.D. Tex. (January 22, 2001 (No. 2-00-CV-0291).

Additional Prison and Parole Issues

Exceptions to the Right of Access to a Law Library

***Johnson v. Texas*, 257 S.W.3d 778 (Tx. App.—Texarkana 2008, pet. ref'd.)** Johnson appealed a conviction wherein he had been afforded court-appointed counsel but subsequently decided to proceed *pro se*. Johnson later recanted and entered a plea aided by counsel's assistance. Johnson's appeal was later filed. Among other issues, Johnson claimed he was denied his Sixth Amendment rights due to the fact that he was denied access to a law library. The Texarkana Court of Appeals held that Johnson was entitled *either* to appointed counsel *or* access to a law library. In this particular fact situation, since Johnson had earlier rejected court-appointed counsel, he was *not* then entitled to access to a law library. The original access to a law library case, *Bounds v. Smith*, 97 S.Ct. 1491 (1977), was overruled on other grounds by *Lewis v. Casey*, 116 S.Ct. 2174 (1996). In *Lewis*, the court explained that Bounds "did not create an abstract, freestanding right to a law library," and that Bounds "does not guarantee inmates the wherewithal to transform themselves into litigation engines." *See also United States v. Whittington*, 269 Fed. Appx. 388, 406 (5th Cir. 2008); *United States v. Godwin*, 84 F.3d 768, 769 (5th Cir. 1996).

Parole: The Opportunity to Be Heard and the Right to Notice of Decision

In *Johnson v. Wells*, the court reviewed many of the deficits in the lack of rights that attach in the granting of parole to Texas inmates. 566 F.2d 1016 (5th Cir. 1978). The Court addressed the following critical issues in its opinion:

> [T]his court has already held that the refusal to allow a Texas state prisoner a hearing before the Parole Board, and the lack of a written statement of the reasons for the Board's decision, do not amount to the deprivation of constitutional rights. *Shaw v. Briscoe*, 541 F.2d 489 (5th Cir. 1976). The printed form used by the Texas State Parole Board to notify a prisoner of the reasons for his parole denial has been held to be sufficient to comply with whatever due process rights a prisoner may have to be informed concerning the justification as to exactly why he was denied parole. *Craft v. Tex. Board of Pardons and Paroles*, 550 F.2d 1054 (5th Cir. 1977).

Can a Sex Offender Parolee Who Fails to Register for Six Consecutive Months Be Charged with Six Separate Offenses?

***Villanueva v. Texas*, 257 S.W.3d 527 (Tex. App.—Austin 2008)** Villanueva was allowed to move from one work release facility to another in Austin. When Villanueva's parole officer went to meet Villanueva—as agreed—at an Austin bus station, Villanueva was not there. He continued to be "MIA" for the next

six months (meaning he failed to register pursuant to article 62.051 of the Texas Code of Criminal Procedure). Villanueva was eventually arrested. He was charged with six separate offenses of failure to report. However, on appeal, the court found that due to the lack of proof of any such activity as to the last five of those counts, there was no evidence to support the claim that defendant moved every month between May and October, and *nothing* in the statute supported the State's decision to allege a new offense for the same action on a monthly basis, save and except for the first of the six months.

***Wallace v. Quarterman*, 516 F.3d 351 (5th Cir. 2008)** In 1981, Wallace was sentenced to life on a capital murder case. At that time, the parole eligibility rules required that for parole to be granted, two out of three members of the parole panel must vote in favor of parole. Many years later, when Wallace was finally eligible for parole, the statute changed in that it only required that to be paroled on a life capital murder sentence, the defendant must be favorably voted on by two-thirds of the total parole board (meaning there was a change from the requirement that the offender win two of three board panel votes to twelve of eighteen votes at the time this parole was considered)—which, of course, made parole much more difficult to obtain. Wallace claimed this violated his *ex post facto* protections. The *Wallace* court—in its reliance upon *Portley v. Grossman*, 444 U.S. 1311 (1980), *Simpson v. Ortiz*, 995 F.2d 606 (5th Cir. 1992), and *Sheary v. United States*, 822 F.2d 556 (5th Cir. 1987)—held that Wallace could not prevail due to the fact that he had failed to prove that the same two board members who originally voted in his favor would have voted the same way the next time they voted on his case had the panel been three members instead of eighteen. The *Wallace* case was affirmed in *Kyles v. Quarterman*, 291 Fed. Appx. 612, 2008 WL 4111405 (5th Cir. 2008)(unpublished).

***Harty v. Texas*, 229 S.W.3d 849 (Tex. App.—Texarkana 2007)** Even where there is an agreement to not disclose the contents of a polygraph examination, what the parolee has told the polygraph operator *can* be disclosed and the polygraph operator will be permitted to testify to such information—so long as the content and/or results of the polygraph itself are not disclosed. The court's ruling herein is based upon article 8.22, section 5 of the Texas Code of Criminal Procedure, which allows voluntary statements relevant to the defendant's credibility to be used in cross-examination.

***United States v. Locke*, 482 F.3d 764 (5th Cir. 2007)** Here, the federal court held that using polygraph testing as a condition of federal probation does *not* violate any rights afforded by the Fifth Amendment.

As a result of the court's ruling in *Abdullah v. Texas*, a new game for jailhouse lawyers in prison has arisen. 211 S.W.3d 938 (Tex. App.—Texarkana 2007). Texas Government Code, section 501.014(e), allows the prison, on "notification by a court," to withdraw—from a prison inmate's trust account—any amount the inmate is ordered to pay from a designated list of expenses such as child support, restitution, court fees, fines, and other "court order, judgment, or writ." The court order at issue in *Abdullah* was *not* the result of civil litigation but, instead, was a summary bill of costs generated by the district clerk of Hopkins County that resulted from Abdullah's conviction and totaled $1,517.25. However, in Abdullah's original judgment of conviction, the space for "costs" was blank. The court held that this was a garnishment, and that the rules of garnishment apply. In Abdullah's case, however, these rules were not followed. Due process under the statute must apply, and inmates throughout Texas are now engaged in fighting these procedures. Texas Civil Practices and Remedies Code, section 63.007, allows a writ of garnishment to be issued against an inmate's trust fund account, but any such garnishment is subject to due process. This case is contra to the holding in *Crawford v. State*, No. 10-06-002-CR, (Tex. App.—Waco 2007)(unpublished), where, upon receipt of the order for payment, the inmate attempted *to directly file an appeal of that order of garnishment* to a Waco appeals court that had no jurisdiction. However, in *Ex parte Goad*, 243 S.W.3d 858 (Tex. App.—Waco 2008), the Waco court indicated it would grant inmate Goad's mandamus if the trial court in that case would proceed with the requisite due process.

***Ex parte McCurry*, 175 S.W.3d 784 (Tex. Crim. App. 2005)** McCurry was released to the Ben Reid Facility in Houston, which is a "halfway house," but—in reality—is a jail facility. Conditions in this facility are subject to regular complaints by those living there as a condition of parole. McCurry filed a writ claiming that having to live at Reid is "qualitatively different" from the punishment characteristically suffered by a person convicted of the crime, with "stigmatizing consequences." McCurry claimed that such a condition is not authorized by the parole statute. The court determined that McCurry failed to prove his allegations, and that the condition of living at the Reid facility was a proper parole condition.

***Green v. State*, Nos. 2-03-377/397-CR (Tex. App.—Ft. Worth 2005)(unpublished)** Defendant had the benefit of court-appointed counsel. Under section 26.05 of the Texas Code of Criminal Procedure, the court ordered the defendant repay $4,000 in court-appointed attorney's fees as a condition of parole. On appeal, it was argued that such an order was invalid. The point here is that in *Heredia v. State*, the court held, "The

decision to parole . . . is beyond the province of the courts . . . and is exclusively a matter within the province of the executive branch of government, under proper regulation by the legislative branch." 528 SW2d 847, 953 n.4 (Tex. Crim. App. 1975). *Heredia* was subsequently overruled on other grounds by *Sneed v. State,* which provided that the parole board shall determine conditions of parole and may impose any condition that a court may impose on a defendant placed on community supervision. 670 S.W.2d 262 (Tex. Crim. App. 1984); TEX. GOV'T CODE ANN., section 508, 441 (a)(2) .221 (Vernon 2004). *But see* TEX. CODE CRIM. PROC. ANN., section 42.037(h) (Vernon Supp. 2004), which provides that a parole panel must impose—as a condition of parole—the amount of restitution to a victim ordered by the trial court. In accord, *see Campbell v. State,* 5 S.W.3d 693, 696 n.6 (Tex. Crim. App. 1999).

Notes

1. In Texas, mandatory supervision is defined as "the release of an eligible inmate sentenced to the institutional division so that the inmate may serve the remainder of the inmate's sentence, not on parole, but under supervision of the pardons and parole division." TEX. GOV'T CODE §508.001(5). For a discussion of the history of mandatory supervision and discretionary mandatory supervision, *see Teague v. Quarterman,* 482 F.3d 769 (5th Cir. 2007).

2. This is a very important case in that it reviews the meaning of a "pardon granted" and/or what rights shall continue to be limited after the dismissal from probation under article 42.12 §20. This case, too, should be studied in great detail.

3. While this paper was being revised, the Texas Court of Criminal Appeals issued its holding in *Ex parte Campbell,* 267 S.W.3d 916 (Tex. Crim. App. 2008). There, in a 5–4 decision, the court held—even after the Coleman ruling—that the current Texas Parole Board policy still does not meet constitutional requirements. This case appears to be contra to the holding of the court in the Graham case (*supra*).