



**PART I**

**TIME CREDIT PROBLEMS**

**AND OTHER ISSUES IN**

**TEXAS PRISON AND PAROLE LAW**

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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 SAFP 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 SAFF 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 con-

victions. 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).

### 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.

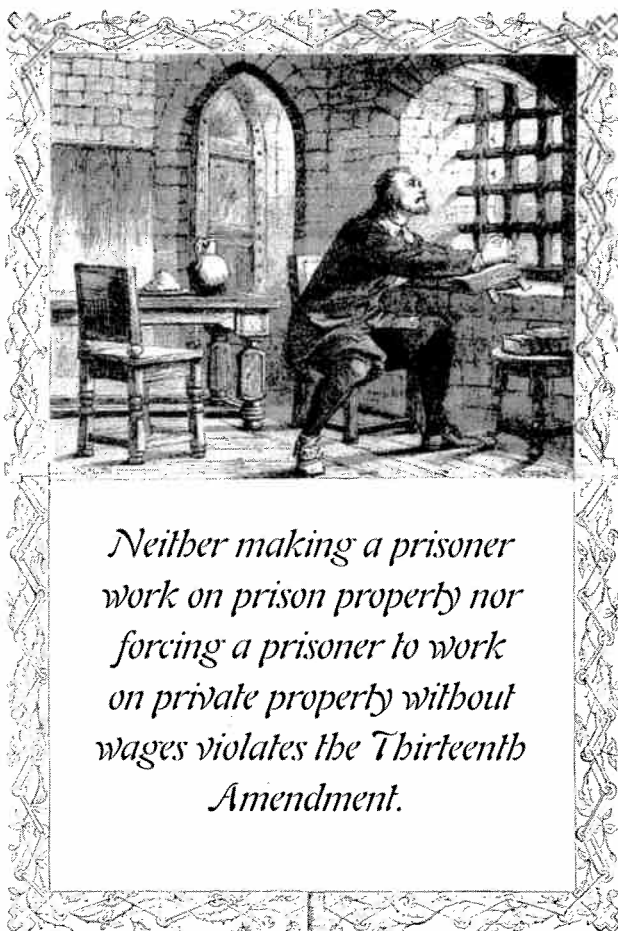
The requisite procedure in federal court for attacking a disciplinary action was discussed in *Preiser v. Rodriguez*, 411 U.S. 475

(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

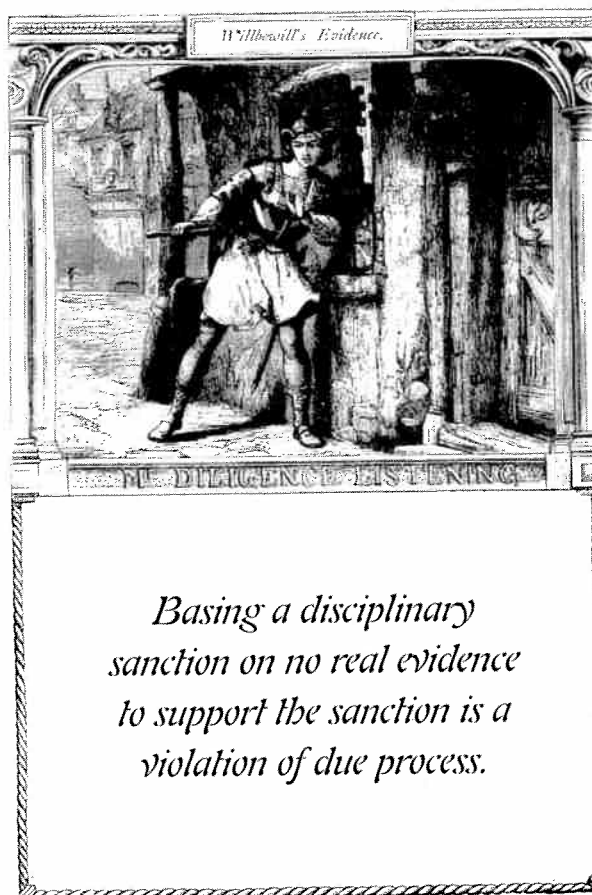


this issue is *Lockett v. Swardini*, 526 F.2d 866 (6th Cir. 2008). The *Lockett* court followed the dictates of *Heck v. Humphrey*, which require first that the loss be subject to the exhaustion of administrative remedies. 512 U.S. 477 (2005). The holding in *Wilkinson* cracked this wall in some instances, 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).

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).



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

## 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 v. 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-

tain 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”<sup>1</sup> 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 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.



*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 . . .*

*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<sup>2</sup> 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)(1).) 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<sup>3</sup>

*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 for-

eign country. In *Rodriguez*, Texas sought assistance from the U.S. Department of Justice in arresting Rodriguez, who was hiding out in another country. Federal officers filed a fugitive warrant in the other country, and Rodriguez 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.<sup>4</sup> *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.<sup>5</sup>) 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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