

STATE COUNSEL FOR OFFENDERS

LEGAL HANDBOOK



Twelfth Revised Edition

Texas Department of Criminal Justice

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Volume 1 of 2

DISCLAIMER

This handbook is a cooperative effort of the State Counsel for Offenders' (SCFO) employees and is created for intra-agency use within the Texas Department of Criminal Justice. It is in no way intended as an authoritative legal source to be substituted for legal advice for attorneys. Users may contact their unit law library or SCFO to ensure they have the latest edition.

LEGAL HANDBOOK

TABLE OF CONTENTS

CHAPTER 1 TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION

1.1 - General Information	1
1.2 - What is State Counsel for Offenders?	2
1.2.1 - Criminal Defense Section	2
1.2.2 - Civil Defense Section	2
1.2.3 - Appellate Section	3
1.2.4 - Legal Services Section	3
1.3 - How to Contact State Counsel for Offenders	5
1.4 - Areas Beyond State Counsel for Offenders' Scope of Assistance	6
1.5 - Alternative Avenues to Seek Assistance	7
CAPÍTULO 1 – INTRODUCCIÓN	8

CHAPTER 2 TABLE OF CONTENTS

CHAPTER 2 - LEGAL RESEARCH

2.1 - Introduction	1
2.2 - Sources of the Law	1
2.3 - Beginning Your Research	2
2.4 - Basic Research Tools	4
2.5 - Legal Writing	9

CHAPTER 3 TABLE OF CONTENTS

CHAPTER 3 - TRIAL AND APPELLATE PROCESS

3.1 - Criminal Defense Section	1
3.1.1 - Before Appointment of Counsel	1
3.1.2 - Appointment of Counsel	2
3.1.3 - Criminal Discovery after the Michael Morton Act	3
3.1.4 - After Appointment of Counsel	4
3.1.5 - At Court	5
3.1.6 - Post Trial	6
3.2 - Basic Appellate Information	6
3.2.1 - The Appellate Record	7
3.3 - The Appellate Attorney	8

3.4 - The Appellate Process	10
3.5 - The Anders Brief Procedure	12
3.6 - Petition for Discretionary Review	13
3.6.1 - The Format of the Petition.....	13
3.6.2 - Extension of Time	13
3.6.3 - Rules on Filings	14
3.6.4 - The PDR in the Texas Court of Criminal Appeals.....	14
3.7 - The State Counsel for Offenders Attorney and Your Appeal	17
3.8 - Questions Offenders Often Ask.....	18
3.9 - Table of Authorities.....	25

CHAPTER 4 - TABLE OF CONTENTS

CHAPTER 4 - HABEAS CORPUS

Introductory Note.....	5
State Counsel for Offenders and Habeas Corpus	6
Chapter 4 - Habeas Corpus	7
4.1 - Habeas Corpus Relief	7
4.1.1 - The State Conviction	7
4.1.1.1 - Introduction	7
4.1.1.2 - The Effect of a Trial	7
4.1.2 - Habeas Corpus Generally	7
4.1.3 - The Effect of a Writ of Habeas Corpus	9
4.2 - Texas State Court Procedure	10
4.2.1 - Procedure in Texas District Courts.....	10
4.2.1.1 - Contents of a Writ Application.....	10
4.2.1.2 - Filing the Application.....	11
4.2.1.3 - State’s Answer.....	11
4.2.1.4 - Trial Court’s Response	11
4.2.2 - Procedure in the Court of Criminal Appeals.....	13
4.2.3 - Forms	13
4.3 - Obstacles to Writ Relief	13
4.3.1 - Subsequent Writ Applications	13
4.3.2 - Timeliness, or “Laches”	14
4.3.3 - The Contemporaneous Objection Rule.....	15
4.3.4 - Harmless Error.....	16
4.3.5 - Waiver of the Right to File a Writ Application	17
4.3.6 - The Claim is One Best Suited for Direct Appeal	17
4.3.7 - Miscellaneous Limitations.....	17
A. Police Brutality/Misconduct	17
B. Illegal Arrests	18
C. Denial of Bail	18
D. Denial of an Examining Trial.....	18
E. Discretionary Actions by a Trial Judge	18

F. Defects in an Indictment.....	18
G. Retroactive Application of the Law	18
H. Stacking Orders.....	19
I. Deadly Weapon Findings	19
J. Evidentiary Sufficiency.....	19
4.4 - The Fourth Amendment: Illegal Searches and Seizures.....	20
4.4.1 - The Fourth Amendment and Habeas Corpus	20
4.4.2 - Ineffectiveness for Failure to File a Motion to Suppress.....	21
4.5 - The Fifth Amendment	21
4.5.1 - Involuntary Confessions.....	21
4.5.1.1 - Generally	21
4.5.1.2 - In Habeas Corpus Proceedings.....	22
4.5.1.3 - Explanations, Limitations, and Exceptions	22
A. “Miranda” Warnings.....	22
B. Jackson v. Denno Hearings.....	24
C. Invoking Miranda’s Protections.....	24
D. Self-Incriminating “Testimony”.....	25
E. Exceptions to Miranda.....	26
i. The Public Safety Exception.....	26
ii. The “Fruits” Exception.....	26
iii. Use for Impeachment Purposes	26
iv. The Booking Exception.....	26
4.5.2 - Double Jeopardy and Collateral Estoppel	27
4.5.2.1 - Double Jeopardy Generally	27
4.5.2.2 - Other Developments.....	30
A. Waiver.....	30
B. Punishment Requirement	30
4.6 - Grounds for Writ - Sixth Amendment.....	31
4.6.1 - Denial of the Right to Counsel	31
4.6.2 - Sixth Amendment: Ineffective Assistance of Counsel.....	34
4.6.2.1 - The Foundations of Ineffective Assistance of Counsel.....	34
4.6.2.2 - Bases of a Claim of Ineffectiveness	35
A. Common Ineffectiveness Claims	35
i. Failure to Investigate	35
ii. Failure to Pursue Defenses	35
iii. Pretrial Ineffectiveness	36
iv. Ineffective Use of Witnesses	36
v. Jury Instruction Neglect.....	36
vi. Jury Selection Negligence	37
vii. Failure to Object	37
viii. Erroneous Advice/Failure to Advise	38

ix. Defense Counsel and Plea Offers	38
x. Professional Misconduct.....	39
B. Ineffective Assistance of Counsel after Conviction.....	39
i. Ineffective Direct Appeals Counsel.....	39
ii. Ineffective Habeas Corpus Counsel.....	40
C. Conflicts of Interest.....	40
D. Insufficient Participation.....	41
4.6.2.3 - Ineffectiveness and the Contemporaneous Objection Rule.....	41
4.6.3 - Right to Trial by an Impartial Jury and/or Grand Jury.....	42
4.6.4 - The Right to Confront and Cross-Examine Witnesses.....	44
4.6.4.1 - The “Testimonial” Requirement.....	44
4.6.4.2 - Codefendant Testimony.....	45
4.6.4.3 - Confrontation and Habeas Corpus.....	46
4.6.5 - 6th and 14th Amendments: Compulsory Process.....	46
4.7 - New Developments in the Eighth Amendment.....	47
4.8 - The Fourteenth Amendment.....	48
4.8.1 - Introduction	48
4.8.2 - Specific Fourteenth Amendment Due Process Claims.....	48
4.8.2.1 - Prejudicial Lineup Procedures.....	48
4.8.2.2 - Withholding of Exculpatory Evidence (“Brady” claims).....	49
4.8.2.3 - Knowing Introduction of False Testimony.....	49
4.8.2.4 - Destruction of Evidence	50
4.8.2.5 - No Evidence	50
4.8.2.6 - Prosecutorial Vindictiveness	50
4.8.2.7 - “Anders” Briefing.....	51
4.8.2.8 - Defendant Forced to Wear Jail Clothes at Trial	51
4.8.2.9 - Improper Prosecutorial Comment	52
4.8.3 - Equal Protection Clause: Batson Challenges.....	52
4.8.4 - Pleas of Guilty and Due Process.....	52
4.8.4.1 - Overturning a Plea of Guilty or Nolo Contendere.....	52
4.8.4.2 - Vacating an Involuntary Plea	53
4.8.4.3 - Plea Bargains as Contracts	54
4.9 - The Ex Post Facto Clause and Statutes of Limitations.....	55
4.10 - State Grounds for Relief.....	57
4.10.1 - Fatally-Flawed Indictments	57
4.10.2 - Out-of-Time Appeals.....	57
4.10.2.1 - General Principles.....	57
4.10.2.2 - Out-of-Time Appeal and Texas Habeas Corpus.....	59
4.10.2.3 - Out-of-Time Appeal and Federal Habeas Corpus	59
4.10.3 - Improper Sentences and Their Remedies	59
4.10.3.1 - Illegal Sentences.....	60

4.10.3.2 - Improper Stacking	60
4.10.3.3 - Enhancements and Deadly Weapon Findings	61
4.10.3.4 - Harmless Error and Illegal Sentences.....	61
4.10.3.5 - Direct Appeal and Waiver	62
4.10.3.6 - Invited Error and Waiver.....	62
4.11 - Texas and Federal Habeas Corpus, Reconciled	62
4.12 - Federal Petitions for Writ of Habeas Corpus.....	64
4.12.1 - Recent History	64
4.12.2 - Federal Petition Paperwork	65
4.12.3 - District Court Petition Procedure	66
4.13 - Federal Habeas Corpus Review	67
4.13.1 - Procedural Barriers.....	67
4.13.1.1 - The Petitioner Pled Guilty.....	67
4.13.1.2 - The Custody Requirement.....	67
4.13.1.3 - Timeliness, Tolling, and Equitable Tolling.....	68
4.13.1.4 - Successive Petitions.....	69
4.13.1.5 - State Exhaustion Requirement.....	70
4.13.1.6 - Procedural Default.....	71
4.13.1.7 - State Court Reasonability	72
4.13.1.8 - Evidentiary Hearing Bar.....	72
4.13.1.9 - Cognizable Claims.....	73
4.13.1.10 - Harmless Error.....	73
4.13.1.11 - Actual Innocence	73
4.13.2 - Federal Habeas Corpus Appeals.....	73
4.14 - Frequently Asked Questions.....	74
4.15 - Table of Authorities.....	77

CHAPTER 5 TABLE OF CONTENTS

CHAPTER 5 - PENDING CHARGES AND DETAINERS

5.1 - Introduction	2
5.2 - Detainers Generally	2
5.2.1 - Removal of Resolved, Expired, or Erroneous Detainers.....	3
5.3 - Texas Detainers	3
5.3.1 - Right to Counsel	4
5.3.2 - Trial of Unresolved Charges.....	4
5.3.3 - Motion for Speedy Trial	5
5.3.4 - Guilty Pleas.....	5
5.3.5 - Traffic Violations	6
5.3.6 - Untried Misdemeanors	7
5.3.7 - State Jail Detainers	7
5.3.8 - Crimes Committed While in TDCJ	8
5.3.9 - Untried Charges with No Detainer	9

5.3.10 - SAFPF Detainers	9
5.3.11 - Forms	10
5.4 - Pending Charges in Other States	11
5.4.1 - Introduction	11
5.4.2 - Law on the Interstate Agreement on Detainers Act	11
5.4.3 - Prisoner Exchange within the U.S.	12
5.4.4 - Case Law	12
5.4.5 - Forms	13
5.5 - Extradition	13
5.6 - Federal Detainers and Transfers to Federal Penitentiary.....	14
5.7 - Community Supervision (Probation) Revocation/Probation Waiver Program	15
5.7.1 - Introduction	15
5.7.2 - Misdemeanor Community Supervision (Probation) Revocation	16
5.7.3 - Deferred Community Supervision Revocation.....	16
5.7.4 - Appealing a Deferred Community Supervision	17
5.7.5 - Source of Rights	17
5.7.6 - Case Law	18
5.7.7 - Forms	19
5.8 - Questions Offenders Often Ask.....	20
5.9 - Table of Authorities.....	22

CHAPTER 6 TABLE OF CONTENTS

CHAPTER 6 - TIME QUESTIONS

6.1 - Basic Eligibility Rules	2
6.2 - Jail Time	2
6.2.1 - Introduction	2
6.2.2 - Law on Jail Time	2
6.3 - Computation of Offender's Jail Time Credit.....	4
6.4 - Conditions of Community Supervision	4
6.5 - Good Time Credits	5
6.5.1 - Forfeiture of Good Time Credits	6
6.5.2 - Suspension of Good Time Credits.....	7
6.5.3 - County Good Time	8
6.6 - Obtaining Concurrent Credit for Federal Sentences.....	8
6.6.1 - Effect of the Federal Detainer	9
6.6.2 - Commitment to Federal Custody.....	9
6.6.3 - Sentence Computation.....	9
6.6.4 - Release from Federal Sentence.....	10
6.6.5 - Supervised Release Term	10
6.6.6 - References	10
6.7 - Prison Management Act	10
6.7.1 - Introduction	10
6.7.2 - Source of Right.....	10
6.7.3 - Rules for SB727 Awards: Offense Date Prior to 02-20-87	11
6.7.4 - Rules for SB215 Awards: Offense Date on or after 02-20-87	11
6.7.5 - Case Law	12

6.8 - Concurrent Sentences	12
6.9 - Cumulative Sentences.....	13
6.9.1 - Credit for Jail Time.....	14
6.9.2 - Parole Eligibility.....	15
6.10 - Credit for Street Time.....	15
6.11 - Dispute Resolution	16
6.12 - State Jail Convictions	17
6.12.1 - Jail Time Credits.....	17
6.12.2 - State Jail Detainers	17
6.12.3 - Good Time.....	18
6.12.4 - Concurrent with ID Sentences	18
6.13 - Issuance of New TDCJ Numbers	18
6.14 - Improper Release.....	19
6.15 - Questions Offenders Often Ask.....	19
6.16 - Table of Authorities.....	22

CHAPTER 7 TABLE OF CONTENTS

CHAPTER 7 - PAROLE AND MANDATORY SUPERVISION

7.1 - Preamble	1
7.2 - Parole	2
7.2.1 - Introduction	2
7.2.2 - Source of Right.....	3
7.2.3 - Law on Parole.....	3
7.2.3.1 - Eligibility.....	3
7.2.3.2 - Protests.....	4
7.2.3.3 - Voting Options	4
7.2.4 - Case Law	5
7.2.5 - Rules Regarding Release to Parole or Mandatory Supervision	7
7.2.5.1 - Parole Criteria.....	8
7.2.5.2 - Parole Guideline Components	9
7.2.5.3 - Parole Presentation Packets	9
7.2.5.4 - Parole Support Letters	11
7.3 - Mandatory Supervision.....	12
7.3.1 - Introduction	12
7.3.2 - Source of Right.....	14
7.3.3 - Law on Mandatory Supervision	14
7.3.4 - Discretionary Mandatory Supervision Release	14
7.3.5 - Case Law	16
7.4 - Medically Recommended Intensive Supervision	16
7.5 - Parole Revocation.....	17
7.6 - Questions Offenders Often Ask.....	17
7.7 - Table of Authorities.....	20

CHAPTER 8 TABLE OF CONTENTS

CHAPTER 8 - ADMINISTRATIVE MATTERS AND OTHER LEGAL ISSUES

8.1 - TDCJ Reentry Services for Offenders.....	1
8.2 - Bankruptcy.....	2
8.2.1 - 3 rd Party Bankruptcy.....	2
8.3 - Social Security.....	2
8.4 - Military Discharge Upgrade.....	4
8.4.1 - Military Discharge Upgrading Manual.....	6
8.5 - Power of Attorney.....	6
8.5.1 - Creating a Power of Attorney.....	6
8.5.2 - Revoking a Power of Attorney.....	7
8.6 - Unsworn Declarations.....	7
8.7 - Restoration of Rights.....	8
8.8 - Expunction of Arrest Records.....	9
8.9 - Legislation Prohibiting Contact with Victims.....	10
8.10 - Inheritance Matters.....	11
8.11 - Civil Matters Outside the State of Texas.....	11
8.12 - DNA Collection.....	11
8.13 - DNA Post-Conviction Testing.....	12
8.14 - Sex Offender Registration.....	14
8.14.1 - General Information.....	14
8.14.2 - Sex Offender Treatment Program.....	15

CHAPTER 9 - TABLE OF CONTENTS

CHAPTER 9 - FAMILY LAW

9.1 - Termination of Parental Rights.....	1
9.1.1 - Procedure.....	1
9.1.2 - Appointment of an Attorney in Termination Proceedings.....	2
9.1.3 - Grounds for Termination.....	3
9.1.4 - The Best Interests of the Child.....	4
9.1.5 - Imprisonment, Abandonment, and Danger.....	4
9.1.6 - Voluntary Termination of Parental Rights.....	4
9.1.7 - Contact with the Child Following Voluntary Termination.....	5
9.1.8 - Practical Considerations when Faced with Termination.....	5
9.1.9 - Case Law.....	5
9.2 - Adoption.....	7
9.3 - Determination of Parentage.....	8
9.3.1 - Introduction.....	8
9.3.2 - Statutory Provisions on Determination of Parentage.....	9
9.3.3 - Case Law.....	9
9.4 - Divorce.....	10
9.4.1 - Procedure.....	10
9.4.2 - Grandparent Visitation.....	12
9.5 - Child Custody.....	12
9.6 - Getting Married While Incarcerated.....	14

9.7 - Common-Law Marriage	14
9.8 - Child Support and Suits by the Attorney General	15
9.9 - Questions Offenders Often Ask.....	17
9.10 - Table of Authorities.....	21

CHAPTER 10 TABLE OF CONTENTS

CHAPTER 10 – COMMUNITY SUPERVISION AND TIME-CUTS

10.1 - Community Supervision	1
10.1.1 - Introduction	1
10.1.2 - Statutory Provisions on Community Supervision	1
10.1.3 - Case Law	2
10.1.4 - Instructions for Forms	3
10.1.5 - Forms	4
10.1.6 - Summary.....	4
10.2 - State Jail Offenses	4
10.2.1 - Basic Information	4
10.2.2 - Instructions for Forms	4
10.2.3 - Forms	5
10.2.4 - Summary.....	5
10.3 - Commutations or Time-Cuts	5
10.3.1 - Introduction	5
10.3.2 - Source of Right.....	5
10.3.2.1 - Basis for a Commutation or Time-Cut.....	5
10.3.2.2 - Requirements.....	6
10.3.2.3 - Instructions for Forms	7
10.3.2.4 - Forms	7
10.3.2.5 - Summary.....	7
10.3.3 - Questions Offenders Often Ask.....	8
10.4 - Table of Authorities.....	9

CHAPTER 11 TABLE OF CONTENTS

CHAPTER 11 - IMMIGRATION PROCEEDINGS

11.1 - Overview	1
11.2 - Law on Removal.....	2
11.3 - Grounds for Discretionary Relief	3
11.3.1 - Cancellation of Removal	3
11.3.2 - Asylum.....	3
11.3.3 - Withholding of Removal	3
11.3.4 - Deferral of Removal	4
11.3.5 - Adjustment of Status	4
11.4 - Citizenship.....	4
11.5 - Prisoner Transfer	4
11.6 - Questions Offenders Often Ask.....	5

CHAPTER 12 TABLE OF CONTENTS

CHAPTER 12 - CIVIL COMMITMENT PROCESS

12.1 - What is Civil Commitment?.....	1
12.2 - Civil Commitment History	1
12.3 - Who is a Target.....	2
12.4 - The Selection Process.....	4
12.5 - The Pre-Trial Process	5
12.6 - The Trial Process	6
12.7 - Commitment Terms.....	6
12.8 - The Appellate Process	7
12.9 - Criminal Penalties.....	7
12.10 - Biennial Review and Hearing.....	7
12.11 - Petition for Release.....	8
12.12 - Questions Offenders Often Ask.....	8
12.13 - Table of Authorities.....	11

CHAPTER 13 TABLE OF CONTENTS

CHAPTER 13 – INNOCENCE CLAIMS

13.1 - Who Should File an Innocence Claim.....	1
13.2 - Choosing an Innocence Clinic.....	1
13.3 - The Texas Prisoner Innocence Questionnaire (TPIQ).....	3
13.4 - What to Expect After Sending the TPIQ	5
13.5 - Questions Offenders Often Ask.....	5

CHAPTER 1 TABLE OF CONTENTS

CHAPTER 1 - INTRODUCTION

1.1 - General Information	1
1.2 - What is State Counsel for Offenders?	2
1.2.1 - Criminal Defense Section.....	2
1.2.2 - Civil Defense Section	2
1.2.3 - Appellate Section.....	3
1.2.4 - Legal Services Section.....	3
1.3 - How to Contact State Counsel for Offenders	5
1.4 - Areas Beyond State Counsel for Offenders’ Scope of Assistance	6
1.5 - Alternative Avenues to Seek Assistance	7
CAPÍTULO 1 – INTRODUCCIÓN	8

CHAPTER 1 - INTRODUCTION

§1.1 - General Information

This book is designed to serve as a legal reference guide for offenders incarcerated in the Texas Department of Criminal Justice (TDCJ). Many legal problems can arise despite the fact (or perhaps due to the fact) that you are confined in the Texas prison system. The underlying goal of this publication is to help you understand and solve your own legal problems.

The authors of this resource are the attorneys and legal assistants of State Counsel for Offenders (SCFO) who are experienced in resolving issues affecting those confined in TDCJ. This Legal Handbook can assist you in determining how to pursue the resolution of legal issues. It is an introductory resource tool designed to help you begin to help yourself. In some instances it identifies where you can turn for further assistance.

The law is in a constant state of change and revision; consequently, as information changes the revision date will be noted in the footer of that chapter or on individual pages. You should also be aware of changes to the law when researching an issue. While the contents of this manual may be current as of the date of publication, new cases and laws can modify the legal principles contained herein. These legal principles should always be fully researched to make sure they are up to date with the most recent changes in the law. For more information on how to conduct legal research, see Chapter 2.

Reference material (such as forms, letters and pleadings) have been placed in a separate reference book and numbered to correspond to the chapters. They are referred to in the chapters as SCFO REF xx.yy (“xx” is the Chapter that discusses the document, “yy” is the number of the

referenced document). These are offered as a guide to help offenders understand the practical application of documents or material discussed within the chapter.

§1.2 - What is State Counsel for Offenders?

State Counsel for Offenders is a division of TDCJ created for the sole purpose of providing legal aid to indigent offenders confined in Texas prisons. Formerly known as Inmate Legal Services, and prior to that, Staff Counsel for Inmates, this organization has been in existence since 1969. SCFO employees are dedicated to protecting individual liberties and constitutional rights and have devoted their careers to the areas of law relating to offender problems.

As a general principle, SCFO can provide assistance only to those who are indigent. Others must proceed pro-se or hire a private attorney.

As SCFO has grown, the office has departmentalized in order to provide more specialized areas of service. The following briefly explains the different sections of the office.

§1.2.1 - Criminal Defense Section

This section will represent you at trial if you are indicted for a felony allegedly committed while you are incarcerated within TDCJ. Trial attorneys will obtain discovery and utilize the services of professional defense investigators to investigate your case. Attorneys and investigators will discover and question potential witnesses and prepare the case for trial, if necessary. Trial attorneys will represent you at all court appearances, file all necessary motions and pretrial writs, and fully litigate all relevant issues on your behalf.

Note: Correspondence with your SCFO attorney, investigator, legal assistant or any SCFO employee is privileged information. Any other communication by you to any other personnel or offenders may **not** be confidential and may be used against you at trial or at other administrative hearings.

§1.2.2 - Civil Defense Section

This section represents indigent sex offenders prosecuted under the Sexually Violent Predator (SVP) civil commitment statute, located in Chapter 841 of the Texas Health & Safety Code. Civil Defense attorneys, utilizing the services of professional investigators and legal assistants, gather documents and locate witnesses, often delving into underlying convictions in preparation for trial.

Civil Defense attorneys will represent you at all trial stage court appearances, file all necessary motions and pretrial writs, and fully litigate all relevant issues on your behalf.

Civil commitment issues beyond the trial stage are handled in other sections of this office. See further discussion of civil commitment services provided by this office in the Appellate and Legal Services sections below, respectively. For more general information about Civil Commitment Process, see Chapter 12.

§1.2.3 - Appellate Section

Appellate attorneys will assist indigent offenders who need legal services in the appellate and writ areas. The following services are provided:

1. Appeals: In the event that you are represented by our Criminal Defense Section and you are convicted, an SCFO attorney experienced in appeals will represent you in preparing your appeal, to include identifying appellate issues, preparing legal briefs, and arguing before appellate courts.
2. Writs of Habeas Corpus: Sometimes errors of a constitutional dimension are made in your conviction. The attorney can research the case to see if there are valid, provable legal reasons to file a writ of habeas corpus to set aside or modify the conviction or sentence.
3. Appeals of Civil Commitment: In the event that a sex offender is civilly committed, experienced attorneys will prepare and file appellate briefs as appropriate.

§1.2.4 - Legal Services Section

Legal Services attorneys can help you with a variety of legal issues you may be facing.

1. Post-Conviction Issues:
 - A. *Petitions for Discretionary Review* - In addition to the forms and information located in Chapter 3, §3.6, attorneys can provide you with additional information about PDR's.
 - B. *Pending Charges and Detainers* - Legal Services attorneys can provide information and/or assistance with pending charges, state detainers, out-of-state detainers, federal detainers, or county detainers. In some cases, they can assist in having an outstanding probation case revoked through the Probation Revocation Waiver Program. See Chapter 5 for additional information about pending charges and detainers.

2. Time Issues:

- A. *Time Corrections (Nunc Pro Tunc filings)* - These are prepared and filed to correct mistakes contained in your judgment(s) of conviction usually relating to obtaining credit for time previously served, unlawful affirmative findings of use of a deadly weapon, or mistake in the degree of felony conviction, etc.
- B. *Time Writs* - Time issues will sometimes need a writ filed when the issue cannot be resolved at the local court level. An attorney along with legal assistants specializing in time issues will research the case to see if there are valid, provable legal reasons to file a writ on these issues. See Chapters 6 and 10 for additional information regarding time credit issues.

3. Immigration Issues:

- A. *Removal Proceedings under Federal Immigration Law* - When the United States Citizenship and Immigration Services bring removal proceedings against an alien offender, he or she will be served with a Notice to Appear. This is the charging document prepared by ICE that alleges the reasons for which you may be removable and the law authorizing the removal. Once the government brings removal proceedings against you, an Immigration attorney will interview you in TDCJ-ID, and your rights will be explained to you. You may decide to proceed or ask for a continuance. An attorney from the Legal Services section may represent you at the hearing if you are indigent and entitled to relief from removal.
- B. *Prisoner Exchange* - You may request to participate in the Prisoner Exchange program if your country is a treaty signatory. If granted, you would be allowed to serve your remaining sentence in your own country.
- C. *Miscellaneous Questions* - If you have any questions about immigration issues, whether you have been served or not, you may write to SCFO-Immigration Section for assistance. See Chapter 11 for additional information about Immigration proceedings and issues.

4. Civil Commitment Issues: All civilly committed persons are entitled to a biennial and other court reviews to determine if they are ready for release. These are limited evidentiary hearings and are conducted in the district court where the person resides.

The SVP statute provides that all of the person's treatment records obtained while civilly committed are admissible in these hearings. Although the hearing is limited, the constitutional rights at issue may necessitate a writ of mandamus at this juncture. Legal Services attorneys represent civilly committed individuals who are indigent and are under biennial review, or who have been set for hearing for release from civil commitment.

5. Administrative Proceedings and Other Legal Issues: Information can be provided for issues such as powers of attorney, unsworn declarations, basic parole guidelines and post-conviction DNA testing. See Chapters 7, 8 and 9 for additional information.
6. Family Law: Attorneys in this section can assist you if someone is trying to terminate your parental rights. See Chapter 9 for additional information.
7. Time Questions: Legal Assistants will investigate claims of jail time not being credited to your sentence. Information and/or assistance can also be given in reference to flat time, good time, educational time, and work time credit. Additionally, information and/or assistance may be provided on SAIP programs (Boot Camp), SAFFP-TF program, Prison Management Act (PMA), and State Jail Convictions.
8. Parole and Mandatory Supervision: Legal Assistants can assist you with your parole and mandatory supervision eligibility issues.

§1.3 - How to Contact State Counsel for Offenders

The different sections of SCFO can be contacted directly through the truck mail system. An I-60 form (Inmate Request to Official), a letter, or a package can be sent to our office by truck mail. When addressing the truck mail envelope to SCFO, be sure to write which section you want the mail to go to for faster processing. All correspondence submitted to our office to obtain legal assistance is considered legal mail and as such is covered by the laws of privilege. Original documents sent to our office will be returned once they are examined. Mail can also be sent via the United States Postal Service to the addresses as follows:

State Counsel for Offenders
P.O. Box 4005
Huntsville, TX 77342-4005

It is very important that you write your **TDCJ offender name** and **TDCJ number** on all correspondence you send to our office. Otherwise, we may be unable to identify you and respond to your request.

§1.4 - Areas Beyond State Counsel for Offenders' Scope of Assistance

Due to the nature of our office and stipulations from Ruiz v. Estelle, there are many areas in which SCFO cannot provide assistance at all. In some instances the rationale is because of a conflict of interest, and in others, due to departmental policy. Generally, SCFO cannot help in the following matters:

1. Internal TDCJ matters, including parole matters (beyond the type of advice provided in Chapter 7), grievances, disciplinary actions, classification disputes and other administrative proceedings.
2. Civil rights suits including claims against TDCJ, correctional officers, or other offenders. This also includes suits challenging policies and conditions of confinement or supervision.
3. Fee-generating cases such as lawsuits, including cases where money can be awarded as damages, or where some property is sought to be recovered.
4. Offenders within TDCJ are ineligible for name change pursuant to the 72nd Legislature Amended Family Code §45.103 (previously 32.22, effective September 1, 1991).
5. Non-indigent offenders - when the offender has access to enough funds or property to be able to retain private counsel.
6. Cases where another attorney is already responsible for the matter, such as court-appointed counsel in a direct appeal.
7. Assistance in arranging offender marriage ceremonies inside a TDCJ-ID facility, beyond the advice found in Chapter 9.
8. Civil Commitment issues that fall outside of those issues specifically delegated to State Counsel for Offenders in §841 of the Texas Health and Safety Code.

Since SCFO cannot represent you in any claim you want to make against TDCJ, you may want to write to a free-world attorney in such cases. Consult the Texas Legal Directory located in your unit law library to find an attorney who may be able to help you.

Despite the fact that SCFO cannot file fee-generating cases, you still may pursue your cause of action. You can hire an attorney or contact a legal aid organization to institute your suit. Pursuant to a 1987 amendment to §16.001 of the Civil Practice and Remedies Code, imprisonment no longer tolls the Statute of Limitations. In other words, the fact that you are imprisoned does NOT extend the Statute of Limitations.

§1.5 - Alternative Avenues to Seek Assistance

It may be advisable for you to pursue TDCJ grievance procedures before contacting a free-world attorney. There are a number of organizations that may be able to assist you in areas that SCFO cannot handle. Refer to SCFO REF 1.1 for the list of organizations.

SCFO cannot guarantee that another organization will be able to provide assistance. The federal government passed a law prohibiting legal services organizations that receive federal funding from providing legal aid to offenders within state or federal penitentiaries. Consequently, many groups that formerly could provide assistance no longer can do so. Often legal problems in the free world have an impact on a family member as well as the offender (e.g., a foreclosure would also affect a spouse). In that event, the best way to receive assistance is to allow someone else to primarily resolve the problem.

Additionally, many private attorneys will provide representation in a meritorious personal injury or civil rights case on a contingency fee basis. A contingent payment plan is a fee agreement in which the attorney receives compensation as a percentage of any recovery received. Further, some other types of cases may have a statutory provision providing for attorney fees. These matters must be arranged on an individual basis, and SCFO cannot make referrals or help negotiate representation provisions. The Texas Legal Directory, which is a reference guide located in each unit's law library, contains mailing addresses of all the attorneys licensed in the State of Texas. Volumes I and II list attorneys by county and contain information on their practice specialties.

Finally, each unit/facility maintains a collection of legal research materials to which you have access in order to do legal research. The Law Library Supervisor can assist you with questions you may have regarding legal research materials/publications or to obtain a complete Law Library Holdings list.

CHAPTER 1 REFERENCES

SCFO REF 1.1 - Outside Organizations Available to Assist Offenders

CAPÍTULO 1 INDICE DE MATERIAS

CAPÍTULO 1- INTRODUCCIÓN

1.1 - Información General.....	8
1.2 - Qué es Los Abogados del Estado para Ofensores?	9
1.2.1 - Sección de la Defensa Criminal.....	9
1.2.2 - Sección de la Defensa Civil.....	9
1.2.3 - Sección de Apelación	10
1.2.4 - Sección de los Servicios Legales.....	10
1.3 - Cómo Ponerse en Contacto con Los Abogados del Estado para Ofensores.....	13
1.4 - Áreas Fuera Del Ámbito De Asistencia de Los Abogados del Estado para Ofensores...13	
1.5 - Avenidas Alternativas Para Solicitar Asistencia	14

CAPÍTULO 1 - INTRODUCCIÓN

§1.1 - Información General

Este libro está hecho para servir como un guía de referencia legal para ofensores encarcelados en el Departamento de la Justicia Criminal de Texas (TDCJ). Muchos problemas legales pueden resultar a pesar del hecho (o quizá por el hecho) de que usted está encarcelado en el sistema de prisión de Texas. El objetivo fundamental de esta publicación es ayudarlo a entender y resolver sus propios problemas legales.

Los autores de este recurso son los abogados y asistentes legales de los Abogados del Estado para Ofensores (SCFO) que tienen experiencia en resolver problemas que afectan a los que están encarcelados en TDCJ. Este Manual Legal puede asistir en determinar cómo conseguir una resolución de problemas legales. Está creado para servir como un recurso introductorio indicándole como puede empezar a ayudarse usted mismo. En algunos casos puede identificar donde más puede acudir para ayuda adicional.

La ley está constantemente en un estado de cambio y revisión; consecuentemente a medida que información cambia, la fecha de revisión se anotará al fin de ese capítulo o en cada página individual. También debe de estar consiente de cambios a la ley cuando investigue un asunto. Mientras la materia de este manual está vigente a la fecha de publicación, casos y leyes nuevas pueden modificar los principios legales contenidos aquí. Estos principios legales siempre deben ser investigados para estar en acuerdo con las leyes más recientes. Para más información sobre cómo ser la investigación legal, mire Capítulo 2.

Material de Referencia (como formas, cartas y alegatos) se han puesto en un libro de referencia separado y están numerados correspondiendo a los capítulos. Están referidos en los capítulos como SCFO REF xx.yy (“xx”es el capítulo que discute el documento,”yy” es el número

del documento referido). Estos se ofrecen como guía para ayudar a los ofensores a entender la aplicación práctica de documentos o material discutido dentro del capítulo.

§1.2 - Qué es Los Abogados del Estado para Ofensores?

Los Abogados del Estado para Ofensores es una división de TDCJ creada con la única intención de proporcionar ayuda legal para ofensores indigentes encarcelados dentro de las prisiones en Texas. Conocido antes como Servicios Legales de Presos, (Inmate Legal Services) y más antes de eso, Personal para Presos, (Staff Counsel for Inmates), esta organización ha existido desde 1969. Empleados de SCFO están dedicados a proteger libertades individuales y derechos constitucionales, y por lo tanto han dedicado sus carreras a las áreas de ley con relación a los problemas de ofensores.

Como un principio general, los Abogados del Estado para Ofensores pueden proporcionar asistencia solamente a los que son indigentes. Otros deben proceder solos o contratar un abogado privado.

A medida que SCFO ha crecido, son divididos en departamentos para proporcionar más áreas especializadas de servicio. Lo siguiente explica brevemente las diferentes secciones de la oficina.

§1.2.1 - Sección de la Defensa Criminal

Esta sección lo representará en el juicio si lo acusan por una felonía supuestamente cometida mientras está encarcelado dentro de TDCJ. Abogados litigantes obtendrán descubrimiento y utilizarán los servicios de investigadores de la defensa profesional a investigar su caso. Abogados e investigadores descubren y hacen entrevistas con los testigos potenciales y preparan el caso para el juicio, si es necesario. Abogados de la Sección de la Defensa Criminal lo representarán en todas las comparecencias judiciales, entablarán todas las mociones necesarias y todos los mandatos antes del juicio, y completamente litigarán todos los puntos cruciales para usted.

Nota: Cualquier correspondencia con su abogado, investigador, asistente legal o cualquier persona empleado con SCFO está protegida bajo las leyes de comunicaciones privilegiadas. Cualquier otra comunicación de usted hacia otras personas u ofensores **no** podría ser confidencial y se podría usar contra usted durante el juicio u otros procesos administrativos.

1.2.2 - Sección de la Defensa Civil

Esta sección representa los ofensores indigentes con ofensas sexuales enjuiciados bajo el Decreto de Confinamiento Civil Depredador Sexual y Violente (Sexually Violent Predator -SVP) localizado en Capítulo 841 del Código de Seguridad y Salud de Texas (Texas Health & Safety

Code). Los Abogados de la Defensa Civil, los servicios de investigadores profesionales y asistentes legales, juntan documentos y localizar testigos, avece indagando convicciones precedentes en preparación para juicio. Los Abogados de la Defensa Civil lo representarán en todos los aspectos de etapa de juicio de Corte, presentar todas las mociones necesarias y escrituras preventivas y litigar completamente todos los asuntos pertinentes en su nombre. Asuntos del Confinamiento Civilmente más allá de la etapa de juicio se tratan en otras secciones de esta oficina. Para más discusión de servicios del Confinamiento Civilmente proporcionados por esta oficina están en los Servicios de Apelación y de Servicios Legales siguientes, respectivamente. Para más información general sobre el proceso del Confinamiento Civilmente, mire el Capítulo 12.

§1.2.3 - Sección de Apelación

Los Abogados de la Sección de Apelación asistirán a ofensores indigentes que necesitan servicios legales en áreas de apelación y de mandatos. Se proporcionan los siguientes servicios:

1. Apelaciones: En caso que usted fue representado por la Sección de la Defensa Criminal y fue condenado, un abogado de SCFO con experiencia en apelaciones lo representara en preparar su apelación, incluyendo la identificación de puntos de apelación, preparando informes legales y argüir ante las cortes de apelación.
2. Autos de Habeas Corpus: A veces se hacen errores de una dimensión constitucional en su convicción. El abogado puede investigar el caso para ver si hay razones legales válidas y probables para entablar un mandato de habeas corpus para apartar o modificar la convicción o la sentencia.
3. Apelaciones del Confinamiento Civilmente: En caso de que un ofensor sexual es confinamiento civilmente, abogados con experiencia preparan y presentan escritos de apelación según corresponda.

§1.2.4 - Sección de Servicios Legales

Los Abogados del Sección de los Servicios Legales pueden ayudarle con una variedad de asuntos legales que usted podrá tener.

1. Asuntos después de las convicciones:
 - a. *Petición para la Revista Discrecional* - Además de las formas e información en el Capítulo 3, §3.6, los abogados pueden asistir con información adicional para PDR's (Petición para Revista Discrecional).
 - b. *Detención y Cargos Pendientes* - Los abogados de la Sección de Servicios Legales pueden proporcionar información y/o asistencia con cargos pendientes, detención

del Estado, detención fuera del Estado, detención Federal, o detención del Condado. En unos casos, pueden asistirlo en un caso viejo de probación sea revocado por el Programa Renuncia de Revocación Probatoria. Mire el Capítulo 5 para información adicional para casos pendientes y detención.

2. Asuntos de Tiempo:

- a. *Correcciones de Tiempo* (Nunc Pro Tunc-con efecto retroactivo) - Estas son preparadas y entabladas para corregir errores encontrados en su juicio de convicción que tienen que ver con obtener crédito para tiempo servido anteriormente, encuentros de afirmativos ilegales de uso de arma peligrosa, o un error en el grado de convicción de felonía, etc.
- b. *Mandatos de Tiempo* - Asuntos de tiempo a veces necesitan un mandato entablado cuando el asunto no se puede resolver al nivel de la corte local. Un abogado, junto con asistentes legales especializados en asuntos de tiempo, investigarán el caso para confirmar si hay razones legales válidas y probables para entablar un mandato sobre estos asuntos. Mire Capítulos 6 y 10 para más información para asuntos tocante de crédito de tiempo

3. Asuntos de Inmigración:

- a. *Remuevo Bajo la Ley de Inmigración Federal* - Cuando los Servicios de Inmigración y Ciudadanía de los Estados Unidos trae el proceso de remuevo contra un ofensor extranjero, le manden a él o ella un Aviso de Comparecer (Notice to Appear). Esto es el documento de carga preparado por Inmigración y Aduanas (ICE-(Immigration & Customs Enforcement) que alega las razones porque lo quieren remover y la ley que autoriza el remuevo. Una vez que el Gobierno comienza el proceso de remuevo contra usted, un abogado de Inmigración lo entrevista en TDCJ-ID y sus derechos serán explicados a usted. Usted puede decidir seguir pro se (usted mismo) o pedir una continuación. Un abogado de la Sección de Servicios Legales puede representarlo en su audiencia si es indigente y tiene derecho del remedio de remuevo.
- b. *Intercambio de Prisioneros* - Puede solicitar para participar en el programa de Intercambio de Prisioneros si su país es signatario del pacto. Si se le concede, usted es permitido a servir la sentencia restante en su propio país.

- c. *Preguntas Misceláneas* - Si tiene preguntas sobre asuntos de inmigración, con o sin notificación, puede escribir a SCFO-Sección de Inmigración para ayuda. Mire Capítulo 11 para más información tocante de asuntos y del proceso de Inmigración.
4. Asuntos de Confinamiento Civilmente: Todas las personas en confinamiento civilmente tienen derecho a una revisión de Corte y a una bienal para determinar si están listos para poner en libre. Son limitadas las audiencias probatorias y se corren en el distrito en donde vive la persona. El Estatuto de SVP prevé que todos los registros de tratamiento de una persona obtenido mientras que son confinamiento civilmente son admisibles en estas audiencias. Aunque la audiencia es limitada, los derechos constitucionales en cuestión requieren un auto de mandamus en ese momento. Los Abogados de los Servicios Legales representan a personas confinamiento civilmente que son indigentes y están bajo revisión bienal, o que se hayan configurado para audiencia para ponerlo en libre de confinamiento civilmente.
 5. Procedimientos Administrativos y Otros Asuntos Legales: Información se puede proporcionar para asuntos como carta de poder de abogado, declaraciones sin juramento, guías de parole básicas y pruebas genéticas de DNA después de una convicción. Mire Capítulos 7, 8, y 9 para más información.
 6. Ley Familiar: Abogados en esta sección pueden asistir si alguien está tratando de terminar sus derechos paternales/maternales. Mire el Capítulo 9 para información adicional.
 7. Preguntas de Tiempo: Las Asistentes Legales investigarán demandas de tiempo de cárcel que no se han acreditado a su sentencia. Información y/o asistencia se puede dar sobre tiempo derecho, tiempo bueno, tiempo educativo, y crédito para tiempo de trabajo. Adicionalmente, información y/o asistencia es proporcionado sobre el programa SAIP (campo militar), SAFP-TF (Instalaciones de Tratamiento para Castigos de Felonía de Abuso de Drogas), Decreto de Administración de Prisiones (PMA), y Convicciones de la Cárcel del Estado (State Jail Convictions).
 8. Libertad Condicional y Supervisión Obligatorio: Las Asistentes Legales pueden asistirle con sus asuntos de libertad condicional y elegibilidad de supervisión obligatorio.

§1.3 - Cómo Ponerse en Contacto con Los Abogados del Estado para Ofensores

Las diferentes secciones de SCFO pueden contactarse directamente a través del sistema de truck mail. Un I-60 (pedido al oficial), una carta o un paquete pueden mandarse a nuestra oficina por truck mail. Cuando dirija el sobre por truck mail al SCFO, asegúrese de anotar la sección que usted quiere dirigir el correo para que se procese más rápido. Toda correspondencia sometida a nuestra oficina para obtener asistencia legal es considerada correo legal y como tal, está protegida por las leyes de comunicación privilegiada. Devolveremos documentos originales mandados a nuestra oficina una vez que sean examinados. También se puede mandar correo por el Servicio Postal Estadounidense a la siguiente dirección:

State Counsel for Offenders
P. O. Box 4005
Huntsville, TX 77342-4005

Es muy importante que escriba su **nombre de preso de TDCJ** y **número de TDCJ** en toda correspondencia que mande a nuestra oficina. De otro modo, nosotros no podremos identificarlo y responder a su solicitud.

§1.4 - Áreas Fuera del Ámbito de Asistencia de los Abogados del Estado para Ofensores

Debido al carácter de nuestra oficina y las estipulaciones de Ruiz v. Estelle hay muchas áreas que SCFO no puede proporcionar asistencia. A veces la razón es por un conflicto de interés y en otras, debido a la póliza departamental. Generalmente, SCFO no puede ayudar en los asuntos siguientes:

1. Asuntos internos del TDCJ, incluyendo asuntos de libertad condicional (fuera del tipo de consejo proporcionado en Capítulo 7), quejas, castigos, disputas de clasificación y otros procedimientos administrativos.
2. Demandas de derechos civiles incluyendo demandas contra TDCJ oficiales correccionales, u otros ofensores. Esto también incluye demandas que recusan pólizas y condiciones de encarcelamiento o supervisión.
3. Casos que engendran honorarios, tal como demandas, incluyendo casos en que se confiere dinero por perjuicios, o cuando se trata de recuperar propiedad.
4. Ofensores dentro de TDCJ no son elegibles para cambiarse el nombre según la Legislatura del 72 Código Familia Enmendado §45.103 (previamente 32.22, efectiva el 1 de Septiembre, 1991.)

5. Ofensores que no son indigentes - cuando el ofensor tiene acceso a suficientes fondos o propiedad para poder obtener abogado privado.
6. Casos donde otro abogado ya tiene responsabilidad del asunto, tal como abogado designado por la corte en una apelación directa.
7. Asistencia en la organización de ceremonias de matrimonios con ofensores dentro de TDCJ, más allá de los consejos encontrados en el Capítulo 9.
8. Asuntos de confinamiento civilmente que caen fuera de esos asuntos específicamente delegadas a los Abogados del Estado para Ofensores en §841 del Código de Seguridad y Salud de Texas.

Como SCFO no lo puede representar en ningún reclamo que quiera hacer contra TDCJ, usted le puede escribir a un abogado del mundo-libre sobre esos casos Mire el Directorio Legal de Texas que se encuentra en la biblioteca legal de su prisión para conseguir un abogado que lo pueda asistir.

A pesar de que SCFO no puede entablar casos que engendran honorarios, usted todavía puede continuar con su derecho de acción. Puede contratar un abogado o ponerse en contacto con una organización de asistencia legal para establecer su demanda.

En virtud de una enmienda de 1987 de §16.001 del Código de Practica y Remedios Civil, encarcelado no libre el Estatuto de Limitaciones. En otras palabras, el hecho de que está encarcelado NO extiende el Estatuto de Limitaciones.

§1.5 - Avenidas Alternativas Para Solicitar Asistencia

Puede ser aconsejable que usted siga los procedimientos de quejas del TDCJ antes de comunicarse con un abogado del mundo-libre. Hay un número de organizaciones que lo pueden asistir en asuntos que SCFO no puede. Mire SCFO REF 1.1 para la lista de organizaciones.

SCFO no puede garantizar que otra organización pueda proporcionarle asistencia. El gobierno federal pasó una ley prohibiendo a las organizaciones de servicios legales que reciben fondos federales a proporcionarles ayuda legal a ofensores dentro de las penitenciarías federales o estatales. Consecuentemente, muchos grupos que antes podían proporcionar asistencia, ya no lo pueden hacer. A veces problemas legales en el mundo-libre tienen un impacto sobre un miembro familiar así como al ofensor (...como un juicio hipotecario también afectaría al conyugue.) En ese caso, la mejor manera de recibir ayuda, es dejar que alguien más principalmente resuelva el problema.

Adicionalmente, muchos abogados privados proporcionan representación para casos de danos de heridas personales meritorios o en casos de derechos civiles con base de honorarios condicionales. Un plazo condicional es un acuerdo de honorarios el cual el abogado recibe tanto por ciento de cualquier recuperación recibida. Además, otros tipos de casos pueden tener una estipulación por ley para honorarios del abogado. Sin embargo, estos asuntos deben ser arreglados sobre una base individual, y SCFO no puede hacer referencias ni ayudar a negociar provisiones de representación. El Directorio Legal de Texas, que es un guía de referencias, localizado en la biblioteca de ley en cada prisión, contiene direcciones de todos los abogados licenciados en el Estado de Texas. Tomos I y II enumeran los abogados por condado y contienen información sobre las prácticas especialidades de ellos.

Finalmente, cada prisión/facilidad mantiene una colección de estudios de información legal, al cual usted puede tener uso de ello en orden de hacer estudios legales. El Supervisor de la Biblioteca de Ley puede asistirlo con preguntas que usted pueda tener sobre estudios de información legal/publicaciones o para obtener una lista completa de Tenencias de Biblioteca de Ley completa (“Law Library Holdings”).

Referencias de Capitulo 1

SCFO REF 1.1 - Organizaciones de Fuera Disponible para Ayuda a los Ofensores

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CHAPTER 2 TABLE OF CONTENTS

CHAPTER 2 - LEGAL RESEARCH

2.1 - Introduction	1
2.2 - Sources of the Law	1
2.3 - Beginning Your Research.....	2
2.4 - Basic Research Tools.....	4
2.5 - Legal Writing.....	9

CHAPTER 2 - LEGAL RESEARCH

§2.1 - Introduction

The purpose of this section is to teach the proper method to use the law books in the unit law library. The information given here is an introduction to basic legal materials. The only way to become proficient at legal research is to study the different sets of law books closely and to practice using them.

The more extensively you attempt to educate yourself about the law, the better you will be able to protect yourself in legal matters. When you learn the basics of legal knowledge you will be able to handle some problems without any help. You will also be better equipped to explain the important facts about your case if you do require an attorney's services.

§2.2 - Sources of the Law

The major sources of the law are constitutions, statutes, and court decisions.

1. Constitutions - The United States Constitution is known as the "supreme law of the land." Each state has its own constitution in addition to the federal constitution. Constitutions usually contain general statements of legal principles. It is the responsibility of the courts to decide in specific cases what these general provisions mean. For example, the U.S. Constitution provides that no state shall deprive any person of life, liberty, or property without due process of law. Thousands of court decisions handed down each year focus on whether particular actions by the government violate the due process clause.
2. Statutes - Statutes are written laws that are passed by legislative bodies and approved by a chief executive or passed over his veto. Statutes are much more detailed statements of law than constitutions, but it is still up to the courts to decide what statutes mean in specific cases. A constitutional provision prevails over a statute that conflicts

with it, and a court will rule the conflicting part of the statute to be invalid. A federal statute, however, is not invalid if it conflicts with a state constitution. Federal statutes are passed by the U.S. Congress and approved by the President or passed over his veto. They must conform to the U.S. Constitution.

Texas statutes are passed by the Texas Legislature and approved by the Governor or passed over his veto. They must conform to the U.S. Constitution and the Texas Constitution.

3. Court Decisions - Court decisions are the rulings of the courts in different cases. Most cases interpret the meaning of constitutions and statutes. Sometimes court decisions are based only upon equity and earlier decisions of the courts and not upon any constitution or statute. The law developed in this manner is known as “common law.” A case decided by a court is binding on that court as well as on all lower courts. The most important decisions are those of the U.S. Supreme Court. The U.S. Supreme Court’s decisions must be followed by all state and federal courts. The decisions of the Fifth Circuit Court of Appeals are binding upon all federal district courts in Texas, because Texas is in the Fifth Judicial Circuit. The Texas state courts are also bound to follow the Fifth Circuit’s decisions, unless the U.S. Supreme Court overrules the Fifth Circuit.

In doing research, it is important to discover what the constitutions (U.S. and Texas), statutes, and court decisions dictate about the legal issue in your case. The constitutional provisions, statutes, and cases you find are the legal authorities you will use to persuade the courts that your argument or theory is correct.

§2.3 - Beginning Your Research

In researching a legal problem, the first step is to determine the issue involved. What basic words or phrases describe the legal question?

EXAMPLE: A robbery victim points out the defendant to the police in a line-up at the police station several hours after the robbery. The defendant is several inches taller than the other people in the line-up. All participants in the line-up are asked to speak a few sentences. The defendant has no attorney present at the line-up. The victim testified at the trial about the line-up, stating that she identified the defendant by appearance and by voice.

The legal question is whether the victim can testify about a line-up conducted under these circumstances. To research the question, think of as many legal sounding expressions as you can that describe your problem. Possible descriptive words or phrases for the above sample include: line-up, identification, pre-trial identification, voice sample, self-incrimination and right to counsel.

Once you have a list of these descriptive words, you can use a number of research tools that will help you find legal authorities related to your question. Most research tools available in the unit law libraries are made up of (1) main volumes, (2) index volumes, and (3) pocket parts.

1. Main Volumes - The main volumes are subdivided into sections, each dealing with a specific area of the law. For example, Volume 2 of the Texas Statutes Annotated, Code of Criminal Procedure, includes Articles 21 to 26. Each article is further subdivided by use of decimals. Article 24.01, for example, covers the issuance of a subpoena. Each set of law books is organized differently. It is important that you learn the numbering system when you start using each set of books.

Under each section you find short summaries of court decisions about that point of law. These are in very small print. Following each summary is the case's "citation," which tells you what court decided the case and where to find the text of the court's opinion. You need to look at the opinion rather than just the summary in order to know exactly what the court decided.

2. Index Volumes - The index volumes are arranged in alphabetical order by subject. After each word or phrase in the index is a list of the places in the main volumes where that particular topic is covered. The index volumes subdivide many topics by listing subheadings underneath the general subject heading. A general topic like "arrest" may be followed by several pages of subheadings arranged alphabetically.

Often the first words you think of to describe your problem cannot be found in the index. You need to be patient and think of as many words and phrases as you can.

3. Pocket Parts - The pocket parts are found in the back of each volume. They slip in and out easily because they are often updated. They update the law by giving summaries of cases decided since the main volumes were published. The pocket parts keep the same numbering system as the main volumes, although new sections are added to keep

pace with the developments in the law. ALWAYS CHECK THE POCKET PARTS to find the most recent cases on the subject you are researching. The index volumes also have pocket parts.

On the inside cover of the pocket parts there is a list of the most recent volumes of the case reporters whose opinions are summarized in the pocket part.

§2.4 - Basic Research Tools

The following descriptions of the major legal research tools available in the unit law libraries are intended to give you only a basic understanding of how to use them. Most sets of law books contain an introduction explaining their different features, but the best way to learn legal research is to practice.

1. Encyclopedias - A legal encyclopedia discusses the law in general terms, with references to books that give more detailed information. The main volumes are divided alphabetically by topic. Each topic is divided into sections (The symbol “§” means “section”). Remember to check the pocket parts for the most recent discussion of the law.
2. Digests - Legal digests, like encyclopedias, are arranged alphabetically by general topics, such as Assault and Battery, Criminal Law, Habeas Corpus, etc. Digests are different, however, because they contain short summaries of cases on each topic instead of general textual statements of the law.

Most digests use the “key number system,” which was invented by the West Publishing Company, the giant legal publisher. Each topic is subdivided into “key numbers,” which correspond to specific areas of the law. For example, Indictment and Information, key number 137(6), covers sufficiency of the accusation. Under each key number you find summaries of the cases about that area of the law. After each summary is the case’s citation, which tells you where to find the court’s opinion in the case.

The index volumes refer you to the topic(s) and key number(s) that apply to your issue. If you know what topic applies, you can skip the index and go to the main volumes where your topic starts. An outline at the beginning of each topic lists the different areas covered by the key numbers.

The Texas Digest covers Texas cases. The Supreme Court Digest contains summaries of cases decided by the United States Supreme Court. The topics and key numbers are the same in both digests. Once you have found the key numbers in one digest, you can turn to the same headings in the other digests to find cases on the same issue. Be sure to check the pocket parts for the most recent cases.

In addition to the index volumes, digests also have volumes called “Table of Cases.” Use these volumes when you know the name of the case but you do not know its citation (where to find it in the reporter). The most recent cases will be listed in the pocket parts of the “Table of Cases” volumes.

3. Annotated Statutes - Many legal problems are decided by the application of a statute. Annotated Statutes give the text of the statutes followed by short summaries of the cases (“annotations”). The citation of the case follows the summary. Annotated statutes are arranged by title, section, and/or article number of the statutes.

If you know which statute applies to your case, you can use the main volume that includes the statute. If you do not know what statute (if any) applies, you start by using the index of volumes, just as if you were using an encyclopedia or a digest.

Following the text of each statute are historical notes and cross references to other statutes. There is also a section called “Notes of Decisions.” This section is very helpful because it is an alphabetical index to the annotations. Some statutes have over 100 pages of annotations, and the cases are about different topics. Look through the headings in the “Notes of Decisions” and write down the numbers given to the ones that sound similar to your problem. Read the annotations in the sections with those numbers. Often there will be useful cases under several section headings.

Always check the pocket parts to see if the statute has been amended (changed) or repealed, and to find annotations of the most recent cases construing (interpreting) the statute. The annotations in the pocket parts are organized by the same section numbers listed in the Notes of Decisions in the main volume. New section headings are often added; these are also found in the pocket part. To find cases too recent for the pocket parts, check the reporters which have a “Table of Statutes Construed.”

Vernon's Texas Statutes Annotated is the series for Texas statutes. Many Texas statutes are found in "codes," such as the Penal Code and the Code of Criminal Procedure. The codes are annotated by Vernon's and are organized as separate units.

United States Code Annotated (U.S.C.A.) contains annotations to federal statutes. The federal statutes are organized by title and section number. For example, "42 U.S.C.A. §17935 (2009)" refers to Title 42, Section 17935 in the 2009 edition of U.S.C.A. Title 18 covers public health and welfare.

4. Cases

A. *Reports and Reporters* - Once you have found citations of cases about your topic, you need to read the opinions written by the courts that decided those cases. These opinions are published in court "reports" or "reporters." The term "report" means an official publication of a court; "reporter" means that a private company is publishing the opinions. The reporters are as accurate as the official reports, and contain useful editorial features not found in the reports. Some courts' opinions are published only in reports.

The following is a list of the reports available in unit law libraries and the opinions they publish:

<u>REPORTER</u>	<u>HOW CITED</u>	<u>CASES REPORTED</u>
Southwestern Reporter, Second and Third Series	S.W.2d S.W.3d	All reported Texas cases
Federal Supplement, to include Second Series	F. Supp. F. Supp. 2d	Federal district courts
Federal Reporter, Second and Third Series	F. 2d F. 3d	U.S. Circuit Courts of Appeals
Supreme Court Reporter	U.S.	U.S. Supreme Court

B. *Citations* - Each reported case has a citation. The citation states the volume number and page number of the reporter where the opinion is located. For example, Bounds v. Smith, 488 U.S. 869, 109 S. Ct. 176, 102 L. Ed. 2d 146 (1988), means that the opinion can be found at volume 488 of the U.S. Reports, at page 869; in volume 109 of the Supreme Court Reporter at page 176; and in volume 102 of the U.S. Supreme Court Reports, Lawyer's Edition, Second Series, at page 146.

The citation may also include additional information, such as the history of the case and the court(s) that decided it. For example, *Johnson v. Beto*, 337 F.Supp. 1371 (S.D. Tex.), *aff'd*, 469 F.2d 1396 (5th Cir. 1972), means that the U.S. District Court for the Southern District of Texas originally decided the case, and that the Fifth Circuit Court of Appeals affirmed its decision. Both courts decided the case in 1972 (otherwise the date of the district court decision should follow [“S.D. Tex.”]). A citation of a case in S.W.2d, F.Supp. or F.2d should identify the court because these reporters publish decisions of more than one court.

C. *Reading Cases* - It is important to look at the actual court opinions rather than relying on the summaries found in digests, annotated statutes, and annotated constitutions. The summaries do not tell you the specific facts involved and can mislead you as to what a case actually decided. Furthermore, the opinion includes the process of reasoning by which the court reached its conclusion.

The private publishing companies provide some features that can save you the time it takes to read a long opinion. Before the text of the court’s opinion, the reporters have a summary (“synopsis”) of the case’s history and the court’s decision (“holding”).

The largest legal publisher is Thomson Reuters Corporation, which publishes all the reporters currently received in the unit law libraries. The West reporters use the same topic and key number system as the West digests. After the synopsis there are numbered paragraphs, called “headnotes,” beginning with the topic(s) and key number(s) that describe the subject. The paragraphs (only a single sentence) state a rule of law as announced by the court in the opinion. The editors divide the opinion by placing the bracketed headnote number before the court’s discussion of the point of law stated in the headnote.

If a case has 20 headnotes, and the only points of law related to your problem are stated in paragraphs 6 and 7, look in the court’s opinion where you find [6] and [7]. You may want to read other parts of the opinion, especially the facts, which are usually in the beginning of the opinion. By using the headnotes, you can quickly find the parts of the court’s opinion that apply to your case.

When you take notes about a case, write down which headnotes apply to your problem. Also write down the topics and key numbers following the headnote (if you found the case by using a digest, you already have this information). The headnote numbers are useful when you look for later cases in Shepard's Citations, discussed below. You can find other cases by looking in the Texas Digest and the Supreme Court Digest under the same topic and key number.

Example: You read a case in which only headnote 2 is about your problem. After the headnote number 2, you find "Homicide" printed in bold face, a small "key" and the number 35. The topic (Homicide) and the key number (35) will lead you to any digest made by West Publishing Company. Find the main volume that has Homicide in it and turn to key number 35. There you will find summaries of other cases involving the same area of the law but based on different fact situations. Be sure to check the pocket parts of the digest for recent cases.

- D. *Finding the Most Recent Cases* - The West reporters each contain a Key Number Digest of the cases in that volume. They also have a "Words and Phrases" section that is sorted by topic and the topics are arranged in alphabetical order.

The reporters are published in paperback before the bound volumes appear. There are no pocket parts to the reporters. The paperback issues are called "Advance Sheets." West Publishing Company publishes most of its Advance Sheets weekly. The cases have the same volume and page numbers in the bound volumes and the Advance Sheets. The Key Number Digest appears in the front of the Advance Sheets and in the back of the bound volumes.

5. Citator Services - The purpose of a Citator service is to (1): provide comprehensive lists of authorities that have cited a case, and (2) to validate a case as still being a good statement of the law i.e. the case has not been overturned by a later decision. The "Citator" helps you find out what recent cases have said about the way a court decided a similar problem in an earlier case. You can also use the Citator service to see how the courts have interpreted statutes and constitutional provisions.

To utilize the Citator service, you must submit an I-60 to the unit law library staff that contains a complete citation (volume, publication, and page). Law library staff

will retrieve your requested information utilizing the electronic legal research system. Offenders with direct law library access shall receive the requested information the next business day. Offenders with indirect law library access shall receive the requested information the next delivery day.

§2.5 - Legal Writing

If your research convinces you that you have good grounds for a legal cause of action, you probably will want to start legal proceedings. You may file papers in court on your own behalf (“pro se”) or you may try to obtain legal assistance. Here are some suggestions about legal writing, which apply whether you are writing to the court or to any attorney:

1. Try to explain your case in clear and simple terms. Be as brief as possible.
2. Organize your presentation by starting with the facts, then stating the legal issue(s), and finally giving your legal arguments. It may help you to start with an outline.
3. Be specific in describing the facts. A statement that you were “denied a fair trial” or given “ineffective assistance of counsel” does not tell anything about your case. These phrases are conclusions rather than facts. State the facts that make you think your trial was unfair or your attorney ineffective.
4. Select a few cases helpful to your legal argument and explain why they support your position. This is better than citing a large number of cases without any discussion of how their facts make them similar to your case.
5. If there are important cases that seem to go against your position, explain how your case is different and why the facts of your case call for a different result or legal conclusion.

CHAPTER 2 REFERENCES

NONE.

SCHEO

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CHAPTER 3 TABLE OF CONTENTS

CHAPTER 3 - TRIAL AND APPELLATE PROCESS

3.1 - Criminal Defense Section..... 1
 3.1.1 - Before Appointment of Counsel..... 1
 3.1.2 - Appointment of Counsel..... 2
 3.1.3 - Criminal Discovery after the Michael Morton Act 3
 3.1.4 - After Appointment of Counsel 4
 3.1.5 - At Court 5
 3.1.6 - Post Trial..... 6
3.2 - Basic Appellate Information..... 6
 3.2.1 - The Appellate Record..... 7
3.3 - The Appellate Attorney 8
3.4 - The Appellate Process 10
3.5 - The Anders Brief Procedure 12
3.6 - Petition for Discretionary Review 13
 3.6.1 - The Format of the Petition..... 13
 3.6.2 - Extension of Time 13
 3.6.3 - Rules on Filings..... 14
 3.6.4 - The PDR in the Texas Court of Criminal Appeals..... 14
3.7 - The State Counsel for Offenders Attorney and Your Appeal 17
3.8 - Questions Offenders Often Ask..... 18
3.9 - Table of Authorities..... 25

CHAPTER 3 - TRIAL AND APPELLATE PROCESS

§3.1 Criminal Defense Section

SCFO Criminal Defense Section attorneys represent indigent offenders accused of committing felony crimes while confined in the Texas Department of Criminal Justice (TDCJ). *See* Texas Code of Criminal Procedure Article 26.051. The Section is made up of attorneys who have experience defending criminal cases. If you are indicted for allegedly committing a felony offense while confined in TDCJ and you are indigent, the judge will most likely appoint SCFO to represent you. Your case will then be assigned to an attorney. You are also free to hire counsel of your own choosing but should do so without delay.

§3.1.1 Before Appointment of Counsel

SCFO can offer you very limited help prior to your indictment. If you have been involved in an incident for which you may be charged with a felony inside the prison and cannot afford an attorney, you may write to SCFO - Criminal Defense Section to alert us of the situation. However, SCFO will not be appointed to represent you until you have been formally charged (by indictment or complaint). In any case, you should try to remember all the surrounding facts and the names

and/or TDCJ numbers of all witnesses to the incident so you may later provide that to your attorney. If you are indicted, your attorney can use this information to prepare your defense.

To avoid harming your case, remember these three important facts:

1. Your general mail is subject to inspection by TDCJ. Only legal mail to your attorney is covered by the attorney-client privilege. Letters to your attorney should be clearly addressed to your attorney and clearly indicate on its face that it is legal mail.
2. Anything you say about your case to anyone, except your attorney and their investigators, may be used against you.
3. “Kites” and other letters are often intercepted and used as evidence against defendants at trial.

It is best for you not to discuss your case with anyone except your attorney or your attorney’s investigators. This includes your family members and friends. Family and friends will want to know about your case and will want to help; however, they are not covered by the attorney-client privilege. Your family and friends could be used as witnesses against you if you involve them in your case. It is also possible that TDCJ will read your mail and pass on anything you say to the prosecutors. Also, note that SCFO attorneys and staff will not discuss your case with your family members without receiving specific written permission from you to do so. Even with permission, SCFO will not reveal any confidential information regarding your case to anyone outside of SCFO.

Oral or written statements from you and your witnesses at disciplinary hearings may be used against you by the prosecutor at trial. If you are warned before giving a statement that you have a right to an attorney it is usually in your best interest to ask for an attorney and to remain silent until an attorney is appointed by the court or hired by your family. The prison system cannot discipline you for not answering questions about an incident for which you face prosecution.

Any offers in exchange for cooperation such as promises of leniency, promises not to file “free-world charges,” or promises not to indict should be made through your attorney. To enforce these promises, all promises should be in writing (preferably to your attorney) and included as part of the statement provided to any TDCJ or law enforcement officer. When the statement provided is recorded, any promises by TDCJ or law enforcement officers should be restated at the beginning of the recording.

§3.1.2 Appointment of Counsel

The district judge presiding over your case controls who is appointed to represent you, not SCFO. The judge will first decide if you are indigent. The judge will then decide whether to

appoint SCFO to represent you. If the judge appoints SCFO, that judge will notify SCFO by mail that the office has been appointed to represent you. SCFO will then contact you, usually by mail, and begin the process of representing you in court. If an attorney from the Section is unable to represent you due to a conflict of interest, the District Court will appoint a local attorney. Being indicted for a felony is completely separate from any TDCJ disciplinary case arising from the same conduct. SCFO is unable to provide advice relating to internal TDCJ disciplinary cases.

§3.1.3 Criminal Discovery after the Michael Morton Act

Prior to January 2014, criminal discovery in Texas followed a mid-20th century model. The United States Supreme Court's landmark case, Brady v. Maryland 373 U.S. 83 (1963), ensured that defense counsel is entitled to receive all information from the government that could show the defendant's innocence (known as "exculpatory" evidence) or that could be used for impeachment. Over time the government's case files became more and more available to the defense bar. By 2013, the majority of district attorneys across Texas had adopted some type of "open file policy." A few counties, however, maintained the old rule of providing only exculpatory material to the defense attorney.

Following the exoneration of Michael Morton, the Michael Morton Act was codified into Texas law in 2013. *See* Tex. Code Crim. Pro. § 39.14. Michael Morton was wrongfully convicted of his wife's murder in 1987 in the suburbs of Austin. Later, it was found that the Williamson County District Attorney's Office had concealed evidence implicating a stranger in Mrs. Morton's murder. Morton's conviction was overturned on December 19, 2011 after he spent 24 years of his life in prison. The Texas Legislature passed the Michael Morton Act in 2013 in an effort to prevent a tragedy like the one that befell Mr. Morton from ever occurring again.

The Morton Act, as it amended Article 39.14 of the Code of Criminal Procedure, codified an open-file policy for all prosecutors in Texas. Under the act, discovery materials must be affirmatively requested by the defense attorney and, following such request, the government must turn over that discovery to the defense attorney "as soon as practicable." This request is almost always in writing, as is the case with SCFO criminal defense trial attorneys who routinely file a Morton Discovery Request along with our initial pretrial motions.

One area of concern for the defense bar is the defendant's access to copied discovery. Specifically, the Texas Code of Criminal Procedure § 39.14 (g) states that the only discovery that a defendant may possess is a copy of his own statement. The defendant may review statements of

other witnesses, however the law requires that any sensitive information must be edited by the defense attorney before defendant is allowed to see them.

In contrast, State prosecutors have expressed concern that witnesses may now be subject to influence and intimidation as a result of the Michael Morton Act. Specifically, prosecutors have expressed concerns that if a defendant has access to witness information in the discovery, the defendant may try and bribe, threaten, or harm that witness to avoid prosecution. It is important that defendants understand and appreciate the benefits and limitations of this law.

§3.1.4 After Appointment of Counsel

When an attorney from the Criminal Defense Section is assigned to represent you, the attorney will begin working with SCFO investigators to prepare the case for trial. The investigators, like the attorneys, are bound by attorney-client confidentiality rules. This means that SCFO attorneys and investigators, along with the rest of SCFO staff, cannot discuss your case with anyone outside the SCFO office other than you and experts retained on your behalf.

The attorney assigned to represent you will meet with you as soon as practicable to discuss your case. It is not always possible for the trial attorney to visit you as often as you might like. Your first contact with SCFO may be with an investigator assisting the trial attorney in preparing your case. SCFO investigators work closely with attorneys. The investigator's duties include, but are not limited to:

1. interviewing clients and their witnesses;
2. examining physical evidence and chain of custody;
3. obtaining and serving subpoenas on witnesses and custodians of records;
4. gathering information significant to the case; and
5. preparing reports.

You should not file *pro se* motions and/or write letters to the judge or prosecutor. *Pro se* motions can seriously damage your case. If you are inclined to file *pro se* motions in your case, we encourage sending your attorney a copy first, so the attorney may advise you on whether the motion may damage your case. The court keeps all *pro se* motions and letters to the court in the court's file, which the prosecutor can read. For example, a motion to quash may tell the prosecutor that a case needs to be reindicted, thus helping the prosecutor correct an error that could have provided a defense at trial. Many offenders have filed motions with the court that have provided information that is harmful to their case.

If you have any questions about your case, we encourage you to write to your attorney.

§3.1.5 At Court

You have the right to have your attorney present at all court sessions. Due to situations beyond SCFO's control, the same attorney may not be present at all court sessions. You will be represented by an attorney from SCFO who is familiar with your case and prepared for the court session. The same attorney-client confidentiality rules apply if a substitute attorney is present for some of your court sessions.

At the pre-trial hearing, the attorney may present pre-trial motions. Most motions do not have to be filed until docketed for a pre-trial hearing. Sometimes the court will schedule more than one pre-trial hearing, or the attorney may request additional pre-trial hearings.

When appearing for trial before a jury, you have the right not to be tried in prison clothes. Your physical appearance may influence the judge or the jury's overall view of you. SCFO will provide you with clothing for trial unless your family or others furnish clothing.

Prosecutors usually offer a plea bargain on each case. SCFO attorneys have a duty to convey all plea bargain offers to you, even if you tell us you do not want to plea bargain your case. You may choose to plead guilty in exchange for a reduction in the number or seriousness of the charges and/or for a particular sentence limit. Whether you choose to plead guilty is your decision alone. The attorney will advise you on the strengths and weaknesses of your case and give you an opinion regarding the fairness of the offer. You, however, are the one who must live with the results of the plea. You must be satisfied when you leave the courthouse that you have done what is best for you, all factors considered. You should not be pressured by anyone into pleading guilty. If you want to plead not guilty, that is your choice alone.

In those cases where you disagree with your attorney about the control and direction of the case, it may be helpful to refer to American Bar Association Standards, §5.2 Control and Direction of the Case, which reads:

- (a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:
 - (i) what pleas to enter;
 - (ii) whether to accept a plea agreement;
 - (iii) whether to waive jury trial;

- (iv) whether to testify in his or her own behalf; and
 - (v) whether to appeal.
- (b) Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced.

§3.1.6 Post Trial

If you are found not guilty of all charges at trial, SCFO will send a copy of the judgment to you after it is prepared and signed. You should keep the judgment for your records. The court will keep the original. If your trial results in a mistrial, and the state plans to retry the case, SCFO will continue to represent you. If your trial results in a conviction, the trial attorney will advise you about your appellate rights, which are outlined below. The clerk's record and reporter's record (previously known as the statement of facts and transcript) will be prepared at no cost to you if you decide to appeal a conviction, or if a trial results in a mistrial and the State intends to prosecute that case again. *See* §3.2.1 below. If you are acquitted, or if the case results in a mistrial and the State does not re-prosecute the case, no reporter's record will be prepared unless you personally ask for and pay for it.

§3.2 Basic Appellate Information

In Texas, there are two levels of direct appeal on a criminal conviction. The first level of the appeal goes to a court of appeals. The second level goes to the Court of Criminal Appeals in Austin, the highest criminal appellate court in Texas.

After sentencing, or after a motion for new trial in the trial court, a conviction can be appealed to a court of appeals. You are entitled to a court appointed attorney for the first level of appeal if you are indigent. Texas has fourteen courts of appeals. Each county has an assigned court of appeals. For example, if the conviction is out of Harris County, the appeal will go to either the First or Fourteenth Court of Appeals, and if the conviction is from Dallas County, the appeal will go to the Fifth Court of Appeals. To find out which is the appropriate court of appeals for your conviction, you or your appellate attorney may contact the District Clerk of the county where the conviction occurred. You may also look in the Texas Legal Directory (in the prison unit's law library) to find the right court of appeals for your court of conviction.

If you write to the District Clerk of the county where you were convicted, include your full name, your cause number, the court number and/or judge's name (if known), date of sentencing (if known), and the offense. Be sure to provide your complete address so they will be able to contact you. The Texas Legal Directory contains addresses for the fourteen Courts of Appeals and all the District Clerks in Texas.

If the court of appeals affirms a conviction, some cases are then taken to the next level in the direct appeal – a Petition for Discretionary Review to the Court of Criminal Appeals (P.D.R.). You are not entitled to a court-appointed attorney at this stage. As the name implies, the Court has discretion as to whether it will review the lower Court's decision. The Court of Criminal Appeals is located in Austin and it is the highest state court to hear appeals of criminal convictions. The Court of Criminal Appeals also hears post-conviction writs of habeas corpus, as discussed in Chapter 4.

§3.2.1 The Appellate Record

A direct appeal of a criminal conviction is based only on the record of what happened at trial. The Courts of Appeals do not hear new evidence. Their decision is based on the appellate record and the legal issues raised by the appellate attorney. While it is your decision whether to appeal, it is the appellate attorney who decides what issues to raise. The definitions of the different kinds of records used in an appeal are as follows:

- A. The clerk's record is made up of all the documents filed in the case. It includes the indictment, judgment and sentence, and any motions filed by either attorney. Rule 34.5 of the Texas Rules of Appellate Procedure lists the requirements of a clerk's record. The clerk's record is prepared by the District Clerk of the county where the conviction occurred.
- B. The reporter's record is prepared by the court reporter. It consists of the testimony presented at trial. It may also include exhibits that were entered as evidence at trial. Its preparation is controlled by Rule 34.6 of the Texas Rules of Appellate Procedure.
- C. The appellate record consists of the clerk's record and the reporter's record under Rule 34.1 of the Texas Rules of Appellate Procedure.

The appellate record will not immediately be available to the appellate attorney. If a motion for new trial was filed in the district court, the appellate record is due to be filed in the court of appeals 120 days after sentencing. *See* Texas Rule of Appellate Procedure 35.2. If needed, the

court reporter may file a motion for extension of time with the court of appeals to extend this deadline. Therefore, it may be quite some time after conviction before the appellate record is completed.

The Texas Rules of Appellate Procedure provide for a free appellate record if the appellant is indigent. *See* Rule 20.2 of the Texas Rules of Appellate Procedure. This does not mean that the record will be given to the indigent appellant. Instead, the record will be made available to the indigent appellant's attorney for preparation of the brief. The appellate attorney must return the record when the work is completed. The appellate attorney may not be able to provide the appellant with a free copy of the record. If not, the appellant may purchase copies of the record.

If the appellant in a criminal case is not indigent, he or she will be required to pay for preparation of the trial record. The appellate record will usually be available from the appellate attorney once the appellate process is over.

The appellant has the right to review the appellate record and file a brief pro se (without representation of counsel) if the appellate attorney files a brief stating there are no meritorious grounds for relief. This right is outlined in Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967); and Gainous v. State, 436 S.W.2d 137 (Tex. Crim. App. 1969). See Section 3.5 of this chapter for a further discussion of the Anders brief.

Please note that there is no right to free access to the appellate record for preparation of a writ of habeas corpus or a Petition for Discretionary Review. If the appellate record is needed, it must be purchased. The District Clerk of the county of conviction will be able to provide information on how to order a copy and how much it will cost. In addition, if the appeal was to the Third Court of Appeals in Austin or if the Court of Criminal Appeals has the appellate record, low cost copies can be ordered from the State Law Library in Austin. All addresses needed are available in the Texas Legal Directory. When writing to request the appellate record, be sure to include all important information so that the correct record can be located.

§3.3 The Appellate Attorney

The appellate attorney's duties include the following:

1. Timely file a proper notice of appeal under Texas Rules of Appellate Procedure (TRAP) 26.2;
2. Timely request the court reporter to prepare the reporter's record and the District Clerk to prepare the clerk's record under TRAP 34.5 and 34.6;

3. Review the clerk's record and reporter's record for possible issues to raise; and
4. Prepare and file the appellate brief under TRAP 38.

Note: The appellate attorney's duties are quite different from the trial attorney's. The appellate attorney generally does not need to visit personally with the appellant. No investigation of facts is generally done outside the appellate record. The appellate attorney will write the brief based on the appellate record, applicable law, and his/her decision as to what issues may have merit.

If the appellate attorney decides, after reviewing the record, that there are no meritorious issues to raise on appeal, the attorney must then file an Anders brief stating why there are no meritorious issues. The appellate attorney has certain duties when an Anders brief is filed, and the appellant has certain rights. *See* Section 3.5 of this chapter for a further discussion of the Anders brief.

If the court of appeals affirms the appellant's conviction, the appellate attorney's duty is finished. However, the appellate attorney may file a motion for rehearing, which is a request for the court of appeals to reconsider its decision. The deadline for filing a motion for rehearing is fifteen days after the court of appeals issues its opinion. *See* Rule 49.1 of the Texas Rules of Appellate Procedure. It is the appellate attorney's decision whether or not to file a motion for rehearing. A motion for rehearing is not required for filing a petition for discretionary review. *See* Rule 49.9 of the Texas Rules of Appellate Procedure.

If no motion for rehearing was filed, or after a ruling on a motion for rehearing, the appellate attorney must either file a petition for discretionary review for the appellant or must notify the appellant in time for the appellant to file one. This duty is outlined in Ex parte Wilson, 956 S.W.2d 25 (Tex. Crim. App. 1997). If the appellate attorney does not do this, it can provide the basis for a writ of habeas corpus requesting an out-of-time petition for discretionary review. *See* Chapter 4 for more information on this issue.

The appellant has the right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). If the appellate attorney failed to raise an issue on appeal that would have benefited the appellant, the appellant may be eligible for an out-of-time appeal. This can be sought through a writ of habeas corpus. *See* Chapter 4 for further discussion.

§3.4 The Appellate Process

After sentencing, the trial attorney may file a motion for new trial under Texas Rules of Appellate Procedure (TRAP) 21. The motion must be filed within 30 days of sentencing, and must be decided by the trial judge within 75 days of sentencing. *See* TRAP 21.8. A motion for new trial is usually not necessary to appeal a conviction, but it does extend the deadline for filing the Notice of Appeal and appellate documents. A hearing on a motion for new trial may be used to preserve errors on matters not appearing in the trial record. If the trial judge does not rule on the motion for new trial within 75 days of sentencing, the motion is denied by operation of law.

The appellate attorney must file a written notice of appeal within 30 days of sentencing if no motion for new trial was filed. If a motion for new trial was filed, then the notice of appeal is due within 90 days of sentencing. *See* TRAP 26.2. It must be filed with the District Clerk of the convicting county. *See* TRAP 25.2. The notice of appeal can be filed within 15 days after the due date if a motion for extension of time is also filed. *See* TRAP 26.3.

1. **Clerk's Record**

The District Clerk will prepare the clerk's record, file it with the court of appeals and send notice to the appellate attorney that it has been filed. The documents that will be included in the clerk's record are listed in TRAP 34.5. The appellate attorney must send a request to the District Clerk only if additional items should be included in the clerk's record. There is no deadline for designating items to be included in the clerk's record except that the designation should be made before the clerk's record has been filed with the court of appeals.

2. **Reporter's Record**

The appellate attorney will request the court reporter to prepare the reporter's record. Counsel will usually request a transcription of all the court reporter's notes from the trial, along with the exhibits. The request for the reporter's record is due at the same time the notice of appeal is due, which is within 30 days of sentencing if no motion for new trial was filed or within 90 days of sentencing if a motion for new trial was filed. However, a late request will generally not have negative consequences. *See* TRAP 34.6.

Once the clerk's record and the reporter's record have been completed, they will be filed with the court of appeals by the district clerk. They are due in the court of appeals within 60 days

of sentencing, unless a motion for new trial was filed, in which case they are due within 120 days of sentencing. *See* TRAP 35.2. It will usually take the court reporter longer to prepare the reporter's record than the time allowed. If so, the court reporter will file a motion for extension of time. *See* TRAP 35.3.

When both the clerk's record and reporter's record have been filed with the court of appeals, the appellate attorney has 30 days to prepare the appellate brief. *See* TRAP 38.6. It is not unusual for the appellate attorney to request an extension of time to file the brief. The appellate attorney will prepare the appellate brief according to TRAP 38.1 and decide whether oral argument will be helpful. If so, the appellate attorney will request oral argument at the time the brief is filed. *See* TRAP 39.7. If oral argument is not requested, the court of appeals will decide the case based on the appellate record and the appellate briefs that were submitted. Even if oral argument is requested, the court of appeals does not have to grant the request.

Note: The appellant generally does not appear with the appellate attorney at the court of appeals for oral argument. Oral argument usually involves only attorneys and the judges of the court of appeals.

Once appellant's brief is filed, the State has 30 days to file its response brief. The State may also file for an extension of time if necessary. After the appellant's brief and the State's brief are filed with the court of appeals, and after oral argument (if any), the court of appeals will issue its opinion deciding the case. *See* TRAP 41. The court of appeals may:

1. Affirm (uphold) the judgment of the trial court;
2. Change it;
3. Reverse and send the case back to the trial court to be tried again;
4. Reverse and send the case back to the trial court for a new punishment hearing;
5. Reverse and render an acquittal.

See TRAP 43.

The appellate process can be very slow. It can take a year or longer from the date of sentencing to the date of the court of appeals' opinion. While waiting for the court of appeals to issue its opinion, there is generally nothing further the appellate attorney can do. All procedures will be on hold until the court of appeals decides the case and issues its opinion.

When the court of appeals issues its opinion, counsel for either the appellant or the State may file a motion for rehearing, requesting the court of appeals to reconsider its opinion. The motion for rehearing must be filed within 15 days of the date of the opinion, unless a motion for extension

of time is filed. *See* TRAP 49. A motion for rehearing is optional. It is not required, even if the appellant plans to file a petition for discretionary review. *See* TRAP 49.9.

If the motion for rehearing is granted, the court of appeals will issue a new opinion. The new opinion may differ from the original opinion in several ways. For example, the court of appeals may change its reasoning but keep the same result. It may also change the result. The court of appeals may merely issue a new opinion, or the court may require submission of new appellate briefs. *See* TRAP 49.3.

If the court of appeals denies the motion for rehearing, the appellate attorney may consult with the appellant to determine if a petition for discretionary review is warranted. If a decision is made to pursue a petition for discretionary review, the deadline for filing it is 30 days after the final decision of the court of appeals. *See* TRAP 68.2.

The appellant does not have a right to have counsel file a motion for rehearing or a petition for discretionary review, and an appointed appellate attorney is often not paid for filing a petition.

§3.5 The Anders Brief Procedure

If a court-appointed appellate attorney finds no meritorious issues to raise, the attorney is required to file what is known as an Anders brief. Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The Texas Court of Criminal Appeals has expressly set out the steps necessary for a valid Anders brief. *See* Gainous v. State, 436 S.W.2d 137 (Tex. Crim. App. 1969). The attorney will:

1. File a motion to withdraw in the trial court with a copy to the court of appeals;
2. File in the court of appeals a brief in support of the motion to withdraw discussing why there are no meritorious appellate issues with a copy to the district clerk;
3. Send the appellant a copy of the brief;
4. Inform the appellant that he/she has a right to file a *pro se* brief or a response to the Anders brief;
5. Tell the appellant of his/her right to review the trial record when preparing the *pro se* brief; and
6. Either provide the appellant a copy of the trial record or inform appellant how to request a copy.

Once the appellant is informed that the appellate attorney has filed an Anders brief, and if the appellant wants to file a *pro se* brief, the appellant must contact the court of appeals

immediately. See the sample letter at SCFO REF 3.1. The appellant may also file a motion for extension of time to file the *pro se* brief. A sample form is included at SCFO REF 3.2.

The appellant will need to get the trial record. The instructions provided by the appellate attorney should be followed. If the appellate attorney did not provide instructions, the appellant should contact the district clerk of the convicting county. See the sample letter at SCFO REF 3.3. Most counties will allow the appellate record to be loaned to the appellant for preparation of the *pro se* brief. The appellate record is sent to the unit through appropriate TDCJ channels. The appellate record is generally loaned for a specific period of time and must be returned after that.

The *pro se* brief must be filed on time. The appellant should confirm the due date with the court of appeals. If the brief cannot be completed and mailed by the due date, the appellant should file a motion for extension of time with the court of appeals. See the sample letter and motion at SCFO REF 3.1 and 3.2. The requirements for an appellate brief are outlined in TRAP 38. Note that there is no requirement for the brief to be typed. Also, under TRAP 2, the appellant can request the court of appeals suspend the rules governing the number of copies to be filed due to the appellant's inability to make copies.

§3.6 Petition for Discretionary Review

§3.6.1 The Format of the Petition

A Petition for Discretionary Review (PDR) must be no longer than 4,500 words if it is computer-generated, or no longer than 15 pages if it is hand-written. See TRAP 9.4(i)(2)(D). If you choose to file a Reply to the State's Response to the Petition, it must be no longer than 2,400 words if computer-generated, or no longer than 8 pages if hand-written. See TRAP 9.4(i)(2)(E). Note again that TRAP 9.4 allows the courts to make exceptions if it is "in the interest of justice," however it is best to keep within what the rules require.

§3.6.2 Extension of Time

If you need an extension of time to file the PDR, you may file a "Motion for Extension of Time" with the court. See SCFO REF 3.4 and 3.5 for an example.

This motion must state:

1. Which court of appeals you are appealing from;
2. The date of the appeals court's judgment;
3. The case number and style of the case in the court of appeals; and

4. If a Motion for Rehearing was filed in the appeals court, you must state the date and outcome of that motion. If it has not been decided yet by the appeals court, you must state that it is pending in that court still. *See* TRAP 10.5(b)(3).

§3.6.3 Rules on Filings

If you mail in your petition to the Texas Court of Criminal Appeals (rather than e-file it), you must file the original version of the petition, *and* eleven (11) copies of it. You may request the Court of Criminal Appeals suspend this rule due to your inability to make copies. *See* TRAP 2.

You must also give a copy of anything you file to all of the parties that are part of the case. If any of the parties is represented by counsel, you must serve notice to the lead attorney on the case. *See* TRAP 9.5.

§3.6.4 The PDR in the Texas Court of Criminal Appeals (CCA)

The PDR is also a matter of discretion in the CCA, which means it does not have to review your case. *See* TRAP 66.2. The reasons the CCA will grant review are whether: two or more appeals courts disagree on an issue, the court of appeals decided an important issue of state or federal law that the CCA has not decided yet, the appeals court decided an issue that is contrary to a decision of the CCA or US Supreme Court, the court of appeals declared a statute unconstitutional or misconstrued the law, the appeals court justices have disagreed on a material (important) question of law that is necessary to the decision, or the court of appeals departed from the accepted and usual course of proceedings. *See* TRAP 66.3 (a)-(f).

To help it decide whether to grant or deny the PDR, the CCA may ask the appeals court clerk to send it the appellate record, copies of the opinions from the appeal court, copies of motions filed in the court of appeals, and certified copies of the judgment or order from the court of appeals. *See* TRAP 66.4(a). The appellate record will be returned to the court of appeals if the PDR is denied. *See* TRAP 66.4(b).

The PDR must be filed within 30 days after the appeals court rendered its judgment. If you filed a Motion for Rehearing, you have 30 days after the motion was denied. *See* TRAP 68.2(a). You may file a Motion for Extension of Time as long as it complies with TRAP 10.5. *See* TRAP 68.2(c). To file the PDR, you must send it in to the clerk of the CCA. *See* TRAP 68.3(a).

The PDR must contain the following, and is explained in further detail below:

1. Name of trial judge and parties to judgment appealed from;

2. Names and addresses of any attorneys that represented the parties;
3. Table of contents;
4. Index of authorities;
5. Statement regarding oral argument;
6. Statement of the case;
7. Statement of procedural history;
8. Grounds for review;
9. Argument;
10. Prayer for relief; and
11. Appendix.

See TRAP 68.4(a)-(j).

The following information explains in greater detail what each of these requirements mean:

1. The Table of Contents is a list of everything included in your PDR with the page number where that information can be found in the PDR.
2. The Index of Authorities is a list of any cases, statutes, rules of procedure or evidence, penal code, or code of criminal procedure that you cite. List these in alphabetical order and list the page numbers in which each citation can be found in the PDR.
3. If you want to request oral argument, you must write a brief statement explaining why you think oral argument would be helpful.
4. The Statement of the Case should only be a few sentences long to set out what type of case it was (criminal case and the offense charged), the fact there was a conviction, who the judge was, whether there was a plea bargain or trial by judge or jury, and what sentence was received.
5. The Statement of Procedural History simply specifies the date the court of appeals' opinion was handed down and the date a Motion for Rehearing was filed and denied, if one was filed.
6. In the Grounds for Review section, you must list each ground separately and number each of the grounds. If you have the record available to you, you write the page number of the record down where the issue can be found in the record.
7. The next section is your Argument section:

- A. Here is where you get to explain all your reasons why you think the court of appeals erred and why the CCA should review the case, and cite to relevant law that supports your case.
 - B. To help organize yourself, you can better ensure that you present clear arguments by doing the following for each issue, or for each argument if there are several within each issue:
 - i) First state what you think the error is that the court of appeals committed;
 - ii) Then cite to a case or cases that are similar to yours, and state what the main rule is from that case that you can then apply to your case;
 - iii) Explain how that case or cases apply to your situation, and
 - iv) End with one more sentence concluding how the court of appeals erred in your case.
8. The idea is to show the CCA that other cases exist that are similar enough to your case, or at least the principle from those cases can be applied to your case, to persuade to the CCA that the court of appeals erred. Be aware that the CCA considers unpublished opinions to have no precedential value and shall not be cited as authority. *See* TRAP 77.3.

After the CCA clerk receives notice that your PDR has been filed (which is done by sending the PDR to the CCA's clerk), the court of appeals' clerk has 15 days to send the CCA clerk the appellate record, any motions filed in the case, copies of judgments and opinions, and any orders from the court of appeals. *See* TRAP 68.7. After you file your PDR, the State has 15 days to file a Reply to your PDR. *See* TRAP 68.9.

After receiving the PDR, the CCA then reviews it to determine whether it deems review of your case should be granted. There are nine judges on the CCA. If four of them choose to grant the PDR, it will be granted. If four cannot agree to grant the PDR, it will be refused. *See* TRAP 69.1. If it is granted, the case will then be set for submission, and the clerk will inform you that the PDR was granted. *See* TRAP 69.2, 69.4. If it is refused or dismissed, the CCA clerk will inform you of this decision, but will hold on to the PDR for 15 days. This means you have 15 days to file a Motion for Rehearing asking the CCA to reconsider its dismissal or refusal of the PDR. *See* TRAP 69.4.

If the PDR is granted, you must file a Brief within 30 days after the PDR was granted. This Brief must comply with TRAP 9 and 38, which is set out above in the section discussing “General Rules that Apply to Civil and Criminal Cases.” *See* TRAP 70.1. The State then has 30 days to respond to your Brief after it is filed. *See* TRAP 70.2. After the briefs are filed, the CCA will then schedule oral argument, if it was requested by the Court. Otherwise, it will submit the case to be decided on the briefs.

It can take several months for the CCA to issue its opinion in your case, in which it may do any of the following:

1. Affirm the lower court’s judgment in whole or in part;
2. Modify the lower court’s judgment and affirm it as modified;
3. Reverse the judgment in whole or in part and render the judgment the lower court should have done;
4. Reverse the judgment and send it back to the lower court for further proceedings;
5. Vacate the judgment and dismiss the case;
6. Vacate the judgment and send it back to the lower court for further proceedings in light of changes in the law; or
7. Dismiss the appeal altogether.

See TRAP 78.1.

If you lose any or all of the issues in your appeal to the CCA, you may file a Motion for Rehearing within 15 days from the date the CCA issues its judgment or order. *See* TRAP 79.1. If this Motion is denied, then your appeals are entirely exhausted. You may petition the United States Supreme Court to issue a writ of certiorari.¹

§3.7 The State Counsel for Offenders Attorney and Your Appeal

If a case is on appeal, there is probably an attorney working on the appeal. SCFO will not interfere if there is already an attorney representing the appellant. Any questions an appellant has about the appeal should be directed to the appellate attorney.

If the court of appeals affirms the conviction and the appellate attorney notifies the appellant that the attorney will not file a Petition for Discretionary Review (P.D.R.), indigent appellants can review the case for possible filing of a P.D.R. There is a 30-day deadline for filing a P.D.R., so

¹¹ You may also file a Writ of Habeas Corpus, an extraordinary remedy afforded to very few individuals, though everyone has the right to file at least one. This is discussed in Chapter 4 of the Handbook.

act quickly. If you need to file an extension, see SCFO REF 3.4 and 3.5 for an example. When you file the P.D.R., send a copy of the appellate brief and court of appeals opinion with the petition.

A writ of habeas corpus cannot be filed while the case is on direct appeal. The direct appeal must be completed first. Once the direct appeal is finished, you may notify SCFO of your possible grounds to file a writ of habeas corpus. SCFO may review those grounds for you; however, SCFO does not have the resources to investigate possible grounds for a writ.

§3.8 Questions Offenders Often Ask

1. HOW CAN I GET A COPY OF MY COURT RECORDS?

Answer: Generally, you must buy a copy. You are not normally entitled to a free copy. If you cannot afford to buy one, then you will have access to a copy only if (1) you are your own attorney on appeal or (2) your appellate attorney filed an Anders brief. You are not entitled to a free copy for purposes of a writ of habeas corpus or a petition for discretionary review.

2. MY CASE IS ON APPEAL. CAN I FILE A WRIT?

Answer: No. You should not file a writ until your appeal is final. The Court will automatically dismiss your writ when your case is still on appeal.

3. CAN I RECEIVE AGGRAVATED TIME FOR THE OFFENSE OF POSSESSION OF A DEADLY WEAPON IN A PENAL INSTITUTION?

Answer: A conviction for possession of a deadly weapon in a penal institution is not aggravated unless the court makes an affirmative finding that a deadly weapon was “used or exhibited” during the commission of the offense.

4. IT HAS BEEN MORE THAN 180 DAYS SINCE I WAS INDICTED. WHY CAN'T I GET MY CASE DISMISSED FOR DENIAL OF A SPEEDY TRIAL?

Answer: The legislature enacted Articles 32A.01 and 32A.02 to guarantee defendants a speedy trial. The Texas Court of Criminal Appeals, however, held those statutes to be unconstitutional in Meshell v. State, 739 S.W.2d 246, (Tex. Crim. App. 1987). To be entitled to a speedy trial, you must first request one. A motion to dismiss for denial of a speedy trial may not be enough to preserve a speedy trial issue unless you first ask for a speedy trial. There is no current statute saying how soon your case must be tried.

Each case must be looked at on its own facts to determine whether a particular defendant was denied a speedy trial.

5. I DON'T LIKE HAVING A CRIMINAL CASE HANGING OVER ME. WHY ISN'T MY ATTORNEY MOVING MORE QUICKLY TO GET MY CASE TO TRIAL?

Answer: First, your attorney needs time to prepare your case. Proper investigation takes time. Documents may have to be subpoenaed, witnesses have to be interviewed, legal research may be needed, and follow-up investigation may be necessary based on initial interviews and documents reviews. Second, while you are awaiting trial, if there is a detainer in place, you are earning time credits toward any new sentence you may receive. Third, the court will usually schedule older cases first. Despite all of these reasons, you may request a speedy trial through your attorney.

6. I WANT COMPLETE DISCOVERY IN MY CASE. WHY CAN'T I GET COPIES OF ALL OIG, CLASSIFICATION, AND PERSONNEL DOCUMENTS RELATING TO MY CASE?

Answer: The Texas Code of Criminal Procedure § 39.14 (g) states that the only discovery that a defendant may possess is a copy of his own statement. Refer to Section 3.1.3 above.

7. WHY CAN'T THE TIME ON MY NEW SENTENCE RUN CONCURRENTLY WITH MY OLD CASE?

Answer: Article 42.08(b) of the Texas Code of Criminal Procedure requires the judge to stack the sentence in the case of a defendant sentenced for an offense committed while the defendant is in TDCJ serving a previous sentence. The statute does not give the judge any discretion to run the sentences concurrently.

8. WHY CAN'T I SELECT THE SCFO ATTORNEY I WANT TO REPRESENT ME?

Answer: SCFO represents offenders in over 30 counties. It is not practical for each attorney to have clients in each county due to the amount of travel involved. To ensure the best possible representation, the number of cases and counties for which each attorney is responsible is carefully managed.

9. I KNOW OTHER OFFENDERS WHO DID THE SAME THING I'M CHARGED WITH AND ALL THEY GOT WAS A DISCIPLINARY CASE. WHY WAS I INDICTED?

Answer: TDCJ and the prosecutor have great discretion in deciding who is prosecuted and who is not. SCFO has no say in this.

10. STATE COUNSEL FOR OFFENDERS IS A PART OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE. ISN'T IT A CONFLICT OF INTEREST FOR THEM TO REPRESENT ME IN A CASE ARISING OUT OF TDCJ?

Answer: State Counsel for Offenders answers only to The Texas Board of Criminal Justice. The Board appoints State Counsel for Offenders trial attorneys pursuant to Article 26.051, Texas Code of Criminal Procedure. Texas Courts have found there to be no conflict of interest because of State Counsel for Offenders' relationship to TDCJ. Darrian v. State, 807 S.W.2d 407 (Tex. App. - Houston [14th Dist.] 1991, pet. ref'd.); Simon v. State, 805 S.W.2d 519 (Tex. App. - Waco, 1991, no. pet.).

11. MY MOTHER HAS CALLED THE SCFO ATTORNEY TO DISCUSS MY CASE, BUT THE ATTORNEY REFUSED TO DISCUSS THE CASE WITH HER. WHY?

Answer: The attorney cannot discuss your case with anyone without your written permission. If you would like the attorney to discuss the case with someone, write the attorney and give your permission to discuss the case with that particular person.

12. WHY CAN'T I REPRESENT MYSELF?

Answer: You may represent yourself if you request that of the court, and the court believes that you fully understand the consequences of your decision. Usually it is not in your best interest to represent yourself. Criminal law and procedure are very technical. From discovery through trial, it is easy to make a mistake or waive a right that could result in conviction, a lengthy sentence, or denial of appellate issues. When faced with indictment, even experienced trial attorneys do not attempt to represent themselves.

13. IF I WANT TO REPRESENT MYSELF, WHY CAN'T I HAVE MY APPOINTED COUNSEL AS STANDBY OR ADVISORY COUNSEL?

Answer: There is no right to standby or advisory appointed counsel. If you are permitted to proceed *pro se*, the appointment of counsel as standby or advisory is discretionary with the trial court.

14. IS IT A GOOD IDEA TO FILE *PRO SE* MOTIONS IN MY CASE?

Answer: No. You should send copies of all requested motions to your attorney for review. Some offenders have filed motions that have hurt their cases by identifying certain weaknesses

in the state's case that the prosecutor can then prepare for, or by providing additional information that the prosecutor can use in shaping his/her case. If you send copies to your attorney before you file them, your attorney can advise you before you jeopardize your case.

15. WHY DOESN'T THE COURT EVER RESPOND TO MY LETTERS?

Answer: Courts typically do not correspond with defendants. They will put copies of your letters in the court's file which the **prosecutor** is free to read and use as evidence against you. Many defendants have seriously hurt their case by letters they have written to the judge, especially when they get into the facts of their case or the reasons for their actions. You have the absolute right to correspond with the court; however, your defense attorney is the only one who is looking out for your best interests, and who also is prohibited from revealing client communications covered by the attorney-client privilege. Ask for his/her opinion first.

16. HOW CAN I GET AN EXAMINING TRIAL IN MY CASE?

Answer: To have any chance for an examining trial you must make the request to the court before you are indicted. Article 16.01, Texas Code of Criminal Procedure, gives defendants in felony cases the right to an examining trial "before indictment." Once an indictment has been returned, that right is terminated even where a request for examining trial was made before the indictment was returned. Menefee v. State, 561 S.W.2d 822 (Tex.Crim.App. 1977).

17. WILL I GO TO COURT FOR THE APPEAL?

Answer: Appeals are based on the record developed at trial and the legal issues raised in the appellate brief. The appellate attorney may present oral argument to the appellate court, but there is no evidentiary hearing, and the client does not usually attend. Furthermore, you cannot compel the appellate court to bench warrant you there.

18. DO I HAVE A RIGHT TO HAVE A COPY OF MY TRIAL RECORDS?

Answer: The general answer is no. If you are indigent, your appellate attorney is given access to the record to prepare the appellate brief. The record is then returned for the prosecutor to use in preparing his/her brief. In some cases a copy may be available, but there is **no right** to have one provided to you.

19. I WASN'T READ MY MIRANDA RIGHTS WHEN THE INCIDENT ALLEGED IN MY INDICTMENT OCCURRED. ISN'T THAT A VIOLATION OF MY CONSTITUTIONAL RIGHTS? CAN'T I GET MY CASE DISMISSED BECAUSE OF THAT?

Answer: Failure to advise you of your Miranda rights provides a basis to suppress any statement made during the questioning, but it does not provide a basis to dismiss the indictment. Miranda rights only affect admissibility of statements made, not the validity of the indictment and prosecution.

20. I HAVE ALREADY BEEN PUNISHED AT A DISCIPLINARY HEARING FOR THE OFFENSE I HAVE BEEN INDICTED FOR. ISN'T THAT DOUBLE JEOPARDY?

Answer: State and federal courts have repeatedly rejected claims that prison disciplinary hearings bar subsequent criminal prosecution on double jeopardy grounds. In short, the double jeopardy clause protects against repeat *judicial* proceedings, but not against *administrative* proceedings. Ex parte Hernandez, 953 S.W.2d 275 (Tex. Crim. App. 1997); Guerrero v. State, 893 S.W.2d 260 (Tex. App.- Waco 1995); U.S. v. Salazar, 505 F.2d 72 (8th Cir. 1974); Hutchinson v. U.S., 450 F.2d 930 (10th Cir. 1971); U.S. v. Lepiscopo, 429 F.2d 258 (5th Cir. 1970).

21. CAN'T I GET MY CASE DISMISSED SINCE I WAS NOT TIMELY SERVED WITH A COPY OF MY INDICTMENT UNDER ARTICLE 26.03 TEXAS CODE OF CRIMINAL PROCEDURE?

Answer: No. *See* Article 26.03 of the Texas Code of Criminal Procedure. The State's failure to serve you with a copy of the indictment may entitle you to delay the proceedings, but it is not a bar to prosecution. *See* Whittington v. State, 680 S.W.2d 505 (Tex. App. - Tyler 1984, pet.ref'd); and Jamerson v. Estelle, 666 F.2d 241 (5th Cir. 1982).

22. CAN'T I GET MY CASE DISMISSED SINCE I WAS NOT TIMELY INDICTED UNDER ARTICLE 32.01, TEXAS CODE OF CRIMINAL PROCEDURE?

Answer: No. The Court of Criminal Appeals has ruled that Article 32.01 does not apply once an indictment is returned. Tatum v. State, 505 S.W.2d 548, 550 (Tex. Crim. App. 1974); Brooks v. Texas, 990 S.W.2d 278, 285 (Tex. Crim. App. 1999).

23. IN RECENT YEARS, HOW HAS THE LAW CHANGED WITH RESPECT TO WRITS?

Answer: The greatest change has occurred in the statute of limitations on federal writs. There is still no time limit on state writs. However, federal writs are now subject to a one-year statute of limitations. The year begins on the day after you were sentenced or if you appealed, on the day after the appeal was concluded – or ninety days after the denial of a P.D.R. The one-year statute of limitations stops during the time any state writ is pending, then starts again the day after that writ is denied. There are some possible exceptions. First, the concept of “equitable tolling” allows extensions of time for “extraordinary circumstances beyond a prisoner’s control.” However, the 5th Circuit has been very stingy in calling a situation an “extraordinary circumstance.” Second, there is the notion of “actual innocence,” a claim which requires a showing that a finding of guilt (or severe punishment) would likely not have happened absent a constitutional violation. *See Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). One other major change in federal writs involves a very strict standard of review. Now a federal petitioner must show that the Court of Criminal Appeals’ denial of his state writ was either “contrary to” or an “unreasonable application” of clearly established federal law, as decided by the U.S. Supreme Court, or that the state courts unreasonably determined the facts of the case. *See* 28 U.S.C. § 2254(d). **Finally, you should note that the state courts are now very likely to deny state writs if the person filing it has already had one writ denied on the same conviction.** There are evidently two exceptions: (1) writs that do not attack the conviction itself do not count as the “one writ” for that conviction; and (2) claims for “actual innocence.” This means that, at least for now, you can file a writ asking for jail time credit without using up your one writ as long as you file the time credit writ first. This may change in the future. Also remember that time credit writs, with few exceptions, can only be filed after you have exhausted your administrative grievance remedies with TDCJ. The other exception seems to be on “actual innocence” claims, as noted above. For the full statute, *see* TEX. CODE CRIM. PRO. Art. 11.07, § 4. The federal courts are even more restrictive about subsequent writs than the state courts. *See* 28 U.S.C. § 2244(b). You can also bring up issues in a writ that were impossible to have been brought up when the first writ was filed.

CHAPTER 3 REFERENCES

SCFO REF 3.1 – Sample cover letter for Anders brief response

SCFO REF 3.2 – Motion for Extension of Time to File Brief

SCFO REF 3.3 – Cover letter to obtain Trial Record

SCFO REF 3.4 – Cover letter to file Extension of Time for Petition for Discretionary Review

SCFO REF 3.5 – Motion for Extension of Time to File Petition for Discretionary Review

SCFO

§3.9 Table of Authorities

Cases

<u>Anders v. California</u> , 386 U.S. 738, 87 S.Ct. 1396 (1967)	8, 12
<u>Brooks v. Texas</u> , 990 S.W.2d 278 (Tex. Crim. App. 1999).....	23
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963)	3
<u>Calderon v. Thompson</u> , 523 U.S. 538, 118 S.Ct. 1489 (1998)	23
<u>Darrian v. State</u> , 807 S.W.2d 407 (Tex. App. - Houston [14th Dist.] 1991).....	20
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830 (1985).....	9
<u>Ex parte Hernandez</u> , 953 S.W.2d 275 (Tex. Crim. App. 1997)	22
<u>Ex parte Wilson</u> , 956 S.W.2d 25 (Tex. Crim. App. 1997).....	9
<u>Gainous v. State</u> , 436 S.W.2d 137 (Tex. Crim. App. 1969)	8, 12
<u>Guerrero v. State</u> , 893 S.W.2d 260 (Tex. App.- Waco 1995).....	22
<u>Hutchinson v. U.S.</u> , 450 F.2d 930 (10th Cir. 1971).....	22
<u>Jamerson v. Estelle</u> , 666 F.2d 241 (5th Cir. 1982)	22
<u>Menefee v. State</u> , 561 S.W.2d 822 (Tex.Crim.App. 1977).....	21
<u>Meshell v. State</u> , 739 S.W.2d 246 (Tex. Crim. App. 1987).....	19
<u>Simon v. State</u> , 805 S.W.2d 519 (Tex. App. - Waco, 1991).....	20
<u>Tatum v. State</u> , 505 S.W.2d 548 (Tex.Crim.App. 1974)	23
<u>U.S. v. Lepiscopo</u> , 429 F.2d 258 (5th Cir. 1970).....	22
<u>U.S. v. Salazar</u> , 505 F.2d 72 (8th Cir. 1974).....	22
<u>Whittington v. State</u> , 680 S.W.2d 505 (Tex. App. - Tyler 1984).....	22

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CHAPTER 4 - TABLE OF CONTENTS

CHAPTER 4 - HABEAS CORPUS

Introductory Note.....	5
State Counsel for Offenders and Habeas Corpus	6
Chapter 4 - Habeas Corpus	7
4.1 - Habeas Corpus Relief	7
4.1.1 - The State Conviction	7
4.1.1.1 - Introduction	7
4.1.1.2 - The Effect of a Trial	7
4.1.2 - Habeas Corpus Generally	7
4.1.3 - The Effect of a Writ of Habeas Corpus	9
4.2 - Texas State Court Procedure	10
4.2.1 - Procedure in Texas District Courts.....	10
4.2.1.1 - Contents of a Writ Application.....	10
4.2.1.2 - Filing the Application.....	11
4.2.1.3 - State’s Answer.....	11
4.2.1.4 - Trial Court’s Response.....	11
4.2.2 - Procedure in the Court of Criminal Appeals.....	13
4.2.3 - Forms	13
4.3 - Obstacles to Writ Relief	13
4.3.1 - Subsequent Writ Applications.....	13
4.3.2 - Timeliness, or “Laches”	14
4.3.3 - The Contemporaneous Objection Rule.....	15
4.3.4 - Harmless Error.....	16
4.3.5 - Waiver of the Right to File a Writ Application	17
4.3.6 - The Claim is One Best Suited for Direct Appeal	17
4.3.7 - Miscellaneous Limitations.....	17
A. Police Brutality/Misconduct	17
B. Illegal Arrests	18
C. Denial of Bail	18
D. Denial of an Examining Trial.....	18
E. Discretionary Actions by a Trial Judge	18
F. Defects in an Indictment.....	18
G. Retroactive Application of the Law	18
H. Stacking Orders.....	19
I. Deadly Weapon Findings	19
J. Evidentiary Sufficiency	19
4.4 - The Fourth Amendment: Illegal Searches and Seizures.....	20
4.4.1 - The Fourth Amendment and Habeas Corpus	20
4.4.2 - Ineffectiveness for Failure to File a Motion to Suppress.....	21
4.5 - The Fifth Amendment	21
4.5.1 - Involuntary Confessions.....	21

4.5.1.1 - Generally	21
4.5.1.2 - In Habeas Corpus Proceedings	22
4.5.1.3 - Explanations, Limitations, and Exceptions	22
A. “Miranda” Warnings	22
B. Jackson v. Denno Hearings	24
C. Invoking Miranda’s Protections	24
D. Self-Incriminating “Testimony”	25
E. Exceptions to Miranda.....	26
i. The Public Safety Exception.....	26
ii. The “Fruits” Exception.....	26
iii. Use for Impeachment Purposes	26
iv. The Booking Exception	26
4.5.2 - Double Jeopardy and Collateral Estoppel	27
4.5.2.1 - Double Jeopardy Generally	27
4.5.2.2 - Other Developments	30
A. Waiver	30
B. Punishment Requirement	30
4.6 - Grounds for Writ - Sixth Amendment.....	31
4.6.1 - Denial of the Right to Counsel	31
4.6.2 - Sixth Amendment: Ineffective Assistance of Counsel	34
4.6.2.1 - The Foundations of Ineffective Assistance of Counsel	34
4.6.2.2 - Bases of a Claim of Ineffectiveness	35
A. Common Ineffectiveness Claims	35
i. Failure to Investigate	35
ii. Failure to Pursue Defenses	35
iii. Pretrial Ineffectiveness	36
iv. Ineffective Use of Witnesses	36
v. Jury Instruction Neglect.....	36
vi. Jury Selection Negligence	37
vii. Failure to Object	37
viii. Erroneous Advice/Failure to Advise	38
ix. Defense Counsel and Plea Offers	38
x. Professional Misconduct.....	39
B. Ineffective Assistance of Counsel after Conviction.....	39
i. Ineffective Direct Appeals Counsel.....	39
ii. Ineffective Habeas Corpus Counsel.....	40
C. Conflicts of Interest.....	40
D. Insufficient Participation.....	41
4.6.2.3 - Ineffectiveness and the Contemporaneous Objection Rule	41
4.6.3 - Right to Trial by an Impartial Jury and/or Grand Jury	42

4.6.4 - The Right to Confront and Cross-Examine Witnesses.....	44
4.6.4.1 - The “Testimonial” Requirement.....	44
4.6.4.2 - Codefendant Testimony.....	45
4.6.4.3 - Confrontation and Habeas Corpus.....	46
4.6.5 - 6th and 14th Amendments: Compulsory Process.....	46
4.7 - New Developments in the Eighth Amendment.....	47
4.8 - The Fourteenth Amendment.....	48
4.8.1 - Introduction.....	48
4.8.2 - Specific Fourteenth Amendment Due Process Claims.....	48
4.8.2.1 - Prejudicial Lineup Procedures.....	48
4.8.2.2 - Withholding of Exculpatory Evidence (“Brady” claims).....	49
4.8.2.3 - Knowing Introduction of False Testimony.....	49
4.8.2.4 - Destruction of Evidence.....	50
4.8.2.5 - No Evidence.....	50
4.8.2.6 - Prosecutorial Vindictiveness.....	50
4.8.2.7 - “Anders” Briefing.....	51
4.8.2.8 - Defendant Forced to Wear Jail Clothes at Trial.....	51
4.8.2.9 - Improper Prosecutorial Comment.....	52
4.8.3 - Equal Protection Clause: Batson Challenges.....	52
4.8.4 - Pleas of Guilty and Due Process.....	52
4.8.4.1 - Overturning a Plea of Guilty or Nolo Contendere.....	52
4.8.4.2 - Vacating an Involuntary Plea.....	53
4.8.4.3 - Plea Bargains as Contracts.....	54
4.9 - The Ex Post Facto Clause and Statutes of Limitations.....	55
4.10 - State Grounds for Relief.....	57
4.10.1 - Fatally-Flawed Indictments.....	57
4.10.2 - Out-of-Time Appeals.....	57
4.10.2.1 - General Principles.....	57
4.10.2.2 - Out-of-Time Appeal and Texas Habeas Corpus.....	59
4.10.2.3 - Out-of-Time Appeal and Federal Habeas Corpus.....	59
4.10.3 - Improper Sentences and Their Remedies.....	59
4.10.3.1 - Illegal Sentences.....	60
4.10.3.2 - Improper Stacking.....	60
4.10.3.3 - Enhancements and Deadly Weapon Findings.....	61
4.10.3.4 - Harmless Error and Illegal Sentences.....	61
4.10.3.5 - Direct Appeal and Waiver.....	62
4.10.3.6 - Invited Error and Waiver.....	62
4.11 - Texas and Federal Habeas Corpus, Reconciled.....	62
4.12 - Federal Petitions for Writ of Habeas Corpus.....	64
4.12.1 - Recent History.....	64
4.12.2 - Federal Petition Paperwork.....	65

4.12.3 - District Court Petition Procedure	66
4.13 - Federal Habeas Corpus Review.....	67
4.13.1 - Procedural Barriers	67
4.13.1.1 - The Petitioner Pled Guilty	67
4.13.1.2 - The Custody Requirement	67
4.13.1.3 - Timeliness, Tolling, and Equitable Tolling	68
4.13.1.4 - Successive Petitions.....	69
4.13.1.5 - State Exhaustion Requirement.....	70
4.13.1.6 - Procedural Default.....	71
4.13.1.7 - State Court Reasonability	72
4.13.1.8 - Evidentiary Hearing Bar	72
4.13.1.9 - Cognizable Claims.....	73
4.13.1.10 - Harmless Error.....	73
4.13.1.11 - Actual Innocence	73
4.13.2 - Federal Habeas Corpus Appeals.....	73
4.14 - Frequently Asked Questions.....	74
4.15 - Table of Authorities.....	77

S
C
F
O

INTRODUCTORY NOTE CONCERNING RECORDS AND CASELAW

Access to Courts and the State Law Library can provide offenders with copies of cases that are not readily available. They cannot provide copies of an individual offender's medical or court records. If an offender needs his or her trial transcripts or court records in order to prepare an application for writ of habeas corpus, they must write to the district clerk in the county where they were convicted and purchase the records. The right to a free transcript for indigent persons only applies to a first direct appeal, not to Petitions for Discretionary Review ("PDR") or the filing of a writ application. *See Ex parte Trainer*, 181 S.W.3d 358 (Tex. Crim. App. 2005). If an offender's unit law library does not have the items they are looking for, ask the unit law librarian about ordering them. **State Counsel for Offenders will not provide transcripts or records of any kind for offenders.**

Access to Courts may also be able to help offenders notarize documents, locate law books through a loan program, and check the validity of cases (also called "shepardizing" cases). The unit law librarian can provide more information about this process to offenders.

The State Law Library provides copies of court cases from regional reporters and statutes from federal and state codes for offenders who provide the specific citation. The cost is twenty-five cents (\$0.25) per page plus 8.25% sales tax. The address for the State Law Library is:

State Law Library
P.O. Box 12367
Austin, TX 78711-2367

STATE COUNSEL FOR OFFENDERS AND HABEAS CORPUS

SCFO is equipped to assist offenders who believe that they may have grounds for an application for writ of habeas corpus. SCFO **will not** provide representation to offenders, however, who meet any of the following criteria:

1. The offender has already filed an application for writ of habeas corpus, unless that application was related to the offender's time credit only;
2. The writ application is based on a claim of actual innocence (*See* Ch. 13 of this Handbook);
3. The offender wishes to write his or her own writ application *pro se*, and is seeking assistance from SCFO for advice;
4. The offender's application has already been filed, and he or she is seeking counsel for representation at an evidentiary hearing;
5. The offender's direct appeal process is not yet complete;
6. The offender is seeking assistance with legal research;
7. The offender wants assistance of any kind with federal petitions for writ of habeas corpus; or
8. The offender's potential ground for a writ alleges ineffective assistance of counsel directed at an attorney employed by or formerly employed by SCFO.

For all other inquiries regarding applications for writ of habeas corpus, please contact State Counsel for Offenders at the address provided in this handbook.

CHAPTER 4 - HABEAS CORPUS

§4.1 - Habeas Corpus Relief

§4.1.1 - The State Conviction

§4.1.1.1 - Introduction

Before researching a case for issues to raise in an application for a writ of habeas corpus, it is crucial for an offender to understand the fundamentals of the criminal justice system which instituted the offender's state felony conviction. Numerous rights are provided to a criminal defendant through the constitutions of Texas and the United States. The writ of habeas corpus was designed as a final measure to ensure that those convicted are convicted without any overwhelming violation of those rights. Of course, almost all rights provided to a criminal defendant may be waived or forfeited.

When an informed decision to waive such a right is made, such waiver cannot be challenged simply because hindsight might suggest that was not the best decision. In other words, it is not enough that a criminal defendant made a decision regarding a right and now regrets it – the right must have been denied to the defendant. The writ of habeas corpus is an extraordinary remedy, and will not be granted simply to afford an offender a second chance.

§4.1.1.2 - The Effect of a Trial

The criminal trial is a criminal defendant's opportunity to contest the evidence that the State believes is sufficient to obtain a conviction beyond a reasonable doubt. When a defendant is innocent, has a defense to the charges, or does not believe that there is sufficient evidence against him or her, the trial is the time to raise those arguments. At a trial, the defendant has the right to question and cross-examine witnesses, and present his or her own testimony, if desired, as well as to refuse to testify. When a trial results in an acquittal, the defendant is cleared of their charges, and the State is barred from further prosecution of the case as originally indicted. When a defendant is convicted at trial, he or she also has the right to an appeal, and the right to assistance of effective counsel during that appeal before one of the Courts of Appeals in Texas. Direct appeal is the defendant's opportunity to challenge errors which arose before or during trial.

§4.1.2 - Habeas Corpus Generally

The writ of habeas corpus is a judicial device predating the birth of the United States. "Habeas corpus," a term essentially meaning "produce the body" dates back to the English Magna Carta of A.D. 1215. As with many other principles of English law, the writ of habeas corpus was

incorporated into American criminal law, specifically in Article I, §9 of the United States Constitution. Later, habeas corpus was included in the constitution of the State of Texas, in Article I, §12.

The term “writ” means a written order. An application or petition for “writ” of “habeas corpus” is, therefore a written request to a court to produce a person. While there technically exist other varieties of habeas corpus writ (for example, the “writ of habeas corpus *ad prosequendum*,” wherein the request is to produce someone for prosecution), for the purposes of this chapter, a writ of habeas corpus is a written request to produce a person in an effort to free them from a conviction which occurred as the consequence of a constitutional defect. The grounds on which a writ application may be based are limited, and most of the issues which were, or could have been and should have been addressed on direct appeal do not constitute grounds for habeas corpus relief. See Ex parte Truong, 770 S.W. 2d 810 (Tex. Crim. App. 1989); Ex parte Banks, 769 S.W.2d 539 (Tex. Crim. App. 1989).

Writs of habeas corpus are only available to those whose convictions have become “final.” That is, an applicant’s avenues of direct appeal must be completely exhausted, and a mandate must be issued in the applicant’s case declaring his or her conviction final. Once a conviction is final, an applicant may request a writ of habeas corpus, looking to the relevant statutes to comply with all necessary procedures. In Texas, procedures for filing an “application” for writ of habeas corpus can be found in article 11.07 of the Texas Code of Criminal Procedure. The procedures for filing federal “petitions” for writ of habeas corpus can be found in Title 28, United States Code §2254. As they are only validly filed after a conviction is final, a petition or application for writ of habeas corpus does not reinstate the appeals process. Instead, the filing of a writ application begins a collateral proceeding largely independent of the original trial and appellate process.

Many issues that can be used in an appeal simply cannot be addressed in state habeas corpus proceedings, as any issue which could have been brought forward on direct appeal is not a legitimate ground for state habeas corpus relief. See Ex parte Townsend, 137 S.W.3d 79 (Tex. Crim. App. 2004); Ex parte Knight, 401 S.W.3d 60 (Tex. Crim. App. 2013); Ex parte Rich, 194 S.W.3d 508 (Tex. Crim. App. 2006). Furthermore, only errors which result in fundamental constitutional error may be included in a writ application. Most errors must be resolved during trial or on appeal.

Offenders seeking to apply for a writ of habeas corpus after a final conviction, or who are seeking to file a writ petition in federal court after already filing in state court should be aware that the law and procedures which are explained in this chapter may be subject to change and reinterpretation.

§4.1.3 - The Effect of a Writ of Habeas Corpus

Contrary to popular belief, obtaining a writ of habeas corpus in a case does not necessarily result in an applicant or petitioner being released from custody. When a writ is granted because a conviction is illegal, the result is a reversal of the present conviction. Typically, however, habeas corpus relief does not serve as a bar to reprosecution. Another trial in such a circumstance does not violate the double jeopardy provisions of the United States and Texas constitutions.

The mere fact that the State erred in the trial process does not, in itself entitle a prisoner to release. As a practical matter, the more serious the crime, and the better the proof, the more likely the State will retry a case following a successful writ application. Of course, it is possible, once habeas corpus relief is granted that the State will not move for a retrial. Generally, however, the ways to be permanently released after obtaining a writ of habeas corpus is to either be acquitted in a second trial or to enter a plea.

An applicant who is re-convicted must be given credit for all of the time served under their original conviction. This rule also requires that upon retrial, they be given credit for any “good time” which they may have received under the prior conviction. *See Ex parte Bennett*, 508 S.W.2d 646 (Tex. Crim. App. 1974). If an applicant’s sentence is substantially reduced on retrial, it may not be necessary to give the applicant credit for time previously served, provided a reduction in credit was bargained for. *See Dames v. Wainwright*, 491 F.2d 1098 (5th Cir. 1974).

If an offender is re-sentenced by a judge or jury, they may be assessed a harsher punishment. *See Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S. Ct. 1977 (1973); *Texas v. McCullough*, 475 U.S. 134, 106 S. Ct. 976 (1986)(holding that where a harsher sentence is imposed, the reasons relied upon by the judge must appear on the record); Also *See* Chapter 4 of this Handbook at §4.8.2.6. It is also possible for the State to allege enhancements in a new indictment which were not originally included when the applicant was convicted upon the addition of new enhancements, the burden shifts to the State to prove that vindictiveness was not a motive for the enhancements. *See Hood v. State*, 185 S.W.3d 445 (Tex. Crim. App. 2006). To that end, it is satisfactory for the State to show “mistake or oversight” as the reason for not adding the enhancements during the original

proceedings. *Id.* at 449 (overruling, in part Bouie v. State, 565 S.W.2d 543 (Tex. Crim. App. 1978)).

An offender serving more than one sentence may attack any or all of his or her convictions simultaneously. Furthermore, if the offender is serving consecutive (“stacked”) sentences, the offender may file a writ application on the basis of the conviction for which the sentence has not begun. *See Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549 (1968).

§4.2 - Texas State Court Procedure

As stated previously, the controlling procedural provision for an application for a writ of habeas corpus is the Texas Code of Criminal Procedure, article 11.07. Again, the procedures of Article 11.07 apply only after an offender’s conviction is final, meaning that the direct appeal has been affirmed, and the mandate issued, or else where the offender has failed to appeal within the allotted time. Applicants cannot file an application for writ of habeas corpus while their appeal is pending or while they are on probation. *See Coronado v. State*, 617 S.W.2d 265 (Tex. Crim. App. 1981); *Ex parte Payne*, 618 S.W.2d 380 (Tex. Crim. App. 1981); *Ex parte Brown*, 662 S.W.2d 3 (Tex. Crim. App. 1983).

§4.2.1 - Procedure in Texas District Courts

§4.2.1.1 - Contents of a Writ Application

The Texas Court of Criminal Appeals strictly construes the rules for filing an application for writ of habeas corpus, and often rejects, without prejudice¹ claims which otherwise might have merit due to drafting errors.

Rule 73.1 of the Texas Rules of Appellate Procedure requires that the application form be accurate and complete. An applicant may attach a memorandum of law in support of the grounds contained in an application, but the facts on which the argument is based must first appear in the application. *See Ex parte Blacklock*, 191 S.W.3d 718 (Tex. Crim. App. 2006). It is not sufficient for the applicant to incorporate the facts underlying his ground for relief by reference. The applicant must, for each ground raised recite the facts supporting the ground for relief under each section of the application stating a ground for relief. In the section of the application allotted to state the facts of a case, applicants should not state case law, instead making legal arguments in a memorandum of law.

¹ In this context, “prejudice” means the inability to refile an application.

The court will furthermore not consider any argument which is raised in an attached memorandum but not in the corresponding application. *See Ex parte Walton*, 422 S.W.3d 720 (Tex. Crim. App. 2014). As the application instructions state, each ground for habeas corpus relief must be stated within the two pages allotted by the application. *See* SCFO REF 04.2. The Court of Criminal Appeals has signaled that it will strictly enforce the page limit set forth in Texas Rule of Civil Procedure 73. *See Ex parte Walton*, 422 S.W.3d 720 (Tex. Crim. App. 2014) (denying relief where the applicant's memorandum was 328 pages in length).

§4.2.1.2 - Filing the Application

Applications for a writs of habeas corpus are to be filed in the district court which entered the judgment convicting the applicant. Applicants should file one original and one copy of their application with the district clerk of the state district court where he or she was convicted and should retain a copy of anything filed or mailed to the court. Applications should be sent by certified mail, return receipt requested. When the application is filed, it will be assigned a file number. A copy of the application will be sent to the relevant district attorney's office by the district clerk.

§4.2.1.3 - State's Answer

The district attorney representing the State has 15 days to answer or give a response to the application. If the District Attorney's Office does not respond, their silence constitutes a general denial.

§4.2.1.4 - Trial Court's Response

Within 20 days following the expiration of time for the State to answer, the convicting court must decide whether there are controverted, previously unresolved or disputed facts which are material to the legality of the applicant's confinement. However, this 20-day timeframe can be suspended so as to give the court time to gather the evidence it needs to determine factual matters.

1. No Facts in Controversy

If there are no such issues of fact, the court will send the Court of Criminal Appeals a copy of the petition, any answers filed, and a certificate showing the date upon which that finding was made. If the court fails to make any findings during the time period, the Court of Criminal Appeals will operate, as a matter of law, as if there were no controverted, previously unresolved facts (i.e., as if nothing is in dispute). In the event that the applicant was previously cited for abuse of the

writ, the convicting court will not consider the case, but will send the petition to the Court of Criminal Appeals with a notation that the applicant has been cited for abuse of the writ.²

2. Facts are in Controversy – Hearing or Investigation Ordered

If the convicting court finds that there are facts in controversy, it will order affidavits, depositions, interrogatories, or a hearing to resolve these issues. The court will rarely order a hearing since it can normally make its determination through other means. The court will make findings of fact after it has accumulated all necessary evidence. The court may ask an attorney or a magistrate to hold the hearing or to make findings of fact. The court reporter has 15 days from an evidentiary hearing to prepare a transcript. Thereafter, the convicting court will send the records to the Court of Criminal Appeals which should include the petition, any motions filed, transcripts, affidavits and all other records used to resolve the issues and determine facts. Even if an application has already been transferred to the Court of Criminal Appeals, an applicant who wishes the convicting court and the Court of Criminal Appeals to consider supplemental evidence should file those materials in the convicting court in the county of conviction. *See Ex parte Whisenant*, 443 S.W.3d 930 (Tex. Crim. App. 2014).

The trial court is the only court which will hear evidence on a writ of habeas corpus. While the trial court most often will make a recommendation regarding the disposition of an application, the Court of Criminal Appeals alone has the authority to decide whether habeas corpus relief should be granted. If the Court of Criminal Appeals demands further factual development, it will send the case back to the trial court for a hearing. *See Ex parte Reyna*, 701 S.W.2d 921 (Tex. Crim. App. 1986).

3. Trial Court's Failure to Act

Occasionally, a trial court will be slow to comply with the provisions of Article 11.07. Offenders who believe that the court has unnecessarily delayed their applications must write directly to the District Clerk's office and request that the county comply with Article 11.07 by forwarding the application to the Court of Criminal Appeals in Austin. If the District Clerk still fails to comply, an offender may consider sending a second request, asking that the county forward the application so that a writ of mandamus does not have to be filed. Requests should be sent via

² Regarding abuse of the writ as it pertains to perjured applications, *see Ex parte Jones*, 97 S.W.3d 586 (Tex. Crim. App. 2003)(Where an offender forged the signature of an attorney from State Counsel for Offenders, the court denied his application outright, citing him for abuse of the writ).

certified mail, when possible. Ultimately, if the District Clerk refuses to comply with article 11.07, a writ of mandamus is the appropriate vehicle for insuring compliance. For a sample writ of mandamus, see SCFO REF 4.1.

§4.2.2 - Procedure in the Court of Criminal Appeals

The Court of Criminal Appeals will review the record and enter its order accordingly. The court will (1) order a “white card” denial, in which the court automatically denies relief without further consideration, (2) order the case submitted for additional consideration to the court *en banc*, or (3) remand the case to the trial court for additional facts. Upon final review of the record, the court will enter its judgment, either ordering the applicant’s release or reversing and remanding the conviction for either resentencing or a new trial.

If the Court of Criminal Appeals denies an offender’s application, he or she has the opportunity to file a petition for writ of habeas corpus in federal district court, assuming their claim involves an issue which involves a violation of the federal constitution or the laws or treaties of the United States. *See* 28 United States Code §2254; *See also* this Handbook at Chapter 4, §4.11 and §4.13. Federal courts will not grant relief where the grounds stated involve only state law.

§4.2.3 - Forms

A packet for filing a state application for writ of habeas corpus is included in the second volume of this handbook. The packet includes a cover letter, the application itself, and a method of verification (either by Oath before a Notary Public or the Declaration of Inability to Pay Costs). *See* SCFO REF 04.2.

§4.3 - Obstacles to Writ Relief

The filing of an application for writ of habeas corpus is not an action which can be done at will, at any time by an offender who believes his or her conviction to be unfair. Many substantive and procedural obstacles stand in the way of habeas corpus applicants, several of which are discussed below.

§4.3.1 - Subsequent Writ Applications

Texas Code of Criminal Procedure Article 11.07, §4 provides that the court may not consider a subsequent (meaning second or successive) application for writ of habeas corpus unless (1) the claim stated relies on newly-discovered evidence which was unavailable on the date the applicant filed his or her previous application or (2) but for the violation of constitutional rights alleged, no reasonable juror would have found the applicant guilty beyond a reasonable doubt. The Court of

Criminal Appeals construes the subsequent writ bar strictly. As an example, refer to Ex parte Sledge, 391 S.W.3d 104 (Tex. Crim. App. 2013) (rejecting a subsequent application, and refusing to hear an argument that the trial court did not have jurisdiction over the case).

If an applicant's first application for writ of habeas corpus did not "challenge the conviction" then they may be allowed to file a subsequent application.³ See Ex parte Evans, 964 S.W.2d 643 (Tex. Crim. App. 1998). However, if an applicant's first application did not challenge the conviction, they will be barred from raising new arguments in a subsequent application which could have been raised in the first application (such as time credit issues). See Ex parte Whiteside, 12 S.W.3d 819 (Tex. Crim. App. 2000) ("Once an applicant files an application challenging the conviction, all subsequent applications regarding the same conviction must meet one of the two conditions set forth in §4(a)(1) and (2)"). *Id.* at 821.

§4.3.2 - Timeliness, or "Laches"

While the Court of Criminal Appeals has no strict time limit on the filing of writ applications, that is no reason to delay. Using an old, equitable time limitations rule called "laches" (pronounced "latches"), the court will dismiss a writ application if, as a result of unjustified delay, the State's ability to retry the case is harmed. In Ex parte Perez,⁴ the court abandoned its old approach to the timing restrictions of writ applications, as originally stated in Ex parte Carrio.⁵ In Carrio, the Court had adopted the now-defunct federal rule of laches, a rule in which a petition for writ of habeas corpus was rejected if the passage of time before filing unnecessarily burdened the State. After the federal courts abandoned the rule of laches in favor of the one-year limitations period described in the federal AEDPA section of this chapter, the Court of Criminal Appeals in Perez made it easier for the State to prove prejudice to its case.⁶

The Perez court, modified the Carrio test, stating that it would "(1) no longer require the State to make a 'particularized showing of prejudice' so that the courts may more broadly consider material prejudice from delay, and (2) expand the definition of prejudice under the existing laches

³ As an example, applications for writ of habeas corpus asserting the right to an out-of-time appeal generally do not challenge an applicant's conviction. (See Ch. 4 of this Handbook at §4.102).

⁴ 398 S.W.3d 206 (Tex. Crim. App. 2013).

⁵ 992 S.W.2d 486 (Tex. Crim. App. 1999).

⁶ Under the previous test in Carrio, the State was required to "(1) make a particularized showing of prejudice, (2) show that the prejudice was caused by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." Carrio, 992 S.W.2d at 488.

doctrine to permit consideration of anything that places the State in a less favorable position, including prejudice to the State's ability to retry a defendant[.]” See Perez, 398 S.W.3d at 215. The Perez court's ruling⁷ is rooted mostly in the concept of fairness, but is also derived from the concept that the State has a strong interest in the finality of a conviction. *Id.* at 216. Because Article 11.07, Code of Criminal Procedure does not require the State to file an answer to an application for a writ of habeas corpus, the State is not required to affirmatively plead a laches theory that bars an applicant relief; therefore, the convicting court may *sua sponte* (on its own initiative) conduct a laches inquiry. See Ex Parte Smith, 444 S.W.3d 661 (Tex. Crim. App. 2014).

With Perez in mind, therefore, it is important for prospective applicants to be aware of the impact the passage of time may have on their case. While it is vital that in preparing an application for writ of habeas corpus, an applicant researches the law and investigates the facts as well as they are able, it is equally important not to wait so long that they forfeit their claim under the equitable principle of laches.

§4.3.3 - The Contemporaneous Objection Rule

Many meritorious grounds are forfeited when not raised by way of a contemporaneous objection at trial. Simply put, the contemporaneous objection rule requires that the defendant put the trial court on notice of the objection at the time the court is in a position to take corrective action or avoid error. See Ex parte Crispen, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989). The Court of Criminal Appeals will decline to consider claims raised in a habeas corpus application which “could have been avoided or corrected by the trial court.” *Id.* (citing Gibson v. State, 726 S.W.2d 129 (Tex. Crim. App. 1987)). However, this rule does not apply where the issue to be raised in a habeas corpus application is a novel legal concept which was unavailable⁸ at the time the objection could have been made. *Id.*; See also Matthews v. State, 768 S.W.2d 731 (Tex. Crim. App. 1989).

⁷ The court remanded the case to the trial court, and upon the case's return to the Court of Criminal Appeals, the court denied Perez' application for writ of habeas corpus, as, among other reasons (1) the police no longer had evidence or documents from his case, which occurred twenty years earlier, (2) the investigator was too feeble to participate in a second trial, (3) many other witnesses had memory problems and (4) many others could not be located. Perez, 445 S.W.3d at 724-25. Those facts, in the Court of Criminal Appeals' view, taken together prejudiced the State to a sufficient degree to prevent the granting of Perez' application. *Id.* at 727.

⁸ This exception to the contemporaneous objection rule is not to be confused with retroactivity analysis under Teague v. Lane, 489 U.S. 288; 109 S. Ct. 1060 (1989), *infra*. (See Chapter 4 of this Handbook at §4.037(G)). The rule found in Matthews and Crispen applies to new rules of law which are handed down during the defendant's direct appeal period and before the defendant's conviction is final.

Not all rights are forfeited by failing to make a proper objection, although most are. Whether a right is forfeited by a failure to object depends on which of three categories created by the Court of Criminal Appeals the right fits into. *See* Marin v. State, 851 S.W.2d 275, 279 (Tex. Crim. App. 1993) (overruled on other grounds by Cain v. State, 947 S.W.2d 262 (Tex. Crim. App. 1997) as stated in Garza v. State, 435 S.W.3d 258 (Tex. Crim. App. 2014)). The court described the three categories as follows:

“The first category of rights are those that are ‘widely considered so fundamental to the proper functioning of our adjudicatory process . . . that they cannot be forfeited . . . by inaction alone.’ These are considered ‘absolute rights.’ The second category of rights is comprised of rights that are ‘not forfeitable’— they cannot be surrendered by mere inaction, but are ‘waivable’ if the waiver is affirmatively, plainly, freely, and intelligently made.

The trial judge has an independent duty to implement these rights absent any request unless there is an effective express waiver. Finally, the third category of rights are ‘forfeitable’ and must be requested by the litigant. Many rights of the criminal defendant, including some constitutional rights, are in this category and can be forfeited by inaction.”

See Garza, 435 S.W.3d at 260, *citing* Marin v. State, 851 S.W.2d 275 (Tex. Crim. App. 1993). In attempting to assert a claim based on a constitutional right, potential applicants should research which of the three Marin classifications the right falls into, as such a determination may greatly impact whether a claim has been procedurally-defaulted by a failure to make a contemporaneous objection. *See* Sanchez v. State, 120 S.W.3d 359 (Tex. Crim. App. 2003).

§ 4.3.4 - Harmless Error

In state habeas corpus proceedings, the applicant has the burden of proof to show error warranting reversal, a burden which is tremendous. In almost all cases, if an applicant proves a trial defect (for example, if the applicant shows that his or her attorney slept through most of an entire trial and was in some way deficient for doing so), but fails to show that the defect **actually harmed** the case’s outcome, the court will not grant habeas corpus relief. An applicant must prove by a preponderance of the evidence that the harm caused by the defect caused a different outcome. *See* Ex parte Fierro, 934 S.W.2d 370 (Tex. Crim. App. 1996). In other words, an applicant bears the burden to show that, more likely than not, the trial error caused a different result, as to either the applicant’s conviction or the applicant’s sentence.

There are constitutional claims for which an applicant does not need to show harm, but “they are the exception and not the rule.” *See* Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101 (1986). Such

trial errors are called “structural errors.” The Supreme Court of the United States has listed the following as structural errors warranting automatic reversal: (1) total deprivation of counsel at trial, (which is not the same as **ineffective** counsel), (2) bias of the presiding judge, based on extrajudicial facts, not upon the judge’s trial rulings alone, (3) exclusion of members of a jury panel on the basis of their race, (4) denial of a defendant’s right to self-representation at trial, and (5) the denial of a public trial. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246 (1991).

By contrast, as discussed later in the federal habeas corpus section, federal courts use an even more burdensome standard, as harm will only be found if it had a “substantial and injurious effect” on the jury’s verdict. *See Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S. Ct. 1710, 1721-22 (1993); (*See* Ch. 4 of this Handbook at §4.13.1.10).

§4.3.5 - Waiver of the Right to File a Writ Application

To a somewhat limited degree, an applicant may waive his or her right to file an application for writ of habeas corpus pursuant to a valid plea agreement, if the applicant could reasonably have known of the claim to be waived at the time the waiver is made. *See Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. 2009).

§4.3.6 - The Claim is One Best Suited for Direct Appeal

Almost any claim which could have been addressed on direct appeal is not a valid ground for habeas corpus relief. *See Ex parte Gardner*, 959 S.W.2d 189 (Tex. Crim. App. 1998); *Ex parte Goodman*, 816 S.W.2d 383 (Tex. Crim. App. 1991); *Ex parte Groves*, 571 S.W.2d 888 (Tex. Crim. App. 1978). Any claim which was addressed on direct appeal and decided upon by the court of appeals is not a valid ground either, as the decision of a court of appeals is final as to a particular issue. *See Ex parte Schuessler*, 846 S.W.2d 850 (Tex. Crim. App. 1993).

§4.3.7 - Miscellaneous Limitations

Finally, many other errors, while subject to appeal, are not subject to attack by a writ of habeas corpus after a conviction has occurred. Some of those errors, many of which are discussed later in this chapter, include but are not limited to the following:

A. Police Brutality/Misconduct

Failures by police to follow certain required procedures will not mandate habeas corpus relief. Excessive force by itself is not an adequate ground for relief, although the admission of a confession extracted by means of police brutality may constitute grounds for relief. *See Brown v. Mississippi*, 297 U.S. 278, 56 S. Ct. 461 (1936).

B. Illegal Arrests

A conviction is not voided by an illegal arrest. *See Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975).

C. Denial of Bail

Denial of bail does not constitute grounds for habeas corpus relief after an offender has already been convicted.

D. Denial of an Examining Trial

A preliminary hearing is not required by the United States Constitution, nor is it an absolute right granted by the State. To obtain such a hearing, it must be requested, and even so, the right terminates when the indictment is issued by the grand jury. *See Harris v. Estelle*, 487 F.2d 1293 (5th Cir. 1974).

E. Discretionary Actions by a Trial Judge

Many of a judge's rulings prior to and during trial are discretionary. Provided the judge's decision conforms with guiding rules and principles (the "abuse-of-discretion" standard), courts of appeals seldom overturn a trial judge's decisions. In any case, such decisions are a matter for direct appeal, not habeas corpus review. Note also that a consistent pattern of a judge ruling against a defendant in discretionary matters is insufficient to prove bias warranting reversal, as proof of bias must be from extrajudicial sources, meaning that the proof cannot be based entirely on a judge's temperament or rulings at trial. *See Liteky v. United States*, 510 U.S. 540, 114 S. Ct. 1147 (1994).

F. Defects in an Indictment

Failure to object to an indictment generally waives the matter for habeas corpus purposes. *See Ex parte Gibson*, 800 S.W.2d 548 (Tex. Crim. App. 1990); (*See* Ch. 4 of this Handbook at §4.10.1).

G. Retroactive Application of the Law

Federal courts generally will not apply a "new rule" of law to habeas corpus cases. In other words, if there is a new right established by the courts, the new right will not be applied to any cases which were final when the new rule was issued. *See generally Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989); *See also Penry v. Lynaugh*, 492 U.S. 302; 109 S. Ct. 2934 (1989) (overruled in part by *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242 (2002)). Although *Teague* is not binding on state courts, the Court of Criminal Appeals applies *Teague* to state court

convictions. *See* Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029 (2008); Ex parte De Los Reyes, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013).

H. Stacking Orders

An illegal stacking order generally cannot be attacked in a writ application, as it is a matter which must be addressed on appeal. *See* Ex parte Townsend, 137 S.W.3d 79 (Tex. Crim. App. 2004); (*See* Ch. 4 of this Handbook at §4.10.3.2).

I. Deadly Weapon Findings

Even if a deadly weapon finding is questionable, if an affirmative finding is not attacked on direct appeal, it generally cannot be challenged in habeas corpus proceedings. *See* Ex parte Nelson, 137 S.W.3d 666 (Tex. Crim. App. 2004); *See* Ex parte Rich, 194 S.W.3d 508 (Tex. Crim. App. 2006) (holding that where the original record on direct appeal does not show the sentencing error to the court, a writ of habeas corpus may be used to remedy the error); (*See* Ch. 4 of this Handbook at §4.10.3.3).

J. Evidentiary Sufficiency

A bare claim that the evidence to support a conviction was legally or factually insufficient is not a claim which may be brought in an application for writ of habeas corpus in Texas. *See* Ex parte Easter, 615 S.W.2d 719 (Tex. Crim. App. 1981); *see also* Ex parte Williams, 703 S.W.2d 674 (Tex. Crim. App. 1986) (holding that the sufficiency of evidence cannot be attacked after a guilty plea). The same rule applies in attempting to attack any prior offenses which were used by the State in another case (for enhancement purposes, for example) as being based on insufficient evidence. *See* Ex parte Wingfield, 162 Tex. Crim. 112, 282 S.W.2d 219 (Tex. Crim. App. 1955); Colbroth v. Wainwright, 466 F.2d 1193 (5th Cir. 1972). An applicant may have a meritorious claim, however if he or she can show that there was **no evidence** on a crucial element of the offense with which they were convicted. *See* Ex parte Barfield, 697 S.W.2d 420 (Tex. Crim. App. 1985); Ex parte Perales, 215 S.W.3d 418 (Tex. Crim. App. 2007).

Federal courts will consider an “exhausted” claim of insufficient evidence, however. The standard for whether the evidence is sufficient to sustain a conviction in federal court review is “whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *See* Donahue v. Cain, 231 F.3d 1000, 1004 (5th Cir. 2000) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781 (1979)).

§4.4 - The Fourth Amendment: Illegal Searches and Seizures

The Fourth Amendment to the United States Constitution reads:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

If police search or seize a person in violation of the Fourth Amendment (e.g. without meeting the requisite burden of proof needed for a search or seizure), any evidence contributing to the guilt of the person discovered as a consequence of that search or seizure must be excluded from a state prosecution of that person upon proper motion. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S. Ct. 1684, 1691 (1961). Any testimony related to such an unlawful invasion must also be excluded as a “fruit of the poisonous tree.” *See Wong Sun v. United States*, 371 U.S. 471, 485-88, 83 S. Ct. 407, 417-18 (1963) (citing *McGinnis v. United States*, 227 F.2d 598 (5th Cir. 1955)). This prohibition against unlawfully-seized evidence is called the “exclusionary rule.”

§4.4.1 - The Fourth Amendment and Habeas Corpus

The improper admission of Fourth Amendment-deficient evidence into a defendant’s trial does not constitute a valid claim to support a federal petition for writ of habeas corpus. *See Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037 (1976). In holding as much, the *Powell* court explained that the exclusionary rule was designed not as a protection for an individual criminal defendant, but as a deterrence measure used to prevent state misconduct. *Id.* at 487, 1084. As the time between an error by law enforcement and the filing of a habeas corpus petition weakens the intended deterrent effect of the exclusionary rule, the *Stone* court declined to extend the exclusionary rule to habeas corpus. Therefore, a defendant whose trial was tainted by illegally-seized evidence has no valid habeas corpus claim based on that fact alone, provided he or she was provided with a full and fair opportunity to litigate his or her claim at or before trial. *Id.* at 481-82, 3046-47; *See also Swicegood v. Alabama*, 577 F.2d 1322 (5th Cir. 1978).

Texas courts require that a defendant or his or her attorney raise any complaints regarding an illegal search and seizure at trial, otherwise the complaint is waived. *See Meyer v. Estelle*, 621 F.2d 769 (5th Cir. 1980). This rule, called the Contemporaneous Objection Rule, precludes challenges to evidence obtained from an illegal search and seizure which are raised for the first time in a writ application. Similarly, objections to the admission of unlawfully-seized evidence or

the fruits of the same should be litigated on direct appeal, not in habeas corpus proceedings. *See* generally Ex parte Kirby, 492 S.W.2d 579 (Tex. Crim. App. 1973).

§4.4.2 - Ineffectiveness for Failure to File a Motion to Suppress

While Powell forbade the filing of a petition for writ of habeas corpus in federal court claiming a Fourth Amendment violation as an independent ground for reversal of a conviction, the court distinguished Powell in Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574 (1986). The Kimmelman court held that an attorney may be ineffective for failing to move to suppress illegally-seized evidence. Likewise, although Texas courts require that Fourth Amendment issues be raised on appeal or not at all, a habeas applicant may successfully assert that his or her counsel was ineffective for failing to file a motion to suppress on the issue, provided the motion would have succeeded if filed, and the success of the motion would have reasonably likely led to a different outcome. *See* Jackson v. State, 973 S.W.2d 954 (Tex. Crim. App. 1998); (*See* Ch. 4 of this Handbook at § 4.6.2.2).

§4.5 - The Fifth Amendment

§4.5.1 - Involuntary Confessions

§4.5.1.1 - Generally

The Fifth Amendment to the United States Constitution provides a right to defendants in criminal cases which allows them to refuse to testify against themselves. Speech is not the only form of self-incrimination which can be prohibited by the Fifth Amendment, however, as both written and oral statements will suffice. In many cases, the physical behaviors of a defendant may not be considered “testimonial,” and thus may be admissible under the Fifth Amendment. *See* Miffleton v. State, 777 S.W.2d 76 (Tex. Crim. App. 1989). As a result of this right against self-incrimination, as discussed below, courts are bound to make a finding that an incriminatory statement was given voluntarily⁹ before admitting it at trial. *See* Jackson v. Denno, 378 U.S. 368, 84 S. Ct. 1774 (1964).

On the other hand, the contemporaneous objection rule discussed in §4.3.3 of this chapter applies to self-incriminating testimony. *See* Ex parte Bagley, 509 S.W.2d 332 (Tex. Crim. App.

⁹ The voluntariness requirement for confessions is not unique to the Fifth Amendment. Under the Due Process Clause of the Fourteenth Amendment as it applies to the states, confessions must also be voluntary. *See* Brown v. Mississippi, 297 U.S. 278, 56 S. Ct. 461 (1936); *see also* Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019 (1938)(examining the concept of voluntariness)(overruled in part by Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880 (1981)).

1974); Ranson v. State, 707 S.W.2d 96 (Tex. Crim. App. 1986); Ex parte Stansbery, 702 S.W.2d 643 (Tex. Crim. App. 1986) (holding that a judicial confession is not a bar to reconsideration of issues which were raised before a plea was entered in limited circumstances).

§4.5.1.2 - In Habeas Corpus Proceedings

Unlike the bar against Fourth Amendment claims created by Stone v. Powell, the claim that a confession was introduced at trial in violation of the Fifth Amendment is “cognizable” in federal habeas corpus proceedings. *See* Withrow v. Williams, 507 U.S. 680, 113 S. Ct. 1745 (1993). The reason for the opposite rules in Stone and Withrow is that while the Fourth Amendment’s exclusionary rule is only a tool to deter police misconduct, a criminal defendant’s Fifth Amendment right against self-incrimination is a fundamental **trial** right expressly provided by the Constitution. *Id.* at 691, 1753.

In Texas, claims involving coerced confessions are a matter more suitable for direct appeal, and require a contemporaneous objection to preserve error for that appeal. *See* Ex parte Bagley, 509 S.W.2d 332 (Tex. Crim. App. 1974); Ex parte Crispen, 777 S.W.2d 103 (Tex. Crim. App. 1989). However, where an applicant moves before trial to suppress a statement obtained in violation of the Fifth Amendment, that motion was denied, and the applicant subsequently pleads guilty before a judge who imposed a sentence within the valid sentencing range, the court may consider the merits of his or her Fifth Amendment claim in habeas corpus proceedings. *See* Ex parte Stansbery, 702 S.W.2d 643 (Tex. Crim. App. 1986).

§4.5.1.3 - Explanations, Limitations, and Exceptions

A. “Miranda” Warnings

In the landmark case of Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), the Supreme Court declared that before police may question a criminal suspect who is both (1) in custody and (2) subject to interrogation, they must provide several warnings:

1. He must be warned prior to any questioning that he has the right to remain silent,
2. that anything he says can be used against him in a court of law,
3. that he has the right to the presence of an attorney, and
4. that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

See Miranda, 384 U.S. at 479, 86 S. Ct. at 1630 (numeration added). These warnings have since been codified in Texas Code of Criminal Procedure Article 38.22, which adds a fifth

admonishment, supplementing those mandated by Miranda. The admonishment requires police to warn a suspect who is being subjected to custodial interrogation that he or she has the right to terminate questioning at any time.

If the above warnings are not given before custodial interrogation, courts will presume that a confession was not voluntary, and will bar admission of any resulting confession. *See Williams v. State*, 270 S.W.3d 112 (Tex. Crim. App. 2008). Exceptions exist to the above rules, however. In *Illinois v. Perkins*,¹⁰ for example, the Supreme Court upheld the admission of a confession where the questioner was an undercover agent, reasoning that because the suspect did not know that the questioner was a state actor, the environment was not inherently coercive. Likewise, a defendant may still show that a statement was given involuntarily, even if Miranda warnings were adequately given, as waiver of those rights must be made voluntarily, and courts presume that a defendant did not waive his or her rights. *See Tague v. Louisiana*, 444 U.S. 469, 100 S. Ct. 652 (1980). Finally, note that if a defendant introduces his or her own confession at trial, the defendant waives any objection to the confession. *See Crawford v. State*, 617 S.W.2d 925 (Tex. Crim. App. 1980).

The safeguards of the Fifth Amendment are only triggered in the context of law enforcement questioning when a person is both (1) in custody and (2) being interrogated. A person is in “custody” when he or she is deprived of his or her freedom in any significant way. *See Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682 (1980); *See also Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232 (1977). Outright arrest satisfies the custody requirement, of course. *Orozco v. Texas*, 394 U.S. 324, 89 S. Ct. 1095 (1969); but *see Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213 (2010) (holding that imprisonment is not custody *per se*).¹¹

“Interrogation” occurs when police ask questions to a suspect which they should know are reasonably likely to elicit an incriminating response. *See Innis*, 446 U.S. at 301, 100 S. Ct. at 1689-90. Spontaneous statements made by a suspect are not protected, however. *See United States v. Savell*, 546 F.2d 43 (5th Cir. 1977) (citing Miranda, 384 U.S. at 479, 86 S. Ct. at 1630).

¹⁰ 496 U.S. 292, 110 S. Ct. 2394 (1990).

¹¹ For more discussion of the Fifth Amendment as it applies to interrogations carried out by law enforcement while an offender is serving time in a jail, state jail, or penitentiary, *see Howes v. Fields*, 132 S. Ct. 111 (2012); *United States v. Melancon*, 662 F.3d 708 (5th Cir. 2011); *Wilson v. Cain*, 662 F.3d 708 (5th Cir. 2011).

B. Jackson v. Denno Hearings

As indicated above, the State must prove by at least a preponderance of the evidence that a confession was given voluntarily before it may be admitted at trial, if the confession's voluntariness is questionable. *See* Martinez v. Estelle, 612 F.2d 173 (5th Cir. 1980); Coursey v. State, 457 S.W.2d 565 (Tex. Crim. App. 1970). A defendant's testimony at a hearing on the voluntariness of his or her confession cannot be used in his or her later criminal trial, provided that the proper objection was made. *See* Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968). At such a hearing, the trial judge is the sole trier of fact, having the exclusive right to weigh the evidence. *See* Hughes v. State, 562 S.W.2d 857 (Tex. Crim. App. 1978). When a trial court fails to provide a hearing, a habeas corpus petitioner must still show that "[the petitioner's] version of events, if true, would require the conclusion that his confession was involuntary." *See* Martinez v. Estelle, 612 F.2d 173 (5th Cir. 1980).

C. Invoking Miranda's Protections

A defendant's unequivocal assertion of his or her right to remain silent or to an attorney requires that the questioning be brought to an end. However, whether a suspect has invoked his or her right to an attorney or silence is a legal question of significant depth unto itself. Whether a statement by a suspect is unequivocal (clear) or equivocal (unclear) turns on whether a reasonable officer would, under the circumstances interpret a statement as a request for an attorney. *See* State v. Gobert, 275 S.W.3d 888 (Tex. Crim. App. 2009)(citing Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350 (1994)); *see also* Edwards v. Arizona, 451 U.S. 477, 486, 101 S. Ct. 1880, 1885, n. 9 (1981)(citing Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979)).

Provided that a suspect did in fact invoke one of the above rights, the degree to which police must wait to reinitiate questioning depends on whether the defendant invoked the right to an attorney or the right to remain silent, and whether the suspect is in custody or free.

Once a defendant who is in custody and subject to interrogation unequivocally requests counsel, the police may not reapproach the defendant until he or she has been out of custody for fourteen days (or until the defendant's attorney is present, as stated in Michigan v. Mosley¹²). Under Minnick v. Mississippi,¹³ once a defendant **in custody** invokes their right to counsel,

¹² 423 U.S. 96, 96 S. Ct. 321 (1975).

¹³ 498 U.S. 146, 111 S. Ct. 486 (1990).

interrogation must cease until the defendant's lawyer is present. Furthermore, under Mosley, once a defendant invokes the right to remain silent, police must "scrupulously honor" the defendant's invocation of that right before reinitiating interrogation. *See Mosley*, 423 U.S. at 104, 96 S. Ct. at 326.

Of course, a suspect may personally reinitiate questioning by re-approaching law enforcement, but some inquiries made by a defendant of police while in custody, such as to use the restroom are so bare that they cannot be reasonably said to manifest an intent by the defendant to reopen a more generalized discussion regarding the crime for which he or she is being questioned. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46, 103 S. Ct. 2830, 2834-35 (1983).

D. Self-Incriminating "Testimony"

As indicated in the introduction, non-speech can constitute testimony, while some speech may not constitute testimony. The following cases demonstrate how courts have responded when confronted with the question of whether a piece of evidence is a testimonial confession or not:

1. Schmerber v. California, 384 U.S. 757, 86 S. Ct. 1826 (1966)(overruled on other grounds by Missouri v. McNeely, 133 S. Ct. 1552 (2013)): Extracting blood samples does not violate a defendant's privilege against self-incrimination.
2. United States v. Mara, 410 U.S. 19, 93 S. Ct. 774 (1973): The Fifth Amendment is not violated where the State seeks handwriting examples from a defendant for the purpose of obtaining the physical characteristics of the handwriting only.
3. United States v. Dionisio, 410 U.S. 1, 93 S. Ct. 764 (1973): Requiring a voice sample for identification does not violate the Fifth Amendment, so long as that voice sample is solely for the purpose of identifying its own physical characteristics.
4. United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967): Requiring a defendant to put on certain clothing or repeat certain words does not violate the Fifth Amendment.
5. White v. Estelle, 720 F.2d 415 (5th Cir. 1983): The defendant's Fifth, Sixth, and Fourteenth Amendment rights were violated where a psychiatrist, who made a pretrial psychiatric examination of defendant by court order, answered questions as to the defendant's propensity for future violence. *See also Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866 (1981).

E. Exceptions to Miranda

i. The Public Safety Exception

In situations where officers have a need to discover information which may protect the public from an immediate danger, police may ask questions of a suspect which otherwise might violate Miranda, and the statements given in response to their inquiries will not be excluded from a later criminal trial. *See* New York v. Quarles, 467 U.S. 649, 104 S. Ct. 2626 (1984).

ii. The “Fruits” Exception

While a Miranda-defective statement must be excluded from the prosecution’s case-in-chief, physical evidence, leads, or other third party testimony discovered as a result of the tainted confession are not to be automatically excluded due to the Miranda violation. *See* Oregon v. Elstad, 470 U.S. 298, 105 S. Ct. 1285 (1985) (overruled in part on other grounds by Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601 (2004)).

iii. Use for Impeachment Purposes

Though the Fifth Amendment commands the exclusion of Miranda-defective statements, the rule is not meant to give license to a criminal defendant to commit perjury. *See* Harris v. New York, 401 U.S. 222, 91 S. Ct. 643 (1971). As a consequence, under Harris, the State is allowed to use statements which were taken in violation of Miranda for the purpose of impeaching the defendant’s trial testimony.

iv. The Booking Exception

Miranda does not forbid any and all questioning by officers. Questions which are routine to a police booking procedure are allowable, regardless of whether or not the suspect has been “Mirandized.” *See* Rhode Island v. Innis, 446 U.S. 291, 100 S. Ct. 1682 (1980); Pennsylvania v. Muniz, 496 U.S. 582, 110 S. Ct. 2638 (1990). In the view of the Court of Criminal Appeals, to fall under this exception, the question asked of a suspect must “serve a legitimate administrative need.” *See* Alford v. State, 358 S.W.3d 647 (Tex. Crim. App. 2012)(citing United States v. Doe, 878 F.2d 1546, 1551 (1st Cir. 1989)). Inquiries as to a suspect’s name, address, height, weight, eye color, date of birth, and current age have been upheld as being justified by administrative need, as well as phone numbers,¹⁴ in some cases. *See* Muniz, 496 U.S. at 601; Alford, 358 S.W.3d at 654; *But see* State v. Cruz, 461 S.W.3d 531 (Tex. Crim. App. 2015)(holding that detectives did

¹⁴ *See* the cases cited by the Court of Criminal Appeals in Cruz, 461 S.W.3d at 537, n. 22.

not demonstrate an administrative need for the telephone number of a suspect who was jailed in Chicago).

§4.5.2 - Double Jeopardy and Collateral Estoppel

§4.5.2.1 - Double Jeopardy Generally

The Fifth Amendment of the United States Constitution prohibits a person from being twice placed in jeopardy for the same crime. A sizable selection of case law related to the Double Jeopardy Clause examines what exactly constitutes a “crime,” as the tests for Double Jeopardy can differ jurisdiction to jurisdiction. To examine whether a charge violates the Double Jeopardy Clause, Texas follows a modified version of the majority rule (the “same elements test”) provided by the United States Supreme Court in Blockburger v. United States,¹⁵ which is the test used by federal courts. The Blockburger court provided that where a criminal defendant is charged with multiple offenses arising from the same criminal conduct, and each of the offenses requires a criminal element which the other does not, then no double jeopardy violation will occur if the defendant is convicted of both crimes.

As an example, assume that the letters A, B, and C represent different elements of a crime, and that the two defendants below were charged with crimes which contain different elements, but some overlap:

	Defendant 1	Defendant 2
Charge I	A, B	A, B, C
Charge II	B, C	A, B

In the example above, conviction of Defendant 1 of both charges would not violate the Double Jeopardy Clause, as each charge possesses an element the other does not, satisfying the Blockburger test. On the other hand, conviction of Defendant 2 would violate the Double Jeopardy Clause, as only one of the offenses has a different element than the other, causing the second charge to be a lesser included offense of the first.

The Court of Criminal Appeals’ test for whether multiple charges under the same statute for the same criminal transaction violates the Double Jeopardy Clause turns on the determination of what the “allowable unit of prosecution” is under the relevant portion of the Penal Code. *See Saenz*

¹⁵ 284 U.S. 299, 52 S. Ct. 180 (1932).

v. State, 166 S.W.3d 270 (Tex. Crim. App. 2005). In practice, this test requires a determination of what the legislature intended the unit of prosecution to be. *See generally* Ex parte Hawkins, 6 S.W.3d 554 (Tex. Crim. App. 1999) (overruling Ex parte Crosby, 703 S.W.2d 683 (Tex. Crim. App. 1986)) (explaining that as robbery is an assaultive crime, and in assaultive crimes, the allowable unit of prosecution is determined by victim, the allowable unit for robbery is also to be determined by each victim); Miles v. State, 259 S.W.3d 240 (Tex. Crim. App. 2008) (holding that the allowable unit of prosecution for deadly conduct is not by victim, but by each discharge of a firearm); Ex parte Cavazos, 203 S.W.3d 333 (Tex. Crim. App. 2006) (deciding that as burglary is a crime against property (unlawful entry), not an assaultive offense, the allowable unit of prosecution is by each unlawful entry and so conviction of multiple burglaries (in essence, multiple **entries**) for **one** entry violates the Double Jeopardy Clause).

The doctrine of collateral estoppel prohibits a party from re-litigating an issue at a second trial when the issue has already been ruled upon in the first. For example, if a defendant is charged with capital murder, but only found guilty by a jury of the lesser-included offense of manslaughter, and then the manslaughter conviction is overturned, he or she can only be retried for manslaughter.

In the courts' view, by rejecting the capital murder portion of the conviction, the first jury decided that the State could not meet its burden beyond a reasonable doubt for the elements needed for capital murder, and thus retrial on that issue would violate the double jeopardy clause. *See generally* Ashe v. Swenson, 397 U.S. 436, 90 S. Ct. 1189 (1970); *But see* Warren v. State, 514 S.W.2d 458 (Tex. Crim. App. 1974) (holding that prior acquittal bars retrial on the same charges but does not bar later prosecution on charges arising from the same criminal transaction). In attacking a conviction on grounds of collateral estoppel, the defendant has the burden to prove that a factual issue was conclusively decided at the first trial. *See* Guajardo v. State, 109 S.W.3d 456 (Tex. Crim. App. 2003).

As a general rule, jeopardy "attaches" in a jury trial when the jury is sworn in. *See* Ex parte Myers, 618 S.W.2d 365 (Tex. Crim. App. 1981); *But see* Ex parte McAfee, 761 S.W.2d 771 (Tex. Crim. App. 1988) (holding that jeopardy did not attach where, in two previous prosecutions, a mistrial had been declared because the jury could not reach a verdict). The law for when jeopardy attaches in a bench trial depends on the jurisdiction. In Texas, jeopardy attaches in a bench trial when both sides announce ready and the defendant pleads to the indictment. *See* Sanchez v. State, 845 S.W.2d 273 (Tex. Crim. App. 1992) (citing State v. Torres, 805 S.W.2d 418 (Tex. Crim. App.

1991), which held as much under Article I, §14 of the Texas Constitution). In federal court, jeopardy attaches when the jury is empaneled and sworn. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 97 S. Ct. 1349 (1977); *Crist v. Bretz*, 437 U.S. 28, 98 S. Ct. 2156 (1978).

The Double Jeopardy Clause does prevent retrial under the following circumstances:

1. A conviction was reversed on appeal, and the basis for reversal was insufficient evidence. *See Ex parte Reynolds*, 588 S.W.2d 900 (Tex. Crim. App. 1979); *Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211 (1982).¹⁶
2. A conviction of a lesser included offense prevents the prosecution of a higher level offense. The reverse is also true. Prior conviction of the main offense prohibits the prosecution of a lesser included offense. *See Ex parte Jefferson*, 681 S.W.2d 33 (Tex. Crim. App. 1984).
3. A mistrial was granted over defense objection where there was no “manifest necessity” for granting such a motion. *See Ex parte Brown*, 907 S.W.2d 835 (Tex. Crim. App. 1995).

The Double Jeopardy Clause does not prevent retrial under the following circumstances:

1. Reversals, either on appeal or by habeas corpus, were on grounds other than insufficient evidence. *See Bullington v. Missouri*, 451 U.S. 430, 101 S. Ct. 1852 (1981).
2. The defendant concurred with a motion for mistrial. *See Taylor v. State*, 474 S.W.2d 207 (Tex. Crim. App. 1971).
3. Convictions were made by more than one state, by one state and the federal government, or multiple states and the federal government for the same offense (the so-called “separate sovereigns” doctrine). *See Heath v. Alabama*, 474 U.S. 82, 106 S. Ct. 433 (1985); *Hill v. Beto*, 390 F.2d 640 (5th Cir. 1968).
4. The indictment against the defendant was dismissed, then later reinstated. *See Ex parte Rusk*, 79 S.W.2d 865 (Tex. Crim. App. 1935).

¹⁶ Note that whereas previously, the Texas Court of Criminal Appeals distinguished between **legal** sufficiency of evidence and **factual** sufficiency of evidence in the double jeopardy context, the Court has since seemingly done away with that distinction. *See Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010); *see Butcher v. State*, 454 S.W.3d 13, 20 (Tex. Crim. App. 2015) (distinguishing between factual and legal sufficiency when raised as an affirmative defense).

§4.5.2.2 - Other Developments

A. Waiver

In Texas, claims involving double jeopardy can be raised for the first time on appeal or in a habeas corpus application, but only if (1) the double jeopardy violation is clearly apparent on the face of the record and (2) enforcement of usual rules of procedural default¹⁷ serves no legitimate state interests. *See Gonzalez v. State*, 8 S.W.3d 640 (Tex. Crim. App. 2000).

Under the first part of the Gonzalez test, “[a] double-jeopardy claim is apparent on the face of the trial record if resolution of the claim does not require further proceedings for the purpose of introducing additional evidence in support of the double-jeopardy claim.” *See Ex parte Denton*, 399 S.W.3d 540 (Tex. Crim. App. 2013). The court has been less clear on the second prong of the Gonzalez test, indicating that the State has no legitimate interest in enforcement of procedural default rules “when it is clear on the face of the record that the conviction was obtained in contravention of constitutional double-jeopardy protections.” *Id.* at 545. In the alternative, the concurring opinion (which is not a controlling opinion) in Denton interpreted the second prong of Gonzalez to mean that no waiver occurs where “granting the defendant double-jeopardy relief places the State in no worse a position than it would have been in had a timely objection been made.” *See Denton*, 399 S.W.3d at 557 (J. Keller, concurring); *But see Ex parte Martin*, 747 S.W.2d 789 (Tex. Crim. App. 1988) (Where the applicant challenged an older conviction which was used to enhance the sentence attached to the present conviction, alleging the former was the product of double jeopardy, the court denied relief as he had knowingly, intelligently, and voluntarily waived the issue by entering a guilty plea).

B. Punishment Requirement

Fundamentally, a legislatively-mandated procedure must both commence criminal proceedings and be punitive to violate the Double Jeopardy Clause. In Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072 (1997), the United States Supreme Court upheld a petitioner’s civil commitment, as Kansas’ commitment scheme was deemed to have neither commenced criminal proceedings nor punished the petitioner. *See also In re Fisher*, 164 S.W.3d 637 (Tex. 2005) (holding that the Texas civil commitment statute is civil and regulatory, not criminal and punitive), cert. denied, 126 S. Ct. 428 (2005). Other measures have been upheld as being civil, regulatory

¹⁷ “Procedural default” is a concept discussed elsewhere in this chapter. (*See* Ch. 4 of this Handbook at § 4.036).

and non-punitive for double jeopardy purposes. *See Ex parte Diaz*, 959 S.W.2d 213 (Tex. Crim. App. 1998) (holding that tax assessment by comptroller, as evidenced by tax determination notice, is not punishment for double jeopardy purposes); *see also Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554 (1963) (discussing several factors in whether a sanction is punitive or regulatory).

§4.6 - Grounds for Writ - Sixth Amendment

The Sixth Amendment provides some of the most basic guarantees for a procedurally fair trial, including (1) the right to counsel, (2) the right to an impartial jury, and (3) the rights to compel and confront witnesses. The amendment states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

§4.6.1 - Denial of the Right to Counsel

The Sixth Amendment of the United States Constitution guarantees that every defendant in a criminal case has the right to be represented by counsel. If a defendant in a state prosecution cannot afford to hire counsel, the defendant has a right to have counsel appointed to represent him or her. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792 (1963). The right to counsel is not exclusive to felonies, but also applies to misdemeanors where the sentence involves, or potentially involves, a loss of liberty. *See Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006 (1972). Under Texas law, a defendant also has a right to court-appointed counsel if he or she is charged with a felony or a Class A or B misdemeanor. Texas Code of Criminal Procedure Article 1.051(c). The Sixth Amendment’s provision of a right to counsel extends to a defendant’s first appeal as a matter of right. *See Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814 (1963).

The Sixth Amendment right to counsel is offense-specific. In other words, when a criminal defendant invokes the right to counsel under the Sixth Amendment in one criminal case, that does not constitute invocation of the right to all future charges. *See McNeil v. Wisconsin*, 501 U.S. 171, 111 S. Ct. 2204 (1991). The *McNeil* court, for example held that a defendant invoking the right to counsel in a burglary charge did not trigger the right to counsel for yet-to-be charged murders. However, the court held that where the “right to counsel attaches [for charged offenses], it does

encompass offenses that, even if not formally charged, would be considered the same offense under the Blockburger test.” See Texas v. Cobb, 532 U.S. 162, 173, 121 S. Ct. 1335, 1343 (2001).

The right to counsel does not attach to a defendant until the criminal process has reached a “critical stage,” meaning that “adversarial judicial proceedings” have been initiated against a defendant. See Kirby v. Illinois, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882 (1972). Although the point at which adversarial judicial proceedings are initiated varies depending upon a specific case’s procedural posture, it typically occurs when a defendant is charged with a crime by the filing of a criminal complaint, information, or indictment, and first appears before a magistrate for a hearing under Article 15.17, Texas Code of Criminal Procedure. See Rothgery v. Gillespie County, 554 U.S. 191, 128 S. Ct. 2578 (2008). Once adversarial judicial proceedings have been initiated, counsel must be appointed to indigent defendants within a “reasonable time” after a request for counsel is made. See Rothgery, 554 U.S. at 221, 128 S. Ct. at 2591.

A defendant who requests counsel is entitled to the assistance of counsel at all subsequent “critical stages” of his or her case, meaning “every stage of a criminal proceeding where substantial rights of a criminal accused may be affected.” See Mempa v. Rhay, 389 U.S. 128, 134, 88 S. Ct. 254 (1967). Examples of critical stages include lineups, interrogations, plea negotiations, sentencing hearings, and probation revocation hearings. *Id.*; Coleman v. Alabama, 399 U.S. 1, 90 S. Ct. 1999 (1970); Ex parte Vestal, 468 S.W.2d 372 (Tex. Crim. App. 1971); Turnbow v. Estelle, 510 F.2d 127 (5th Cir. 1975). However, while a lineup which follows an article 15.17 hearing requires the presence of counsel, a lineup which precedes such a hearing does not. See Kirby, 406 U.S. at 689, 92 S. Ct. at 1882.

Convictions acquired where a defendant was wrongfully denied counsel may not be used to enhance a later sentence. See Burgett v. Texas, 389 U.S. 109, 88 S. Ct. 258 (1967); United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589 (1972); *But see* Parke v. Raley, 506 U.S. 20, 113 S. Ct. 517 (1992) (distinguishing Burgett and holding that a petitioner for writ of habeas corpus must overcome a presumption of regularity which attaches to final, prior convictions).

Where the Sixth Amendment right to counsel is violated, the relief granted depends on the nature and extent of the violation. Denial of counsel at one critical stage is usually subject to harmless error analysis. See Cooks v. State, 240 S.W.3d 906 (Tex. Crim. App. 2007).

Total deprivation of counsel, on the other hand constitutes “structural error,” meaning that as it is error which affects the whole criminal proceeding, it is not subject to harmless error

analysis. *See* Chapman v. California, 386 U.S. 18, 87 S. Ct. 824 (1967); Massingill v. State, 8 S.W.3d 733 (Tex. Crim. App. 1999); *see also* Ch. 4 of this Handbook at § 4.3.4. Statements from an accused which are deliberately elicited by law enforcement after the Sixth Amendment right to counsel has attached are inadmissible in a criminal trial. *See* Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199 (1964).

After invoking the right to counsel, a defendant may relinquish this right through a knowing and intelligent waiver, even if an attorney has been appointed to represent him or her. *See* Montejo v. Louisiana, 556 U.S. 778, 129 S. Ct. 2079 (2009).¹⁸ A defendant who has not requested counsel also may waive the right to counsel, although failure to request counsel does not by itself constitute a waiver of the right. *See* Brewer v. Williams, 430 U.S. 387, 97 S. Ct. 1232 (1977). In order to be valid, a waiver must be entered after a defendant has been informed of the right to have counsel present during any adversarial judicial proceeding, and the defendant must be aware of the consequences of a decision to waive the right to counsel. *See* Patterson v. Illinois, 487 U.S. 285, 108 S. Ct. 2389 (1988).

Defendants who do not want the assistance of counsel have the right to represent themselves. When a defendant elects to be self-represented in a criminal matter, the presiding judge must determine whether the defendant understands the dangers of self-representation, and whether the defendant is capable of voluntarily waiving his or her right to counsel. *See* Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). It is improper for the court to force the defendant to accept legal representation at trial if the defendant is capable of making a valid waiver of the right to counsel. *See* Faretta, 422 U.S. at 835, 95 S. Ct. at 2541; Lyles v. Estelle, 658 F.2d 1015 (5th Cir. 1981).

Note, however that a defendant cannot claim ineffective assistance of counsel if the defendant elects to represent him or herself. *See* Williams v. State, 549 S.W.2d 183 (Tex. Crim. App. 1977). This right of self-representation under Faretta does not extend to appeals. *See* Martinez v. Court of Appeal, 528 U.S. 152, 120 S. Ct. 684 (2000).

¹⁸ The United States Supreme Court's ruling in Montejo, a Sixth Amendment case contrasts with Fifth Amendment jurisprudence in one important respect. Under the Fifth Amendment, once a defendant invokes his right to counsel, members of law enforcement are forbidden from reinitiating interrogation of a defendant. (*See* Ch. 4 of this Handbook at § 4.051(C)(3)). Under Montejo, police may reapproach a defendant to obtain a waiver of his Sixth Amendment right to counsel, and after such waiver conduct an interrogation.

§4.6.2 - Sixth Amendment: Ineffective Assistance of Counsel

§4.6.2.1 - The Foundations of Ineffective Assistance of Counsel

In many cases before 1984, lower courts recognized a criminal defendant's right to representation by "effective" counsel at trial. The Texas Court of Criminal Appeals recognized a habeas corpus claim based on ineffective assistance of counsel in Ex parte Duffy.¹⁹ However, in 1984, the United States Supreme Court issued its decision in Strickland v. Washington,²⁰ a landmark case which effectively overruled all previous cases on the matter, including Duffy, at least as to the legal test used to determine whether a defendant's counsel was constitutionally effective under the Sixth Amendment. A successful claim of ineffective assistance of counsel, according to the United States Supreme Court in Strickland requires that a habeas applicant or petitioner prove two elements: (1) deficiency and (2) prejudice.

(1) *Deficiency*: The defendant must show that counsel's performance was deficient, to the extent that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Under this part of the Strickland test, courts look to whether counsel's behavior comports with recognized professional norms. *Id.* at 688, 2065. To that end, the reasonableness of counsel's decision is to be analyzed considering the totality of the circumstances known to counsel at the time the offending act or omission occurred. *Id.* at 689, 2065.

(2) *Prejudice*: The defendant must show that his or her counsel's deficient performance prejudiced his or her defense, to the extent that the defendant was deprived of a fair trial, "a trial whose result is reliable." *Id.* at 687, 2064. However, "[i]t is not enough for the defendant show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 2067. The petitioner or applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," such that the errors "undermined confidence in the outcome." *Id.* at 694, 2068.

Subsequent decisions have demonstrated that the Strickland standard is a highly deferential one. Reasonable, purely strategic decisions, or merely questionable strategic decisions are not satisfactory to render counsel's performance ineffective. *Id.* at 690-91, 2066. For example, while counsel has a duty to reasonably investigate his or her client's case, some decisions not to investigate may be strategic and therefore reasonable. *Id.*

¹⁹ 607 S.W.2d 507 (Tex. Crim. App. 1980)

²⁰ 466 U.S. 668, 104 S. Ct. 2052 (1984)(adopted by the Court of Criminal Appeals in Hernandez v. State, 726 S.W.2d 53 (Tex. Crim. App. 1986)).

Common claims involving ineffective assistance of counsel are discussed in following subsections, but by no means should they be considered exhaustive. Note also that the claims discussed in (B)(3) and (B)(4) have their own distinct tests for ineffective assistance which are not the same as the test in Strickland. Finally, know that if the law surrounding a particular matter of law underlying an ineffectiveness claim is unsettled, the court will not find the attorney to have been ineffective. *See Ex parte Smith*, 296 S.W.3d 78 (Tex. Crim. App. 2009) (Where the law surrounding an unlawful possession of a firearm statute was unsettled, counsel could not be faulted for failing to address the issue).

For discussion of trial management matters, *see Gonzalez v. United States*, 553 U.S. 242, 249-53, 128 S. Ct. 1765, 1770-72 (2008); Wainwright v. Sykes, 433 U.S. 72, 91-96, 97 S. Ct. 2497, 2509-11 (1977)(Burger, C. J., and Stevens, J., concurring); Sonnier v. State, 913 S.W.2d 511, 522-23 (Tex. Crim. App. 1995). For an extensive opinion discussing a wide range of potential Strickland claims, *see Bower v. Quarterman*, 497 F.3d 459 (5th Cir. 2007).

§4.6.2.2 - Bases of a Claim of Ineffectiveness

A. Common Ineffectiveness Claims

i. Failure to Investigate

Broadly speaking, counsel may be ineffective for failing to adequately investigate the facts and circumstances underlying a criminal accusation. For example, trial counsel's failure to investigate an alibi witness may entitle an applicant to relief, provided it sufficiently harms the applicant's defense. *See Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994). Likewise, trial counsel has a duty to seek out evidence which rebuts the evidence the State will put on to show a defendant's guilt. Therefore, counsel will be held to have been ineffective if the applicant can show that investigation would have revealed information which, if discovered and introduced into evidence reasonably likely would have changed the result of the case. *See Stokes v. State*, 298 S.W.3d 428 (Tex. Crim. App. 2009).

ii. Failure to Pursue Defenses

In deciding which legal line of defense would be best to bring before the jury, trial counsel's conscious decision not to pursue a line of defense is not entirely insulated from review as being mere "strategy," and is reviewable, but an applicant must nevertheless overcome the strong presumption that the actions of his or her trial counsel were reasonable. *See Ex parte Flores*, 387 S.W.3d 626 (Tex. Crim. App. 2012); *see also Ex parte Briggs*, 187 S.W.3d 458 (Tex. Crim. App.

2005) (holding that trial counsel’s choice not to pursue the defendant’s medical records was an economic, not strategic decision). Failure to raise a constitutional defense may also constitute ineffective assistance of counsel. *See Ex parte Denton*, 399 S.W.3d 540 (Tex. Crim. App. 2013) (granting relief where trial counsel failed to argue that the applicant’s convictions violated the Double Jeopardy clause).

iii. Pretrial Ineffectiveness

Counsel’s failure to undertake certain pretrial courses of action may fall below prevailing professional norms and prejudice a defendant, entitling him or her to relief. As but one example, in *Kimmelman v. Morrison*,²¹ mentioned earlier (*see* Ch. 4 of this Handbook at §4.4.2), the court held that a person petitioning for writ of habeas corpus based on ineffective assistance of counsel for failing to file a pretrial motion to suppress will prevail, provided he or she can show that his or her “Fourth Amendment claim is meritorious and there is a reasonable probability that the verdict would have been different absent the excludable evidence.”

iv. Ineffective Use of Witnesses

Failure to call a witness may constitute ineffective assistance of counsel, provided the applicant can show (1) the witness was available and (2) the witness’ testimony would have benefited the defense to the degree that the result of the trial likely would have been different. *See Wilkerson v. State*, 726 S.W.2d 542 (Tex. Crim. App. 1986); *Perez v. State*, 310 S.W.3d 890, 894 (Tex. Crim. App. 2010) (reiterating that the failure to call witnesses at the guilt or punishment phases does not constitute ineffectiveness absent a showing that such witnesses were available and the applicant would benefit from the testimony).

v. Jury Instruction Neglect

At trial, both the State and defense have the ability to request jury instructions supporting their theory of the case. An applicant may be entitled to relief if he can show deficient performance and prejudice related to a particular unrequested jury instruction. Of course, under *Strickland*, the attorney’s failure to request the instruction must be inexcusable by strategy. *See Okonkwo v. State*, 398 S.W.3d 689, 697 (Tex. Crim. App. 2013). It is further mandatory that the applicant would have been entitled to the instruction at trial, meaning that the evidence on the

²¹ 477 U.S. 365, 106 S. Ct. 2574 (1986).

record would have supported the defense theory which would have been represented by the instruction. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005).

vi. Jury Selection Negligence

The criminally-accused have the right to an impartial jury (*see* Ch. 4 of this Handbook at §4.6.3), and when trial counsel has an opportunity to remove obviously biased jurors from the jury but fails to, he or she may be ineffective. To prevail, the petitioner or applicant must first show that a particular juror was actually biased. *See Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006). Second, although denial of the right to an unbiased jury is, in other contexts considered “structural error,” when alleged in the context of an ineffective assistance of counsel claim, to be entitled to relief, the petitioner or applicant must still prove that his or her counsel’s failure to remove the juror caused prejudice to his or her case. *Id.* at 607.

Again, counsel’s decision not to strike a juror may be excused, even if it is not an entirely wise decision, provided that it can be justified by strategy. *See State v. Morales*, 253 S.W.3d 686, 698 (Tex. Crim. App. 2008) (upholding a conviction where a prosecutor from the office prosecuting the defendant was allowed on the jury); *see also Delrio v. State*, 840 S.W.2d 443 (Tex. Crim. App. 1992) (holding that counsel was not ineffective for allowing a narcotics officer who knew the defendant and stated he could not be impartial, as counsel believed the officer would lean toward a lighter sentence).

vii. Failure to Object

Where an aspect of a criminal trial is objectionable, trial counsel has the duty to object to it so as to give the court the opportunity to correct the error. Such an objection “preserves” the error for the court of appeals, whereas failure to object waives almost every objection.

Provided the unobjected-to material causes prejudice to a criminal defendant, he or she may be entitled to habeas corpus relief on a theory of ineffective assistance of counsel. *See Batiste v. State*, 888 S.W.2d 9 (Tex. Crim. App. 1994)(further holding that applicants are not exempt from showing prejudice when the issue involved waiver of a valid objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986)); (*See* Ch. 4 of this Handbook at §4.8.3). To succeed on a claim of ineffective assistance of counsel based on a claim that counsel failed to object, the applicant must show that the trial court would have committed error in overruling an objection. *See Ex parte Parra*, 420 S.W.3d 821, 824-25 (Tex. Crim. App. 2013). Of course, an applicant must

also satisfy the second prong of Strickland, showing sufficient harm to warrant reversal. *See Ex parte Martinez*, 330 S.W.3d 891 (Tex. Crim. App. 2011).

viii. Erroneous Advice/Failure to Advise

An attorney has many duties, among which are the duties to (1) give accurate information where information is given, and (2) in some circumstances, give a client advice without being prompted to do so. In limited circumstances, an attorney giving erroneous advice may constitute ineffective assistance of counsel. For example, where a client asks for advice as to whether his or her state sentence is set to run concurrently with his federal sentence, and his or her defense attorney gives the defendant incorrect information, and the client relies on that information in deciding to plead guilty, the defendant may be entitled to habeas corpus relief. *See Ex parte Moody*, 991 S.W.2d 856 (Tex. Crim. App. 1999). To make such a claim, the applicant must prove under Strickland that (1) trial counsel's advice fell below professional norms (that he or she was deficient) and (2) that there is a reasonable probability that the outcome would have been different (meaning, in the plea context that but for the attorney's poor advice, the applicant would not have pled guilty but instead would have proceeded to trial). *Id.* at 857-58.

On the other hand, an attorney is under an affirmative duty to advise a noncitizen client about the immigration consequences of their plea, regardless of whether the client inquires about them. *See Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010) (dismissing the idea that attorneys may be ineffective for giving "affirmative misadvice" only). The focus of the Padilla court in holding as much focused in part on the "seriousness" of deportation. *Id.* at 374, 1486.

Conceivably, then, if the question of what an attorney must advise clients of depends on the seriousness of a consequence and the certainty of its being imposed, the reasoning of Padilla may be extended by future courts to any number of consequences which are collateral to a conviction, as the concurring opinion in Padilla noted. *Id.* at 376-77, 1487-88 (Alito, J., concurring).

ix. Defense Counsel and Plea Offers

As a general rule, defense counsel has the duty to communicate formal plea offers from the prosecution which contain terms and conditions that may be favorable to the accused. Failure to communicate a plea offer which later lapses may, under the right circumstances constitute ineffective assistance of counsel. *See Missouri v. Frye*, 132 S. Ct. 1399 (2012). To make a successful claim under Frye, the applicant must first show that (1) a formal offer was made, but it lapsed, and (2) there was a reasonable probability that they would have accepted the offer. *Id.* at

1409. The Frye test has a third requirement, beyond the normal two prongs of Strickland: the applicant must show that there was a “reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented.” *Id.* at 1410. Note that this claim stems from the Sixth Amendment’s right to effective counsel, as a criminal defendant has no constitutional right to a plea bargain. *Id.*

In a companion case to Frye, the Supreme Court held that counsel may also be found to have been constitutionally ineffective for giving poor advice to a client regarding whether to accept or reject an offer. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012). To make a successful claim under Lafler, an applicant must show that (1) he or she was given deficient advice and (2) the outcome would have been different with competent advice. *Id.* at 1384; *see also Ex parte Argent*, 393 S.W.3d 781 (Tex. Crim. App. 2013) (acknowledging that Lafler and Frye overruled In re Lemke, 13 S.W.3d 791 (Tex. Crim. App. 2000), previously the leading Texas case on the issue of effective counsel and pleas).

x. Professional Misconduct

In considering whether trial counsel has given ineffective assistance to his or her client, professional rules are too rigid to be more than a mere guide.²² *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065. It is unsafe to assume, then that violation of an ethical rule will constitute ineffective assistance of counsel *per se*.

B. Ineffective Assistance of Counsel after Conviction

i. Ineffective Direct Appeals Counsel

Under Douglas v. California,²³ the right of an accused to the assistance of counsel on an appeal provided as a matter of right is constitutionally guaranteed. That right includes the right to effective assistance of counsel, subject to the test in Strickland. *See Ex parte Lozada-Mendoza*, 45 S.W.3d 107 (Tex. Crim. App. 2001). Among other duties, appellate counsel must notify his or her client if the court of appeals affirms their conviction so that the client may file a petition for discretionary review with the Court of Criminal Appeals. Where appellate counsel’s action or inaction prevents the client from pursuing discretionary review, the defendant is deemed to have

²² And, in any case, violation of a professional rule will not constitute a ground for relief unless the requisite level of harm can be shown under Strickland.

²³ 372 U.S. 353, 83 S. Ct. 814 (1963).

been denied effective assistance of counsel under the Sixth Amendment. See Ex parte Wilson, 956 S.W.2d 25, 26 (Tex. Crim. App. 1997); (See Ch. 4 of this Handbook at §4.10.2).

ii. Ineffective Habeas Corpus Counsel

Prisoners have no right to counsel on collateral review of their convictions. See Pennsylvania v. Finley, 481 U.S. 551, 107 S. Ct. 1990 (1987). According to the reasoning of the Texas Court of Criminal Appeals, then, it follows that an applicant is not entitled to effective assistance of counsel in filing an application for writ of habeas corpus. See Ex parte Graves, 70 S.W.3d 103 (Tex. Crim. App. 1989).

C. Conflicts of Interest

Conflicts of interest are governed by a standard slightly different than the standard utilized by Strickland. Whereas in Strickland the United States Supreme Court laid down a two-part deficiency-and-prejudice standard, the United States Supreme Court four years prior to Strickland laid down a legal test governing conflicts of interest in Cuyler v. Sullivan,²⁴ requiring the defendant to show that “trial counsel had an actual conflict of interest, and that the conflict actually colored counsel’s actions during trial.” See Odelugo v. State, 443 S.W.3d 131, 136 (Tex. Crim. App. 2014) (citing Acosta v. State, 233 S.W.3d 349, 356 (Tex. Crim. App. 2007)); see also Perillo v. Johnson, 205 F.3d 775 (5th Cir. 2000). An “actual” conflict of interest exists “if counsel is required to make a choice between advancing his client’s interest in a fair trial or advancing other interests (perhaps counsel’s own) to the detriment of the client.” *Id.* (citing Acosta, 233 S.W.3d at 355). The applicant must show that such an actual conflict “had an adverse effect on specific instances of counsel’s performance.” See Monreal v. State, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997) (citing Cuyler, 446 U.S. at 348-50, 100 S. Ct. at 1718-19). The burden is on the habeas corpus applicant to prove his or her case, showing a conflict of interest by a preponderance of the evidence. See Odelugo, 443 S.W.3d at 136-137. See the following cases for more legal rules illuminating the test for ineffective assistance of counsel based on a conflict of interest:

1. Ex parte Acosta, 672 S.W.2d 470 (Tex. Crim. App. 1984): Where the applicant’s attorney represented his codefendant, and the applicant was able to show that the conflict stemming from that relationship actually affected the lawyer’s representation, the applicant was entitled to relief.

²⁴ 446 U.S. 335, 100 S. Ct. 1708 (1980).

2. Foster v. State, 693 S.W.2d 412 (Tex. Crim. App. 1985): An actual conflict exists in a case in which one attorney represents multiple defendants when “one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a co-defendant whom counsel is also representing.”
3. James v. State, 763 S.W.2d 776 (Tex. Crim. App. 1989): The Court of Criminal Appeals does not review an attorney’s conduct through hindsight, but only considers “actual, significant conflicts of interest at the time of trial that counsel should have been aware of and should have advised his clients of in the particular case.” While the court concluded that it may have been better for the applicants in James to be tried separately, their joint trial did not violate Cuyler.

D. Insufficient Participation

In a companion case decided the same day as Strickland, the United States Supreme Court held that if counsel’s performance shows a total lack of participation in the proceedings, then trial counsel is deemed to have been ineffective, and prejudice is presumed. See United States v. Cronin, 466 U.S. 648, 658-59, 104 S. Ct. 2039, 2047 (1984). To display a total lack of participation under Cronin, defense counsel must “entirely fail to subject the prosecution’s case to meaningful adversarial testing.” *Id.*

Trial counsel’s deliberate attempts to boycott a trial will constitute ineffective assistance of counsel under Cronin. See Cannon v. State, 252 S.W.3d 342 (Tex. Crim. App. 2008). On the other hand, trial counsel choosing not to give a closing argument during sentencing has been held to not constitute ineffective assistance under Cronin. See Martin v. McCotter, 796 F.2d 813, 820 (5th Cir. 1986).

§4.6.2.3 - Ineffectiveness and the Contemporaneous Objection Rule

Many other topics in this chapter note that certain legal objections must be made at or before trial, or they are waived, and cannot be raised in an application for writ of habeas corpus. Furthermore, as noted previously, matters which were or could have been raised on direct appeal are considered to be procedurally-defaulted, and do not constitute grounds for habeas corpus relief. While these rules serve as the downfall for many a habeas applicant, a habeas corpus applicant may, under the right circumstances overcome such procedural errors by rephrasing his or her claim as an ineffective assistance claim. Where a defendant is represented by counsel, it is his or her

counsel's professional duty to object to objectionable material, to preserve error for complaint on direct appeal, and to raise meritorious claims on direct appeal. Where counsel fails to preserve error for direct appeal, he or she may be found to have been ineffective. In that way, ineffective assistance of counsel serves as a backdoor through which otherwise-waived complaints can be re-addressed, albeit through a slightly different analysis than would be typical for a claim.

Consider, for example an applicant who believes that the prosecutor in his case struck jurors from his venire based on their racial characteristics in violation of Batson, (*See* Ch. 4 of this Handbook at §4.8.3) but his attorney did not object to the prosecutor's actions. For the purposes of state court review, the claim cannot be raised in a habeas corpus application, as the matter could have been raised on direct appeal. Likewise, it cannot be raised federally as, first, the issue was not exhausted in the state review process below, and second, the contemporaneous objection rule serves as an independent and adequate state ground to deny federal habeas corpus relief (meaning in other words, the state contemporaneous objection rule carries weight in federal court). (*See* Ch. 4 of this Handbook at §4.3.3). However, phrased differently, the claim might succeed. The applicant could allege instead that his counsel was ineffective for failing to make a successful Batson objection. *See* Batiste v. State, 888 S.W.2d 9 (Tex. Crim. App. 1994). As the Batiste opinion indicates, this transformation of a claim which was otherwise waived by an attorney's failure to object into an ineffective assistance claim can come at a price. Whereas on direct appeal, harm is presumed from a Batson violation, and so an error automatically warrants reversal, alleged as an ineffective assistance claim, the applicant must show that the error actually harmed the outcome of his or her case.

§4.6.3 - Right to Trial by an Impartial Jury and/or Grand Jury

A criminal defendant also has the right to an impartial jury. *See* Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507 (1966). This right is derived from the Due Process Clause of the Fourteenth Amendment, as well as the Sixth Amendment's right to a jury trial. *See* Ristaino v. Ross, 424 U.S. 589, 595, 96 S. Ct. 1017, 1021, n. 6 (1976). The ideal jury under the Sixth and Fourteenth amendments views the facts of a case within a vacuum, unaffected by personal biases, facts which should not be known to the members of the jury, considerations in levying a sentence which they should not make, or by external pressures. While arguments that a defendant was denied the right to an impartial jury are most typically handled on direct appeal in Texas, for the purposes of federal habeas corpus, denial of the right to an impartial jury is a cognizable claim.

For more information on the various ways in which a defendant may be denied the right to an impartial jury, *see* Gutierrez v. Stephens, 590 Fed. Appx. 371 (5th Cir. 2014) (discussing a juror’s viewing of media coverage); Greer v. Thaler, 380 Fed. Appx. 373 (5th Cir. 2010)(regarding a jury’s discussing the case before deliberations, as well as a juror’s statement in support of the death penalty); United States v. Scott, 854 F.2d 697 (5th Cir. 1988) (reversing a conviction where the jury foreman’s brother worked for the law enforcement agency which investigated the defendant’s case);²⁵ United States v. Rivera, 295 F.3d 461 (5th Cir. 2002) (concerning waiver of a juror misconduct claim); Monroe v. Collins, 951 F.2d 49 (5th Cir. 1992) (dismissing a petitioner’s claim that the jury improperly considered the parole ramifications of a lesser sentence); Ratcliff v. Estelle, 597 F.2d 474 (5th Cir. 1979) (holding that the petitioner’s complaints about the composition of the grand jury were waived).

The Sixth Amendment also commands that the jury in a criminal case be drawn from sources reflecting a fair cross section of the community. *See* Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692 (1975). To establish a claim that the jury was not drawn from a representative source, the petitioner must allege that:

1. the group alleged to be excluded is a 'distinctive' group in the community;
2. the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
3. this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

See Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979) (numeration added). However, the fair cross section rule does not require that a jury maintain a certain quota of racially-grouped people or a certain number of males and females, according to the population of the community. A claim under Duren requires that a petitioner allege with particularity how a group is being systematically-excluded, and provide evidentiary support for that allegation. *See* Berghuis v. Smith, 559 U.S. 314, 130 S. Ct. 1382 (2010). In other words, it is not enough to show the end result: that the jury pool is not representative. The petitioner must also show the precise cause for the disparity in representation, beyond mere luck or chance.

²⁵ While some of the above cases involve habeas corpus petitions, some do not. This is important to note, as while the substantive law underlying the claim on direct appeal might be identical to the law when considered in the light of habeas corpus, the standard for harm warranting reversal is considerably more stringent in federal habeas corpus proceedings than on direct appeal. (*See* Ch. 4 of this Handbook at §4.131(J)).

§4.6.4 - The Right to Confront and Cross-Examine Witnesses

The Confrontation Clause of the Sixth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment grants every defendant in a criminal trial the right to be confronted with the witnesses against him or her. Essentially, the meaning of the clause is that the defendant must be given a meaningful opportunity to cross-examine the State's witnesses. This right may be waived by the defendant in a written waiver pursuant to a guilty plea. *See* Tex. Code Crim. Proc. art. 1.15; Elder v. State, 462 S.W.2d 6 (Tex. Crim. App. 1971).

§4.6.4.1 - The "Testimonial" Requirement

The Confrontation Clause is not a bar to all out-of-court statements. Out-of-court statements may be admitted into evidence if they fall within an exception to the hearsay rule, but only if they are not "testimonial," or if the defendant both (1) has had a previous opportunity to cross-examine the witness and (2) the declarant (the source of the testimony) is unavailable. *See* Dutton v. Evans, 400 U.S. 74, 91 S. Ct. 210 (1970); Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004).²⁶ A "testimonial statement" is one "made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *See* Crawford, 541 U.S. at 52, 124 S. Ct. at 1364. Some statements, such as testimony at a preliminary hearing, before a grand jury, at a former trial, or to police during interrogations easily qualify as being "testimonial" under the Confrontation Clause. *Id.* at 68, 1374.

There are other types of evidence, however, which while not intuitively "testimonial" have been ruled to be testimonial by the United States Supreme Court. In Bullcoming v. New Mexico,²⁷ the Supreme Court ruled that a laboratory report is testimonial under the Confrontation Clause.

Likewise, in Melendez-Diaz v. Massachusetts,²⁸ the Supreme Court ruled that a certificate signed by a forensic examiner certifying that a substance seized from the defendant was cocaine was testimonial, and violated the Confrontation Clause, as the signer was not called as a witness and could not be cross-examined. *See also* Paredes v. State, 462 S.W.3d 510 (Tex. Crim. App. 2015). Those cases contrast with a recent holding of five justices of the Supreme Court, in which

²⁶ The Supreme Court has held Crawford to not have retroactive effect. Whorton v. Bockting, 549 U.S. 406, 127 S. Ct. 1173 (2007).

²⁷ 131 S. Ct. 2705 (2011).

²⁸ 557 U.S. 305, 129 S. Ct. 2527 (2009).

the court in a split plurality²⁹ decision held that an expert's in-trial testimony which relied on a DNA profile generated by a laboratory did not violate the Confrontation Clause, as the laboratory report itself was not "testimonial." See Williams v. Illinois, 132 S. Ct. 2221 (2012)(4-1-4 decision). In Williams, a swab from a rape victim was extracted and analyzed to create a DNA profile by a forensic laboratory, before the defendant was under suspicion of the rape. *Id.* at 2229-2230. He was later conclusively matched to the DNA discovered from the victim. *Id.* The Supreme Court, affirming his conviction, held that because Williams was not under suspicion at the time the lab report was generated, the Confrontation Clause was not violated by the expert's eventual trial testimony. *Id.* at 2244. The court explained that the Confrontation Clause is meant to protect criminal defendants from testimony which is generated for the purpose of accusing a targeted individual, whereas the laboratory report in Williams' case was not so targeted at one individual. *Id.* at 2242-43.

Other statements may be considered non-testimonial, and therefore not barred by the Confrontation Clause. For example, statements which are made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance in an ongoing emergency are deemed to be non-testimonial. See Davis v. Washington, 547 U.S. 813, 126 S. Ct. 2266 (2006).

§4.6.4.2 - Codefendant Testimony

A confession by a codefendant which inculcates a criminal defendant violates the Confrontation Clause if it is admitted into evidence in a joint trial and the codefendant does not take the stand, presenting the opportunity for cross-examination. See Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). However, where a codefendant's incriminating statement is redacted to eliminate any reference to the defendant, and sufficient limiting instructions are given, the codefendant's statement may be introduced by the State without violating the Confrontation Clause. See Richardson v. Marsh, 481 U.S. 200, 107 S. Ct. 1702 (1987); *but see* Gray v. Maryland, 523 U.S. 185, 118 S. Ct. 1151 (1998) (holding that where the defendant's name was removed from

²⁹ According to the Court of Criminal Appeals, "the general rule for interpreting opinions in which no single rationale is adopted by a majority of the Court is 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Paredes, 462 S.W.3d at 516 (citing Marks v. United States, 430 U.S. 188, 97 S. Ct. 9990 (1977)). Caution should be exercised in citing to Williams, or in trying to divine a controlling rule of law from it, as noted by the Court of Criminal Appeals in the above Paredes case.

his codefendant's written confession and replaced with a blank space of the word "deleted," the defendant's Confrontation right was violated). Moreover, a codefendant's testimony may be included if it is a testimonial but non-hearsay statement, meaning that it is offered for a purpose other than to prove the truth of the matter asserted. *See Crawford*, 541 U.S. at 59-60, 124 S. Ct. at 1369, n. 9 (citing *Tennessee v. Street*, 471 U.S. 409, 105 S. Ct. 2078 (1985)); *see also Hernandez v. State*, 273 S.W.3d 685 (Tex. Crim. App. 2008) (finding no Confrontation Clause violation where a codefendant's statement regarding a crime was admitted to impeach her own testimony, not to prove the defendant's guilt); *but compare* Texas Rules of Evidence 801(e)(2)(E) (a statement made by a party's conspirator during and in furtherance of the conspiracy is not hearsay).

§4.6.4.3 - Confrontation and Habeas Corpus

As with other claims, it is not enough that a habeas corpus applicant or petitioner can show that a violation has occurred, as Confrontation Clause violations are subject to harmless error analysis. *See Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008).

§4.6.5 - Sixth and Fourteenth Amendments: Compulsory Process

The Sixth Amendment contains a lesser-known clause known as the Compulsory Process Clause, which provides a criminal defendant with the right to compel witnesses to testify for the defendant's own benefit. Although seldom-invoked, this clause has been interpreted as being on equal footing in importance with the more frequently litigated Confrontation Clause, discussed in the previous section. *See Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967).

The right to compel witnesses is not restricted to the Sixth Amendment, however, but is intertwined also with principles of fundamental due process under the Fourteenth Amendment, which is discussed in a later section of this chapter. *See Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351 (1972); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989 (1987) (holding that the Compulsory Process Clause provides no greater right to discover the identities of witnesses or be provided with exculpatory evidence than the Due Process Clause does). In order to obtain a writ of habeas corpus for deprivation of the right to compel witnesses, a petitioner must demonstrate both (1) a colorable need for the witness and (2) that the defense was prejudiced by the absence of that witness. *See Ashley v. Wainwright*, 639 F.2d 258 (5th Cir. 1981). A defendant's right to Compulsory Process can be waived for both direct appeal and habeas corpus purposes, however, if the defendant fails to attempt to call the desired witness at or before trial. *See Ex parte Kirk*, 478 S.W.2d 503 (Tex. Crim. App. 1972).

§4.7 - New Developments in the Eighth Amendment

The Eighth Amendment to the United States Constitution forbids the imposition of cruel and unusual punishments. “Cruel and unusual” has not been interpreted to be synonymous with the term “unfair.” Instead, the jurisprudence of the United States Supreme Court has interpreted the Eighth Amendment to categorically exclude certain punishments for certain classes of offenders.

In 2005, for example, the Supreme Court ruled that juveniles cannot be sentenced to death. *See generally* Roper v. Simmons, 543 U.S. 551, 125 S. Ct. 1183 (2005). In 2010, the Court followed by holding that juveniles cannot be sentenced to life without parole for non-homicide crimes. *See generally* Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011 (2010). Most recently, the Court held that those who were juveniles at the time a homicide was committed may not be sentenced to **mandatory** life sentences without the possibility of parole. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012). In Ex parte Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014), the Texas Court of Criminal Appeals held that the ruling in Miller is retroactive as to sentences already imposed.³⁰

In coming to its conclusion, the Court of Criminal Appeals noted that the Miller court did not eliminate the ability of a sentencing factfinder to impose life without parole for a juvenile, but instead requires “those determining the sentence of a juvenile . . . [to] take into account the offender’s ‘age and wealth of characteristics and circumstances attendant to it.’” *Id.* at 69 (citing Miller, 132 S. Ct. at 2467). The Texas Rules of Appellate Procedure allow the court to remedy an unlawful sentence in several ways. However, in previous cases, the Court of Criminal Appeals has shown a strong preference for the **reformation** of sentences of life without the possibility of parole for juveniles to life **with** the possibility of parole. *See* Turner v. State, 443 S.W.3d 128, 129 (Tex. Crim. App. 2014); Lewis v. State, 428 S.W.3d 860 (Tex. Crim. App. 2014) (two consolidated actions).

It bears restatement: unless an offender was (1) a juvenile (under eighteen) at the time of the crime who was (2) sentenced to life, (3) without parole, **and** (4) the penal code section at the time of the offense gave the judge or jury no other sentencing option but life without parole, Maxwell **does not apply to that offender.**

³⁰ In spring of 2016, the United States Supreme Court decided Montgomery v. Louisiana, 135 S. Ct. 1546 (2016). The Court’s decision confirmed the Court Criminal Appeals’ holding in Maxwell: that Miller applies retroactively under Teague.

§4.8 - The Fourteenth Amendment

§4.8.1 - Introduction

The Due Process Clause of the Fourteenth Amendment to the United States Constitution applies to the states, while the Fifth Amendment's Due Process Clause applies to the federal government. The Fourteenth Amendment also contains the Equal Protection Clause, discussed at the end of this section. Due process requires that a criminal trial process provide protections for a criminal defendant, including but not limited to the following:

1. The State cannot introduce into evidence the results of a lineup procedure which was unduly suggestive and prejudicial, and therefore unreliable.
2. The State cannot withhold exculpatory evidence, and has an ongoing duty to report such exculpatory evidence to the defense, even without request.
3. The State may not put on testimony which is known by the State to be materially false.
4. The State is restricted in how and when it can destroy evidence.
5. A conviction cannot stand where there was **no** evidence on an element of the crime.
6. The State cannot punish a defendant for exercising his or her procedural rights.
7. If an appellant's attorney believes that an appeal is wholly frivolous, Fourteenth Amendment Due Process and the Sixth Amendment require that the attorney provide an appellate brief explaining his reasoning for not filing a standard appellate brief.
8. The defendant must not be forced to wear identifiable jail or prison clothing at trial.
9. The State must not make improper and prejudicial comments during trial.
10. Pleas of guilty or nolo contendere must be entered knowingly and voluntarily.

§4.8.2 - Specific Fourteenth Amendment Due Process Claims

§4.8.2.1 - Prejudicial Lineup Procedures

A conviction based on an eyewitness identification at trial which followed a pretrial identification by photograph will be set aside on the ground of misidentification only if the photographic identification procedure was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."³¹ See Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968); Bloodworth v. Hopper, 539 F.2d 1382 (5th Cir. 1976); Coleman v. Quarterman, 456 F.3d 537 (5th Cir. 2006). Identifications infected by improper police procedure

³¹ As it relates to the earlier section on the Sixth Amendment, see United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926 (1967). In Wade, the Supreme Court held that a defendant has a right under the Sixth Amendment to the presence of counsel at a post-indictment lineup procedure. This rule does not apply to photographic lineups or to lineups conducted after a defendant is arrested, but before he is formally charged. United States v. Ash, 413 U.S. 300, 93 S. Ct. 2568 (1973); Kirby v. Illinois, 406 U.S. 682, 92 S. Ct. 1877 (1972).

are not automatically required to be excluded, but must be screened for reliability by trial courts on a case-by-case basis. *See Perry v. New Hampshire*, 132 S. Ct. 716, 724 (2012). If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. *Id.* at 720. However, if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. *Id.*; *see also Stovall v. Denno*, 388 U.S. 293, 87 S. Ct. 1967 (1967) (overruled on other grounds by *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708 (1987)) (holding that a defendant was not deprived of due process by virtue of the fact that he was brought to a hospital room for the purpose of identification by the stabbing victim, as the victim was not physically able to visit the jail in which the defendant was confined).

§4.8.2.2 - Withholding of Exculpatory Evidence (“Brady” claims)

The United States Supreme Court’s leading case on the issue of the State withholding exculpatory evidence is *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). The *Brady* court held that, irrespective of the good or bad faith of the State, the prosecution must not withhold favorable evidence which is material to guilt or punishment. Evidence is “material” within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *See Smith v. Cain*, 132 S. Ct. 627 (2012). A “reasonable probability” does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Id.* The State’s duty to disclose exculpatory *Brady* evidence applies even when the defense has made no request for its disclosure. *See Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936 (1999).

§4.8.2.3 - Knowing Introduction of False Testimony

A criminal defendant’s Fourteenth Amendment Due Process rights are violated when the State knowingly puts on false testimony which is material. *See Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763 (1972). Knowledge of falsity can in some instances be imputed from police to a prosecutor. *See Ex parte Castellano*, 863 S.W.2d 476 (Tex. Crim. App. 1993). Testimony is “material” when it is reasonably likely that its admission affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014).

§4.8.2.4 - Destruction of Evidence

Although the State is not prohibited from destroying evidence, it may only do so subject to certain restrictions. Under California v. Trombetta,³² a defendant is entitled to reversal if the State destroys evidence (1) for which the exculpatory value was apparent to the State at the time of destruction, and (2) could not be comparably replaced by the defendant's use of reasonable means. Under this test, proof of the State acting in bad faith is critical. See Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988).

§4.8.2.5 - No Evidence

If the State has produced **no** proof of an element of a crime, the applicant may be entitled to habeas corpus relief. While federal courts recognize **insufficiency** of evidence as a ground for habeas corpus relief, the Texas Court of Criminal Appeals does not. For further explanation, see Ex parte Reed, 402 S.W.3d 39, 44-46 (Tex. Crim. App. 2013) (Frost, J., concurring).

§4.8.2.6 - Prosecutorial Vindictiveness

When an appellant on direct appeal or applicant on habeas corpus prevails, the State is precluded from intentionally punishing the defendant for pursuing his or her procedural rights, using the ability to punish more harshly on retrial as a deterrent. Expounding upon this principle in Blackledge v. Perry,³³ the Supreme Court upheld the granting of a writ of habeas corpus to a petitioner who had his misdemeanor conviction vacated, only to have the State charge him with a felony for the same underlying conduct. The court indicated that Due Process requires that a criminal defendant be free from apprehension of retribution in exercising his rights to appeal. *Id.* at 28, 2102-03.

Likewise, a judge may not show vindictiveness. If a judge on remand imposes a harsher sentence than that which was originally imposed, the judge's reasons for doing so must appear on the record. See Ex parte Bates, 640 S.W.2d 894 (Tex. Crim. App. 1982) (citing North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072 (1969)). Unless the particular judicial or prosecutorial action creates a presumption of vindictiveness, the burden is on the applicant to prove vindictiveness by a preponderance of the evidence. Bates, 640 S.W.2d at 898 (citing Ex parte Alexander, 598 S.W.2d 308 (Tex. Crim. App. 1980)). In Pearce, the United States Supreme Court found a presumption of

³² 467 U.S. 479, 104 S. Ct. 2528 (1984).

³³ 417 U.S. 21, 94 S. Ct. 2098 (1974).

vindictiveness when, after remand from appeal, the trial judge imposed a harsher sentence than was originally imposed. In Bates, the Court of Criminal Appeals found no such presumption where the defendant's misdemeanor conviction, once vacated was recharged as a felony. The Bates court noted that that a prosecutor's charging discretion is a fluid, pretrial decision.

§4.8.2.7 - "Anders" Briefing

When an attorney, after full examination of the record of a case decides that any appeal would be frivolous, he or she may advise the court to that effect and request to withdraw, accompanied by a brief rebutting any potentially arguable point of appeal. See Anders v. California, 386 U.S. 738, 87 S. Ct. 1396 (1967).

Such a brief (referred to often as an "Anders brief") must be provided to the attorney's client, allowing the client an opportunity to rebut the attorney's brief. So long as a fair opportunity to argue is provided to the appellant, the court may either embrace or reject the attorney's briefing.

Texas courts will not accept Anders briefs from **appointed** counsel unless the brief (1) discusses the evidence adduced at the trial, (2) points out where pertinent testimony might have been found in the record, (3) refers to pages in the record where objections were made, the nature of the objection, the trial court's ruling, and (4) discusses either why the trial court's ruling was correct or why appellant was not harmed by the ruling. See High v. State, 573 S.W.2d 807 (Tex. Crim. App. 1978).

§4.8.2.8 - Defendant Forced to Wear Jail Clothes at Trial

The State cannot compel an accused to stand trial before a jury while dressed in identifiable prison clothing, as doing so impinges upon the defendant's presumption of innocence, violating the Due Process Clause. See Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691 (1976); Ex parte Clark, 545 S.W.2d 175 (Tex. Crim. App. 1977). However, failure to object to being tried in prison clothing will lead a court to find that a defendant was not compelled to do so, defeating an applicant's claim of a constitutional violation. Estelle, 425 U.S. at 512-13, 96 S. Ct. at 1697. Addressing a complaint based on being compelled to wear prison clothes to the bailiff is not enough to preserve the issue, however. See Gray v. Estelle, 538 F.2d 1190 (5th Cir. 1976). Of course, the clothing must be identifiable as prison or jail clothing for a claim to arise. See Goodspeed v. Estelle, 436 F. Supp. 1383 (N.D. Tex. 1977).

§4.8.2.9 - Improper Prosecutorial Comment

A prosecutor's arguments may be so impermissibly inflammatory as to deny a defendant due process under the Fourteenth Amendment. *See Houston v. Estelle*, 569 F.2d 372 (5th Cir. 1978). However, for constitutional error to occur, the comment must be so unfair as to make the resulting conviction a denial of due process. *See Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974). Whether such unfairness exists is determined by an examination of the comments considered in the context of the trial as a whole. *See Branch v. Estelle*, 631 F.2d 1229 (5th Cir. 1980).

§4.8.3 - Equal Protection Clause: Batson Challenges

Through the Equal Protection Clause, the Fourteenth Amendment guarantees equal protection of the laws to criminal defendants. The Equal Protection Clause requires that the State not have jurors removed from a jury solely on account of the venirepersons' race or sex. *See Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986), overruled in part by *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364 (1991); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S. Ct. 1419 (1994). The issue may only be raised in federal habeas corpus proceedings, however after a specialized objection at the trial court through a three step process:

1. First, the defendant must make a *prima facie* showing of discrimination, meaning that the stricken juror is a member of a protected class under the Equal Protection Clause.
2. The burden then shifts to the State which, if at all possible, must provide a race-neutral reason for excluding a juror, which may be rebutted by the defense's argument that those reasons are merely pretext for removing a juror based on a protected classification.
3. The court must decide whether the State's reasons were purposefully discriminatory.

See Moody v. Quarterman, 476 F.3d 260 (5th Cir. 2007). It is not necessary for the defendant to be within the same racial or sexual classification to raise the objection. *See Powers v. Ohio, supra*.

§4.8.4 - Pleas of Guilty and Due Process

§4.8.4.1 - Overturning a Plea of Guilty or Nolo Contendere

An applicant has a heavy burden to overcome in challenging a conviction which came as the result of a plea. In order for the trial court to accept a guilty plea, the defendant must confess his or her guilt to the judge, which bears upon the guilt of the applicant, making any other habeas corpus claim more difficult to assert. The reasons a court will overturn a guilty plea in a habeas corpus proceeding are limited to occasions where errors of constitutional magnitude occurred during the process of obtaining the plea. It is not enough that an offender entered a voluntary plea

and now regrets having done so, as “buyer’s remorse” alone is not a legitimate reason to vacate an otherwise validly-entered plea.

While it is sometimes possible to overcome a guilty plea, it may be to an offender’s disadvantage to have their sentence vacated. As explained in §4.1.3 and §4.8.2.6, it is not impossible for the State to seek a harsher sentence than what was imposed at the time of the guilty plea.

§4.8.4.2 - Vacating an Involuntary Plea

That a defendant understands the consequences of a plea and agrees to it voluntarily is at the heart of a valid plea of guilty or nolo contendere. *See Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709 (1969) (holding that a plea must be knowingly and voluntarily made). The Texas Court of Criminal Appeals and federal courts have recognized several circumstances under which a plea might not be adequate within the meaning of the Due Process Clause of the Fourteenth Amendment. Nevertheless, pleas of guilty and nolo contendere are presumed to be adequately voluntary, and the burden to overcome that presumption rests upon the individual habeas corpus applicant. *See Ex parte Wilson*, 716 S.W.2d 953 (Tex. Crim. App. 1986).

On a basic and obvious level, a defendant’s guilty plea must not be the product of direct, active coercion. *See Boykin*, 395 U.S. at 243, 89 S. Ct. at 1712. Official coercion can render a plea constitutionally invalid, as it may overcome the voluntariness of a defendant’s plea. *See also Fontaine v. United States*, 411 U.S. 213, 93 S. Ct. 1461 (1973) (finding involuntariness due to police coercion, illness, and other factors). More often than not, however, the Court of Criminal Appeals finds a lack of voluntariness or knowingness due either to deficient performance by a defendant’s counsel, or else because of the acts or omissions of the trial court in accepting a plea.

When an attorney gives poor advice to a client, or else fails to give advice to a client, the attorney causes twofold damage to the validity of a subsequently entered plea. On one hand, ineffective assistance of counsel may invalidate the defendant’s plea under the Fourteenth Amendment which, under principles of Due Process requires that pleas be entered knowingly and voluntarily. On the other hand, the plea might be vacated because the attorney’s deficiency violated the client’s Sixth Amendment right to effective assistance of counsel. *See* Ch. 4 of this Handbook at §4.6.2. These two analyses are separate and distinct, and should not be confused, although they overlap in the decisions of the Court of Criminal Appeals.

A guilty plea is not knowing or voluntary if made as a result of ineffective assistance of counsel. *See Ex parte Moussazadeh*, 361 S.W.3d 684 (Tex. Crim. App. 2012); *see also Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366 (1985) (noting that whether a plea is voluntary depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases).

A defendant's decision to plead guilty when based upon erroneous advice of counsel is not done voluntarily and knowingly. *Moussazadeh* at 689. In asserting a claim that a plea was made involuntarily due to the misadvice of counsel, the burden is on the petitioner to show that his or her counsel's poor advice affected the voluntariness of his or her plea. *See Ex parte Adams*, 707 S.W.2d 646 (Tex. Crim. App. 1986). As it relates to issues of parole advice, *see also Moussazadeh*, 361 S.W.3d at 688 (holding that whereas erroneous advice regarding parole **attainment** may not render a plea involuntary, erroneous advice regarding parole **eligibility** may in fact do so).

A trial court is required by Texas law to provide certain admonishments to a defendant about the consequences of a plea. However, because habeas corpus is a device used to correct only those errors which are of constitutional magnitude, failure to give the admonishments as required by statute will only warrant reversal if the failure rises to a constitutional, voluntariness-nullifying level. *See Ex parte Tovar*, 901 S.W.2d 484 (Tex. Crim. App. 1995). Faulty admonishments, likewise do not automatically defeat the presumption of a knowing and voluntary plea. *See Ex parte Smith*, 678 S.W.2d 78 (Tex. Crim. App. 1984). The burden is on the applicant to show that he or she was misled or harmed by a faulty admonishment. *Id.*; *see also Ex parte Williams*, 704 S.W.2d 773 (Tex. Crim. App. 1986).

§4.8.4.3 - Plea Bargains as Contracts

In some cases, an offender may wish to protest the conditions of his or her plea, as the terms as entered by the trial court are not representative of what was bargained for between the offender and the State. In essence, a negotiated (not "open") plea bargain is a contract between the offender and the State. The State agrees to forgo formal prosecution, and the defendant waives all defenses and certain rights, in order for a reasonable middle ground to be reached between the parties. Accordingly, the Court of Criminal Appeals, viewing a plea bargain as a contract will apply contract law principles, looking to "the written agreement, as well as the formal record, to determine the terms of the plea agreement, and [the court] will imply a term only when necessary

to effectuate the intention of the parties.” See Ex parte De Leon, 400 S.W.3d 83, 89 (Tex. Crim. App. 2013).

Once a trial court accepts a bargain between the State and the defendant and pronounces the sentence, the parties are bound to carry out their end of the bargain. See Ex parte Williams, 637 S.W.2d 943 (Tex. Crim. App. 1982). If the State breaches its end of the bargain, the defendant may be entitled to one of two remedies in habeas corpus proceedings. On one hand, under contract law principles, an applicant may be entitled to “specific performance,” a remedy which forces the State to adhere to the terms of the original plea bargain. See State v. Williams, 938 S.W.2d 456 (Tex. Crim. App. 1997). However, if specific performance is impossible under the circumstances (for example, if the terms of the agreed upon sentence are not allowable under Texas law), the remedy imposed by the Court of Criminal Appeals will be to vacate the defendant’s conviction and sentence, effectively returning the parties to their original positions. See De Leon, 400 S.W.3d at 90-91.

The State’s failure to uphold its end of the bargain also has implications for the voluntariness of a defendant’s plea. See generally Ex parte Rogers, 629 S.W.2d 741 (Tex. Crim. App. 1982) (citing Bass v. State, 576 S.W.2d 400 (Tex. Crim. App. 1979)) (vacating the applicant’s conviction, as the broken plea agreement rendered the applicant’s plea involuntary); See Ex parte Rogers, 629 S.W.2d 741 (Tex. Crim. App. 1982); Ex parte Slaughter, 689 S.W.2d 464 (Tex. Crim. App. 1985); Ex parte Pruitt, 689 S.W.2d 905 (Tex. Crim. App. 1985); Ex parte Hairston, 766 S.W.2d 790 (Tex. Crim. App. 1989).

§4.9 - The Ex Post Facto Clause and Statutes of Limitations

The Ex Post Facto Clause of the United States Constitution, on a basic level, provides that new, punitive laws will not be applied to crimes which have already been committed. U.S. Constitution Article 1, §9, Clause 3. The Clause places restrictions not only on the prohibitions laid out in the Penal Code, but also to substantive procedural rules, including statutes of limitations. Each crime charged in Texas has a statute of limitations, meaning a period of time after which the State may no longer prosecute a criminal defendant. The first day of the limitations period is the day after the crime was committed. Most of the various limitations periods for felony charges are specified in Article 12.01, Texas Code of Criminal Procedure. Limitations periods under this section range anywhere from three years to no limit at all, and vary depending on the relative seriousness of the crime charged.

At one time, the statute of limitations was viewed as a jurisdictional matter. That is, if the indictment or other charging instrument presented to the court specified a date which was not within the statute of limitations, then the court did not have jurisdiction to try the case. *See Ex Parte Dickerson*, 549 S.W.2d 202, 203 (Tex. Crim. App. 1977). However, following amendments to the Code of Criminal Procedure in 1985, courts began to interpret defects in the charging instrument as an affirmative defense which generally must be raised before or at trial, or else they are waived for appeal. *See State v. Yount*, 853 S.W.2d 6, 8 (Tex. Crim. App. 1993) (citing *Studer v. State*, 799 S.W.2d 263, 273 (Tex. Crim. App. 1990)). Furthermore, because it is now viewed as an affirmative defense, it is not necessary for the State to prove beyond a reasonable doubt that a crime occurred within the limitations period. *See Proctor v. State*, 967 S.W.2d 840 (Tex. Crim. App. 1998). This is because a statute of limitations defense is not seen as a defense stemming from a constitutional right, but rather a benefit conferred onto the criminally-accused by the legislature, or as the *Proctor* court explained it, “an act of grace . . . a voluntary surrendering by the people of their right to prosecute,” so as to prevent potential injustices which may arise for the defendant with the passage of time. *Id.* at 843.

Recent developments in case law have narrowed the ability to appeal a statute of limitations defense further, indicating that failure to raise the statute of limitations as an issue before trial or during trial, regardless of whether it is based on “pure law” or is fact-based, waives the argument for appeal. *See Ex parte Heilman*, 456 S.W.3d 159 (Tex. Crim. App. 2015). While *Heilman* is a relatively new case, and as of this writing has not been extensively discussed in lower courts, it appears to hold that any statute of limitations claim, except for those coupled with accusations of an Ex Post Facto Clause violation (see below) are forfeited if not raised before conviction. *Id.* at 7-8. It is, however possible to bring a petition for writ of habeas corpus, arguing that an applicant’s trial counsel was ineffective for failing to address the statute of limitations issue. Note that under *Heilman*, this is not usually applicable to charges pled to as the consequence of plea bargains, nor to lesser-included offenses requested by the defense at trial which otherwise would have been limitations-barred.

The Clause has been interpreted by state and federal courts to have a notable exception to the general rule stated earlier as it relates to statutes of limitations. Where an original statute of limitations period has not expired, the legislature may extend the limitations period for a crime already committed without violating the Ex Post Facto Clause. *See Phillips v. State*, 362 S.W.3d

606 (Tex. Crim. App. 2011), *overruled on other grounds by* Ex parte Heilman, 456 S.W.3d 159 (Tex. Crim. App. 2015). For example, if a crime was committed in 1999, and was subject to a five year statute of limitations period, but the legislature amended the statute of limitations to ten years in 2001, the defendant would not have a valid Ex Post Facto claim if he were convicted in 2007, as the legislature had the ability to expand the statute of limitations until 2004, when the period would expire as to that defendant. If the crime had been committed in 1995, however, that same defendant would have a valid claim, as the original limitations period (five years) would have run before the legislature amended the limitations period in 2001. Bearing this example in mind, it is important for offenders to understand the interrelation between the date of their offense, the actions of the Texas Legislature, and the date a statute of limitations is set to expire.³⁴

§4.10 - State Grounds for Relief

Many of the claims discussed elsewhere in this chapter are founded on amendments of the Constitution of the United States. By contrast, this section discusses claims which primarily arise from Texas law.

§4.10.1- Fatally-Flawed Indictments

Ordinarily, defects in an indictment do not constitute a basis for habeas corpus relief if those defects were not objected to at or before trial. *See Studer v. State*, 799 S.W.2d 263 (Tex. Crim. App. 1990). Only errors of great constitutional magnitude, such as where an indictment fails to name a defendant or names an impossible defendant will habeas corpus relief be granted despite a failure to object in the trial court. *See Ex parte Patterson*, 902 S.W.2d 487 (Tex. Crim. App. 1995). In such a case, relief is based not upon the United States Constitution, but upon article V, Section 12(b) of the Texas Constitution. *Id.* at 488.

§4.10.2 - Out-of-Time Appeals

§4.10.2.1 - General Principles

For those offenders who did not enter a plea of guilty or nolo contendere, or who otherwise preserved their right to appeal by the terms of their plea agreement, but did not in fact receive their appeal, it may be possible, in limited circumstances to attain one despite an offender's failure to

³⁴ As a final note on this topic, offenders convicted of or accused of sexual assault should know that under Texas Code of Criminal Procedure article 12.01(1)(C), if DNA is collected from an investigation of a sexual assault and the identity of the perpetrator or victim cannot be "readily ascertained" from the DNA profile collected, the statute of limitations is suspended indefinitely.

timely file the relevant post-trial filings necessary to secure an appeal. Such a claim arises under article 5, §8 of the Texas Constitution. See Rodriguez v. Court of Appeals, 8th Supreme Jud. Dist., 769 S.W.2d 554 (Tex. Crim. App. 1989).

Trial counsel has the duty to fully advise a defendant regarding the meaning of the judgment, the client's right to appeal, the importance of filing a notice of appeal, as well as expressing the attorney's professional judgment as to possible grounds for appeal and their merit, detailing the advantages and disadvantages of appeal. See Ex parte Axel, 757 S.W.2d 369, 374 (Tex. Crim. App. 1988). Failure to advise a client may result in that client being entitled to an out-of-time appeal, as can failure to formally withdraw, which can sometimes have the practical effect of "abandoning" a client. *Id.* at 374. Likewise, an attorney's failure to meet filing deadlines, forfeiting the client's direct appeal may result in a defendant being entitled to an out-of-time appeal. See Samaniego v. State, 952 S.W.2d 50 (Tex. Crim. App. 1997). As a final example, when appellate counsel files an Anders brief, (See Ch. 4 of this Handbook at §4.8.2.7) and an appellant is not provided with the court transcripts so that the appellant may rebut that brief, he or she may be entitled to an out-of-time appeal. See Mestas v. State, 214 S.W.3d 1 (Tex. Crim. App. 2007).

The same principles of due process and due course of law support out-of-time petitions for discretionary review. An appellate attorney is not required to file a PDR on the behalf of his or her client, but he or she must at a bare minimum inform his or her client regarding the right to file a PDR *pro se*. See Ex parte Riley, 193 S.W.3d 900 (Tex. Crim. App. 2006). Filing an Anders brief does not absolve an attorney of the duty to inform his or her client of the right to file a petition for discretionary review. See Ex parte Owens, 206 S.W.3d 670 (Tex. Crim. App. 2006); (See Ch. 4 of this Handbook at § 4.8.2.7).

Attorney error is not the only source of out-of-time appeals. Where one of the Texas courts of appeals wrongfully dismisses a case for want of jurisdiction due to untimeliness, a defendant may be entitled to an out-of-time appeal. See Mestas v. State, 214 S.W.3d 1 (Tex. Crim. App. 2007). Furthermore, the filing errors of the clerk of court may deprive a defendant of his or her right to appeal. For example, as an indigent defendant has the right to an adequate record on direct appeal, if the clerk fails to transfer court records to the appellate court, and those records cannot be found, the defendant may be entitled to a new trial. See Ex parte Contreras, 586 S.W.2d 550 (Tex. Crim. App. 1979); Ex parte Mays, 510 S.W.2d 606 (Tex. Crim. App. 1974).

§4.10.2.2 - Out-of-Time Appeal and Texas Habeas Corpus

Applications for writ of habeas corpus may only be filed once a mandate has been issued in an offender's case. Essentially, a mandate certifies that an offender's direct appeal process is complete, and that his or her conviction is "final." If an offender is granted an out-of-time appeal after a mandate has been issued in his or her case, the originally-issued mandate is not considered revoked for the purpose of filing an application for writ of habeas corpus. *See Ex parte Webb*, 270 S.W.3d 108 (Tex. Crim. App. 2008).

§4.10.2.3 - Out-of-Time Appeal and Federal Habeas Corpus

Under the United States Supreme Court's decision in *Jimenez v. Quarterman*, 555 U.S. 113, 129 S. Ct. 681 (2009), a conviction is not "final" under the terms of its original mandate under 28 United States Code §2244(d)(1)(A) if the Texas courts grant an out-of-time appeal. (*See* Ch. 4 of this Handbook at §4.1.3).

§4.10.3 - Improper Sentences and Their Remedies

The three sentencing issues about which offenders most often inquire are (1) sentences which are not allowed by statute, (2) sentences which were improperly "stacked," or (3) enhancements and deadly weapon findings.

The remedy which the courts may grant for an improper sentence depends on the nature of the claim. Accidental, purely clerical errors which are apparent on the face of the record are most properly dealt with by filing a motion for judgment nunc pro tunc,³⁵ a motion which, when granted has the effect of replacing an old judgment with a corrected one.

Habeas corpus, it bears reiteration, is an extraordinary remedy, and courts will not grant habeas corpus relief where other relief, such as a motion for judgment nunc pro tunc is available. *See Blanton v. State*, 369 S.W.3d 894 (Tex. Crim. App. 2012)(noting that where a habeas corpus applicant has the option to appeal the denial of a motion for judgment nunc pro tunc, habeas corpus relief is not appropriate). A motion for judgment nunc pro tunc, however is not a device to change a judgment to what the moving party "believes should have been done," but to reflect the judgment which was "actually rendered." *See Collins v. State*, 240 S.W.3d 925, 928 (Tex. Crim. App. 2007); *Blanton v. State*, 369 S.W.3d at 899 (citing *Jones v. State*, 795 S.W.2d 199, 200 (Tex. Crim. App. 1990)).

³⁵ This motion is also the preferred remedy for adjusting matters of time credit, and is discussed more in Chapter 6.

If the facts of a particular case demand it, the case may be remanded to the trial court for proper resentencing. *See Ex parte Rich*, 194 S.W.3d 508 (Tex. Crim. App. 2006) (citing *Levy v. State*, 818 S.W.2d 801, 803 (Tex. Crim. App. 1991)). Remand for resentencing does not violate the Double Jeopardy Clause, discussed earlier in this chapter. *See* Ch. 4 of this Handbook at §4.5.2; *See also Monge v. California*, 524 U.S. 721, 118 S. Ct. 2246 (1998). On the other hand, where an illegal sentence was caused by a defect in the indictment which affected the entirety of the criminal proceeding against a defendant, the judgment itself may be vacated, and the cause remanded for retrial. *Rich*, 194 S.W.3d at 514. In some cases, where part of a sentence is illegal, yet part of the sentence is valid (for example, where imprisonment and a fine are imposed yet only imprisonment is authorized), the court may erase that portion which is invalid, preserving the rest of the sentence. *See Berry v. Hughes*, 710 S.W.2d 600, 601, n. 1 (Tex. Crim. App. 1986).

§4.10.3.1 - Illegal Sentences

The Texas Penal Code designates specific ranges of punishments for different crimes, with some being fairly limited in range, while others, such as the punishment for a first degree felony, grant wide discretion to the trier of fact at sentencing. Where the punishment assessed exceeds the scope of the punishment allowed by statute, the Court of Criminal Appeals will grant relief, subject to various procedural requirements which must be met.

Beyond issues simply involving the number of years' imprisonment imposed in cases, however, the Court of Criminal Appeals has also invalidated sentences which deviate from the **type** of sentence allowed by statute. In *Ex parte Walker*, 599 S.W.2d 332 (Tex. Crim. App. 1980) (superseded on other grounds by statute as stated in *Ex parte Jordan*, 659 S.W.2d 827 (Tex. Crim. App. 1983)), the court invalidated a sentence which commanded the defendant to serve her sentence at home, which was not authorized by statute. Almost as commonly, applicants file a writ application in an attempt to protest an illegal fine, which like a prison sentence must be authorized by statute, or else an applicant may be entitled to relief. *See Berry v. Hughes*, 710 S.W.2d 600 (Tex. Crim. App. 1986).

§4.10.3.2 - Improper Stacking

Where an applicant has the opportunity to raise a claim about the improper stacking of their sentence on direct appeal, they may not attack such an order by way of a writ application. *See Ex parte Townsend*, 137 S.W.3d 79 (Tex. Crim. App. 2004). On the other hand, if the applicant alleges that the trial court lacked **jurisdiction** to impose a stacking order, instead of alleging the

court's lack of statutory authority, the court may consider granting relief. *See Ex parte Moss*, 446 S.W.3d 786, 788 (Tex. Crim. App. 2014). Critically, an applicant who waived his or her right to appeal pursuant to a plea agreement is not deemed under Townsend to have had an adequate remedy for an improper stacking order, and may be granted relief where they claim that there is **no** evidence to support a stacking order which was imposed. *See Ex parte Knight*, 401 S.W.3d 60 (Tex. Crim. App. 2013).

§4.10.3.3 - Enhancements and Deadly Weapon Findings

As with claims involving improper stacking, a claim that there is **insufficient** evidence to support an enhancement is not cognizable in habeas corpus proceedings in Texas. *See Ex parte Brown*, 757 S.W.2d 367 (Tex. Crim. App. 1988); *see also Haley v. Cockrell*, 306 F.3d 257 (5th Cir. 2002). However, a claim that there is **no** evidence to support an enhancement is a cognizable claim. *Id.*

Aside from “no evidence” claims, there are a few other sentencing scenarios where habeas relief may be granted upon a writ application alleging an improper enhancement or deadly weapon finding. Where a trial court enters a deadly weapon finding in a defendant's judgment following a jury trial in which the jury did not give an express finding of a deadly weapon, an applicant may be granted habeas corpus relief. *See Ex parte Moore*, 727 S.W.2d 578 (Tex. Crim. App. 1987).

Likewise, a defendant is entitled to notice from the State that it intends to pursue a finding of a deadly weapon or to use a prior criminal conviction for enhancement purposes, and the State's failure to give proper notice may constitute grounds for habeas corpus relief. *See Ex parte Minott*, 972 S.W.2d 760 (Tex. Crim. App. 1998).

§4.10.3.4 - Harmless Error and Illegal Sentences

An applicant for habeas corpus based on an illegal sentence must show both (1) a cognizable irregularity in their sentence and (2) harm for relief to be granted. *See Ex parte Parrott*, 396 S.W.3d 531, 534 (Tex. Crim. App. 2013). He or she must show, by a preponderance of the evidence that the sentencing error contributes to his or her conviction or punishment, based upon evidence beyond the appellate record if need be. *Id.* If, as in Parrott, an applicant claims that his or her enhancement is invalid, but the criminal history of that applicant in fact supports the enhancement, any error will most likely be deemed harmless. *Id.* at 536-37.

§4.10.3.5 - Direct Appeal and Waiver

Where a sentencing error is plain on the record, an applicant may be found to have waived the right to challenge a sentence or judgment in a habeas corpus application if he or she did not raise it on direct appeal. *See Ex parte Nelson*, 137 S.W.3d 666 (Tex. Crim. App. 2004). However, where a defendant has had no other adequate remedy at law than habeas corpus, it may be possible to attack a judgment for the first time in an application for writ of habeas corpus. *See Ex parte Knight*, 401 S.W.3d 60 (Tex. Crim. App. 2013); *see also Ex parte Rich*, 194 S.W.3d 508 (Tex. Crim. App. 2006) (holding that where the error was not or would not have been apparent on appeal, habeas corpus relief may be proper despite the applicant's failure to raise it on direct appeal).

§4.10.3.6 - Invited Error and Waiver

If an applicant specifically bargains for an improper sentence pursuant to a plea agreement, he or she may not later complain that the received the benefit of the bargain in an application for writ of habeas corpus, even if the sentence was invalid. *See Ex parte Guerrero*, 521 S.W.2d 613 (Tex. Crim. App. 1975); *But see Ex parte Roemer*, 215 S.W.3d 887 (Tex. Crim. App. 2007) (finding that under the facts of the case, although the habeas applicant had stipulated to a crime which was to be used for enhancement purposes, he had not invited error).

§4.11 - Texas and Federal Habeas Corpus, Reconciled

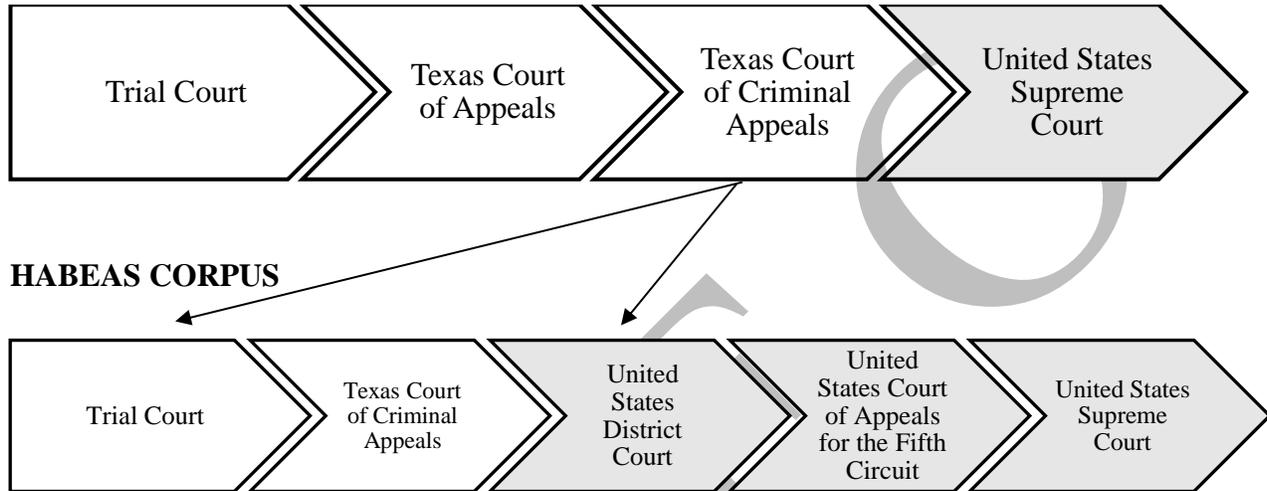
To understand how state direct appeals issues and state habeas corpus grounds converge into a federal habeas corpus petition, it is first important to understand the full scope of the appellate system, encompassing both the Texas and federal courts.

A criminal defendant in a felony case is first tried in a Texas District Court. Upon conviction, the defendant has the right to appeal to the court of appeals which oversees the district in which he or she was convicted. The defendant, now called an "appellant," must bring any of those claims which are obvious from the face of the record before the court at that time, including any federal constitutional claims. The court of appeals will either affirm or reverse all or part of an appellant's conviction.

After the ruling by the court of appeals, the appellant may file a petition for discretionary review with the Court of Criminal Appeals. If that petition is denied or refused, and the issues underlying the appeal implicate the federal constitution or federal statutory law, the appellant may file a petition for writ of certiorari to the United States Supreme Court, which will grant or deny review.

At some point in the process above, a Texas court will issue a mandate, signaling that the conviction of a criminal defendant is “final.” Both Texas procedure and federal procedure require that a conviction become final before habeas corpus proceedings can begin in either system.

TRIAL AND DIRECT APPEAL



Once an appellant’s conviction becomes final, he or she may file an application for writ of habeas corpus in state court. At the same time, once the state court mandate is issued, and if that appellant has exhausted his or her federal constitutional claim on direct appeal, including the filing of a petition for discretionary review in the Texas Court of Criminal Appeals, the door opens for the applicant to file a petition for writ of habeas corpus in the United States District Court presiding over the county of their conviction.

Filing in a federal district court without first engaging in state collateral proceedings is a poor choice, due to the simultaneous involvement of state and federal procedural rules. The category of grounds for federal habeas corpus relief is expansive, encompassing a great many constitutional claims. Practically speaking, however, while Texas ultimately recognizes almost all of the same grounds for relief, some are only capable of redress on direct appeal, while others are more properly brought forward in an application for habeas corpus. In other words, the claims which a prospective petitioner may want to bring before federal courts are split between two state court processes. Federal courts require that a prospective petitioner for habeas corpus exhaust all of the remedies provided by a state to address his or her alleged constitutional errors before pursuing the

grounds in federal court, and also require that a petitioner bring all meritorious claims in one, comprehensive petition, absent specific, extraordinary circumstances.

As an example, imagine an offender wishing to file a petition for writ of habeas corpus in federal court after the end of his direct appeal believes that he has the following grounds for relief:

1. He believes that the prosecutor used a peremptory strike in a racially-motivated manner, in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986). He raised this argument on direct appeal before the First Court of Appeals, which rejected his claim, and then to the Court of Criminal Appeals, which refused his petition for discretionary review.
2. He has proof that the State withheld exculpatory evidence, in violation of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). This evidence has just come to light, and could not have been raised at an earlier time.
3. His lawyer, he believes was ineffective under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984) for failing to call a witness who could provide an alibi for him at the time of the alleged wrongdoing. His lawyer also represented him on direct appeal, and did not raise the issue due largely to a conflict of interest in doing so.

His first claim has been fully exhausted in state court by seeking review by from the Court of Criminal Appeals, and his ground for relief concerns a violation of the federal constitution (the Equal Protection Clause), and thus he may pursue that claim in a federal petition if he so chooses after his PDR has been denied in the Court of Criminal Appeals. Nevertheless, it would be unwise for him to do so. The other two claims have not been fully exhausted, as they have yet to be brought before the state court in an application for writ of habeas corpus. The federal district court will not consider the unexhausted claims until they have been addressed through the Texas writ application process.

His best course of action would be to promptly file an application for writ of habeas corpus in state court to address his other two claims, and once the Court of Criminal Appeals has addressed the issue, combine the Batson claim with his Brady and Strickland claims into one, comprehensive federal petition for writ of habeas corpus.

§4.12 - Federal Petitions for Writ of Habeas Corpus

§4.12.1 - Recent History

Prior to 1996, the law surrounding habeas corpus was primarily governed by judge-made law and procedure. However, in 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (hereafter “AEDPA”) into law, dramatically restricting federal habeas corpus review.

For reference, the statute is codified at Title 28, United States Code §2254. Arguably the most contentious provision, which will be discussed later, is subsection (d), which currently reads:

“(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”

28 United States Code §2254 (1996). The quoted text provides substantial deference to state court decisions, and poses a substantial challenge to those hoping to obtain a writ of habeas corpus in federal court.

In light of the passage of AEDPA, it is crucial that those reading this chapter view the holdings of most cases from 1996 and earlier with a somewhat skeptical eye, as the outcomes in older cases could well have been different under AEDPA.

§4.12.2 - Federal Petition Paperwork

To undertake a petition for writ of habeas corpus in federal court, offenders should seek out the proper forms in the federal district court which presides³⁶ over the state court in which they were convicted. Offenders should request the form to file a petition for writ of habeas corpus, as well as the paperwork to proceed *in forma pauperis*, provided they cannot afford the court’s fees.

The courts’ addresses follow:

United States District Court for the Northern District of Texas:
Clerk of the U.S. District Court
United States District Court
1100 Commerce Street, Room 1452
Dallas, TX 75242

United States District Court for the Eastern District of Texas:
Clerk of the U.S. District Court
300 Willow Street, Suite 100
Beaumont, Texas 77701

³⁶ See SCFO REF 04.03 for a more exhaustive list of the counties within each federal district.

United States District Court for the Southern District of Texas:
Clerk of the U.S. District Court
P. O. Box 61010
Houston, TX 77208

United States District Court for the Western District of Texas:
Clerk of the U.S. District Court
501 West Fifth Street, Suite 1100
Austin, Texas 78701

§4.12.3 - District Court Petition Procedure

Once an offender has carefully and accurately completed the necessary forms for filing a petition, the offender should follow the form's instructions for filing. An offender may choose to file the petition either in the district court presiding over the county in they were convicted or the district court presiding over the county in which they are presently incarcerated.

The incarcerating county may transfer it back to the district court in the region where the offender was convicted, but offenders may request the incarcerating county's district court to maintain the action there. The process in the district court typically unfolds as follows, once a petition is filed:

1. Petitions are usually reviewed by magistrate judges, and less often are reviewed directly by district court judges. If, after initial review, the court desires further discussion of the merits of a petition, they will issue an Order to Show Cause to the Texas Attorney General's Office.
2. The Attorney General's Office, upon the show cause order will reply to the merits of the petition, serving both the petitioner and the court with their response.
3. A petitioner may, but is not required to file a response to the State's answer. However, the court may compel a petitioner to do so.
4. In rare instances, as discussed more extensively further on, a federal court will order an evidentiary hearing on the merits of a petitioner's claim. If an evidentiary hearing is ordered, the petitioner will be brought to the court by way of a writ of habeas corpus *ad testificandum*. The amount of time for this hearing to be ordered may vary depending on the district court in which the application is filed.
5. Magistrate judges, after considering the merits of a petitioner's claim will make a recommendation to the more authoritative district court judges, entering a "Report and Recommendation" or "Findings, Conclusions, and Recommendations." After the magistrate judge's filing, a petitioner has ten days to file written objections to the

court's recommendations, or longer if authorized by the court. Failure to file written objections waives most matters except for those constituting "clear error," a high standard of proof. The same applies to objecting to some issues and not others. Those issues not objected are deemed to be waived unless clear error has occurred.

6. The district court judge will review the magistrate judge's report to determine whether relief should be granted or denied. The district court judge may adopt the magistrate judge's findings, but the district court is not bound by them.

§4.13 - Federal Habeas Corpus Review

§4.13.1 - Procedural Barriers

Whereas state habeas corpus proceedings can be relatively straightforward, federal habeas corpus petitions often fail due to subtle, yet complex procedural errors. The district courts' most common reasons for declining a petition for writ of habeas corpus include (1) broad waiver of claims due to the entry of a plea, (2) the petitioner not being in custody, (3) untimely filing, (4) the petition having been filed successively, (5) the claim not being fully exhausted in state court, (6) the claim being procedurally-defaulted, (7) the state court having not engaged in an unreasonable application of clearly established federal law, (8) the claim depending on facts which are not attainable in a federal evidentiary hearing, and (9) the claim not being "cognizable" on habeas corpus review. As any procedural error tends to prevent a habeas corpus petition from being heard on its merits in federal court, it is unsurprisingly rare for a federal court to reach the merits of a petitioner's claim.

§4.13.1.1 - The Petitioner Pled Guilty

The grounds for federal habeas corpus relief are somewhat more limited for a potential applicant who pled guilty or nolo contendere than for one who pled not guilty and proceeded to trial. The reason for this, according to Fifth Circuit is that a plea of guilty waives all "non-jurisdictional" defects, including constitutional claims found in this chapter. See United States v. Barrientos, 668 F.2d 838, 842 (5th Cir. 1982).

§4.13.1.2 - The Custody Requirement

Habeas corpus relief will not be granted if the petitioner is not in "custody." In Carafas v. LaVallee,³⁷ for example, the United States Supreme Court held that a petitioner's case was moot

³⁷ 391 U.S. 234, 88 S. Ct. 1556 (1968).

(that he was no longer in “custody”) when he was unconditionally released from prison while his petition was still pending. The above rule does not require that a petitioner be in actual, physical custody, however. *See Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004). Parole release may constitute custody for purposes of habeas corpus. *See Jones v. Cunningham*, 371 U.S. 236, 83 S. Ct. 373 (1963); *Wottlin v. Fleming*, 136 F.3d 1032 (5th Cir. 1998).

Prior Supreme Court cases have also established exceptions to the rule that release eradicates a habeas claim, where (1) a petitioner could not bring a petition before the expiration of his or her sentence; or (2) other harmful collateral consequences will result after his or her release. *See Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 (1968) (citing *St. Pierre v. United States*, 319 U.S. 41, 63 S. Ct. 910 (1943)). Such “collateral consequences” recognized by the Supreme Court include a petitioner’s (1) inability to engage in certain businesses, (2) inability to join a labor union, (3) inability to vote, and (4) inability to serve on a jury panel, among others. *Carafas*, 391 U.S. at 237-38, 88 S. Ct. at 1559.

§4.13.1.3 - Timeliness, Tolling, and Equitable Tolling

Under AEDPA, habeas petitioners must file within a one-year statute of limitations in order for their petition to be considered.³⁸ 28 United States Code §2244(d). The limitations period begins once a petitioner’s state court conviction is final, subject to exceptions which can be found in § 2244(d)(1)(B)-(D). *See Greene v. Fisher*, 132 S. Ct. 38 (2011)(“Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from this Court has become time barred or has been disposed of.”). Once a petitioner **properly** files an application for writ of habeas corpus in the state district court in which they are convicted, the one-year time period is frozen, or “tolled.” *See generally Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079 (2007). Improperly filed petitions do not toll the limitations period. *See Wardlaw v. Cain*, 541 F.3d 275 (5th Cir. 2008). Consider the following examples:

1. Susan Jones’ conviction became final on January 1, 2005, causing the federal limitations period to begin to run. She properly filed an application for writ of habeas corpus in a Texas district court in Houston on March 28, 2005. The time expended on her federal limitations period, then at 86 days, “tolls” until state court addresses her

³⁸ While the federal statute governing habeas corpus procedure contains a strict statute of limitations, Texas does not have such a defined timeframe for filing. (*See* Ch. 4 of this Handbook at §4.032). This is important for those seeking habeas corpus relief to note, as while it may in some cases be acceptable to file a habeas corpus application four years after conviction in state court, waiting so long to file in state court would essentially forfeit all claims which could be raised in federal court, due to the requirement that claims be brought in state court before being raised in a federal petition. (*See* Ch. 4 of this Handbook at §4.131(E)).

- state court application. On January 16, 2006, the Texas Court of Criminal Appeals denied her application for writ of habeas corpus. Because the limitations was tolled by her proper filing of a state court application for writ of habeas corpus, on January 16, 2006, the date of the Court of Criminal Appeals' decision, she had 279 days remaining to file her petition in the United States District Court for the Southern District of Texas.
2. Susan Jones' conviction became final on January 1, 2005, causing the federal limitations period to begin to run. On November 3, 2005, she filed an application for writ of habeas corpus in the Dallas district court in which she was convicted, drafting her own application and ignoring the formatting guidelines of the Court of Criminal Appeals. On December 15, 2005, the Court of Criminal Appeals dismissed her application due to her failure to follow their specifications. Because her application was not properly filed, her federal time limit was not tolled. She filed a proper application on December 30, 2005, which was denied on the merits by the Court of Criminal Appeals on June 5, 2006. Her second application, which was properly filed, tolled the remaining days on her limitations period. As of June 5, she had 2 days remaining to file a petition for writ of habeas corpus in federal court.
 3. Susan Jones' conviction became final on January 1, 2005, causing the federal limitations period to begin to run. A fellow offender erroneously told her that there is no federal limitations period, and that timeliness in federal habeas corpus review depends on the equitable doctrine of laches. She filed a petition for writ of habeas corpus on January 15, 2006. As ignorance of the law is no excuse for untimeliness under AEDPA, her petition for writ of habeas corpus is time-barred.

Courts construe the AEDPA limitations period strictly, and will only consider late petitions if the petitioner has (1) pursued his or her rights diligently, and (2) some extraordinary circumstance stood in his or her way. Lawrence v. Florida, 549 U.S. 327, 127 S. Ct. 1079 (2007). It is generally not enough that either the petitioner or his or her attorney miscalculated the time limit for filing. As petitioners are not provided the right to effective assistance of counsel in habeas corpus proceedings, mere attorney negligence is not enough to justify review of a petition outside of the statute of limitations. Holland v. Florida, 560 U.S. 631, 130 S. Ct. 2549 (2010). While the AEDPA deadline is not an absolute barrier to claims of actual innocence, federal courts will nevertheless consider the length of and reasons for a delay in considering whether to address a petition for writ of habeas corpus which alleges actual innocence. *See* McQuiggin v. Perkins, 133 S. Ct. 1924 (2013).

§4.13.1.4 - Successive Petitions

Under 28 United States Code §2244(b)(1), a claim presented in a second or successive habeas petition "shall be dismissed" without consideration of its merits. Under §2244(b)(2), a claim

brought in a second or successive habeas petition which was not included in the first will likewise be dismissed, unless it falls under one of two exceptions.

Under the first exception, a second or successive petition is not barred from review if it relies on a new rule of constitutional law (i.e. a new landmark case by the United States Supreme Court) which applies retroactively. (*See* Ch. 4 of this Handbook at §4.3.7(G)). Under the second exception, a claim first raised in a second or successive petition is not barred if (i) the facts underlying the claim could not have previously been discovered with due diligence, and (ii) the facts of the claim show by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the offense.

§4.13.1.5 - State Exhaustion Requirement

A petitioner must exhaust his or her state court remedies before federal habeas corpus review can occur. In the case of a Texas prisoner, this means filing an application for writ of habeas corpus and engaging the process to its complete conclusion, unless the issues were already addressed on direct appeal. If the matters were raised on direct appeal, and the petitioner failed to file a petition for discretionary review with the Court of Criminal Appeals, the federal district court will not consider the petitioner's federal habeas petition. *See Richardson v. Procnunier*, 762 F.2d 429 (5th Cir. 1985). If the state courts have been given their fullest opportunities to hear the claim, then and only then will the federal district courts within this state hear a habeas petition. If a petitioner presents a district court with a mix of exhausted and unexhausted claims, the court will usually decline to hear the case, unless the petitioner shows good cause for his or her failure to exhaust available state remedies. In that case, the district court will "stay and abate" the exhausted claims while the unexhausted claims proceed in state court. *See Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528 (2005).

In practice, this procedural issue appears in these two contrasting examples:

Example 1. John Smith was convicted, his conviction became final, and he filed an application for writ of habeas corpus in state court, making arguments A, B, and C. After his application was denied, he filed a petition in federal court, making arguments A and C. Smith was within his right to decline to raise ground B in federal court. However, argument B is likely barred under the subsequent writ rule from further discussion in federal court at a later time.

Example 2. Susan Jones was convicted, her conviction became final, and she filed an application for writ of habeas corpus in state court, only making arguments A and B. After her application was denied, she filed a petition in federal court, making arguments A, B,

and C. Arguments A and B will be considered by the district court, but argument C will not be, as she has not exhausted the claim through the state habeas process. If a claim based on C is proceeding through the lower courts, the district court may “stay and abate” proceedings on all three arguments until the state court resolves the matter.

§4.13.1.6 - Procedural Default

This reason for rejecting a habeas petition is particularly common. Procedural default occurs where the petitioner forfeited his right to pursue the claim in compliance with *state* procedural rules. In Coleman v. Thompson,³⁹ a case predating AEDPA, but which still holds merit, the Supreme Court held that where a state court denies a habeas application for procedural reasons, and that procedural reason is an “independent and adequate” state ground for denying the claim, that claim will not be considered federally, either. As with the contemporaneous objection rule mentioned in the Texas habeas application section, failure to make a contemporaneous objection in state court may cause federal procedural default. *See* Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977); *But see* Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982) (holding that where the state court did not rely on failure to contemporaneously object as a basis for denying relief, failure to contemporaneously object did not cause procedural default).

Likewise, other procedural rules may bar federal review. *See* Ramirez v. Estelle, 678 F.2d 604 (5th Cir. 1982) (As the defense failed to move for a continuance when it was discovered that the State had withheld Brady evidence, the claim was barred from federal review). To overcome procedural default, the petitioner must show either both (1) cause and (2) prejudice, or (3) that a fundamental miscarriage of justice will occur if the petition is not heard. Cause must be derived from sources which cannot be attributed to the petitioner. *See* Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986). As attorneys are seen as working in concert with their clients, attorney error is generally not enough to satisfy cause, although complete abandonment in state court by a petitioner’s attorney may suffice. *See* Maples v. Thomas, 132 S. Ct. 912, 924 (2012). To prove prejudice, a petitioner must prove that his or her claim was meritorious. *See* Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497 (1977)(suggesting that prejudice be examined by the damage done by the admission of the petitioner’s confession).

Of course, in order for a state procedural matter to bar federal review, the petitioner must have been given an “adequate” chance to address his or her claim in state court. For example, in

³⁹ 501 U.S. 722, 111 S. Ct. 2546 (1991).

states like Texas which allow claims of ineffective assistance of counsel to be raised on direct appeal, failure to raise it on direct appeal may not be an adequate ground to deny federal relief, as it is virtually impossible to review trial counsel's effectiveness on direct appeal. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *See also Martinez v. Ryan*, 132 S. Ct. 1309 (2012).

§4.13.1.7 - State Court Reasonability

AEDPA forbids review of claims which the state court denied on the merits of the claim, so long as (1) the state court did not render a decision contrary to or involving an unreasonable application of clearly established federal law or (2) make an unreasonable determination of the facts in light of the evidence presented before it. This provision allows for substantial breathing room for state court decision-making, even providing room for the state to render a decision with which many jurists would strongly disagree. Perhaps counterintuitively, this rule applies even where a state court renders a decision without a written opinion. *See Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770 (2011). A state court's legal analysis will only be overturned under this rule if **all reasonable jurists** would disagree with the state court's analysis. *See Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495 (2000). A court's determination of the facts is presumed to be controlling, but a petitioner may rebut that presumption by clear and convincing evidence. *See Nelson v. Quarterman*, 472 F.3d 287 (5th Cir. 2006).

§4.13.1.8 - Evidentiary Hearing Bar

If a petitioner fails to adequately develop the facts of his or her case in state court, then generally speaking, he or she will not be allowed an evidentiary hearing under §2254(e)(2). Only if the claim (1) relies on a new rule of constitutional law which applies retroactively, and that new rule was not available when the petitioner was in state court, or (2) the facts which need to be developed could not have been previously discovered through the exercise of due diligence will the federal courts consider granting an evidentiary hearing. If one of those exceptions is shown, the petitioner must also show by clear and convincing evidence that no reasonable factfinder would have found the petitioner guilty but for the constitutional violation. However, following the Supreme Court's decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), it is extraordinarily difficult to obtain a federal evidentiary hearing.

Under *Pinholster*, federal courts may not consider new evidence in reviewing whether the state court's decision was contrary to or unreasonably applied clearly established federal law under 2254(d)(1). *See Pinholster*, 131 S. Ct. at 1400; *See also Pape v. Thaler*, 645 F.3d 281 (5th Cir.

2011). The consequence is that in most cases, federal courts will not allow new evidence to be discovered, no matter how substantial when reviewing a state court's decision which was made on the merits and did not involve an unreasonable determination of the facts.

§4.13.1.9 - Cognizable Claims

The determination of whether a claim is “cognizable” in habeas proceedings is a determination of whether it is the type of claim most appropriate for habeas corpus proceedings. The category of cognizable federal claims is fairly expansive, encompassing most constitutional violations.

§4.13.1.10 - Harmless Error

Even if a petition does not suffer from one of the procedural bars stated on previous pages, and even if the claim is cognizable, the harm claimed by the petitioner must have caused a “substantial and injurious effect of influence in determining the jury’s verdict” for the federal court to grant relief. *See Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993). This burden of proof, readers may note is much greater than the burden of proof required in state court, as stated in a previous section. *See* Ch. 4 of this Handbook at §4.3.4.

§4.13.1.11 - Actual Innocence

As noted in several previous sections, federal courts are only slightly more relaxed when considering claims involving actual innocence (meaning that the petitioner is innocent-in-fact, not simply that the State cannot meet its burden of proof). A habeas corpus petitioner may overcome many of the above procedural barriers if he or she can show that it is “more likely than not that ‘no reasonable juror’ would have convicted [the petitioner].” *See McQuiggin*, 133 S. Ct. at 1933 (citing *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995)). While federal courts are to be more forgiving of the procedural errors of a petitioner who makes a satisfactory showing of innocence, unnecessary delay in bringing a habeas corpus petition bears on whether relief will be granted. *Id.* at 1936.

§4.13.2 - Federal Habeas Corpus Appeals

When a petition for writ of habeas corpus is denied in federal district court, a Texas petitioner has the option to file an appeal in the United States Court of Appeals for the Fifth Circuit. Likewise, if the petition is granted, the State may appeal to the Fifth Circuit. In order to appeal, the petitioner must acquire a “certificate of appealability” from the district court. The district court will grant such a certificate if the petitioner can show (1) that the issue is subject to dispute among

reasonable jurists, (2) the issue could be resolved in the petitioner’s favor, or if it is (3) “adequate to deserve encouragement” of further proceedings. *See Lozada v. Deeds*, 498 U.S. 430, 432, 111 S. Ct. 860, 862 (1991). If the district court denies a certificate, the petitioner may appeal to the Fifth Circuit to obtain one. Certificates of appealability are rarely granted. Once the district court forwards a petitioner’s documents to the Fifth Circuit, the petitioner will receive further instructions on how to proceed.

If the petitioner’s appeal in the Fifth Circuit fails, he or she may take the final step in filing a petition for writ of certiorari in the United States Supreme Court within ninety days of the Fifth Circuit’s decision. A sixty-day extension may be granted upon a showing of good cause. The Clerk of the Supreme Court will provide instructions and sample writ petitions upon request.

§4.14 - Frequently Asked Questions

1. HAS THE TEXAS LEGISLATURE RECENTLY PASSED A BILL REQUIRING THAT AN OFFENDER WITH A DEADLY WEAPON FINDING ONLY SERVE 35% OF HIS OR HER SENTENCE BEFORE THEY ARE ELIGIBLE FOR PAROLE?

Answer: As of the fall of 2015, the answer is a resounding **no**. Despite the rumors which have circulated within and outside of the Texas Department of Criminal Justice, the Texas Legislature has not created a new “35% rule.”

2. I AM INNOCENT OF THE CRIME FOR WHICH I AM CURRENTLY INCARCERATED. WILL STATE COUNSEL FOR OFFENDERS FILE AN APPLICATION FOR WRIT OF HABEAS CORPUS ON MY BEHALF?

Answer: No. For this and any other inquiry regarding the role of State Counsel for Offenders in filing writ applications, see Ch. 4 of this Handbook at page 6.

3. WHY DID THE FEDERAL COURT AUTOMATICALLY DISPENSE WITH MY PRO SE PETITION?

Answer: The federal district court’s reasons for doing so vary on a case-by-case basis. This chapter contains many of the procedural reasons for which district courts will dispense with a case. *See* Ch. 4 of this Handbook at §4.13.1.

4. MY CASE HAS BEEN PENDING FOR AN EXTENDED PERIOD OF TIME BEFORE THE COURT. IS THERE ANYTHING I CAN DO TO EXPEDITE THE PROCESS AND CAUSE THE COURT TO RENDER A DECISION?

Answer: No. The court system moves at a slow pace, but there is generally nothing than an offender can do to hasten the speed of the system.

5. CAN I USE A WRIT APPLICATION OR A MOTION FOR JUDGMENT NUNC PRO TUNC TO MODIFY MY AGGRAVATED ASSAULT TO A SIMPLE ASSAULT, AS MY JUDGMENT CONTAINED NO DEADLY WEAPON FINDING?

Answer: No. Texas Penal Code § 22.02, the statutory provision for aggravated assault allows for two theories under which the State may prosecute an individual for aggravated assault: (1) an assault in which a deadly weapon was used or exhibited, or (2) in which the individual, in committing an assault causes serious bodily injury. Even if a given judgment contains no explicit deadly weapon finding, that does not mean that there is no evidence to support the “aggravated” character of an assault. The term “deadly weapon” has two distinct and unrelated definitions in the context of a charging instrument and a judgment. A deadly weapon finding in a judgment controls the parole release date of an offender. On the other hand, generally speaking, an indictment’s allegation of the use of a deadly weapon tends to bear more on the classification of an offense into different felony degrees, and therefore the duration of an offender’s total sentence.

6. MY CASE IS ON APPEAL. IF I FILE AN APPLICATION FOR WRIT OF HABEAS CORPUS AT THIS POINT, WILL THE COURT OF CRIMINAL APPEALS ADDRESS MY APPLICATION?

Answer: No. An application for writ of habeas corpus is only properly filed after an offender’s conviction has become final. If the offender’s direct appeal is still pending, the case is not yet final. *See* Ch. 4 of this Handbook at §4.2.

7. MY INDICTMENT CONTAINED DRAFTING ERRORS, OR OTHER ERRORS OF SUBSTANCE. IF I FILE AN APPLICATION FOR WRIT OF HABEAS CORPUS RAISING THE ISSUE, WILL THE COURT GRANT ME RELIEF?

Answer: In almost all cases, the answer is no. Flaws in an indictment must almost always be raised on direct appeal or not at all. *See* Ch. 4 of this Handbook at §4.10.1.

8. WHY IS THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE TREATING MY CASE AS AN AGGRAVATED CASE WHEN I DID NOT RECEIVE AN AGGRAVATED CONVICTION?

Answer: If the offense for which an offender was convicted does not fall under Article 42.12, §3(g) of the Code of Criminal Procedure, then it is not “aggravated” for parole purposes. An offense that falls under this section requires that a certain percentage of the overall sentence be served without taking into consideration the good time earned before the case can be considered for parole review. Offenders often think that their conviction is being considered “aggravated” because they are not eligible for release to mandatory supervision. The rules for mandatory supervision eligibility are discussed in Texas Government Code §508.149 and its predecessor, T.C.C.P. Article 42.18, §8. Eligibility factors for parole and mandatory supervision are not the same. Eligibility rules are based on the date of the commission of the offense and have changed many times over the years. *See* Ch. 7 of this Handbook.

9. CAN THE STATE STILL PROSECUTE ME IF SHORTLY BEFORE THE STATUTE OF LIMITATIONS WAS SET TO EXPIRE IN MY CASE, THE TEXAS LEGISLATURE EXTENDS THE STATUTE OF LIMITATIONS?

Answer: Yes. While it is true that the Ex Post Facto clause of the United States Constitution protects retroactive application of new laws to crimes already committed, both Texas and federal courts have held that the legislature may extend the statutes of limitations as to crimes whose limitations periods have not already expired. *See* U.S. Const. art. I, § 10; Lyndsey v. State, 760 S.W.2d 649, 653 (Tex. Crim. App. 1988); *See also* Ex parte Heilman, 456 S.W.3d 159 (Tex. Crim. App. 2015).

§4.15 - Table of Authorities

<u>Acosta v. State</u> , 233 S.W.3d 349 (Tex. Crim. App. 2007)	40
<u>Alford v. State</u> , 358 S.W.3d 647 (Tex. Crim. App. 2012).....	26
<u>Anders v. California</u> , 386 U.S. 738, 87 S. Ct. 1396 (1967).....	51
<u>Argersinger v. Hamlin</u> , 407 U.S. 25, 92 S. Ct. 2006 (1972).....	31
<u>Arizona v. Fulminante</u> , 499 U.S. 279, 111 S. Ct. 1246 (1991).....	17
<u>Arizona v. Youngblood</u> , 488 U.S. 51, 109 S. Ct. 333 (1988).....	50
<u>Ashe v. Swenson</u> , 397 U.S. 436, 90 S. Ct. 1189 (1970).....	28
<u>Ashley v. Wainwright</u> , 639 F.2d 258 (5th Cir. 1981).....	46
<u>Atkins v. Virginia</u> , 536 U.S. 304, 122 S. Ct. 2242 (2002).....	18
<u>Bass v. State</u> , 576 S.W.2d 400 (Tex. Crim. App. 1979).....	55
<u>Batiste v. State</u> , 888 S.W.2d 9 (Tex. Crim. App. 1994)	37, 42
<u>Batson v. Kentucky</u> , 476 U.S. 79, 106 S. Ct. 1712 (1986).....	37, 52, 64
<u>Berghuis v. Smith</u> , 559 U.S. 314, 130 S. Ct. 1382 (2010).....	43
<u>Berry v. Hughes</u> , 710 S.W.2d 600 (Tex. Crim. App. 1986)	60
<u>Blackledge v. Perry</u> , 417 U.S. 21, 94 S. Ct. 2098 (1974).....	50
<u>Blanton v. State</u> , 369 S.W.3d 894 (Tex. Crim. App. 2012).....	59
<u>Blockburger v. United States</u> , 284 U.S. 299, 52 S. Ct. 180 (1932)	27
<u>Bloodworth v. Hopper</u> , 539 F.2d 1382 (5th Cir. 1976)	48
<u>Bouie v. State</u> , 565 S.W.2d 543 (Tex. Crim. App. 1978).....	10
<u>Bower v. Quarterman</u> , 497 F.3d 459 (5th Cir. 2007).....	35
<u>Boykin v. Alabama</u> , 395 U.S. 238, 89 S. Ct. 1709 (1969).....	53
<u>Brady v. Maryland</u> , 373 U.S. 83, 83 S. Ct. 1194 (1963)	49, 64
<u>Branch v. Estelle</u> , 631 F.2d 1229 (5th Cir. 1980).....	52
<u>Brecht v. Abrahamson</u> , 507 U.S. 619, 113 S. Ct. 1710 (1993).....	17, 73

<u>Brewer v. Williams</u> , 430 U.S. 387, 97 S. Ct. 1232 (1977)	23, 33
<u>Brown v. Mississippi</u> , 297 U.S. 278, 56 S. Ct. 461 (1936).....	17, 21
<u>Bruton v. United States</u> , 391 U.S. 123, 88 S. Ct. 1620 (1968)	45
<u>Bryant v. Scott</u> , 28 F.3d 1411 (5th Cir. 1994)	35
<u>Bullcoming v. New Mexico</u> , 131 S. Ct. 2705 (2011)	44
<u>Bullington v. Missouri</u> , 451 U.S. 430, 101 S. Ct. 1852 (1981)	29
<u>Burgett v. Texas</u> , 389 U.S. 109, 88 S. Ct. 258 (1967)	32
<u>Cain v. State</u> , 947 S.W.2d 262 (Tex. Crim. App. 1997).....	16
<u>California v. Trombetta</u> , 467 U.S. 479, 104 S. Ct. 2528 (1984).....	50
<u>Cannon v. State</u> , 252 S.W.3d 342 (Tex. Crim. App. 2008)	41
<u>Carafas v. LaVallee</u> , 391 U.S. 234, 88 S. Ct. 1556 (1968).....	67, 68
<u>Chaffin v. Stynchcombe</u> , 412 U.S. 17, 93 S. Ct. 1977 (1973).....	9
<u>Chapman v. California</u> , 386 U.S. 18, 87 S. Ct. 824 (1967).....	33
<u>Colbroth v. Wainwright</u> , 466 F.2d 1193 (5th Cir. 1972).....	19
<u>Coleman v. Alabama</u> , 399 U.S. 1, 90 S. Ct. 1999 (1970).....	32
<u>Coleman v. Quarterman</u> , 456 F.3d 537 (5th Cir. 2006).....	48
<u>Coleman v. Thompson</u> , 501 U.S. 722, 111 S. Ct. 2546 (1991)	71
<u>Collins v. State</u> , 240 S.W.3d 925 (Tex. Crim. App. 2007).....	59
<u>Cooks v. State</u> , 240 S.W.3d 906 (Tex. Crim. App. 2007)	32
<u>Coronado v. State</u> , 617 S.W.2d 265 (Tex. Crim. App. 1981).....	10
<u>Coursey v. State</u> , 457 S.W.2d 565 (Tex. Crim. App. 1970)	24
<u>Crawford v. State</u> , 617 S.W.2d 925 (Tex. Crim. App. 1980)	23
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354 (2004).....	44, 46
<u>Crist v. Bretz</u> , 437 U.S. 28, 98 S. Ct. 2156 (1978)	29
<u>Cullen v. Pinholster</u> , 131 S. Ct. 1388 (2011)	72

<u>Cuyler v. Sullivan</u> , 446 U.S. 335, 100 S. Ct. 1708 (1980)	40
<u>Dames v. Wainwright</u> , 491 F.2d 1098 (5th Cir. 1974)	9
<u>Danforth v. Minnesota</u> , 552 U.S. 264, 128 S. Ct. 1029 (2008)	19
<u>Davis v. United States</u> , 512 U.S. 452, 114 S. Ct. 2350 (1994).....	24
<u>Davis v. Washington</u> , 547 U.S. 813, 126 S. Ct. 2266 (2006).....	45
<u>Delrio v. State</u> , 840 S.W.2d 443 (Tex. Crim. App. 1992)	37
<u>Donahue v. Cain</u> , 231 F.3d 1000, 1004 (5 th Circuit 2000)	19
<u>Donnelly v. DeChristoforo</u> , 416 U.S. 637, 94 S. Ct. 1868 (1974).....	52
<u>Douglas v. California</u> , 372 U.S. 353, 83 S. Ct. 814 (1963)	31, 39
<u>Duren v. Missouri</u> , 439 U.S. 357, 99 S. Ct. 664 (1979).....	43
<u>Dutton v. Evans</u> , 400 U.S. 74, 91 S. Ct. 210 (1970).....	44
<u>Edwards v. Arizona</u> , 451 U.S. 477, 101 S. Ct. 1880 (1981).....	21, 24
<u>Elder v. State</u> , 462 S.W.2d 6 (Tex. Crim. App. 1971).....	44
<u>Estelle v. Smith</u> , 451 U.S. 454, 101 S. Ct. 1866 (1981)	25
<u>Estelle v. Williams</u> , 425 U.S. 501, 96 S. Ct. 1691 (1976)	51
<u>Ex parte Acosta</u> , 672 S.W.2d 470 (Tex. Crim. App. 1984)	40
<u>Ex parte Adams</u> , 707 S.W.2d 646 (Tex. Crim. App. 1986).....	54
<u>Ex parte Alexander</u> , 598 S.W.2d 308 (Tex. Crim. App. 1980)	50
<u>Ex parte Argent</u> , 393 S.W.3d 781 (Tex. Crim. App. 2013)	39
<u>Ex parte Axel</u> , 757 S.W.2d 369 (Tex. Crim. App. 1988)	58
<u>Ex parte Bagley</u> , 509 S.W.2d 332 (Tex Crim. App. 1974).....	21, 22
<u>Ex parte Banks</u> , 769 S.W.2d 539 (Tex. Crim. App. 1989)	8
<u>Ex parte Barfield</u> , 697 S.W.2d 420 (Tex. Crim. App. 1985)	19
<u>Ex parte Bates</u> , 640 S.W.2d 894 (Tex. Crim. App. 1982)	50, 51
<u>Ex parte Bennett</u> , 508 S.W.2d 646 (Tex. Crim. App. 1974).....	9

<u>Ex parte Blacklock</u> , 191 S.W.3d 718 (Tex. Crim. App. 2006).....	10
<u>Ex parte Briggs</u> , 187 S.W.3d 458 (Tex. Crim. App. 2005)	35
<u>Ex parte Brown</u> , 662 S.W.2d 3 (Tex. Crim. App. 1983)	10
<u>Ex parte Brown</u> , 757 S.W.2d 367 (Tex. Crim. App. 1988)	61
<u>Ex parte Brown</u> , 907 S.W.2d 835 (Tex. Crim. App. 1995)	29
<u>Ex parte Carrio</u> , 992 S.W.2d 486 (Tex. Crim. App. 1999).....	14
<u>Ex parte Castellano</u> , 863 S.W.2d 476 (Tex. Crim. App. 1993)	49
<u>Ex parte Cavazos</u> , 203 S.W.3d 333 (Tex. Crim. App. 2006).....	28
<u>Ex parte Chandler</u> , 182 S.W.3d 350 (Tex. Crim. App. 2005)	37
<u>Ex parte Clark</u> , 545 S.W.2d 175 (Tex. Crim. App. 1977)	51
<u>Ex parte Contreras</u> , 586 S.W.2d 550 (Tex. Crim. App. 1979).....	58
<u>Ex parte Crispen</u> , 777 S.W.2d 103 (Tex. Crim. App. 1989).....	15, 22
<u>Ex parte Crosby</u> , 703 S.W.2d 683 (Tex. Crim. App. 1986).....	28
<u>Ex parte De Leon</u> , 400 S.W.3d 83 (Tex. Crim. App. 2013)	55
<u>Ex parte De Los Reyes</u> , 392 S.W.3d 675, 679 (Tex. Crim. App. 2013).....	19
<u>Ex parte Denton</u> , 399 S.W.3d 540 (Tex. Crim. App. 2013)	30, 36
<u>Ex parte Diaz</u> , 959 S.W.2d 213 (Tex. Crim. App. 1998).....	31
<u>Ex parte Dickerson</u> , 1549 S.W.2d 203, 203 (Tex. Crim. App. 1977).....	56
<u>Ex parte Duffy</u> , 607 S.W.2d 507 (Tex. Crim. App. 1980).....	34
<u>Ex parte Easter</u> , 615 S.W.2d 719 (Tex. Crim. App. 1981)	19
<u>Ex Parte Evans</u> , 964 S.W.2d 643 (Tex. Crim. App. 1998)	14
<u>Ex parte Fierro</u> , 934 S.W.2d 370 (Tex. Crim. App. 1996)	16
<u>Ex parte Flores</u> , 387 S.W.3d 626 (Tex. Crim. App. 2012)	35
<u>Ex parte Gardner</u> , 959 S.W.2d 189 (Tex. Crim. App. 1998).....	17
<u>Ex parte Gibson</u> , 800 S.W.2d 548 (Tex. Crim. App. 1990).....	18

<u>Ex parte Goodman</u> , 816 S.W.2d 383 (Tex. Crim. App. 1991)	17
<u>Ex parte Graves</u> , 70 S.W.3d 103 (Tex. Crim. App. 1989).....	40
<u>Ex parte Groves</u> , 571 S.W.2d 888 (Tex. Crim. App. 1978).....	17
<u>Ex parte Guerrero</u> , 521 S.W.2d 613 (Tex. Crim. App. 1975).....	62
<u>Ex parte Hairston</u> , 766 S.W.2d 790 (Tex. Crim. App. 1989)	55
<u>Ex parte Hawkins</u> , 6 S.W.3d 554 (Tex. Crim. App. 1999).....	28
<u>Ex parte Heilman</u> , 456 S.W.3d 159 (Tex. Crim. App. 2015)	56, 57, 76
<u>Ex parte Jefferson</u> , 681 S.W.2d 33 (Tex. Crim. App. 1984)	29
<u>Ex parte Jones</u> , 97 S.W.3d 586 (Tex. Crim. App. 2003)	12
<u>Ex parte Jordan</u> , 659 S.W.2d 827 (Tex. Crim. App. 1983)	60
<u>Ex parte Kirby</u> , 492 S.W.2d 579 (Tex. Crim. App. 1973).....	21
<u>Ex parte Kirk</u> , 478 S.W.2d 503 (Tex. Crim. App. 1972).....	46
<u>Ex parte Knight</u> , 401 S.W.3d 60 (Tex. Crim. App. 2013).....	8, 61, 62
<u>Ex parte Lozada-Mendoza</u> , 45 S.W.3d 107 (Tex. Crim. App. 2001).....	39
<u>Ex parte Martin</u> , 747 S.W.2d 789 (Tex. Crim. App. 1988)	30
<u>Ex parte Martinez</u> , 330 S.W.3d 891 (Tex. Crim. App. 2011).....	38
<u>Ex parte Maxwell</u> , 424 S.W.3d 66 (Tex. Crim. App. 2014).....	47
<u>Ex parte Mays</u> , 510 S.W.2d 606 (Tex. Crim. App. 1974)	58
<u>Ex parte McAfee</u> , 761 S.W.2d 771 (Tex. Crim. App. 1988)	28
<u>Ex parte Minott</u> , 972 S.W.2d 760 (Tex. Crim. App. 1998)	61
<u>Ex parte Moody</u> , 991 S.W.2d 856 (Tex. Crim. App. 1999).....	38
<u>Ex parte Moore</u> , 727 S.W.2d 578 (Tex. Crim. App. 1987)	61
<u>Ex parte Moss</u> , 446 S.W.3d 786 (Tex. Crim. App. 2014)	61
<u>Ex parte Moussazadeh</u> , 361 S.W.3d 684 (Tex. Crim. App. 2012)	54
<u>Ex parte Myers</u> , 618 S.W.2d 365 (Tex. Crim. App. 1981).....	28

<u>Ex parte Nelson</u> , 137 S.W.3d 666 (Tex. Crim. App. 2004).....	19, 62
<u>Ex parte Owens</u> , 206 S.W.3d 670 (Tex. Crim. App. 2006)	58
<u>Ex parte Parra</u> , 420 S.W.3d 821 (Tex. Crim. App. 2013).....	37
<u>Ex parte Parrott</u> , 396 S.W.3d 531 (Tex. Crim. App. 2013).	61
<u>Ex parte Patterson</u> , 902 S.W.2d 487 (Tex. Crim. App. 1995)	57
<u>Ex parte Payne</u> , 618 S.W.2d 380 (Tex. Crim. App. 1981)	10
<u>Ex parte Perales</u> , 215 S.W.3d 418 (Tex. Crim. App. 2007).....	19
<u>Ex parte Perez</u> , 398 S.W.3d 206 (Tex. Crim. App. 2013)	14, 15
<u>Ex parte Pruitt</u> , 689 S.W.2d 905 (Tex. Crim. App. 1985)	55
<u>Ex parte Reed</u> , 402 S.W.3d 39 (Tex. Crim. App. 2013).....	50
<u>Ex parte Reedy</u> , 282 S.W.3d 492 (Tex. Crim. App. 2009).....	17
<u>Ex parte Reyna</u> , 701 S.W.2d 921 (Tex. Crim. App. 1986).....	12
<u>Ex parte Reynolds</u> , 588 S.W.2d 900 (Tex. Crim. App. 1979).....	29
<u>Ex parte Rich</u> , 194 S.W.3d 508 (Tex. Crim. App. 2006).....	8, 19, 60, 62
<u>Ex parte Riley</u> , 193 S.W.3d 900 (Tex. Crim. App. 2006)	58
<u>Ex parte Roemer</u> , 215 S.W.3d 887 (Tex. Crim. App. 2007)	62
<u>Ex parte Rogers</u> , 629 S.W.2d 741 (Tex. Crim. App. 1982).....	55
<u>Ex parte Rusk</u> , 79 S.W.2d 865 (Tex. Crim. App. 1935).....	29
<u>Ex parte Schuessler</u> , 846 S.W.2d 850 (Tex. Crim. App. 1993)	17
<u>Ex parte Slaughter</u> , 689 S.W.2d 464 (Tex. Crim. App. 1985).....	55
<u>Ex parte Sledge</u> , 391 S.W.3d 104 (Tex. Crim. App. 2013)	14
<u>Ex parte Smith</u> , 296 S.W.3d 78 (Tex. Crim. App. 2009).....	35
<u>Ex parte Smith</u> , 444 S.W.3d 661 (Tex. Crim. App. 2014).....	15
<u>Ex parte Smith</u> , 678 S.W.2d 78 (Tex. Crim. App. 1984).....	54
<u>Ex parte Stansbery</u> , 702 S.W.2d 643 (Tex. Crim. App. 1986).	22

<u>Ex parte Tovar</u> , 901 S.W.2d 484 (Tex. Crim. App. 1995).....	54
<u>Ex parte Townsend</u> , 137 S.W.3d 79 (Tex. Crim. App. 2004)	8, 19, 60
<u>Ex parte Trainer</u> , 181 S.W.3d 358 (Tex. Crim. App. 2005)	5
<u>Ex parte Truong</u> , 770 S.W. 2d 810 (Tex. Crim. App. 1989)	8
<u>Ex parte Vestal</u> , 468 S.W.2d 372 (Tex. Crim. App. 1971).....	32
<u>Ex parte Walker</u> , 599 S.W.2d 332 (Tex. Crim. App. 1980)	60
<u>Ex parte Walton</u> , 422 S.W.3d 720 (Tex. Crim. App. 2014)	11
<u>Ex parte Webb</u> , 270 S.W.3d 108 (Tex. Crim. App. 2008).....	59
<u>Ex parte Weinstein</u> , 421 S.W.3d 656 (Tex. Crim. App. 2014).....	49
<u>Ex parte Whisenant</u> , 443 S.W.3d 930 (Tex. Crim. App. 2014)	12
<u>Ex parte Whiteside</u> , 12 S.W.3d 819 (Tex. Crim. App. 2000).....	14
<u>Ex parte Williams</u> , 637 S.W.2d 943 (Tex. Crim. App. 1982)	55
<u>Ex parte Williams</u> , 703 S.W.2d 674 (Tex. Crim. App. 1986)	19
<u>Ex parte Williams</u> , 704 S.W.2d 773 (Tex. Crim. App. 1986)	54
<u>Ex parte Wilson</u> , 716 S.W.2d 953 (Tex. Crim. App. 1986).....	53
<u>Ex parte Wilson</u> , 956 S.W.2d 25 (Tex. Crim. App. 1997).....	40
<u>Ex parte Wingfield</u> , 162 Tex. Crim. 112, 282 S.W.2d 219 (1955).....	19
<u>Faretta v. California</u> , 422 U.S. 806, 95 S. Ct. 2525 (1975)	33
<u>Fontaine v. United States</u> , 411 U.S. 213, 93 S. Ct. 1461 (1973)	53
<u>Foster v. State</u> , 693 S.W.2d 412 (Tex. Crim. App. 1985).....	41
<u>Fratra v. Quarterman</u> , 536 F.3d 485 (5th Cir. 2008).....	46
<u>Garza v. State</u> , 435 S.W.3d 258 (Tex. Crim. App. 2014).....	16
<u>Gerstein v. Pugh</u> , 420 U.S. 103, 95 S. Ct. 854 (1975).....	18
<u>Gibson v. State</u> , 726 S.W.2d 129 (Tex. Crim. App. 1987).....	15
<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S. Ct. 792 (1963).....	31

<u>Giglio v. United States</u> , 405 U.S. 150, 92 S. Ct. 763 (1972)	49
<u>Gonzalez v. State</u> , 8 S.W.3d 640 (Tex. Crim. App. 2000)	30
<u>Gonzalez v. United States</u> , 553 U.S. 242, 128 S. Ct. 1765 (2008)	35
<u>Goodspeed v. Estelle</u> , 436 F. Supp. 1383 (N.D. Tex. 1977).....	51
<u>Graham v. Florida</u> , 560 U.S. 48, 130 S. Ct. 2011 (2010)	47
<u>Gray v. Estelle</u> , 538 F.2d 1190 (5th Cir. 1976).....	51
<u>Gray v. Maryland</u> , 523 U.S. 185, 118 S. Ct. 1151 (1998)	45
<u>Greene v. Fisher</u> , 132 S. Ct. 38 (2011)	68
<u>Greer v. Thaler</u> , 380 Fed. Appx. 373 (5th Cir. 2010)	43
<u>Griffith v. Kentucky</u> , 479 U.S. 314, 107 S. Ct. 708 (1987).....	49
<u>Guajardo v. State</u> , 109 S.W.3d 456 (Tex. Crim. App. 2003).....	28
<u>Gutierrez v. Stephens</u> , 590 Fed. Appx. 371 (5th Cir. 2014)	43
<u>Haley v. Cockrell</u> , 306 F.3d 257 (5th Cir. 2002)	61
<u>Harrington v. Richter</u> , 562 U.S. 86, 131 S. Ct. 770 (2011)	72
<u>Harris v. Estelle</u> , 487 F.2d 1293 (5th Cir. 1974).....	18
<u>Harris v. New York</u> , 401 U.S. 222, 91 S. Ct. 643 (1971).....	26
<u>Heath v. Alabama</u> , 474 U.S. 82, 106 S. Ct. 433 (1985).....	29
<u>Hernandez v. State</u> , 273 S.W.3d 685 (Tex. Crim. App. 2008)	46
<u>Hernandez v. State</u> , 726 S.W.2d 53 (Tex. Crim. App. 1986)	34
<u>High v. State</u> , 573 S.W.2d 807 (Tex. Crim. App. 1978).....	51
<u>Hill v. Beto</u> , 390 F.2d 640 (5th Cir. 1968).....	29
<u>Hill v. Lockhart</u> , 474 U.S. 52, 106 S. Ct. 366 (1985)	54
<u>Holland v. Florida</u> , 560 U.S. 631, 130 S. Ct. 2549 (2010)	69
<u>Hood v. State</u> , 185 S.W.3d 445 (Tex. Crim. App. 2006).....	9
<u>Houston v. Estelle</u> , 569 F.2d 372 (5th Cir. 1978).....	52

<u>Howes v. Fields</u> , 132 S. Ct. 111 (2012)	23
<u>Hughes v. State</u> , 562 S.W.2d 857 (Tex. Crim. App. 1978)	24
<u>Illinois v. Perkins</u> , 496 U.S. 292, 110 S. Ct. 2394 (1990)	23
<u>In re Fisher</u> , 164 S.W.3d 637 (Tex. 2005)	30
<u>In re Lemke</u> , 13 S.W.3d 791 (Tex. Crim. App. 2000)	39
<u>J.E.B. v. Alabama ex rel. T.B.</u> , 511 U.S. 127, 114 S. Ct. 1419 (1994)	52
<u>Jackson v. Denno</u> , 378 U.S. 368, 84 S. Ct. 1774 (1964)	21, 24
<u>Jackson v. State</u> , 973 S.W.2d 954 (Tex. Crim. App. 1998)	21
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781 (1979)	19
<u>James v. State</u> , 763 S.W.2d 776 (Tex. Crim. App. 1989)	41
<u>Jimenez v. Quarterman</u> , 555 U.S. 113, 129 S. Ct. 681 (2009)	59
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 58 S. Ct. 1019 (1938)	21
<u>Jones v. Cunningham</u> , 371 U.S. 236, 83 S. Ct. 373 (1963)	68
<u>Jones v. State</u> , 795 S.W.2d 199 (Tex. Crim. App. 1990)	59
<u>Kansas v. Hendricks</u> , 521 U.S. 346, 117 S. Ct. 2072 (1997)	30
<u>Kennedy v. Mendoza-Martinez</u> , 372 U.S. 144, 83 S. Ct. 554 (1963)	31
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S. Ct. 2574 (1986)	21, 36
<u>Kirby v. Illinois</u> , 406 U.S. 682, 92 S. Ct. 1877 (1972)	32, 48
<u>Lafler v. Cooper</u> , 132 S. Ct. 1376 (2012)	39
<u>Lawrence v. Florida</u> , 549 U.S. 327, 127 S. Ct. 1079 (2007)	68, 69
<u>Levy v. State</u> , 818 S.W.2d 801 (Tex. Crim. App. 1991)	60
<u>Lewis v. State</u> , 428 S.W.3d 860 (Tex. Crim. App. 2014)	47
<u>Liteky v. United States</u> , 510 U.S. 540, 114 S. Ct. 1147 (1994)	18
<u>Lozada v. Deeds</u> , 498 U.S. 430, 111 S. Ct. 860 (1991)	74, 76
<u>Lyles v. Estelle</u> , 658 F.2d 1015 (5th Cir. 1981)	33

<u>Lyndsey v. State</u> , 760 S.W.2d 649 (Tex. Crim. App. 1988).....	76
<u>Maples v. Thomas</u> , 132 S. Ct. 912, 924 (2012)	71
<u>Mapp v. Ohio</u> , 367 U.S. 643, 81 S. Ct. 1684 (1961)	20
<u>Marin v. State</u> , 851 S.W.2d 275 (Tex. Crim. App. 1993).....	16
<u>Martin v. McCotter</u> , 796 F.2d 813 (5th Cir. 1986)	41
<u>Martinez v. Court of Appeal</u> , 528 U.S. 152, 120 S. Ct. 684 (2000)	33
<u>Martinez v. Estelle</u> , 612 F.2d 173 (5th Cir. 1980)	24
<u>Martinez v. Ryan</u> , 132 S. Ct. 1309 (2012).....	72
<u>Maryland v. Shatzer</u> , 559 U.S. 98, 130 S. Ct. 1213 (2010)	23
<u>Massiah v. United States</u> , 377 U.S. 201, 84 S. Ct. 1199 (1964).....	33
<u>Massingill v. State</u> , 8 S.W.3d 733 (Tex. Crim. App. 1999).....	33
<u>Matthews v. State</u> , 768 S.W.2d 731 (Tex. Crim. App. 1989).....	15
<u>McGinnis v. United States</u> , 227 F.2d 598 (5th Cir. 1955).....	20
<u>McNeil v. Wisconsin</u> , 501 U.S. 171, 111 S. Ct. 2204 (1991).....	31
<u>McQuiggin v. Perkins</u> , 133 S. Ct. 1924 (2013).....	69, 73
<u>Melendez-Diaz v. Massachusetts</u> , 557 U.S. 305, 129 S. Ct. 2527 (2009)	44
<u>Mempa v. Rhay</u> , 389 U.S. 128, 88 S. Ct. 254 (1967)	32
<u>Mestas v. State</u> , 214 S.W.3d 1 (Tex. Crim. App. 2007)	58
<u>Meyer v. Estelle</u> , 621 F.2d 769 (5th Cir. 1980)	20
<u>Michigan v. Mosley</u> , 423 U.S. 96, 96 S. Ct. 321 (1975)	24
<u>Miffleton v. State</u> , 777 S.W.2d 76 (Tex. Crim. App. 1989)	21
<u>Miles v. State</u> , 259 S.W.3d 240 (Tex. Crim. App. 2008)	28
<u>Miller v. Alabama</u> , 132 S. Ct. 2455 (2012)	47
<u>Miller v. Estelle</u> , 677 F.2d 1080 (5th Cir. 1982).....	71
<u>Minnick v. Mississippi</u> , 498 U.S. 146, 111 S. Ct. 486 (1990).....	24

<u>Miranda v. Arizona</u> , 384 U.S. 436, 86 S. Ct. 1602 (1966)	22
<u>Missouri v. Frye</u> , 132 S. Ct. 1399 (2012)	38
<u>Missouri v. McNeely</u> , 133 S. Ct. 1552 (2013).....	25
<u>Missouri v. Seibert</u> , 542 U.S. 600, 124 S. Ct. 2601 (2004)	26
<u>Monge v. California</u> , 524 U.S. 721, 118 S. Ct. 2246 (1998)	60
<u>Monreal v. State</u> , 947 S.W.2d 559 (Tex. Crim. App. 1997).....	40
<u>Monroe v. Collins</u> , 951 F.2d 49 (5th Cir. 1992)	43
<u>Montejo v. Louisiana</u> , 556 U.S. 778, 129 S. Ct. 2079 (2009)	33
<u>Montgomery v. Louisiana</u> , 135 S. Ct. 1546 (2016)	47
<u>Moody v. Quarterman</u> , 476 F.3d 260 (5th Cir. 2007).....	52
<u>Murray v. Carrier</u> , 477 U.S. 478, 106 S. Ct. 2639 (1986).....	71
<u>Nash v. Estelle</u> , 597 F.2d 513 (5th Cir. 1979)	24
<u>Nelson v. Quarterman</u> , 472 F.3d 287 (5th Cir. 2006).....	72
<u>New York v. Quarles</u> , 467 U.S. 649, 104 S. Ct. 2626 (1984).....	26
<u>North Carolina v. Pearce</u> , 395 U.S. 711, 89 S. Ct. 2072 (1969).....	50
<u>Odelugo v. State</u> , 443 S.W.3d 131 (Tex. Crim. App. 2014).....	40
<u>Okonkwo v. State</u> , 398 S.W.3d 689 (Tex. Crim. App. 2013).....	36
<u>Oregon v. Bradshaw</u> , 462 U.S. 1039, 103 S. Ct. 2830 (1983).....	25
<u>Oregon v. Elstad</u> , 470 U.S. 298, 105 S. Ct. 1285 (1985).....	26
<u>Orozco v. Texas</u> , 394 U.S. 324, 89 S. Ct. 1095 (1969)	23
<u>Padilla v. Kentucky</u> , 559 U.S. 356, 130 S. Ct. 1473 (2010)	38
<u>Pape v. Thaler</u> , 645 F.3d 281 (5th Cir. 2011)	72
<u>Paredes v. State</u> , 462 S.W.3d 510 (Tex. Crim. App. 2015).....	44, 45
<u>Parke v. Raley</u> , 506 U.S. 20, 113 S. Ct. 517 (1992)	32
<u>Patterson v. Illinois</u> , 487 U.S. 285, 293 (1988).....	33

<u>Pennsylvania v. Finley</u> , 481 U.S. 551, 107 S. Ct. 1990 (1987)	40
<u>Pennsylvania v. Muniz</u> , 496 U.S. 582, 110 S. Ct. 2638 (1990)	26
<u>Pennsylvania v. Ritchie</u> , 480 U.S. 39, 107 S. Ct. 989 (1987).....	46
<u>Penry v. Lynaugh</u> , 109 S. Ct. 2934 (1989)	18
<u>Perez v. State</u> , 310 S.W.3d 890 (Tex. Crim. App. 2010).....	36
<u>Perillo v. Johnson</u> , 205 F.3d 775 (5th Cir. 2000).....	40
<u>Perry v. New Hampshire</u> , 132 S. Ct. 716 (2012)	49
<u>Peyton v. Rowe</u> , 391 U.S. 54, 88 S. Ct. 1549 (1968)	10
<u>Phillips v. State</u> , 362 S.W.3d. 606 S. (Tex. Crim. App. 2011)	56
<u>Powers v. Ohio</u> , 499 U.S. 400, 111 S. Ct. 1364 (1991)	52
<u>Proctor v. State</u> , 967 S.W.2d 840, Tex. Crim. App. 1998).....	56
<u>Ramirez v. Estelle</u> , 678 F.2d 604 (5th Cir. 1982).....	71
<u>Ranson v. State</u> , 707 S.W.2d 96 (Tex. Crim. App. 1986).....	22
<u>Ratcliff v. Estelle</u> , 597 F.2d 474 (5th Cir. 1979)	43
<u>Rhines v. Weber</u> , 544 U.S. 269, 125 S. Ct. 1528 (2005)	70
<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S. Ct. 1682 (1980)	23, 26
<u>Richardson v. Marsh</u> , 481 U.S. 200, 107 S. Ct. 1702 (1987)	45
<u>Richardson v. Procnier</u> , 762 F.2d 429 (5th Cir. 1985).....	70
<u>Ristaino v. Ross</u> , 424 U.S. 589, 96 S. Ct. 1017 (1976).....	42
<u>Rodriguez v. Court of Appeals, 8th Dist.</u> , 769 S.W.2d 554 (Tex. Crim. App. 1989).....	58
<u>Roper v. Simmons</u> , 543 U.S. 551, 125 S. Ct. 1183 (2005).....	47
<u>Rose v. Clark</u> , 478 U.S. 570, 106 S. Ct. 3101 (1986).....	16
<u>Rothgery v. Gillespie County</u> , 554 U.S. 191, 128 S. Ct. 2578 (2008).....	32
<u>Rumsfeld v. Padilla</u> , 542 U.S. 426, 124 S. Ct. 2711 (2004).....	68
<u>Saenz v. State</u> , 166 S.W.3d 270 (Tex. Crim. App. 2005).....	27

<u>Samaniego v. State</u> , 952 S.W.2d 50 (Tex. Crim. App. 1997).....	58
<u>Sanchez v. State</u> , 120 S.W.3d 359 (Tex. Crim. App. 2003)	16
<u>Sanchez v. State</u> , 845 S.W.2d 273 (Tex. Crim. App. 1992)	28
<u>Schlup v. Delo</u> , 513 U.S. 298, 115 S. Ct. 851 (1995).....	73
<u>Schmerber v. California</u> , 384 U.S. 757, 86 S. Ct. 1826 (1966)	25
<u>Sheppard v. Maxwell</u> , 384 U.S. 333, 86 S. Ct. 1507 (1966)	42
<u>Sibron v. New York</u> , 392 U.S. 40, 88 S. Ct. 1889 (1968)	68
<u>Simmons v. United States</u> , 390 U.S. 377, 88 S. Ct. 967 (1968).....	24, 48
<u>Smith v. Cain</u> , 132 S. Ct. 627 (2012).....	49
<u>Sonnier v. State</u> , 913 S.W.6 511, 522-23 (Tex. Crim. App. 1995).....	35
<u>St. Pierre v. United States</u> , 319 U.S. 41 (1943)	68
<u>State v. Cruz</u> , 461 S.W.3d 531 (Tex. Crim. App. 2015).....	26
<u>State v. Gobert</u> , 275 S.W.3d 888 (Tex. Crim. App. 2009)	24
<u>State v. Morales</u> , 253 S.W.3d 686 (Tex. Crim. App. 2008)	37
<u>State v. Torres</u> , 805 S.W.2d 418 (Tex. Crim. App. 1991)	28
<u>State v. Williams</u> , 938 S.W.2d 456 (Tex. Crim. App. 1997).....	55
<u>State v. Yount</u> , 853 S.W.2d 6, 8 (Tex. Crim. App. 1993).....	56
<u>Stokes v. State</u> , 298 S.W.3d 428 (Tex. Crim. App. 2009).....	35
<u>Stone v. Powell</u> , 428 U.S. 465, 96 S. Ct. 3037 (1976).....	20, 22
<u>Stovall v. Denno</u> , 388 U.S. 293, 87 S. Ct. 1967 (1967).....	49
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052 (1984).....	34 - 41, 64
<u>Strickler v. Greene</u> , 527 U.S. 263, 119 S. Ct. 1936 (1999)	49
<u>Studer v. State</u> , 799 S.W.2d 263 (Tex. Crim. App. 1990)	56, 57
<u>Swicegood v. Alabama</u> , 577 F.2d. 1322(5 th Circuit. 1978)	20
<u>Tague v. Louisiana</u> , 444 U.S. 469, 100 S. Ct. 652 (1980)	23

<u>Taylor v. Louisiana</u> , 419 U.S. 522, 95 S. Ct. 692 (1975)	43
<u>Taylor v. State</u> , 474 S.W.2d 207 (Tex. Crim. App. 1971).....	29
<u>Teague v. Lane</u> , 489 U.S. 288, 109 S. Ct. 1060 (1989).....	15, 18
<u>Tennessee v. Street</u> , 471 U.S. 409, 105 S. Ct. 2078 (1985).....	46
<u>Texas v. Cobb</u> , 532 U.S. 162, 121 S. Ct. 1335 (2001).....	32
<u>Texas v. McCullough</u> , 475 U.S. 134, 106 S. Ct. 976 (1986)	9
<u>Tibbs v. Florida</u> , 457 U.S. 31, 102 S. Ct. 2211 (1982).....	29
<u>Trevino v. Thaler</u> , 133 S. Ct. 1911 (2013).....	72
<u>Turnbow v. Estelle</u> , 510 F.2d 127 (5th Cir. 1975).....	32
<u>Turner v. State</u> , 443 S.W.3d 128 (Tex. Crim. App. 2014).....	47
<u>United States v. Ash</u> , 413 U.S. 300, 93 S. Ct. 2568 (1973).....	48
<u>United States v. Barrientos</u> , 668 F.2d 838 (5th Cir. 1982)	67
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S. Ct. 2039 (1984)	41
<u>United States v. Dionisio</u> , 410 U.S. 1, 93 S. Ct. 764 (1973)	25
<u>United States v. Doe</u> , 878 F.2d 1546 (1st Cir. 1989).....	26
<u>United States v. Mara</u> , 410 U.S. 19, 93 S. Ct. 774 (1973).....	25
<u>United States v. Martin Linen Supply Co.</u> , 430 U.S. 564, 97 S. Ct. 1349 (1977).....	29
<u>United States v. Melancon</u> , 662 F.3d 708 (5th Cir. 2011).....	23
<u>United States v. Rivera</u> , 295 F.3d 461 (5th Cir. 2002)	43
<u>United States v. Savell</u> , 546 F.2d 43 (5th Cir. 1977).....	23
<u>United States v. Scott</u> , 854 F.2d 697 (5th Cir. 1988).....	43
<u>United States v. Tucker</u> , 404 U.S. 443, 92 S. Ct. 589 (1972).....	32
<u>United States v. Wade</u> , 388 U.S. 218, 87 S. Ct. 1926 (1967).....	25, 48
<u>Virgil v. Dretke</u> , 446 F.3d 598 (5th Cir. 2006).....	37
<u>Wainwright v. Sykes</u> , 433 U.S. 72, 97 S. Ct. 2497 (1977).....	35, 71

<u>Wardlaw v. Cain</u> , 541 F.3d 275 (5th Cir. 2008)	68
<u>Warren v. State</u> , 514 S.W.2d 458 (Tex. Crim. App. 1974).....	28
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S. Ct. 1920 (1967).....	46
<u>Webb v. Texas</u> , 409 U.S. 95, 93 S. Ct. 351 (1972).....	46
<u>White v. Estelle</u> , 720 F.2d 415 (5th Cir. 1983).....	25
<u>Whorton v. Bockting</u> , 549 U.S. 406, 127 S. Ct. 1173 (2007).....	44
<u>Wilkerson v. State</u> , 726 S.W.2d 542 (Tex. Crim. App. 1986).....	36
<u>Williams v. Illinois</u> , 132 S. Ct. 2221 (2012).....	45
<u>Williams v. State</u> , 270 S.W.3d 112 (Tex. Crim. App. 2008).....	23
<u>Williams v. State</u> , 549 S.W.2d 183 (Tex. Crim. App. 1977).....	33
<u>Williams v. Taylor</u> , 529 U.S. 362, 120 S. Ct. 1495 (2000)	72
<u>Wilson v. Cain</u> , 662 F.3d 708 (5th Cir. 2011)	23
<u>Withrow v. Williams</u> , 507 U.S. 680, 113 S. Ct. 1745 (1993).....	22
<u>Wong Sun v. United States</u> , 371 U.S. 471, 83 S. Ct. 407 (1963)	20
<u>Wottlin v. Fleming</u> , 136 F.3d 1032 (5th Cir. 1998).....	68

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CHAPTER 5 TABLE OF CONTENTS

CHAPTER 5 - PENDING CHARGES AND DETAINERS

5.1 - Introduction2

5.2 - Detainers Generally2

 5.2.1 - Removal of Resolved, Expired, or Erroneous Detainers3

5.3 - Texas Detainers3

 5.3.1 - Right to Counsel4

 5.3.2 - Trial of Unresolved Charges.....4

 5.3.3 - Motion for Speedy Trial5

 5.3.4 - Guilty Pleas.....5

 5.3.5 - Traffic Violations6

 5.3.6 - Untried Misdemeanors7

 5.3.7 - State Jail Detainers7

 5.3.8 - Crimes Committed While in TDCJ8

 5.3.9 - Untried Charges with No Detainer9

 5.3.10 - SAFFP Detainers9

 5.3.11 - Forms10

5.4 - Pending Charges in Other States11

 5.4.1 - Introduction11

 5.4.2 - Law on the Interstate Agreement on Detainers Act11

 5.4.3 - Prisoner Exchange within the U.S.12

 5.4.4 - Case Law12

 5.4.5 - Forms13

5.5 - Extradition13

5.6 - Federal Detainers and Transfers to Federal Penitentiary.....14

5.7 - Community Supervision (Probation) Revocation/Probation Waiver Program15

 5.7.1 - Introduction15

 5.7.2 - Misdemeanor Community Supervision (Probation) Revocation16

 5.7.3 - Deferred Community Supervision Revocation.....16

 5.7.4 - Appealing a Deferred Community Supervision17

 5.7.5 - Source of Rights17

 5.7.6 - Case Law18

 5.7.7 - Forms19

5.8 - Questions Offenders Often Ask.....20

5.9 - Table of Authorities.....22

CHAPTER 5 - PENDING CHARGES AND DETAINERS

§5.1 - Introduction

Individuals in TDCJ custody may have charges pending against them. It is important to resolve these outstanding cases. Depending on the severity of the alleged offense, an outstanding case may prevent an offender from being released on parole, prevent enrollment in certain programs, affect his personal credit rating, or may result in collection activity due to unpaid fines or costs. There are several ways to resolve criminal cases, such as entering into a plea agreement or even taking a case to trial. In selecting how to proceed with a case, it is important that offenders understand their rights as well as the potential repercussions of a conviction. Both Texas law and the federal constitution provide defendants with a number of rights and protections in criminal proceedings such as a right to counsel, the right to be present during the disposition of the case, and the right to a trial without an extended delay that affects the defendant's ability to present an adequate defense. Further, some offenses carry civil penalties that are separate from criminal punishment for the case such as fees or ineligibility or cancellation of certain licenses.

§5.2 - Detainers Generally

If a county prosecutor elects to pursue charges against an offender who is in TDCJ's custody, a detainer will be filed against the offender. A detainer is a notice to prison officials advising them that there are outstanding criminal charges pending against the offender in the jurisdiction that placed the detainer. If a detainer is entered against an offender, officials will not release him at the end of the term of his sentence. Instead TDCJ will transfer custody of the offender to the county where the detainer is pending so that he may be tried for pending charges. Jurisdictions permitted to place detainers include the federal government, other states, and other Texas counties.

Offenders arriving at the Byrd Unit or a transfer facility are asked whether they have untried cases in other counties. If they tell TDCJ that they do, TDCJ Classification and Records sends a letter to the sheriff of that county asking them if they want to place a detainer (hold) on the offender. When authorities find out an offender is in TDCJ, they generally will send a copy of the warrant or indictment to TDCJ with a request that a detainer be placed in the offender's TDCJ records. TDCJ then notifies the offender that he has a detainer. When the offender discharges or is to be released on parole, the offender will be transferred to the custody of the authority that placed the detainer with a courtesy copy to the offender. A sample of the letter TDCJ sends appears in Volume 2 at SCFO REF 5.1 (1 page).

The Legislature repealed Texas Revised Civil Statutes Annotated, Article 6184(d), effective August 29, 1977. As a result, an offender is no longer prohibited from becoming a trustee because of a detainer. However, the detainer may still have some detrimental effects:

1. An offender may be prevented from paroling, or the approved parole plan may limit parole to the detainer.
2. Unless an offender takes immediate steps to ask the prosecutor to set a trial date, he may lose the opportunity to have any conviction run concurrently with the present conviction. As a consequence of the detainer, an offender is entitled to time credit from the date that it was placed to the date of the detainer's removal or sentencing. This time credit applies **only** to the same case on which the detainer was placed. It will not apply to other cases.

§5.2.1 - Removal of Resolved, Expired, or Erroneous Detainers

In some instances a detainer is improperly placed against an offender due to a case of mistaken identity or other administrative error. Only the agency that places the detainer has the authority to request its removal from an offender's TDCJ records. If incorrect information is affecting an offender's classification, he can write either by truck mail or first class mail to:

Classification Committee
P.O. Box 99
Huntsville, Texas 77342

If incorrect information is affecting an offender's parole, he should notify the parole counselor on his unit, or write to:

Texas Board of Pardons and Paroles
P.O. Box 13401, Capitol Station
Austin, Texas, 78711

Tips for writing a clear and concise letter can be found in Chapter 2 §2.5 Legal Writing.

§5.3 - Texas Detainers

How to proceed in a matter that is unresolved is often a decision of strategy. In some instances, an offender may choose to enter a plea agreement with the prosecutor or file a motion for a speedy trial. Unfortunately, SCFO is unable to assist offenders with making these decisions. Below is some information that may help an offender select an approach that meets his needs.

§5.3.1 - Right to Counsel

If an offender is indigent and faces charges for a felony or a Class A or B misdemeanor, he or she is entitled to a court-appointed (government-funded) attorney. The court system is complex and having an attorney can help offenders make important decisions such as whether to accept a plea offer. A lawyer also can explain the repercussions of these decisions, including possible collateral consequences or civil penalties under Texas law, such as potential hefty surcharges for renewing a driver's license (varying from \$100 to \$2000 depending on the nature of the offense), or possible ineligibility for public housing or certain professional licensures.

Article 1.051 of the Code of Criminal Procedure mandates that courts must supply counsel to indigent defendants within one to three working days (depending on the size of the county) of receiving a defendant's request for counsel, if adversarial judicial proceedings have been initiated against the defendant. Although there are many different ways that "adversarial judicial proceedings" may be initiated against a defendant, they typically are initiated by an Article 15.17 magistrate hearing following the defendant's arrest or by the filing of an indictment or information. For a more extensive explanation of adversarial judicial proceedings see Chapter 3.

§5.3.2 - Trial of Unresolved Charges

Whether an offender proceeds with counsel or elects to represent himself, it may be in his interest to try his case. In some instances, the presiding judge may sentence the offender to a prison term that runs concurrently with his pre-existing sentence, which would result in his eligibility for release on parole without affecting the amount of time he must serve in state custody. However, when proceeding without counsel it is important that a defendant understand the dangers of self-representation. For example, *pro se* defendants (defendants representing themselves) must follow all of the rules of trial procedure and will not be entitled to repeat proceedings previously held or waived solely on the grounds or the subsequent appointment or retention of counsel. See Faretta v. California, 422 U.S. 806 (1975), and Texas Code of Criminal Procedure, Article 1.051(g) & (h).

If an offender decides to try his case *pro se*, he should start the proceedings for removal of the detainer immediately. He can copy, modify and send the sample letter in Volume 2 at SCFO REF 5.2 (1 page) to court to request a bench warrant to transfer him to the county where the charges were filed against him. Court addresses can be found in the Texas Legal Directory in the unit law library.

§5.3.3 - Motion for Speedy Trial

Although the time frames designated in the Texas Speedy Trial Act were declared unconstitutional, offenders still have the constitutional right to a speedy trial and alternative Motion to Dismiss Warrant. *See* Barker v. Wingo, 407 U.S. 514 (1972), and Strunk v. United States, 412 U.S. 434 (1973) (holding that if the reviewing court finds that the defendant's right to a speedy trial was violated, the indictment must be dismissed or the conviction overturned). Courts balance four factors to assess whether a defendant's right to a speedy trial has been violated: the length of the delay, the reason for the delay, the defendant's assertion of his right, and the prejudice to the defendant. *Id.* at 530. Delays that are due to the actions of the defendant's conduct such as requests for continuances, interlocutory appeals or even including intervening trials or trial within another jurisdiction or even prolonged attempts to evade law enforcement will not trigger a speedy trial violation. *Id.* at 531; *See* Russell v. Lynaugh, 892 F.2d 1205, 1215 (5th Cir. 1989). The decision to file a motion for speedy trial is one of strategy and this office cannot assist an offender in making that decision.

There may be occasions when an offender may want to wait, particularly if a serious crime such as murder, rape, or an aggravated robbery is involved. The offender may wish to let the temper of the prosecutor and community settle down before requesting a trial.

If an offender is serving a lengthy sentence and the detainer is not having an adverse effect, he may want to wait because as time passes it may be more difficult for the State to prove its case (e.g., witnesses may no longer be available, etc. and the county may eventually dismiss the charges). On the other hand, the offender may want to go to trial as soon as possible to get the sentence to run concurrently with a present conviction or because the offender thinks the case can be won and does not want a detainer in his TDCJ records. If an offender decides to go to trial on the pending charges and have the detainer removed, he should start the proceedings for the removal of the detainer immediately. He can copy, modify, and send the sample letter in Volume 2 at SCFO REF 5.2 (1 page) to the court. Court addresses can be found in the Texas Legal Directory in the unit law library.

§5.3.4 - Guilty Pleas

Offenders also may resolve their cases by entering a plea agreement with the prosecutor. Before accepting a plea, it is important to understand both the suggested punishment and any collateral consequences of the conviction, such as sex offender registration, prohibition from

working in certain professions, or civil commitment as a sexually violent predator (see Chapter 12 of this Handbook).

In order to obtain the assistance of counsel to initiate and advise upon an offender's plea negotiations, an offender should request the appointment of counsel using the process described in §5.3.1. To commence plea negotiations on his case without representation by counsel, an offender can contact the court in which the charges are pending for information about this case. Under Texas law, the court must inform a defendant in writing of the right to counsel and the procedures for requesting a court-appointed lawyer. *See* Texas Code of Criminal Procedure, Article 27.19(a) (2). If an offender elects to proceed without counsel, he must waive this right before speaking with a prosecutor about his case. If an offender is able to reach an agreement with the prosecutor in his case, either through his attorney or direct negotiations, he then has two options regarding how to enter a plea. Article 33.03 of the Code of Criminal Procedure provides that a defendant has a right to be present in all proceedings and may submit a motion to the presiding court for a bench warrant in order to be transferred to appear in person. He also may waive his right to be present and enter a plea of guilty via closed circuit teleconferencing, or in writing before the court with jurisdiction over the county where the penal institution in which he is detained is located. *See* Tex. Code Crim. Proc. Arts. 27.18 & 27.19.

§5.3.5 - Traffic Violations

If an offender thinks he has pending traffic violations it is his responsibility to contact the court and make arrangements to resolve the charges. The following course of action may be helpful:

1. First, determine what tickets, if any, exist. To do this, the offender should write the appropriate County Court, Justice of the Peace Court, or Municipal Court. The letter should include:
 - A. information about the offender - full name, date of birth, driver's license number and address so that a response can be sent from the court;
 - B. information about the ticket - approximate date the ticket was issued, where, by whom (city police, sheriff deputy, highway patrol, etc.) and what it was for (speeding, running a stop sign, etc.); and
 - C. a request for specific information - list of unresolved tickets, the cause numbers, charges, court number, name of judge, current status, and the amount of the fine, if

any. Court addresses can be found in the Texas Legal Directory located in the unit law library.

2. When an offender receives the information, he should have someone from his family pay the ticket. If this is not possible, the offender can write to the judge and explain his current situation (in TDCJ, for how long, and minimum expiration date, no money, etc.). The offender can ask the judge what can be done to take care of the ticket(s). Tips for writing a clear and concise letter can be found in Chapter 2, Section 2.5 Legal Writing. While jurisdictions may demand the payment of the monetary assessments, there is a slight possibility that the judge might drop the charges, or grant time served in exchange for a “guilty” or “no contest” plea. An offender should ask if the plea will result in a recorded conviction in his case. Before agreeing to such a plea, he should feel comfortable that any penalty/fine assessed will be an acceptable result.

Note: An offender should consider the possibility that contacting a county, municipality, or other court to dispose of an outstanding traffic ticket could result in an order being issued to pay the fine, fee or other cost from the offender’s trust fund account. In order to avoid this consequence, an offender may consider resolving the matter after discharge or release from TDCJ.

§5.3.6 - Untried Misdemeanors

For untried misdemeanor detainers, the county generally will not bench warrant an offender. The county usually will either dismiss the case with time served or not take any action until the offender is released. If an offender wants to resolve an untried misdemeanor while in TDCJ, he should read §5.3.7 and §5.3.8, below.

If an offender has a community supervision (probated) misdemeanor sentence and wants it revoked, he should read §5.7.2, below.

§5.3.7 - State Jail Detainers

A state jail detainer can be ordered to run concurrently or consecutively with a TDCJ sentence. Other terms for “consecutive” are “cumulative” or “stacked.” State jail sentences will run concurrent with an offender’s TDCJ sentence(s) unless the court indicates on the sentencing documents that they are to run consecutively. The sentencing documents will specify the cause numbers of any conviction(s) that have been ordered to run consecutively. If these documents do not indicate that the case is to run consecutive, then it is safe to say it is running concurrently.

In the event that an offender has both a TDCJ and state jail conviction running concurrently, he or she will usually will be processed into the CID system first due to the longer time requirements normally served in custody on a TDCJ-ID sentence versus a state jail sentence. State jail convictions carry a maximum term in confinement of no more than two (2) years.

A “notify” may be placed in an offender’s TDCJ file regarding the state jail case. This signifies that there are other convictions of which there may be time left to serve. Prior to release from CID the earned flat time credits will be reviewed to determine if the time requirements for the state jail case will be satisfied when an offender is ready to be released from CID. State jail convictions do not earn good time credit. Therefore, only flat time is considered toward satisfying the state jail requirements. If enough time was not served on the CID case to satisfy the time requirements for the state jail case, upon release from CID the offender will be transferred to a state jail facility to serve the time remaining on that sentence. The minimum time requirements must be met **on each conviction** before an offender can be released from TDCJ.

§5.3.8 - Crimes Committed While in TDCJ

A detainer may be placed if an offender is charged with committing a crime while incarcerated in TDCJ. This detainer will remain in effect until final disposition of the charges by trial or dismissal.

An accused offender has a constitutional right, under both the state and federal constitutions, to remain silent and refuse to answer any questions about the incident until he has an attorney. Anything he tells anyone about the incident may be used as evidence against him at trial.

Once an accused offender is indicted, or charged by an information, he is entitled to court appointed representation if he is indigent. In addition, if an indigent offender is charged by a police affidavit or brought before a magistrate for a probable cause hearing he is also entitled counsel free of charge. For more information on when a defendant is eligible for court-appointed counsel, see Chapter 3. If an attorney from SCFO is appointed to represent an offender, he or she will be advised of the SCFO attorney’s name. If there is a conflict that affects SCFO’s representation, a local attorney will be appointed to the case. SCFO can advise an offender of the name of the local attorney but cannot interfere with the local attorney’s handling of the case. Refer to §3.1 for more information about trials.

The offender should write SCFO for assistance in removing the applicable detainer, if charges are not filed, dismissed or finalized.

§5.3.9 - Untried Charges with No Detainer

It is possible that an offender has pending charges he wants to resolve but does not have a detainer. He still has the constitutional right to a speedy trial. This right is based on due process of law; if bringing the offender to trial is delayed so long that an adequate defense cannot be prepared, it is a constitutional violation of the offender's rights. *See Barker v. Wingo*, 407 U.S. 514 (1972). Note that there is no specific period of delay that would automatically violate the right to a speedy trial. Courts have ruled that a delay up to two years may not be a violation.

The Prosecuting Attorney (either the District or County Attorney) is under no obligation to either dismiss or try a case; however, an offender can write the prosecutor in the county where the untried charges are pending and request the charges either be dismissed or that he be bench-warranted back to stand trial.

If the offender is bench-warranted for trial, there is no guarantee he will receive a sentence with the same amount of time he is now serving, or that the convictions will not be stacked. Usually, if the offender pleads guilty, he will receive a new sentence with the same amount of time to run concurrently. If no detainer is in place, the offender is not entitled to receive time credit against any sentence ultimately received and the time already spent in TDCJ will not count.

If an offender informs TDCJ officials of possible outstanding charges when processed, TDCJ should have notified the county that he is in TDCJ. There may be several reasons why there is no detainer: (1) the prosecutor does not want to bench warrant the offender for a trial while he is in TDCJ; (2) the prosecutor does not know the offender is in TDCJ; (3) the prosecutor may not know the offender is the same person subject to prosecution; or (4) the offender might not have an untried charge.

SCFO does not have the ability to check whether an offender has untried charges, warrants or holds in this state, any other state or federal jurisdiction. Offenders can obtain TDCJ detainer information from the unit law librarian.

§5.3.10 - SAFPF Detainers

A Substance Abuse Felony Punishment Facility (SAFPF) detainer is not a detainer but a “notify” to TDCJ officials indicating that an offender has to complete SAFPF as a condition of his community supervision upon release from TDCJ. *See Texas Code of Criminal Procedure, Article 42.12 §14*. When he finishes his TDCJ sentence, more than likely he will be transferred to a TDCJ substance abuse unit to fulfill his SAFPF obligations. Only the Court that ordered this stipulation

can change it. An offender must pursue this matter on his own. Refer to Chapter 2 of this Handbook for tips on legal writing; for address information see the Texas Legal Directory in your unit law library.

§5.3.11 - Forms

If an offender has not already done so, he or she should read Section 5.3 above. An offender should send the forms listed below to the applicable court, by certified mail if possible. Tips for writing a clear and concise letter can be found in this Handbook at §2.6 - Legal Writing. An offender can find court address information in the Texas Legal Directory in your unit law library.

1. Motion for Court Appointed Counsel - An offender should copy, modify, and send the cover letter, Motion, and Order that appear in Volume 2 at SCFO REF 5.6 (5 pages) to request that the Court appoint an attorney to resolve untried pending charges. These forms can be sent to the court along with the Motion for Bench Warrant and Motion for Speedy Trial.
2. Motion for Speedy Trial - If an offender does not receive a response to his request for counsel, he should consider renewing the request before filing it on his own. If an offender still doesn't receive appointed counsel, the offender may consider filing a *pro se* motion for a speedy trial to reserve claim but should be aware that there are strategic considerations that may weigh against filing such a motion (*see* §5.3) and the offender may be prejudiced by making this strategic decision without the advice of counsel. Nonetheless, if an offender has waited at least sixty days and the court has not responded to the request for court appointed counsel, the offender can copy, modify, and send the Motion and Order that appear in Volume 2 at SCFO REF 5.7 (4 pages) to request that the Court resolve the untried pending charges. These forms can be sent to the court along with the Motion for Bench Warrant and Motion Requesting Court Appointed Counsel. If the Court fails to respond, an offender will have perfected his claim and can litigate his right to a Speedy Trial whenever the State attempts to pursue the charges at a later date.
3. Motion for Bench Warrant - An offender can copy, modify, and send the Motion and Order that appears in Volume 2 at SCFO REF 5.8 (3 pages) to request that the Court bench warrant him so that he can resolve the untried pending charges. These forms can

be sent to the court along with the Motion Requesting Court Appointed Counsel and Motion for Speedy Trial.

§5.4 - Pending Charges in Other States

§5.4.1 - Introduction

If an offender has a detainer for untried criminal charges pending in other states, he should be entitled to a speedy trial in most instances. Most states, except Louisiana and Mississippi, have agreed to cooperate with each other in order to help expedite proceedings on pending charges.

Texas Code of Criminal Procedure, Article 51.14 codifies the Interstate Agreement on Detainers Act into Texas law. This law sets forth the agreement that exists between states with regards to out-of-state detainers. The agreement enables an offender subject to another state's detainer to have a trial within 180 days after a request for final disposition has been received by that other state.

§5.4.2 - Law on the Interstate Agreement on Detainers Act

The Interstate Agreement on Detainers Act (IAD) provides for disposition of outstanding untried charges that may be pending in other states. *See* Texas Code of Criminal Procedure, Article 51.13. This act only applies to untried indictments, informations, or complaints. A probation or a parole is not an untried indictment, information, or complaint. This act does not apply if a detainer has not been placed on your TDCJ records for the untried charges.

Further, because Louisiana and Mississippi do not participate in the IAD, an offender cannot use the IAD to force authorities in those states to come to Texas and take him there for trial. An offender should contact that state to determine if there is a public defender's office that can advise him on the possibility of a motion for speedy trial in that case – if he wants to have those charges resolved. Addresses can be found in the Texas Legal Directory in the unit law library.

It is important that an offender knows a request for disposition under the IAD is a request for disposition of **all** untried indictments, informations, and complaints. Also, a request for disposition is a waiver, or agreement, for extradition to the other state.

Once the other state receives the paperwork from TDCJ, they have 180 days to extradite the offender for trial. If the authorities that placed the detainer fail to bring the offender back for trial within 180 days of receipt of the appropriate paperwork, the detainer should be dismissed.

An offender with questions or legal claims should send them to an attorney that practices in the jurisdiction outside the State of Texas. If the other state has placed a detainer, and an offender wants to be extradited to the state that filed the detainer, the offender should write to:

Donna Bell
Detainer, Extradition, and Fugitive Coordinator
TDCJ Classification and Records
P.O. Box 99
Huntsville, Texas 77342-0099

Offenders can obtain detainer information in the TDCJ computer from the unit law librarian. If there is no detainer from another state, an offender should write to the court, prosecutor, probation or parole officer. For tips on writing letters, see Chapter 2, §2.6 - Legal Writing.

§5.4.3 - Prisoner Exchange within the United States

The Interstate Corrections Compact, better known as Prisoner Exchange, operates within the United States. This compact basically means TDCJ has the authority to contract with other states in order for offenders to be sent and received from state-to-state. *See* Texas Code of Criminal Procedure, Article 42.19. All requests regarding prisoner exchange to another state can be sent by truck mail to:

Interstate Corrections Compact Coordinator
TDCJ Classification Administration
P.O. Box 99
Huntsville, Texas 77342-0099

The foreign country prisoner exchange program falls under separate provisions. It is not part of this compact. For more information, refer to §11.5 of this Handbook, entitled International Prisoner Transfer and Prisoner Exchange.

§5.4.4 - Case Law

Cuyler v. Adams, 449 U.S. 433 (1981). In the event an offender refuses to sign the form “Right to Request Disposition,” he must be afforded all the rights to challenge his transfer that he would otherwise have. He retains his right to file a writ of habeas corpus to challenge the legality of his delivery by Article IV (d) of the Interstate Agreement on Detainers Act.

Sassoon v. Stynchombe, 654 F.2d 371 (5th Cir. 1981). Even though the technical language of the act states that if a prisoner is returned to the sending state then the indictment shall be dismissed, the prisoner is not entitled to relief since he was not prejudiced, particularly since he requested to be sent back to the prison temporarily for medical treatment.

U.S. v. Scallion, 548 F.2d 1168 (5th Cir. 1977). Under normal circumstances the indictment, information, or complaint will be void if the state fails to bring the offender to trial within 180 days. Here, habeas corpus relief was denied since the offender caused the delay.

§5.4.5 - Forms

Agreement on Detainers Notice and Offender's Request for Disposition – A sample of the forms TDCJ sends to offenders appears in Volume 2 at SCFO REF 5.3 (4 pages).

§5.5 - Extradition

Extradition is a procedure whereby one state surrenders a defendant to another state for trial and/or possible incarceration. If an offender is wanted in another state and is not returned to the state by the Interstate Agreement on Detainers Act, then his presence will be requested by extradition. *See* Texas Code of Criminal Procedure, Article 51.13.

If an offender is to be extradited to another state, he will be taken to the local county courthouse. At such time, he will be advised of his legal rights, which include having an attorney appointed to fight extradition by way of a writ of habeas corpus.

1. The only grounds an offender has to challenge extradition are the following:
 - A. Whether the demand is in proper form;
 - B. The identity of the accused;
 - C. Whether the person sought is a fugitive from justice or committed an act which intentionally resulted in a crime in the demanding state; and
 - D. Whether the accused has been substantially charged with a crime.

If an offender has any other grounds to challenge the allegations, they must be raised at trial in the state that wants him. Generally, there is very little possibility of defeating extradition.

1. The normal procedure at TDCJ regarding extradition is as follows:
 - A. An offender will be asked if he would like to waive extradition; if he does, then the other state will come get him;
 - B. If he does not waive extradition, upon the mandatory release date, if applicable, he will be taken to a county jail to await arrival of a governor's warrant. If the offender is a candidate for parole, he will return to his permanent unit of assignment while the other state obtains the governor's warrant. This takes approximately 30 to 90 days;

- C. When the governor's warrant arrives, the offender will return to court where a judge will explain his rights and the possibility of filing a writ challenging the extradition; and
- D. The court will, at the offender's request, appoint counsel to file a writ of habeas corpus and set a reasonable time in which the writ must be filed.

§5.6 - Federal Detainers and Transfers to Federal Penitentiary

The notice requirements of the Speedy Trial Act of 1974 apply if the detainer is based on pending federal criminal charges which have not been tried. These provisions do not apply on detainers that have been lodged for charges which have previously been tried or for which no trial is required, such as probation or parole violations.

If an offender's detainer is for an untried federal charge, he should have received a form USM-17, "Notification Requirements – Speedy Trial Act" from TDCJ. If he wants the federal government to try him on this offense, he should sign the form and return it to TDCJ Classification and Records. Barring a good cause showing in court, the U.S. Marshal has 180 days after receipt of the signed form from TDCJ to try the offender on his charge(s).

If the detainer is for a tried charge, or a pending probation or parole violation, the speedy trial requirements do not apply. When released from TDCJ, the U.S. Marshal may take the offender into custody to revoke a pending probated federal sentence or have the offender serve his federal time.

The federal government has adopted a policy whereby offenders will serve their state time in a state prison. The only way for an offender to be transferred to a federal prison is if it is clearly stated on the state judgment and federal plea bargain agreement that the offender is to serve his state time in a federal prison. On the other hand, the offender will receive credit toward his federal sentence if the federal judgment designates TDCJ as the institution to serve the federal sentence or if the federal plea bargain states that the sentences are to run concurrently. Otherwise, the offender will remain in TDCJ and the U.S. Marshal will be notified of the release date.

An offender's federal sentencing papers and the federal authorities will determine whether the federal sentence will run concurrently with the state conviction(s) and if the offender will receive credit on the federal sentence for time served under this detainer. Neither SCFO nor TDCJ have any authority in this area. If the federal plea bargain provides that the sentences should run concurrently and they are not running concurrently, or that the offender should serve his sentence

in federal prison and he is not in federal prison, the offender should contact the federal public defender who handled the case. Addresses can be found in the Texas Legal Directory located in the unit law library.

§5.7 - Community Supervision (Probation) Revocation/Probation Waiver Program

§5.7.1 - Introduction

An offender under community supervision (previously known as “probation”) from a Texas county while in TDCJ will face one of the following possibilities:

1. The county with the community supervision will allow the offender to continue receiving credit toward supervision while in TDCJ; or
2. The county will file a motion to revoke based on a supervision violation and a *capias* will be issued. This stops time credit toward the discharge of community supervision.

Usually the counties will not follow the first alternative. Instead, the county will probably file a detainer with TDCJ. Consequently, street time will not be counted, and the offender will not begin to serve his sentence until his supervision is revoked. However, an offender may receive credit for the time the detainer is lodged toward serving any sentence received if supervision is revoked.

If an offender under community supervision is interested in waiving his right to a revocation hearing thereby allowing the court to revoke his supervision so that time can begin running, he should contact the prosecutor of the community supervision county and ask that his name be submitted to SCFO with the plea bargain offer to have his community supervision revoked. The plea offer should include: the number of years offered, if the sentence is to run concurrent or consecutive (stacked) with the sentence(s) the offender is presently serving, jail time credit, fines, attorney fees, restitution or court costs that may be applicable. Refer to the Note on Page 7 of this Chapter for further information.

By participating in this process, the offender chooses to waive his rights. In doing so, the offender waives his right to an attorney and a hearing and asks the court to revoke his community supervision and pronounce sentence. Prior to the offender’s court appearance, an attorney from SCFO will meet with the offender to ensure he understands the waiver process. **The offender must initiate the initial revocation proceeding** at least six months prior to his release date so that SCFO can arrange for an offer and a waiver of the revocation hearing.

Once a Motion to Revoke Community Supervision is filed, the offender may ask for a speedy revocation hearing. This may enable the offender to resolve the matter while in TDCJ. If the supervision is revoked, it normally results in a concurrent sentence. Please note, however, that a judge has the option of stacking the revocation sentence on top of the sentence already being served.

An offender has the right to reject the prosecutor's plea offer and seek outside counsel to negotiate on his behalf. If the offender is indigent or without means to afford counsel, he is entitled to have an attorney to represent him free of charge. Section 5.3.1 of this Chapter contains more information regarding how to request counsel.

§5.7.2 - Misdemeanor Community Supervision (Probation) Revocation

If a misdemeanor community supervision is revoked, the misdemeanor sentence could extend beyond an offender's incarceration in TDCJ. The offender will more than likely have a "notify" in his TDCJ computer detainer records. This means he will be released to the custody of the agency that placed the detainer so that he can complete any balances of time that he may owe to the county.

As previously mentioned in §5.7.1, an offender has the right to reject the prosecutor's offer and obtain outside counsel to negotiate for him.

§5.7.3 - Deferred Community Supervision Revocation

Unfortunately, our office cannot help an offender get a deferred community supervision revoked and have the sentence run concurrently with the sentence he may presently be serving in TDCJ. Only the revocation of regular community supervision is allowed in Article 42.12, §21 of the Texas Code of Criminal Procedure.

An offender must be bench warranted to the trial court with jurisdiction over the matter and be adjudicated guilty before the community supervision can be revoked. An offender can contact the District Attorney directly to see if that office is willing to bench warrant him back to revoke the deferred community supervision. Tips for writing a clear and concise letter can be found in this Handbook at §2.5 - Legal Writing. Addresses can be found in the Texas Legal Directory located in each unit law library. If a Motion to Adjudicate has been filed and the offender is indigent, he is entitled to have an attorney to represent him at no cost. For information on how to request counsel, see §5.3.1.

§5.7.4 - Appealing a Deferred Community Supervision

An offender may appeal the sentence for a revoked deferred community supervision that was imposed by the court. However, he must file the appeal within thirty (30) days of the sentencing date. He may **not** appeal the court's decision to find him guilty of the original charge. Refer to the Texas Code of Criminal Procedure, Article 42.12 §5(b) in your unit law library for more information.

§5.7.5 - Source of Rights

There is a constitutional right to a speedy revocation hearing, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. A “balancing test” is applied to determine whether an accused has been denied a speedy trial that considers: the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant resulting from the delay. *See Carney v. State*, 573 S.W.2d 24 (Tex. Crim. App. 1978). In addition to the “balancing test,” three interests are considered in determining prejudice to the defendant: 1) prevention of oppressive incarceration; 2) minimizing anxiety and concern of the accused; and 3) limiting the possibility that the defense will be impaired. *See Barker v. Wingo*, 407 U.S. 514 (1972).

An offender may demand a speedy revocation hearing; however, he must make this known to the court by requesting a speedy hearing. He must send his request to the court where he was convicted. As of September 1, 1989, it is possible to waive the right to a hearing in the sentencing court and ask the judge to revoke community supervision and impose sentence while an offender is in TDCJ. *See Texas Code of Criminal Procedure, Article 42.12 §21(b-2)*. A proper waiver must be signed before a judge.

The revocation hearing is administrative in nature. It is not considered to be a new trial. Consequently, an offender does not have the same rights as he would in a trial. For example, double jeopardy does not apply to these proceedings. Nonetheless, despite some limitations, the offender still has some due process and equal protection guarantees. An offender also has a right to counsel and, if indigent, a right to court-appointed counsel.

When the court revokes community supervision, it normally is obligated to assess the sentence as it was originally imposed at the punishment hearing. The court may, however, reduce the sentence within the statutory time span, if it so desires. *See Texas Code of Criminal Procedure, Article 42.12, §23(a)*. On the other hand, if the offender was originally given deferred adjudication

rather than regular community supervision, the court may assess punishment anywhere within the punishment range for that particular class of offense. Before an offender requests to have a deferred adjudication community supervision revoked, he should consult with outside counsel.

§5.7.6 - Case Law

Gagnon v. Scarpelli, 411 U.S. 778 (1973). An accused is entitled to a hearing before his probation is revoked.

Ross v. State, 523 S.W.2d 402 (Tex. Crim. App. 1975). The probationer is entitled to a speedy trial with regard to revocation proceedings.

Champion v. State, 590 S.W.2d 495 (Tex. Crim. App. 1979). The right to a speedy revocation hearing arises under Art. 42.12, §8(a), V.A.C.C.P.

Donavan v. State, 68 S.W.3d 633, 636 (Tex. Crim. App. 2002). A defendant on deferred probation has not been found guilty.

Nix v. State, 65 S.W.3d 664, 667-68 (Tex. Crim. App. 2001). There are “two exceptions to the general rule [that a defendant placed on deferred adjudication communication supervision may raise issues relating to the original plea proceeding only in appeals taken when deferred adjudication community supervision is first imposed]”. . . (1) the ‘void judgment’ exception, and (2) the ‘habeas corpus’ exception.

Von Schounmacher v. State, 5 S.W.3d 221, 223 (Tex. Crim. App. 1999). “Once the trial court proceeds to adjudication, it is restricted in the sentence it imposes only by the relevant statutory limits.” See also McCoy v. State, 81 S.W.3d 917, 919 (Tex. App. Dallas 2002, pet. ref’d).

Chandler v. State, 165 S.W.3d 63, 66-67 (Tex. App. Austin 2005). “[W]e find nothing preventing courts from imposing different terms of imprisonment at different times on separate convictions for which identical terms of deferred adjudication community supervision were originally imposed.”

Henderson v. State, 132 S.W.3d 112, 114 (Tex. App. Dallas 2004). Article 42.12 § 5(b) states that no appeal may be taken from the trial court’s determination to proceed with an adjudication of guilt.

Salinas v. State, 920 S.W.2d 431, 432 (Tex. App. Houston 1st Dist. 1996). “[U]ntil the court decides to defer further proceedings and place a defendant on probation without entering an adjudication of guilt, the duty to inform a defendant of the possible consequences of a violation of probation while on deferred adjudication does not arise.”

Taylor v. State, 911 S.W.2d 906, 909 (Tex. App. Fort Worth 1995, pet. ref'd). “[I]f a defendant is placed on deferred adjudication and successfully lives out the conditions of his probation, then evidence of that deferred adjudication would be admissible in a subsequent trial for another offense.

Bawcom v. State, 78 S.W.3d 360, 361 (Tex. Crim. App. 2002). “[T]he trial court may consider actions taken by the State before the motion to revoke is filed in determining whether the State has exercised due diligence in apprehending the probationer.”

Pierce v. State, 113 S.W.3d 431, 436 (Tex. App. Texarkana 2003). “[T]he general standards for reviewing factual sufficiency do not apply.”

Jackson v. State, 915 S.W.2d 104, 106 (Tex. App. San Antonio 1996). “In a proceeding to revoke probation . . . the inability of the probationer to pay the enumerated fees is an affirmative defense.”

Lugaro v. State, 904 S.W.2d 842, 843-44 (Tex. App. Corpus Christi 1995). “A defendant has the right to counsel at a revocation hearing unless it is affirmatively waived.”

Davis v. State, 150 S.W.3d 196, 208-09 (Tex. App. Corpus Christi 2004). “[A] trial court is permitted to extend a probationer’s period of community supervision with or without a revocation motion and with or without a hearing.”

Cantu v. State, 253 S.W.3D 273, 280 (Tex. Crim. App. 2008). “The right to a speedy trial attaches once someone (in the free world) becomes an “accused” person - he is arrested or charged.”

Henson v. State, 407 S.W.3d 764, 767 (Tex. Crim. App. 2013) “A defendant must raise a speedy-trial claim in the trial court to preserve said issue for appellate review.”

§5.7.7 - Forms

1. Motion for a Speedy Revocation - Copy, modify and send the Motion and Order that appear in Volume 2 at SCFO REF 5.4 (4 pages) to request that the Texas trial court have a prompt revocation of community supervision.
2. Motion for Dismissal - After waiting at least thirty (30) days, an offender should copy, modify and send the Motion and Order that appear in Volume 2 at SCFO REF 5.5 (3 pages) if the Court did not respond to the Motion for a Speedy Revocation.
3. Motion Requesting Court Appointed Counsel - An offender can copy, modify, and send the cover letter, Motion, and Order that appear in Volume 2 at SCFO REF 5.6 (4 pages)

to request that the Court appoint counsel so that he can resolve the pending probation. This form can be sent to the court along with the Motion for Bench Warrant and Motion for Speedy Trial.

4. Motion for Speedy Trial - An offender can copy, modify, and send the Motion and Order that appear in Volume 2 at SCFO REF 5.7 (3 pages) to request that the Court appoint counsel so that he can resolve the untried pending charges. This form can be sent to the court along with the Motion for Bench Warrant and Motion Requesting Court Appointed Counsel.
5. Motion for Bench Warrant - An offender can copy, modify, and send the motion and order that appear in Volume 2 at SCFO REF 5.8 (2 pages) to request that the Court bench warrant him so that he can resolve the pending probation or untried charges. This form can be sent to the court along with the Motion Requesting Court Appointed Counsel and Motion for Speedy Trial.

Note: Send the forms by certified mail if possible. Addresses can be found in the Texas Legal Directory in the unit's law library.

§5.8 - Questions Offenders Often Ask

1. HOW CAN I GET THIS DETAINER REMOVED?

Answer: The detainer will remain on your prison record until the agency that placed the detainer notifies TDCJ to remove it. Authorization to remove a detainer must be received from the agency that placed the detainer. See § 5.2.1 for additional information about what to do if you believe a detainer remains in place in error.

2. MY TRAVEL (COMMITTEE) CARD INDICATES THAT I HAVE PENDING CHARGES, BUT ALL OF MY OUTSTANDING CHARGES HAVE BEEN RESOLVED. HOW CAN I GET THIS INFORMATION REMOVED FROM MY PRISON RECORD?

Answer: The information on your travel (committee) card is based, in part, upon the information you provided at your initial interview when you first arrived at TDCJ. This information is also used on your Admission Summary. Events may occur later that lead to changes in some of this information, however, TDCJ does not alter the original information. If you indicated to them that you had a case pending at your initial interview, that

information will be typed on your card. It will not be removed even though the case is resolved at a future date.

3. I RECEIVED PROBATION IN A STATE OTHER THAN TEXAS AND NOW THAT I AM IN TDCJ THE OTHER STATE WANTS TO REVOKE MY PROBATION. HOW CAN I MAKE THEM BENCH-WARRANT ME SO THAT I CAN GET THIS PROBATION REVOKED AND RUN CONCURRENT WITH MY TEXAS TIME?

Answer: The Interstate Agreement on Detainers Act (IAD) applies only to charges that are untried. A probation is not an untried charge, therefore, the IAD **does not** apply. You cannot force the authorities to bench-warrant, or extradite, you to revoke the outstanding probation or parole.

4. I RECEIVED IAD PAPERS FROM THE CLASSIFICATION AND RECORDS OFFICE. CAN YOU TAKE CARE OF THIS FOR ME?

Answer: If you want to request disposition of charges that you have pending in another state **you** need to return the paperwork that was sent to you to TDCJ Classification and Records office. The attorneys in this office cannot be appointed to represent you on an out-of-state case. Please bear in mind that the IAD paperwork authorizes the receiving state to dispose of **any** pending charges you may have within that state.

CHAPTER 5 REFERENCES

SCFO REF 5.1 – Sample letter Classification and Records sends to counties with detainees

SCFO REF 5.2 – Sample letter Offender can send to District Attorney regarding a detainer

SCFO REF 5.3 – Notice TDCJ sends jurisdiction of Untried Indictments, Informations or Complaints

SCFO REF 5.4 – Motion and Order for Speedy Revocation Hearing

SCFO REF 5.5 – Motion to Dismiss State’s Motion to Revoke Community Supervision

SCFO REF 5.6 – Motion and Order for Court Appointed Attorney

SCFO REF 5.7 – Motion and Order for Speedy Trial

SCFO REF 5.8 – Motion and Order for Bench Warrant

§5.9 - Table of Authorities

Cases

Barker v. Wingo, 407 U.S. 514 (1972) 5, 9, 17

Bawcom v. State, 78 S.W.3d 360 (Tex. Crim. App. 2002) 19

Cantu v. State, 253 S.W.3d 273 (Tex. Crim. App. 2008)..... 19

Carney v. State, 573 S.W.2d 24 (Tex. Crim. App. 1978)..... 17

Champion v. State, 590 S.W.2d 495 (Tex. Crim. App. 1979)..... 18

Chandler v. State, 165 S.W.3d 63 (Tex. App. - Austin 2005) 18

Cuyler v. Adams, 449 U.S. 433 (1981)..... 12

Davis v. State, 150 S.W.3d 196 (Tex. App. - Corpus Christi 2004)..... 19

Donavan v. State, 68 S.W.3d 633 (Tex. Crim. App. 2002) 18

Faretta v. California, 422 U.S. 806 (1975) 4

Gagnon v. Scarpelli, 411 U.S. 778 (1973)..... 18

Henderson v. State, 132 S.W.3d 112 (Tex. App. - Dallas 2004)..... 18

Henson v. State, 132 S.W.3d 112 (Tex. Crim App. 2013) 19

Jackson v. State, 915 S.W.2d 104 (Tex. App. - San Antonio 1996)..... 19

Lugaro v. State, 904 S.W.2d 842 (Tex. App. - Corpus Christi 1995) 19

McCoy v. State, 81 S.W.3d 917 (Tex. App. - Dallas 2002) 18

Nix v. State, 65 S.W.3d 664 (Tex. Crim. App. 2001)..... 18

Pierce v. State, 113 S.W.3d 431 (Tex. App. - Texarkana 2003)..... 19

Ross v. State, 523 S.W.2d 402 (Tex. Crim. App. 1975)..... 18

Russell v. Lynaugh, 892 F.2d 1205 (5th Cir. 1989) 5

Salinas v. State, 920 S.W.2d 431 (Tex. App. - Houston [1st Dist.] 1996) 18

Sassoon v. Stynchombe, 654 F.2d 371 (5th Cir. 1981) 12

Strunk v. U.S., 412 U.S. 434 (1973)..... 5

Taylor v. State, 911 S.W.2d 906 (Tex. App. - Fort Worth 1995)..... 19

U.S. v. Scallion, 548 F.2d 1168 (5th Cir. 1977) 13

Von Schounmacher v. State, 5 S.W.3d 221 (Tex. Crim. App. 1999)..... 18

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CHAPTER 6 TABLE OF CONTENTS

CHAPTER 6 - TIME QUESTIONS

6.1 - Basic Eligibility Rules	2
6.2 - Jail Time	2
6.2.1 - Introduction	2
6.2.2 - Law on Jail Time	2
6.3 - Computation of Offender’s Jail Time Credit.....	4
6.4 - Conditions of Community Supervision	4
6.5 - Good Time Credits	5
6.5.1 - Forfeiture of Good Time Credits	6
6.5.2 - Suspension of Good Time Credits	7
6.5.3 - County Good Time	8
6.6 - Obtaining Concurrent Credit for Federal Sentences.....	8
6.6.1 - Effect of the Federal Detainer	9
6.6.2 - Commitment to Federal Custody.....	9
6.6.3 - Sentence Computation.....	9
6.6.4 - Release from Federal Sentence.....	10
6.6.5 - Supervised Release Term	10
6.6.6 - References	10
6.7 - Prison Management Act	10
6.7.1 - Introduction	10
6.7.2 - Source of Right.....	10
6.7.3 - Rules for SB727 Awards: Offense Date Prior to 02-20-87	11
6.7.4 - Rules for SB215 Awards: Offense Date on or after 02-20-87	11
6.7.5 - Case Law	12
6.8 - Concurrent Sentences	12
6.9 - Cumulative Sentences.....	13
6.9.1 - Credit for Jail Time.....	14
6.9.2 - Parole Eligibility.....	15
6.10 - Credit for Street Time.....	15
6.11 - Dispute Resolution	16
6.12 - State Jail Convictions	17
6.12.1 - Jail Time Credits.....	17
6.12.2 - State Jail Detainers	17
6.12.3 - Good Time	18
6.12.4 - Concurrent with ID Sentences	18
6.13 - Issuance of New TDCJ Numbers	18
6.14 - Improper Release.....	19
6.15 - Questions Offenders Often Ask.....	19
6.16 - Table of Authorities.....	22

CHAPTER 6 - TIME QUESTIONS

§6.1 - Basic Eligibility Rules

1. You are entitled to receive time credit on your present case(s) when you were held in:
 - A. *Physical custody* – “booked” in jail for your case(s), or
 - B. *Constructive custody* – spent time in custody of others with a hold, detainers or warrant “**placed**” by the county of your case(s).
2. Time spent in custody on a different case can only be applied to that case. Time credit earned for one case cannot be transferred to other cases.
3. If your parole or mandatory supervision was revoked **before** September 1, 2001, you are not entitled to receive credit for time spent out-of-custody, on the streets. If your parole or mandatory supervision was revoked on or after September 1, 2001, **and you meet certain eligibility requirements**, you are entitled to receive credit for time spent out on the street while on parole or mandatory supervision.
4. You cannot receive credit for time spent out-of-custody while on bond, probation, or as an escapee.

§6.2 - Jail Time

§6.2.1 - Introduction

The State Legislature decided in 1973 that you should be granted jail time credit toward your sentence. If you were sentenced before August 27, 1973, you generally have no right to receive credit for any jail time prior to your sentencing. However, the judge has the discretion to grant you this credit.

§6.2.2 - Law on Jail Time

Tex. Code Crim. Proc. art. 42.03 §2(a) obligates the trial court to credit your sentence with time spent in jail on “said cause,” from the time of your arrest and confinement until you are sentenced by the trial court. This statute applies to crimes that were committed after August 27, 1973.

To be eligible to receive jail time credit you must be considered in jail on the cause and fit into one of the following situations:

1. You were arrested for the offense for which you were later convicted and remained in custody until your transfer to TDCJ. You will get credit from the day of the arrest. See Ex parte Williams, 589 S.W.2d 711 (Tex. Crim. App. 1972);
2. You made bond, but that bond was later withdrawn or forfeited and you were again put in jail. You will get credit for the time between the arrest and making bond and for the time in jail after you were rearrested. You are not entitled to credit for time spent while out on bond. See Ex parte Allen, 548 S.W.2d 905 (Tex. Crim. App. 1977);

3. You were arrested on a different charge, but a hold or detainer for the case for which you are now in TDCJ was placed while you were in jail. You will get credit from the day the detainer was placed, not from the day of the arrest. *See Ex parte Spates*, 521 S.W.2d 265 (Tex. Crim. App. 1975);
4. You received probation on a particular case, you were arrested for probation violations, and put in jail. You should get jail time credit from the date of arrest and time spent in jail on a warrant for a motion to revoke that probation. *See Guerra v. State*, 518 S.W.2d 815 (Tex. Crim. App. 1975);
5. You were paroled or released on mandatory supervision and later arrested for violation of that parole or mandatory supervision. You should get credit from the day of the arrest on the warrant to revoke your parole or mandatory supervision. *See Ex parte Canada*, 754 S.W.2d 660 (Tex. Crim. App. 1988);
6. You were released by mistake through no fault of your own and you violated laws or any of the terms of release that would have applied had you been properly released. You will receive flat time credit for only the time spent in physical custody from the date released in error to re-incarceration. *See Ex parte Hale*, 117 S.W.3d 866 (Tex. Crim. App. 2003). If you broke no laws and complied with the terms of your release, then you should get credit for all of the time spent on the erroneous release. *See Ex parte Rowe*, 277 S.W.3d 18 (Tex. Crim. App. 2009);
7. You were a juvenile at the time of your arrest and later convicted as an adult for the same charge. You should get credit for all of the time you were in the juvenile detention facility pending certification to stand trial as an adult. *See Ex parte Green*, 688 S.W.2d 555 (Tex. Crim. App. 1985);
8. You should get credit for the time you were in a work furlough program. *See Ex parte Henson*, 731 S.W.2d 97 (Tex. Crim. App. 1987);
9. You should get credit for the time you were awaiting transport to Texas from out-of-state, being held on a fugitive warrant from Texas. *See Ex parte Kuban*, 763 S.W.2d 426 (Tex. Crim. App. 1989);
10. You were sentenced on a case, which was to run concurrently with an earlier conviction and TDCJ released you based on the earlier conviction, without considering the subsequent conviction. As long as you violated no laws nor any terms of your release, you should get credit for all of the time spent on the erroneous release. *See Ex parte Rowe*, 277 S.W.3d 18 (Tex. Crim. App. 2009); or
11. While in TDCJ on other charges, a detainer is placed against you. As long as the detainer is not withdrawn, you should get credit for the time from the placing of the detainer to the date of sentencing. If the detainer is placed and then withdrawn, and you are later sentenced on the case, you are eligible for the time the detainer was in place. *See Ex parte Bynum*, 772 S.W.2d 113 (Tex. Crim. App. 1989).

§6.3 - Computation of Offender's Jail Time Credit

The computation of the credit granted to an offender for time served is made by the TDCJ Classification and Records Department, not SCFO.

If you believe the judge did not give you credit for all the jail time to which you are entitled, or if you believe your time credits are incorrect, complete the Jail Time Questionnaire at SCFO REF 6.1 and send it to the SCFO office.

If you think TDCJ failed to properly calculate the time awarded to you on your judgment(s), contact the SCFO office. SCFO will bring that clerical error to the attention of Classification & Records.

§6.4 - Conditions of Community Supervision

There are a number of situations in which an individual may be released to community supervision (formerly "probation") instead of being sent to prison. The terms of release will be outlined in the sentencing documents and often these terms include "conditions." Fulfilling these conditions may involve remaining in custody in a county jail, and/or confinement in a treatment facility due to a substance abuse problem. Time served under these conditions is often referred to as "jail time as a condition of community supervision."

When the Court places an individual on community supervision, it may order participation in a special program as a condition of that supervision. Should revocation occur for those initially placed on supervision before September 1, 2007, credit for time served as a condition of community supervision will not be awarded. The time spent in the program is part of the terms of supervision. The supervision was granted as an alternative to confinement in prison. It is not considered the same thing as "flat time" served towards fulfilling a prison sentence.

Effective September 1, 2007, the law was changed regarding credit for time spent in a substance abuse treatment facility. This change enables a person who was initially placed on **deferred adjudication** on or after September 1, 2007, to receive credit for time spent in a substance abuse treatment facility operated by the Texas Department of Criminal Justice under the Texas Government Code §493.009, or another court-ordered residential program or facility. This time must have been served as a condition of deferred adjudication and only applies when **the defendant successfully completes the treatment program** at that facility. This change does not affect offenders who receive a conviction in which the punishment was suspended, nor will it apply to time spent in county jail, restitution centers or intermediate sanction facilities.

Below are some Community Corrections Facilities in which an individual may be required to serve a term as a condition of community supervision as listed in Government Code §509.001:

1. a Restitution Center;
2. a Court Ordered Residential Treatment Facility;
3. a Substance Abuse Treatment Facility (SAFP);
4. a Custody Facility or Boot Camp;
5. a Facility for an Offender with a Mental Impairment (as defined by Health and Safety Code §614.001);
6. an Intermediate Sanction Facility (ISF);

This list is subject to change with each legislative session. For additional information see Tex. Code Crim. Proc. art 42.12 §23(b) and §18(c).

§6.5 - Good Time Credits

TDCJ's rule and policies relating to good conduct time and offender classification are reviewed at least once a year by the Board of Criminal Justice. *See* Texas Government Code §498.005. These are not laws; they are **rules and policies**. Any changes in good time policies can be retroactive. *See* Bohannon v. Texas Board of Criminal Justice, 942 S.W. 2d 113 (Tex. App. 1997).

Good time credits are determined by the TDCJ Classification and Records Department pursuant to SB 640 (1983) and SB 245 (1987). The good time credit chart (*See* SCFO REF 6.2) are separated into two categories: pre-70th Legislature and post-70th Legislature. If your offense was committed prior to September 1, 1987, you are a pre-70th Legislature offender. If your offense was committed on or after September 1, 1987 you are a post-70th Legislature offender.

Pre-70th Legislature offenders are capable of earning good time credits for completion of certain educational programs while in TDCJ. Post-70th Legislature offenders do not have this privilege.

The language has been changed from educational good conduct time credits to “work” or “diligent” participation credits for post-70th Legislature offenders. There is no longer a separation of good conduct time and educational good conduct time. These two time-earning categories have now been combined. A post-70th offender will accrue good conduct time based on his/her time earning status, and work time based on his/her attendance on his/her assigned task. Your assigned task may be work or school. You do not accrue good conduct time for successful completion of

educational programs. Instead, work time may be accrued based upon attendance in an educational program if that is your assigned task. If you fail to report to your assigned task due to an unexcused absence, you will not earn work time credits for that day. This is based on daily attendance. For each day of attendance you can earn work time. If you fail to earn the time for that day, you have no means by which to make it up or earn it in the future. It is important to remember that the only basis to **deny** work time credits is unexcused absences from your assigned task, placement in pre-hearing detention, solitary confinement, administrative segregation or lock-down status.

The practice of granting good time is an award of good behavior. Good time is a privilege and not a right. *See* Texas Government Code §498.003(a). The direction of movement on the good conduct time scale is a matter of choice for each offender. Positive behavior and productive work hasten an offender's date of release from prison. On the other hand, negative behavior and poor work performance prolong the period of confinement.

Offenders who are placed in Line Class 3 will earn no good time credits for the period of time spent in Line 3 status. This includes educational, vocational or on-the-job skill credits. Offenders found guilty of a major disciplinary infraction will not be eligible to be reviewed or considered for a promotion in class for 12 months after the date of the disciplinary actions.

Offenders who are on mandatory supervision, community supervision (probation), parole, out-of-custody pending an appeal decision, on escape, on bond, etc, shall not accrue good conduct time. *See* Texas Government Code §498.003(a). Offenders that are received in TDCJ to include parole, mandatory supervision, or shock probation violators, shall be processed as a Line Class 1. Offenders will be required to wait 6 months after their TDCJ receive date before consideration for a promotion in class.

Good time credit will not be backdated. An offender will begin earning good conduct time for the time frame they spend in a particular time earning class. For example: If an offender is classified as a Line Class 1 and later is approved for a promotion to a SAT Class 4, the SAT 4 time would not be backdated over the time that they served as a Line Class 1.

§6.5.1 - Forfeiture of Good Time Credits

Parole/Mandatory Supervision violators returned to TDCJ under their old number will **not** be eligible to have their previously earned good time restored. *See* Texas Government Code §498.003(a). **Even if you did not sign your Certificate of Mandatory Supervision when you were released from TDCJ on Mandatory Supervision, your good time is still not restored.**

However, offenders classified as Pre-65th (offense committed prior to 8-28-77) and shock probation violators returning to TDCJ and classified under their prior TDCJ number for the same charges will be granted the good time credits previously earned prior to being granted shock probation.

All good conduct time that is awarded is subject to forfeiture in cases of institutional misconduct. Work time is a form of good conduct time and can also be forfeited. Any good conduct time that is **forfeited** due to disciplinary violations, will not be subject to restoration. If you lose good conduct time due to a disciplinary violation, there is no way for this lost time to be restored. **It is permanently lost.**

§6.5.2 - Suspension of Good Time Credits

Effective September 1, 2009, the Texas Board of Criminal Justice directed TDCJ to change policy. This change allows for restoration of good conduct time suspended as a result of disciplinary actions. All, or portions, of an offender's good conduct time credit shall be suspended for 12 calendar months following a major disciplinary offense. The good conduct time suspended shall be reinstated, provided:

1. It is not a Level 1 disciplinary violation. (Good conduct time credit shall be **forfeited** for all Level 1 disciplinary offenses);
2. The offender is not currently serving a sentence for or has been convicted of an offense listed in Tex. Gov't Code §508.149. These offenders are not eligible to receive reinstatement of good conduct time credit following a major disciplinary offense.
3. The offender does not have a subsequent major disciplinary violation during the 12 calendar months following the suspension. Any subsequent major disciplinary offense while time is suspended shall result in the forfeiture of the suspended time.

Note: The suspension and restoration of good time will only apply to good conduct time suspended on or after September 1, 2009.

Offenders who become eligible for immediate release under discretionary mandatory supervision due to the reinstatement of good conduct time credit shall remain in custody while the discretionary mandatory supervision consideration process is completed. This process should take a maximum of 60 days. However, if the offender receives a disciplinary conviction after a favorable vote for release, and prior to actual release, the offender's file shall be subject to a subsequent review by the Board of Pardons and Paroles with this additional information provided.

§6.5.3 - County Good Time

You are given good time credits for the flat time you served on your felony conviction while you were confined in the county jail after sentencing (but before transfer to TDCJ). You will be awarded good time credit at the approved state rate when your time credits are computed. Some counties will give you good time at the county rate while you are in their facility. This may be in the form of a ratio (3 for 1, 6 for 1); however, **this does not transfer over to the state good time, nor is it combined with the state good time.** County good time and state good time are not added together. **All convictions with a TDCJ sentence will have good time credits computed only at the approved state rate.**

TDCJ reviews your county records for discipline problems that may have occurred while you were in the county jail. The amount of state good time awarded to you can be reduced due to disciplinary problems. If you believe your good time was taken away in county jail because of a disciplinary matter, and you wish to contest that disciplinary action, SCFO cannot assist you. You must retain the services of a private attorney. See Texas Government Code §498.003 for more information.

§6.6 - Obtaining Concurrent Credit for Federal Sentences

Pursuant to Title 18 U.S.C. §3585(a), a federal sentence commences when the defendant is received by the Attorney General of the United States for service of the federal sentence for offenses that occurred on or after November 1, 1987. However, federal judges have the statutory authority to order a federal term of imprisonment to run consecutively or concurrently with any other sentence of imprisonment being served or imposed at the same time. When a federal judge orders a term of imprisonment to run concurrently with a state term of imprisonment already imposed or recommends that the state institution be designated for service of the federal sentence, the Bureau of Prisons gives effect to such an order or recommendation by designating the state department of corrections for service of the federal sentence. Ordinarily, the reason for designating the state department of corrections is that primary custody resides with a non-federal jurisdiction and the sentencing court intends that the federal sentence be served concurrently with the state sentence.

If the federal judgment and commitment order are silent, the federal sentence will be served consecutively to the state sentence. This means it will be served immediately after the state sentence is served. If the federal judge does not address this issue at sentencing, a request to have

the federal sentence served concurrently with a state sentence must be made to the Federal Bureau of Prisons in Dallas, Texas. All relevant information concerning the state and federal sentences should accompany the request including case numbers, dates and terms of sentence, locations of the courts, and judges' names. The Bureau of Prisons will in turn contact the federal court for consideration of concurrent service of the state and federal sentences. If an amended order or recommendation is made to the Bureau of Prisons, the offender will be notified with a copy of the federal sentence computation.

§6.6.1 - Effect of the Federal Detainer

A federal detainer will be lodged by the US Marshal's Service with the non-federal facility for the duration of the confinement portion of the federal sentence. In general, prisoners serving concurrent federal and state sentences in a state facility are under the complete jurisdiction of that facility. Any programming to be considered while in state custody is determined solely by the staff of the state facility. The federal detainer is not intended to interfere with any programming to be considered, but is only to ensure that a prisoner is not released prior to the federal release date. If the state sentence is completed before the federal sentence has expired, the appropriate US Marshal's Service is to be notified and arrangements will be made to transfer the prisoner to a federal institution for completion of the federal sentence.

§6.6.2 - Commitment to Federal Custody

The US Marshal's Service will assume custody of the prisoner, upon release from the state sentence, and request designation from the Bureau of Prisons. Factors considered in making designations to a federal facility are: place of residence, remaining length of sentence, prior arrest record, history of escape and assault, etc.

Note: An offender cannot be designated to a federal institution prior to entering exclusive federal custody. A request for transfer of custody from state to federal will be considered if a formal request is initiated by the Texas Department of Criminal Justice.

§6.6.3 - Sentence Computation

The Inmate Systems Management Department of the Bureau of Prisons, South Central Regional Office, will compute the prisoner's concurrent sentence and monitor the release date. **The projected release date is based on the award of all applicable Good Conduct Time (GCT).** Fifty-four (54) days of GCT may be earned for each full year served on a sentence in

excess of one year, with the GCT being prorated for the last partial year. **No GCT can be earned on, or awarded to, a sentence of one year or less.**

§6.6.4 - Release from Federal Sentence

If you are in TDCJ custody on the date that your federal sentence expires, the Bureau of Prisons will notify the US Marshal's Service to remove the detainer.

§6.6.5 - Supervised Release Term

A term of supervised release cannot run, or begin to run, during imprisonment on any federal or state sentence. The term of supervised release will commence whenever you are released to the community. A prisoner whose sentence includes a term of supervised release after imprisonment shall **report to the U.S. Probation Office in the sentencing district within 72 hours of release to the community.**

§6.6.6 - References

Questions concerning concurrent sentences or sentence computation of the federal sentence should be directed to:

Regional Inmate Systems Administrator
Federal Bureau of Prisons
4211 Cedar Springs Road, Suite 100
Dallas, Texas 75219

§6.7 - Prison Management Act

§6.7.1 - Introduction

The Prison Management Act (PMA) was designed to allow additional grants of good time credits to offenders when TDCJ reaches an emergency overcrowding situation. The good time credits are referred to as bonus good time. The last time TDCJ awarded PMA bonus time was August 18, 1989.

§6.7.2 - Source of Right

Government Code §499.025 allows for the award of additional good time to eligible offenders when TDCJ reaches an emergency overcrowding situation.

§6.7.3 - Rules for SB 727 Awards: Offense Date Prior to 2-20-87

To be eligible for good time credit under this act, you:

1. Must be physically present in TDCJ when time is awarded.
2. Cannot be awarded time under both SB 215 and SB 727. This applies to offenders with multiple offenses. If you have received SB215 time, you are not eligible for SB727 time and vice versa.
3. Must be at L1, SAT 1, SAT 2, SAT 3, or SAT 4 at time of award. You cannot receive time if you are at L2 or L3.
4. Cannot be serving a sentence for any conviction that is considered “3g” or any conviction that has a deadly weapon finding.

§6.7.4 - Rules for SB 215 Awards: Offense Date on or after 2-20-87

To be eligible for good time credit under this act, you:

1. Cannot be serving a sentence with an offense date on or after February 20, 1987 that is longer than 10 years;
2. Cannot be serving a sentence for any conviction that is considered “3g” or any conviction that has a deadly weapon finding;
3. Cannot have any (past or present) violent offenses against a person;
4. Must be at SAT 1, SAT 2, SAT 3, or SAT 4 at time of award. You cannot receive time if you are at L1, L2 or L3;
5. Cannot have prior institutional record containing:
 - A. offender or staff assault in past year; or
 - B. offender or staff assault in past two years involving weapon possession or sexual misconduct;
6. Cannot have disciplinary record containing:
 - A. guilty of Level 1 or 2 major offender or staff assault within past year; or
 - B. guilty of Level 1 or 2 major offender or staff assault within past two years involving weapon possession or sexual misconduct; and
7. Cannot be serving a sentence for a conviction of:
 - A. Arson;
 - B. Burglary (Habitation, or Weapon, or Injury);
 - C. Capital Murder;
 - D. Deadly Assault on Law Enforcement or Corrections Officer or Court Participant;
 - E. Deadly Weapon in Penal Institution;
 - F. Drug Crimes;
 - i) Aggravated Manufacture or Delivery of a Controlled Substance;
 - ii) Aggravated Possession of a Controlled Substance;
 - iii) Delivery of Marijuana;
 - iv) Aggravated Delivery of Marijuana;
 - v) Aggravated Possession of Marijuana;

- vi) Incest;
- G. Indecency with a Child;
- H. Injury to a Child or an Elderly Individual;
- I. Kidnapping;
- J. Kidnapping, Aggravated;
- K. Murder;
- L. Prostitution, Aggravated Promotion of;
- M. Prostitution, Compelling;
- N. Robbery;
- O. Robbery, Aggravated;
- P. Sale, Distribution, or Display of Harmful Materials to Minor;
- Q. Sale or Purchase of a Child;
- R. Sexual Assault;
- S. Sexual Performance by a Child;
- T. Solicitation of a Child; or
- U. Voluntary Manslaughter.

Note: This offense list **also** includes the “attempt,” “conspiracy,” or “solicitation” to commit any of these crimes.

§6.7.5 - Case Law

Ex parte Rutledge, 741 S.W.2d 460 (Tex. Crim. App. 1987). The TDCJ must use the version of the Prison Management Act (PMA) existing at the time of the offense date involving the offender, otherwise it risks violating the Ex Post Facto Clause. *See also* Ex parte Ruiz, 750 S.W.2d 217 (Tex. Crim. App. 1988).

Ex parte Palomo, 759 S.W.2d 671 (Tex. Crim. App. 1988). Even though the court will determine which PMA applies to a given offender, the offender generally cannot use a writ of habeas corpus to compel the granting of PMA good conduct credit.

§6.8 - Concurrent Sentences

The sentence begin date on each cause number is computed based upon the amount of time awarded on each individual case. This time credit should be listed on the judgment and sentencing documents. TDCJ will take the time credits for each individual conviction and apply them to the case the time credits are actually awarded on. In situations where an individual has multiple convictions, and the time credits on each conviction varies, the resulting sentence begin date on each case will also vary. The computer time screen printout shows only one sentence begin date and normally it will be from the longest conviction.

In a situation where all convictions have the same sentence length, the latest sentence begin date may be the only one listed on the computer printout. This does not mean the jail time credits awarded

by the court on the judgment and sentence for each individual conviction have not been put into the TDCJ computer system; nor does it mean that these time credits have not been added into the time computations for each individual case. You will not see individual case information on the computer printout that you receive.

Just because convictions are ordered to run concurrently with one another does not mean the jail time credit awarded will be the same for each case. Concurrent does not mean all convictions will begin and end on the same date, or stop and start at the same time. As stated above, jail time credit is awarded based upon the amount of time spent in jail on each **individual** case. The time credits served and awarded on different concurrent sentences cannot be added together to calculate one overall sentence begin date.

§6.9 - Cumulative Sentences

Cumulative sentences are also referred to as “stacked” or “consecutive.” Several convictions may be ordered by the court to run cumulative to one another. In other words, they may be “stacked” one on top of another. The stacking of multiple convictions will form a series of sentences to be served. The first sentence will be served before the second starts, the second will be served before the third starts, and so on. The TDCJ computer records use a numbering system to identify each series of cumulative convictions and to identify the sequence of each conviction within the series. For example, the first series is identified by using 01, the second is 02, etc. The first conviction within each series will be identified as 01, the second is 02, the third is 03. The only significance to the numbering system is for identification purposes.

If at least one offense in the stacked series was committed before September 1, 1987, the total sentence on each cumulative conviction will be added together to determine the net sentence to be served. For example, if you have one 10-year, one 5-year, and one 2-year sentence and they are stacked, you will have a net sentence of 17 years to serve in TDCJ.

When all offenses in the stacked series were committed on or after September 1, 1987, these sentences will be calculated on an individual basis, beginning with the first offense in the sequence. The second or subsequent sentence will not begin until the first or prior sentence “ceases to operate” either by:

1. approval for parole by the Parole Board on the specific cause number; or
2. the maximum expiration date on a specific cause number is reached.

Mandatory supervision (short-way) will only apply to the last offense to be served in the “stacked” series. See Ex parte Ruthart, 980 S.W.2d 469 (Tex. Crim. App. 1998).

If you commit a crime while confined in TDCJ and receive a new conviction for the commission of that crime, the new conviction will be stacked either on to the conviction you were serving in TDCJ when you were charged with the new crime or a later conviction. Refer to §42.08(b) of the Texas Code of Criminal Procedure for more information.

§6.9.1 - Credit for Jail Time

You are eligible to receive jail time credit on each of your cumulative sentences. SCFO may be able to assist you in receiving this jail time credit. Write us for assistance.

If at least one of the convictions in a stacked series has an offense date prior to September 1, 1987, the stacked series is commonly referred to by TDCJ as “Bynum” cases. On Bynum cases, the jail time credit awarded on each conviction is added together to determine the overall sentence begin date. Bynum cases are treated as if they were one conviction.

Cumulative sentences that all have an offense date on or after September 1, 1987, are commonly referred to by TDCJ as SB 2335 cases. If your sentences are being calculated under SB 2335, the jail time credit awarded by the judgment will not be reflected on the computer system for the second cumulative conviction until the first conviction has “ceased to operate” either by complete discharge of the first sentence in the series, or when parole is approved on the first sentence. This does not mean you will be released from TDCJ. You will remain in custody until a release from TDCJ custody has been granted on every conviction you have been sentenced to serve. When your first conviction has “ceased to operate,” you will begin to serve the second sentence in the series. The jail time credit awarded by the court on the second conviction presently being served will be subtracted from the date the first conviction ceased to operate.

It is important to remember that, just because convictions are cumulative, they do not automatically fall under the same law. Each conviction is based upon the law in effect on the date the crime was committed. You are required to meet all of the standards established by law regarding release eligibility on each individual conviction before you can be released on that particular conviction.

If you were serving cumulative sentences under SB 2335, were released on parole/mandatory supervision, and had your parole/mandatory supervision revoked, the cumulative sentences will be unstacked pursuant to Ex parte Kuester, 21 S.W.3d 264 (Tex. Crim. App. 2000). The sentences

will now be calculated as if they were concurrent and will remain concurrent until they are fully discharged. Ex parte Kuester is currently not being applied to Bynum cumulative sentences.

SCFO cannot provide you with exact dates as to when the first conviction will be considered to be served and the second will begin to run.

§6.9.2 - Parole Eligibility

For parole eligibility on stacked or cumulative sentences, see Board of Pardons and Paroles Rules §145.4 and §145.14. Copies of the Board Rules are located in your unit law library.

§6.10 - Credit for Street Time

The 77th Legislature passed HB 1649, Government Code §508.149 and §508.283. This law allows some offenders, whose parole or mandatory supervision was revoked on or after September 1, 2001, credit for a portion of the time they were out of TDCJ custody on conditional release. This time is commonly referred to as “street time.” This law applies only to parole violators returned to TDCJ custody and processed under their same TDCJ number. It does not apply to probation violators, state jail sentences, or those released on bond. If awarded, the time is computed as flat time – no good time is given.

Note: Not all revoked offenders will qualify for the award of credit for street time. See the criteria in SCFO REF 06.03.

If your parole or mandatory supervision was revoked **prior** to September 1, 2001, you do **not** receive credit for the time spent out-of-custody, i.e. “street time.” This time is applied to your sentence as long as you abide by the conditions of your release and do not violate these conditions. If you fail to fulfill the conditions of your release and your parole/mandatory supervision is revoked, you are then required to serve the remainder of your sentence. The remainder of your sentence is computed without credit for any time that you served on the streets while on parole or mandatory supervision. The projected release and maximum expiration dates (short-way and long-way) are recomputed when a violator is reprocessed into the prison system. **This does not mean the sentence has been illegally extended.** Nor does it mean the sentence was illegally stopped and started again. A conviction does not stop running until it has completely discharged upon the maximum expiration date.

A ruling by the Court of Criminal Appeals may help offenders obtain street time credit. The holding in Ex parte Mabry, 137 S.W.3d 58 (Tex. Crim. App. 2004) is narrow, applying only to offenders with **some** prior first-degree burglaries. If you are fortunate to fall into this narrow class, the prior first-degree burglary **cannot** be used as a disqualifier for street time credit. You will benefit by this case if:

1. Your supervision was revoked on or after September 1, 2001; and
2. You have no prior offense that is currently listed as a non-mandatory offense in §508.149(a) of the Government Code; and
3. Your prior 1st degree Burglary does not fall into a prohibited class (noted by an “X” in the chart). *See* SCFO REF. 06.04.

If you believe you meet these qualifications and have been denied street time credit following revocation, write the SCFO office.

§6.11 - Dispute Resolution

Senate Bill 364 incorporated the Dispute Resolution system into the Texas Government Code, §501.0081. The Dispute Resolution was created to provide a program for TDCJ to review offender claims regarding time issues. If a discrepancy is noted, TDCJ will have an opportunity to correct the discrepancy before the offender files a writ. Before an offender can file a writ, they are required to make a request through the Dispute Resolution system, unless they are with-in 180 days of their:

1. presumptive parole date (parole eligibility date);
2. mandatory supervision date; or
3. discharge date.

You must file the Dispute Resolution form (CL-147) with Classification and Records. **ID offenders** mail the CL-147 form to:

Dispute Resolution Time Section
Classification and Records Office
BOT Warehouse
P.O. Box 99
Huntsville, TX 77342-0099

State jail confinees need to give the CL-147 to the Intake Office on the unit they are assigned to.

Note: Do not mail the CL-147 to SCFO.

§6.12 - State Jail Convictions

§6.12.1 - Jail Time Credits

If you were sentenced to a term in state jail, the judge can decide whether to give you credit for time you spent in the county jail awaiting sentencing. The judge has total discretion, which means you may receive credit or you may not receive credit. No one can force the judge to give you credit.

If you were released from a state jail facility and placed on community supervision, but later that supervision was revoked and you are returned to state jail, you should get credit for the time previously served in the state jail. This means the judge **must** award credit for this time. Additionally, an offender who is initially placed on community supervision on or after September 1, 2007 and is order to complete a program in a Substance Abuse Facility **shall** receive credit on a subsequent revocation for time spent in the program if it was completed successfully.

SCFO does not help offenders with time credits on state jail cases because a thorough investigation takes time. In most cases the offender will have served the entire sentence before completion of the investigation. For this reason, SCFO will **not** conduct a jail time investigation for state jail offenders. If you think you are entitled to credit for a state jail sentence, write the sentencing court and tell them you want them to award you time credit. Any addresses you need can be found in the [Texas Legal Directory](#) located in your unit law library.

§6.12.2 - State Jail Detainers

If you have a state jail detainer placed on you while you are serving an ID conviction, there is no way to have it removed until the time has expired. This detainer is placed on your TDCJ records to insure that TDCJ does not release you prior to the expiration of your state jail sentence. The minimum time requirements must be met on **each** sentence before an offender/confinee can be released from TDCJ.

Once you have been approved for release on your ID conviction, the time requirements for your state jail conviction will be reviewed to determine if you will be transferred to a state jail facility to complete the state jail sentence. If the time requirements on the state jail conviction have not been satisfied, you should be transferred to a state jail facility to serve any time remaining on your state jail sentence.

If you know the state jail sentence has expired but the detainer is still showing on your records, you can contact SCFO and we will try to have the detainer removed.

§6.12.3 - Good Time

State jail confinees are not eligible to receive credit for any form of good time credits. Your state jail sentence must be served day for day, flat time only, until it has been fully discharged.

§6.12.4 - Concurrent with ID Sentence

State jail sentences will run concurrently with TDCJ sentences unless otherwise indicated on the sentencing documents that they were to run cumulatively (stacked).

If you have both a TDCJ (prison) and a state jail conviction running concurrently, you will usually be processed into the prison system rather than the state jail system due to the fact that prison sentences are usually longer than state jail sentences. Simply because convictions are running concurrently does not mean they will start and stop on the same dates. If enough time has not been served on the prison case to satisfy the state jail sentence when released from prison, you will be reprocessed and transferred to a state jail facility to serve the time remaining on that particular case. The minimum time requirements must be met **on each conviction** before an offender can obtain a release for all of the convictions.

§6.13 - Issuance of New TDCJ Numbers

When returned to TDCJ custody for a parole or mandatory supervision violation, offenders may be classified under the TDCJ identification number previously assigned to them, or they may be issued a new TDCJ number. If a new conviction is received and the sentence length of the new conviction is longer than the “time left to serve” on the prior sentence, prison officials may issue a new number.

It is TDCJ policy to issue a new number when more time is owed on a new conviction(s) as compared to the remainder of your old conviction(s). The remainder of the old conviction is referred to as “time left to serve.” This is the period of time that was not served in confinement specifically for the old case, or cases, whichever the situation may be. In this situation, the maximum expiration date, or long-way discharge date, on the new conviction(s) is longer than the maximum expiration date on the old conviction(s). Any time served in TDCJ or in a county jail on your other cases **is not** applicable to the new sentence.

In some situations the projected release date shown on the TDCJ computer screen for the new number may be the same as the projected release date from the conviction under the old number. The reason for this is because, for the purposes of mandatory supervision release, more time is owed on the old conviction(s) as compared to the new conviction(s). In other words, the

projected release date on the old conviction(s) is considered to be holding for the purposes of mandatory supervision release or short-way discharge. As a result, it will hold you longer than the projected release date on the new conviction(s). This has nothing to do with the maximum expiration date or long-way discharge date.

§6.14 - Improper Release

Historically, when an offender was prematurely released due to no fault of his own, upon return to TDCJ custody the offender would receive credit for any time spent out of custody. That changed in 2003 with the decision in Ex parte Hale, 117 S.W.3d 866 (Tex. Crim. App. 2003).

In accordance with Ex parte Hale, if an improperly released offender violates the law or the conditions of his release he can receive credit only for time spent out of custody **IF** the sentence expires prior to the issuance of a premature release warrant, or **IF** the sentence expires prior to the date the offender is taken into custody (i.e., no premature/erroneous release warrant was issued). Stated another way, if a premature release warrant is issued or a warrant is issued for violation of the conditions of the offender's release prior to the expiration of the sentence, the time will be recalculated without credit for the time spent out of custody. Likewise, if an offender is taken into custody on unrelated charges and the premature release is discovered, the time will be recalculated without credit for the time spent out of custody so long as the sentence has not expired.

Those offenders, who during the time on improper release violate no laws nor any terms of release, should not be penalized for following the rules that would have been in place had he been properly released and shall be credited for the time spent out of custody. *See Ex parte Rowe*, 277 S.W.3d 18 (Tex. Crim. App. 2009).

If you were improperly released, contact SCFO to determine whether you are entitled to additional jail time credit.

§6.15 - Questions Offenders Often Ask

1. I HAVE A 10-YEAR CONVICTION AND A 6-YEAR CONVICTION. I HAVE MORE JAIL TIME CREDIT ON THE 10-YEAR CONVICTION AND I AM ELIGIBLE FOR MANDATORY SUPERVISION RELEASE. TDCJ IS HOLDING ME ON THE 6-YEAR CONVICTION, BUT THE 10-YEAR CONVICTION IS LONGER AND IT "EATS UP" THE 6-YEAR. HOW CAN THEY DO THIS?

Answer: One conviction does not "eat up" another conviction. You must serve the time you were sentenced to serve on **each** conviction that you received from the Court. You

will not be released from prison until you are eligible, and have approval, for release on **every** conviction that you are serving in TDCJ.

2. I WAS GRANTED MY “STREET TIME” BUT MY MAXIMUM DISCHARGE DATE HAS BEEN EXTENDED.

Answer: If awarded “street time” credits, you are only entitled to the time from the date of your last release to parole or mandatory supervision to the date the summons (blue warrant) was issued. You cannot receive credit for the time from the date the blue warrant was issued to the date you were arrested.

3. I WANT A COPY OF MY TIME SHEET AND A COPY OF MY TDCJ RECORDS. TDCJ WILL NOT GIVE ME ONE.

Answer: SCFO is not the custodian of offender records and we do not provide copies to offenders. You can request a copy of your time sheet through your unit administration. You need to contact the Office of General Counsel or the Classification/Records Office to request copies of your offender records.

4. I WAS ORDERED TO A SUBSTANCE ABUSE FACILITY BY MY JUDGE. THE TIME I SPENT IN THIS FACILITY WAS NOT AWARDED TO ME WHEN I WAS SENTENCED TO TDCJ. CAN I GET CREDIT FOR THE TIME I SERVED IN THAT FACILITY?

Answer: It depends on whether you were placed on **deferred adjudication** on or after September 1, 2007 on this charge. Only those **initially** placed on deferred adjudication on or after this date are entitled to credit for successfully completing a substance abuse treatment program.

5. I DON'T THINK TDCJ IS CALCULATING MY SENTENCES CORRECTLY AND I NEED HELP IN GETTING MY RECORDS CORRECTED.

Answer: It is TDCJ policy not to show time credits for a stacked conviction until you begin to serve that conviction. If you believe the incorrect information is affecting your classification or your release to parole, write to Classification and Records in Huntsville. If the incorrect information is affecting your release to parole, you should also notify the institutional parole officer on your unit.

6. I AM MISSING ABOUT EIGHT (8) DAYS OF JAIL TIME CREDIT. WILL SCFO HELP ME?

Answer: SCFO will **not** conduct a jail time investigation for jail time credit for ten (10) days or less. You can contact the judge in your county of conviction and request this time be awarded. Addresses for judges can be found in the Texas Legal Directory located in your unit law library.

7. CAN YOU GIVE ME THE ADDRESS OF MY ATTORNEY AND THE ADDRESS OF THE JUDGE THAT SENTENCED ME?

Answer: The addresses you are requesting can be found in the Texas Legal Directory located in your unit law library. This book contains names and addresses of county officials in the State of Texas, including judges, district clerks, attorneys and a variety of other officials.

CHAPTER 6 REFERENCES

SCFO REF 6.1 – Jail Time Questionnaire

SCFO REF 6.2 – Good Conduct Time Calculation Sheet

SCFO REF 6.3 – HB 1649 Criteria for Street Time Credit after Revocation

SCFO REF 6.4 – Burglary of a Habitation Chart

§6.16 - Table of Authorities

Cases

<u>Bohannon v. Texas Board of Criminal Justice</u> , 942 S.W.2d 113 (Tex. App.-Austin 1997).....	5
<u>Ex parte Allen</u> , 548 S.W.2d 905 (Tex. Crim. App. 1977)	3
<u>Ex parte Bynum</u> , 772 S.W.2d 113 (Tex. Crim. App. 1989)	3, 14,15
<u>Ex parte Canada</u> , 754 S.W.2d 660 (Tex. Crim. App. 1988)	3
<u>Ex parte Green</u> , 688 S.W.2d 555 (Tex. Crim. App. 1985)	3
<u>Ex parte Hale</u> , 117 S.W.3d 866 (Tex. Crim. App. 2003).....	3, 19
<u>Ex parte Henson</u> , 731 S.W.2d 97 (Tex. Crim. App. 1987).....	3
<u>Ex parte Kuban</u> , 763 S.W.2d 426 (Tex. Crim. App. 1989)	3
<u>Ex parte Kuester</u> , 21 S.W.3d 264 (Tex. Crim. App. 2000).....	14, 15
<u>Ex parte Mabry</u> , 137 S.W.3d 58 (Tex. Crim. App. 2004)	16
<u>Ex parte Palomo</u> , 759 S.W.2d 671 (Tex. Crim. App. 1988).....	12
<u>Ex parte Rowe</u> , 277 S.W.3d 18 (Tex. Crim. App.2009).....	3, 19
<u>Ex parte Ruiz</u> , 750 S.W.2d 217 (Tex. Crim. App. 1988).....	12
<u>Ex parte Ruthart</u> , 980 S.W.2d 469 (Tex. Crim. App. 1998)	14
<u>Ex parte Rutledge</u> , 741 S.W.2d 460 (Tex. Crim. App. 1987).....	12
<u>Ex parte Spates</u> , 521 S.W.2d 265 (Tex. Crim. App. 1975).....	3
<u>Ex parte Williams</u> , 589 S.W.2d 711 (Tex. Crim. App. 1972)	2
<u>Guerra v. State</u> , 518 S.W.2d 815 (Tex. Crim. App. 1975)	3

CHAPTER 7 TABLE OF CONTENTS

CHAPTER 7 - PAROLE AND MANDATORY SUPERVISION

7.1 - Preamble	1
7.2 - Parole	2
7.2.1 - Introduction	2
7.2.2 - Source of Right.....	3
7.2.3 - Law on Parole.....	3
7.2.3.1 - Eligibility.....	3
7.2.3.2 - Protests.....	4
7.2.3.3 - Voting Options	4
7.2.4 - Case Law	5
7.2.5 - Rules Regarding Release to Parole or Mandatory Supervision	7
7.2.5.1 - Parole Criteria.....	8
7.2.5.2 - Parole Guideline Components	9
7.2.5.3 - Parole Presentation Packets.....	9
7.2.5.4 - Parole Support Letters	11
7.3 - Mandatory Supervision.....	12
7.3.1 - Introduction	12
7.3.2 - Source of Right.....	14
7.3.3 - Law on Mandatory Supervision	14
7.3.4 - Discretionary Mandatory Supervision Release	14
7.3.5 - Case Law	16
7.4 - Medically Recommended Intensive Supervision	16
7.5 - Parole Revocation.....	17
7.6 - Questions Offenders Often Ask.....	17
7.7 - Table of Authorities.....	20

CHAPTER 7 - PAROLE AND MANDATORY SUPERVISION

§7.1 - Preamble

This chapter will discuss in detail the provisions for parole and mandatory supervision. Eligibility is based upon the date that you committed the crime, not the date that you were sentenced for the crime. If multiple convictions are involved, different eligibility provisions may apply to each conviction. In other words, the legal provisions used to determine eligibility on one conviction may differ from the provisions used on another conviction. To determine which provisions apply to the specific individual conviction in question, you should first determine the date the crime was committed, then locate the appropriate section in this chapter and review the information contained therein.

While SCFO cannot represent you in parole proceedings, assist you with corrections to the contents of your parole file, or seek information from the Parole Board as to why your parole was

denied, we are able to assist you with parole eligibility issues and questions of applicable law. Be aware, however, that many parole provisions are extremely complicated. While we have attempted to provide detail, it is not possible to discuss every scenario. Additionally, these materials should be considered a starting point for your research. If after reviewing this section you still have questions concerning parole/mandatory supervision eligibility, you are strongly encouraged to contact SCFO.

§7.2 - Parole

§7.2.1 - Introduction

The Texas Board of Pardons and Paroles (hereinafter “Parole Board”) has the sole discretion to grant or deny an offender’s parole release. Consequently, most of the Parole Board’s decisions **cannot** be challenged. In other words, should the Parole Board decide not to approve a parole release for you, there is normally nothing that you can do to challenge their decision.

The granting or denial of parole is not a legal matter. The most this office can do is to provide you with your parole eligibility date according to TDCJ records. The TDCJ computer system contains a limited amount of information regarding your parole status. Records of the parole division are maintained separately from the TDCJ prison records. This office does not have access to information contained on the parole division computer system, nor do we have access to your parole file(s). Since the parole division and TDCJ officials do not share the same computer information, the parole information contained on the TDCJ computer records may not be up-to-date. Therefore, to ensure accurate parole eligibility dates/information you should contact the parole division and direct your inquiries to them. You may contact institutional parole staff using an I-60 (Inmate Request to Official) with specific questions related to parole.

SCFO will contact the Parole Board for you only if a possible question of law is involved. A question of law occurs when the applicable law pertaining to a parole issue is in question. Situations in which this may occur are rare. We cannot make a favorable recommendation for you or represent you in a parole revocation matter.

If you want information about why your parole was denied, write the Parole Board at:

Parole Board
P.O. Box 13401
Austin, Texas 78711-3401

§7.2.2 - Source of Right

The Texas Constitution authorizes the Legislature to establish a parole system. Texas Constitution Article IV, §11. The statutory specifications regarding parole and mandatory supervision are found in Chapter 508 Government Code, Vernon's Texas Codes Annotated, §508.141, et seq. For crimes committed prior to September 1, 1997, the statutory specifications are set out in Article 42.18 of the Code of Criminal Procedure.

§7.2.3 - Law on Parole

As stated previously, this office does not have the ability to access the parole division records. Therefore, there is an extremely limited amount of parole information that can be provided to you by this office. You should contact your Institutional Parole Officer (IPO) or write to the Parole Board in Austin for information regarding your parole status. We cannot contact them on your behalf.

Parole Board
P.O. Box 13401
Austin, Texas 78711-3401

§7.2.3.1 - Eligibility

To determine which law will apply to your parole eligibility, you must first determine the offense date of your conviction(s). When an individual is serving multiple convictions in TDCJ, it is common for each conviction to have different parole eligibility dates. Various factors such as sentence length, "aggravated" (3g) crimes, etc. may all have different parole eligibility dates. Your parole eligibility for each conviction is based upon the laws in effect when each crime was committed. These laws vary and are subject to change periodically. Regardless of the sentence length, you must be eligible for release on each conviction that you are serving in TDCJ in order to be released from prison. Should you be parole eligible on one conviction, but not eligible on another, you will remain incarcerated until you are eligible and approved for release on **all** of your convictions. Reaching your parole eligibility date does not mean that you will be released on parole. In order to be released on parole, first you must be **eligible**, then you must be **approved** by the Parole Board for release.

Note: A chart detailing parole eligibility appears at SCFO REF 7.1. The chart also indicates whether an offense qualifies as a mandatory supervision offense or a discretionary mandatory supervision offense.

§7.2.3.2 - Protests

A major factor in the consideration of parole is the readiness of the community to receive the parolee. In this regard, the attitudes of the sentencing judge, the district attorney, and the local law enforcement officers are considered by the Parole Board as reflections of community sentiment. These officials are given the opportunity to “protest” the parole of an offender and such a protest from the county of conviction is given great weight in the matter of selection of parole. Should a protest be lodged in your case it may be advisable to **attempt** to parole to another county. This does not imply that you will be given **permission** from the parole authorities or the county authorities to parole to another county. You will need to submit a plan to the Parole Board requesting permission to parole to another county. The Parole Board has the right to deny your request.

If you wish to make a request to parole to another county, you will need to contact the Parole Board for information on their requirements regarding submitting a request of this nature. This office cannot assist you with making this request, nor can we advise you as to the decision the Parole Board may make on your request.

If a protest letter is filed against you, you do not have a right to have it removed from your parole file. However, you may have favorable letters sent to the Parole Board on your behalf from individuals such as family, former employers, chaplains, friends, etc. to show the Parole Board why you should be released on parole. Those letters may be taken into consideration by the Parole Board when they review your case.

§7.2.3.3 – Voting Options

You may hear individuals refer to various “FI” codes in relation to a voting action taken by the Parole Board. FI votes indicate that the parole vote is tentative based upon “further investigation.” You can find the FI codes in the Rules of the Board of Pardons and Paroles. They may also be found in the Texas Administrative Code §145.12, entitled “Action Upon Review.” A copy of the Board Rules is available in your unit law library, along with a copy of the Texas Administrative Code.

Parole approvals are now indicated by an “A” and parole denials are indicated by a “D”. See Board Rule §145.6. Since the Parole Board frequently changes its rules and its voting options, you should consult the Board Rules in the unit law library to research any issues you may have about Parole Board voting.

During the legislative session that ended in June 2003, the legislature gave the Parole Board the authority to use 5-year set-offs (instead of the maximum of 3 years). See Board Rule 145.12 for the current lengths of set-offs. During the same session the legislature also required the Parole Board to review “non-violent” offenders annually or as soon as practicable within one year after the previous review.

There is no absolute right to parole. It is at the discretion of the Parole Board. However, minimum due process rights apply.

§7.2.4 - Case Law

Ex parte Adams, 941 S.W.2d 136 (Tex. Crim. App. 1997). Applicant is not entitled to receive credit for time served in an Intermediate Sanction Facility (ISF) as a special condition of release on parole after the parole revocation warrant has been withdrawn.

Williams v. Briscoe, 641 F.2d 274 (5th Cir. 1981), rehearing denied, 647 F.2d 1122 (5th Cir. 1981). The Texas parole provision is discretionary in nature and does not create an expectancy of release. In other words, an offender does not have a right to parole.

Ex parte Maceyra, 690 S.W.2d 572 (Tex. Crim. App. 1985). The Board must provide you a hearing in order to revoke your parole, unless you explicitly waive said hearing.

Ex parte Williams, 738 S.W.2d 257 (Tex. Crim. App. 1987). The Parole Board must provide a parolee with a revocation hearing in order to revoke the parole under the due process clause of the Federal Constitution.

Ex parte Pee, 626 S.W.2d 767 (Tex. Crim. App. 1982). Parole is a form of constructive custody. Persons on parole are not entitled to good time credit or trusty time. The legislature can pass legislation granting different time credit-earning capabilities to persons in different situations.

Ex parte Canada, 754 S.W.2d 660 (Tex. Crim. App. 1988) and Ex parte Bates, 978 S.W.2d 575 (Tex. Crim. App. 1998). “[W]hen a person’s parole, mandatory supervision, or conditional pardon is revoked, that person may be required to serve the portion remaining of the sentence on which he was released, such portion remaining to be calculated without credit for the time from the date of his release to the date of revocation.”

Ex parte Taylor, 957 S.W.2d 43 (Tex. Crim. App. 1997). Parolee has right to confront and cross-examine adverse witnesses unless hearing officer specifically finds good cause for not allowing confrontation. A parolee does not have an absolute right to counsel at a revocation hearing.

Gagnon v. Scarpelli, 411 U.S. 778, 790, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656, 666 (1973). The Supreme Court held that a parolee is not absolutely entitled to appointed counsel at a revocation hearing, and “that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.”

Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972). The Parole Board must employ minimal due process in order to revoke a parole. The requirement must include (1) written notice of the claimed parole violations, (2) disclosure to the parolee of evidence against him, (3) opportunity to be heard in person and to present witnesses and documentary evidence, (4) the right to confront and cross-examine adverse witnesses, (5) a neutral and detached hearing body such as traditional Parole Board, and (6) written statements as to the evidence relied on and reasons for revoking parole.

Ex parte Martinez, 742 S.W.2d 289 (Tex. Crim. App. 1987). The Parole Board must provide a parolee with a revocation hearing in order to revoke the parole under the due process clause of the Texas Constitution.

Ex parte Ethridge, 899 S.W.2d 206 (Tex. Crim. App. 1995). The Texas Department of Criminal Justice, Correctional Institution Division, is not authorized to consider an inmate as a violator until such time as the Parole Board orders revocation of parole. The Parole Board has “discretion to continue a conditional release even after a finding that the releasee has committed a new offense.”

Ex parte Snow, 899 S.W.2d 201 (Tex. Crim. App. 1995). Statute does not authorize the Parole Board to withdraw parole solely because releasee is subsequently convicted of an offense committed prior to release, and thus regulation so providing is not authorized by statute and effectively violates releasee’s constitutional rights to due process and due course of law.

Ex parte Rutledge, 741 S.W.2d 460 (Tex. Crim. App. 1987). “The decision to release or not release an inmate of the Texas Department of Corrections, even though eligible for parole, remains within the sound discretion of the Board of Pardons and Paroles.”

Ex parte Choice, 828 S.W.2d 5 (Tex. Crim. App. 1992). “Persons convicted of offenses committed prior to September 1, 1987, are not eligible for ordinary consideration for parole until they have accrued credit for one-third of their sentence.” Legislative amendments changing initial

parole eligibility requirements from one-third to one-fourth do not apply to offenses committed prior to the effective date of the changes.

McLean v. State, 787 S.W.2d 196 (Tex. App. Corpus Christi 1990). Defendant failed to show that statute requiring violent criminals to serve at least two calendar years prior to parole eligibility was unconstitutional.

Ex parte Woodward, 619 S.W.2d 179 (Tex. Crim. App. 1981). Art. 11.07 does not provide the basis to attack a parole revocation. Instead, 11.07 must be employed to attack the conviction itself and such writ must be filed in the court where the defendant was convicted.

Ex parte Henderson, 645 S.W.2d 469 (Tex. Crim. App. 1983). This case involved an unsuccessful challenge to the concept of re-incarceration after revocation of mandatory supervision. Offender stated re-incarceration violated the double jeopardy and due process guarantees. Court responded that while mandatory supervision is still in effect the offender is under continuing custody of TDCJ and subsequent violations can indeed result in re-confinement.

Clark v. State, 754 S.W.2d 499 (Tex. App. Fort Worth 1988). Once a person is convicted of an offense he has no constitutional right to be released on parole before completion of his sentence.

Moncier v. State, 704 S.W.2d 451,455 (Tex. App. Dallas 1986, no pet.). Therefore, “eligibility for parole under TEX. CRIM. PROC. ANN. Art. 42.12 (Vernon 1979) is not a protectable interest under the due process clause. The statute does not enlarge the punishment for the crime or affect the range of punishment that the jury may assess.”

☑ **Note:** Maceyra, Williams, Martinez, supra, successfully challenged re-confinement.

§7.2.5 - Rules Regarding Release to Parole or Mandatory Supervision

The Parole Board promulgates rules regarding the review of offenders for release to supervision. Those rules are changed periodically by the Parole Board. Your unit law library has a copy of the Parole Board’s rules. **They may also be found in the Texas Administrative Code, §141**, et seq.

Among other things, the rules explain the voting options that are available to the Parole Board when they review an offender’s case for release; set forth guidelines and policy statements used to vote a case; set forth the time limits for the next consideration of a release decision; set forth the procedure for a “special review” (Rule 145.17); set forth the conditions of parole and mandatory supervision release and set forth the procedure for filing a motion to reopen or reinstate following revocation of supervision.

§7.2.5.1 - Parole Criteria

Release to parole is a privilege, not a right, and the parole decision maker is vested with complete discretion to grant, or to deny parole release as defined by statutory law. Candidates for parole are evaluated on an individual basis. There are no mandatory rules or guidelines for analysis or set release criteria that must be followed in every case because each offender is unique. The Parole Board has the statutory duty to make release decisions that are in the best interest of society, based on when it thinks an offender is able and willing to be a law-abiding citizen. Parole guidelines are merely optional tools to aid in the Parole Board's discretionary parole decision. An offender will be considered for parole when eligible and when the offender meets the following criteria with regard to behavior during incarceration:

1. Other than on initial parole eligibility, at the time he is reviewed for parole the offender must be classified in the same or higher time earning classification assigned during that offender's initial entry into TDCJ (Currently LINE 1). TBPP Rule 145.3(4)(B).
2. Other than on initial parole eligibility, the offender must not have had a major disciplinary misconduct report in the six-month period prior to the date he is reviewed for parole, which has resulted in loss of good conduct time or reduction to a classification status below that assigned during that offender's initial entry into TDCJ. TBPP Rule 145.3(4)(A).
3. After an affirmative vote to parole, if notification is received that the offender has been reduced below initial classification status or has lost good conduct time, the parole decision will be reviewed and re-voted on by the parole panel that rendered the decision. TBPP Rule 145.3(4)(C).
4. An offender who has been revoked and returned to custody for a violation of the conditions of release to parole or mandatory supervision will be considered for release to parole or mandatory supervision when eligible. TBPP Rule 145.3(4)(D).
5. An offender who is otherwise eligible for parole and who has charges pending alleging a felony offense committed while in TDCJ, any facility under its supervision, or a facility under contract with TDCJ, and for which a complaint has been filed with a magistrate of the State of Texas, will **not** be considered for release to parole or mandatory supervision. TBPP Rule 145.3(4)(E).
6. An offender who is otherwise eligible for release and meets the criteria for special needs parole as required by Government Code §508.146, may be considered for release on parole. TBPP Rule 145.3(4)(F).

§7.2.5.2 - Parole Guideline Components

The parole guidelines consist of two major components that interact to provide a single score. The first is a Risk Assessment Instrument that weighs both static and dynamic factors associated with the offender's record. The other component is Offense Severity class.

1. Risk Assessment Instrument - Static factors are those associated with the offender's prior criminal record. They will not change over time. Dynamic factors reflect characteristics the offender has demonstrated since being incarcerated and are factors that can change over time.
 - A. Static factors include:
 - i. Age at first admission to a juvenile or adult correctional facility
 - ii. History of supervisory release revocations for felony offenses
 - iii. Prior incarcerations
 - iv. Employment history
 - v. The commitment offense
 - B. Dynamic factors include:
 - i. Offender's current age
 - ii. Whether the offender is a confirmed security threat group (gang) member
 - iii. Education, vocational and certified on-the-job training programs completed during the present incarceration
 - iv. Prison disciplinary conduct
 - v. Current prison custody level
2. Offense Severity Class
 - A. Board members have assigned an offense severity rating to every one of the 1,931 felony offenses in the Penal Code.
 - B. Offense severity classes range from Low for non-violent crimes such as credit card abuse, to Highest for crimes such as capital murder.

An offender's most serious active offense is assigned an Offense Severity Class according to the established list.

§7.2.5.3 - Parole Presentation Packets

Remember the Parole Board has sole discretion to either grant or deny parole.

To receive information regarding your parole status, contact the Institutional Parole Officer (“IPO”) on your unit, or write to the Parole Board at:

Texas Board of Pardons and Paroles
P.O. Box 13401
Austin, Texas 78711-3401

It may help to prepare a presentation package to the Parole Board for their review. Below are a few tips that you might want to follow in the preparation of this package:

1. Cover Letter - start your presentation package with a brief one-page letter to the Parole Board members, stating that you have enclosed a presentation package and you would appreciate them reviewing it. Outline, in one sentence, what is contained in the package in the order it appears (e.g. this presentation package contains letters of support, transcripts from the courses completed, and a resume of employment history). End your letter by asking the Parole Board members to seriously consider you for parole.
2. Follow your cover letter with a table of contents - list the items as they appear in the package, not in alphabetical order. Place labeled dividers between each section, if available.
3. Give a parole plan - state where you intend to live and with whom. Briefly identify who lives at the address you are paroling to, their relation to you, what their background is, their educational level, age and type of employment. Indicate that these people will support you in whatever way they can, whether or not you are allowed to live with them. If you have some type of employment lined up or potential employment, include that.
4. Prepare a short essay about why you should be paroled - briefly state what changes you have made in your life and what you intend to do to keep from re-offending. Describe your plans for the future and your resolve to obey the laws. Don’t talk about what you did in the past.
5. Provide a resume - even if you already have a job, show that you are employable. Sometimes the job you have secured doesn’t pan out after you are released. If the Parole Board knows you have marketable skills, they’ll feel better about releasing you. Even if you have never held a free world job include the work you’ve done while incarcerated, if appropriate (i.e. the hoe squad is not an appropriate credential). A one page resume is always an asset.
6. Include transcripts of courses you have completed - GED, vocational and college courses, as well as classes such as Changes, Cognitive Intervention or Voyager.
7. Include support letters - these should be one page letters from family members and friends who know you personally.
8. Typewritten presentation, if possible – check the presentation for spelling, grammar, and typographical errors. Once complete, copies should be made for you and each Parole Board member reviewing you. If that is not possible, submit a clean copy,

preferably in a folder to the parole caseworker, with a letter to each Parole Board member, asking them to re-view your package.

☑ **Note:** There is no guarantee that submitting a parole presentation packet will result in a grant of parole, but doing it may give you the satisfaction of knowing that all that can be done on your behalf has been done. Also, even if the first attempt is unsuccessful the assembled package will still be useful for future review dates with, of course, updates.

§7.2.5.4 - Parole Support Letters

Offenders are encouraged to provide evidence of support for their release on parole. The information below is provided for offenders and family members who have questions about such letters. These are only general guidelines and suggestions.

1. Support letters for the parole file - there are no rules for support letters. Use what fits your situation. Don't be afraid to ask people to write letters. Many people care and want to help.
2. What is a letter of support - evidence that you will have a network of friends and family to help when you are released. The letters should show the following:
 - A. Somebody knows the offender and cares;
 - B. The offender has free world input while in prison;
 - C. Someone will help when he or she gets out; and
 - D. The good side of the offender, which helps balance the bad side appearing in his or her criminal record
3. Who writes support letters:
 - A. You, family members, close friends and loved ones;
 - B. Distant relatives, aunts, uncles, and grandparents; and
 - C. Respected members of the community, including past and present employers, ministers, teachers, religious instructors, students, counselors, and volunteers from the community. People who know your family and can state that their support will be of value during your readjustment to the community.
4. What should support letters look like - a letter of support should make a good appearance. If possible, it should be typed on one page, if everything that needs to be said can be covered on one page. If the letter is from a business or professional person, it should be written on their letterhead stationery, if possible.
5. How many support letters - at the time of the parole interview, 3 to 10 support letters should be enough. Keep sending support letters regularly, not just at the parole review date. This shows consistency, active support, and lets the Parole Board know that family members and friends will stick by you after release.

6. What should the letter say - there are several general areas of information that should be included in these letters:
 - A. Their relationship to you;
 - B. How long they have known you;
 - C. Their belief that, despite your mistake, you are a good person;
 - D. The reason they feel this way;
 - E. Belief that you will be a useful and law-abiding citizen if given another opportunity;
 - F. Describe your improvements in attitude or behavior;
 - G. State whether or not they can offer to spend time with you doing something positive or worthwhile;
 - H. Can offer advice or encouragement (very helpful for someone just released from prison);
 - I. Willing to provide housing, clothing, transportation or some other type of help; and
 - J. Must include their name, address and telephone number if they have one

7. Where to send support letters - to the Board of Pardons and Parole in Austin. Letters may also be written directly to the members of the parole panel that are voting on your case. You can learn their names and addresses only after they have started reviewing your case. You can get this information during your interview, or may ask one of the regional parole offices. It is also acceptable to address letters to "Dear Parole Board Member." Letters will be placed in your file and read by members of the parole panel who review your case.

Send letters of support prior to your parole review to:

Texas Board of Pardons and Paroles
P.O. Box 13401
Austin, Texas 78711-3401

§7.3 - Mandatory Supervision

§7.3.1 - Introduction

Mandatory supervision is an alternative form of release from TDCJ. Unlike a parole eligibility date, which is based on a fraction of the sentence length (e.g., $\frac{1}{4}$, $\frac{1}{2}$), the mandatory supervision date is reached when the accumulation of flat time served and good time credits earned while incarcerated on a particular conviction equal 100% of the sentence. However, to be released to mandatory supervision you must be eligible.

If you committed your offense **before September 1, 1987**, you are eligible for release to mandatory supervision with respect to that offense. If the Parole Board does not release you to

parole, you will be released to mandatory supervision when your flat time plus your good time equals 100% of your sentence. The only exception is for sentences of life or death, which have never been subject to mandatory supervision release.

If you committed your offense **on or after September 1, 1987, but before September 1, 1996**, you **may** be eligible for mandatory supervision release. Eligibility for release changed during those years as the legislature tightened the rules on which crimes would qualify for release to mandatory supervision. As one example, if you committed the crime of aggravated robbery in 1993, you would not be eligible for mandatory supervision. If the Parole Board did not vote to release you to parole, you would have to serve your entire sentence, day for day, until it was discharged. Any good time credits earned would only apply to parole eligibility, and parole eligibility does not equal release. It only entitles you to have the Parole Board vote on your case.

If you committed your offense **on or after September 1, 1996**, there is no automatic release to mandatory supervision. Mandatory supervision release for offenses committed on or after that date became “discretionary.” It is “discretionary” because, unlike the mandatory supervision scheme prior to that date, the Parole Board “votes” your release. If you fall into a discretionary mandatory supervision category, and are not released to parole, the Parole Board will consider you for release to mandatory supervision when your flat time served and good time earned equal 100% of your sentence. If the Parole Board does not vote to release you to mandatory supervision, you may serve your entire sentence, day for day, until it is discharged.

See the eligibility chart at SCFO REF 7.1 to determine whether your offense and prior criminal history entitle you to release to mandatory or discretionary mandatory supervision. Remember that the date the offense was committed, not the date you were sentenced, determines eligibility.

Mandatory supervision eligibility is based on the date that the crime was committed and the laws in effect at that time. Multiple convictions may (and normally do) fall under different laws. Therefore, one conviction may be eligible for mandatory supervision release while another conviction is not eligible. You cannot be released, however, until you receive a parole, discharge, or mandatory supervision release on each case currently being served.

The Parole Board sets the rules and conditions of mandatory supervision. Their authority lies within the appropriate statutory law setting eligibility. Once released, mandatory supervision

functions basically the same as parole. An offender must report to a parole officer and, should the conditions of release fail to be met, the release can be revoked and the individual returned to prison.

§7.3.2 - Source of Right

The rules governing mandatory supervision were established in conjunction with the parole rules. See Texas Government Code §508.149.

§7.3.3 - Law on Mandatory Supervision

The Parole Board may place certain restrictions on your release. These restrictions are designed to assist you in staying clean and avoiding situations that could contribute to an inability to successfully complete the term of mandatory supervision. Examples of conditions are: not permitted to carry a weapon or handgun; not permitted to go into bars or nightclubs; participate in a program of rehabilitation; report to a parole officer; and/or participate in substance abuse counseling. Failure to abide by these conditions may result in revocation of your mandatory supervision and a return to prison to serve the remainder of the sentence.

For all practical purposes the conditions of release on mandatory supervision are the same as release on parole. Even after you are released on parole or mandatory supervision, you are still in the **legal** custody of TDCJ and subject to the rules and orders of the Parole Board. Again, failure to abide by the rules can result in revocation, and revocation can result in your return to TDCJ custody.

To determine whether your conviction(s) is/are subject to automatic release under mandatory supervision, or discretionary mandatory supervision release by the Parole Board, consult the chart that appears at SCFO REF 7.1. Remember to use the date of your offense, not the date of your conviction.

§7.3.4 - Discretionary Mandatory Supervision Release

Authority: Government Code, §508.149, effective September 1, 1996; and BPP-POL.96-12.01.

For crimes committed on or after September 1, 1996, a parole panel may not approve your release even if you are otherwise eligible for mandatory supervision release. Under certain circumstances, release to mandatory supervision is no longer automatic, nor is it guaranteed. Crimes that fall under these provisions are referred to as HB1433 cases (for House Bill 1433) by TDCJ. **This section only applies to crimes that were committed on or after September 1, 1996.** (See SCFO REF 7.2).

You may not be released to mandatory supervision if a parole panel determines that your total good time credits do not accurately show your potential for rehabilitation, or if they feel that your release would be a danger to the public. If you are denied release to mandatory supervision, the parole division must provide notification to TDCJ. Annual reviews should be conducted thereafter by the Parole Board until you are released from prison. You may remain in TDCJ custody until you reach your maximum expiration date and your sentence is discharged, or until **all** of your sentences have been discharged.

TDCJ will identify HB 1433 cases for a Parole Board panel. On these cases, approximately six months prior to the projected mandatory supervision release date, a parole panel will review the case to either approve or deny release to mandatory supervision. (TDCJ uses the abbreviation of DMS to refer to denied mandatory supervision cases.) If approved, you will be released to mandatory supervision when your projected release date is met, provided that you are still otherwise eligible. You may be otherwise eligible on one conviction, but ineligible on another conviction. In this situation, the parole panel will usually not review your case. You must be eligible for release from prison on all of your convictions before you will be released from prison.

If denied, your case will be set for review at a future date. The next review date **should** be set approximately one year from the denial date. Annual reviews should continue to be conducted until you are released from custody. There is a possibility that a parole panel may vote to deny release to mandatory supervision on each annual review of the case. If this occurs you will remain in TDCJ custody until your full sentence is served and the conviction is completely discharged.

A ruling by the Court of Criminal Appeals may help offenders obtain mandatory supervision eligibility. The holding in Ex parte Patrick Gene Thompson, 173 S.W.3d 458 (Tex. Crim. App. 2005) is narrow, applying only to offenders with **some** prior first-degree burglaries. If you are fortunate enough to fall into this narrow class, the prior first degree burglary **cannot** be used as a disqualifier for mandatory supervision eligibility. You will benefit by this case if:

1. Your current offense was committed on or after 09-01-96; and
2. You have no prior offense that is currently listed as a non-mandatory offense in §508.149(a) of the Government Code; and
3. Your prior first degree Burglary does not fall into a prohibited class (noted by an “X” in the chart). (See SCFO REF. 6.4)

If you believe you meet these qualifications and have been denied mandatory supervision eligibility, write SCFO.

§7.3.5 - Case Law

Note: The cases under the parole section §7.2 are applicable here as well.

Ex parte Franks, 71 S.W.3d 327 (Tex. Crim. App. 2001). “It is mathematically impossible to determine a mandatory supervision date on a life sentence because the calendar time served plus any accrued good time will never add up to life.”

Yarbrough v. State, 703 S.W.2d 645 (Tex. Crim. App. 1985). Every prisoner on mandatory supervision remains in the legal custody of the state.

Ex parte Henderson, 645 S.W.2d 469, 472 (Tex. Crim. App. 1983). “When inmate was released from custody of State Department of Corrections to mandatory supervision, he remained in the legal custody of the institution from which he was released for the entire remainder of his original sentence; thus, when he thereafter violated express conditions of his release, he was fully amenable to decision to return him to custody of Department, as long as appropriate procedures were employed to comply with due process.”

Ex parte Schroeter, 958 S.W.2d 811 (Tex. Crim. App. 1997). Amendment making inmates, who were convicted of indecency with a child, ineligible for mandatory supervision could not be applied retroactively.

§7.4 - Medically Recommended Intensive Supervision

Effective September 1, 2003, there was a major change in legislation regarding offenders who qualify for Medically Recommended Intensive Supervision (MRIS) pursuant to §508.146 of the Government Code. The statute now allows the Parole Board to consider all offenders other than those under a sentence of death or life without parole for medical release. However, “3g” offenders and offenders who have reportable convictions under Chapter 62 of the Code of Criminal Procedure (sex offenders) may only be considered if a medical condition of terminal illness or long-term care has been diagnosed. Offenders interested in pursuing an MRIS release should write the Texas Correctional Office on Offenders with Medical or Mental Impairment (TCOOMMI) directly.

TCOOMMI
P. O. Box 99
Huntsville, Texas 77342-0099

§7.5 - Parole Revocation

An offender released on parole or mandatory supervision must report to a parole officer and, should the conditions of release fail to be met, the release can be revoked and the individual returned to prison.

There are a large number of alternative methods of incarceration the Parole Board can use rather than sending a parole/mandatory supervision violator back to TDCJ. A violator can be sent to a SAFP facility, an ISF facility, or possibly some other type of residential treatment program. The decision to use one of these alternative programs in lieu of prison is made by the Parole Board.

§7.6 - Questions Offenders Often Ask

1. HOW CAN I GET MY “AGGRAVATED” DROPPED?

Answer: You cannot get the “aggravated” dropped from your judgment and sentence unless you were not actually convicted of an aggravated offense or the judge agreed to drop the “aggravated” in exchange for your plea of guilty.

2. WHY IS TDCJ TREATING MY CASE AS AGGRAVATED WHEN I WAS TOLD THAT I DID NOT RECEIVE AN AGGRAVATED CONVICTION?

Answer: If the offense for which you were convicted does not fall under Article 42.12 §3(g) of the Code of Criminal Procedure, or the court did not make an affirmative finding that a deadly weapon was used or exhibited during the commission of your offense, then it is not “aggravated” for parole purposes. An offense that falls under this section requires that a certain percentage of the overall sentence be served (without taking into consideration the good time earned) before the case can be considered for parole review. In many instances offenders think that their conviction is being considered “aggravated” because they are not eligible for release to mandatory supervision. The rules for mandatory supervision eligibility are discussed in T.C.C.P. ARTICLE 42.18 §8, Chapter 508 of the Government Code, and in Chapter 7 of this handbook. Eligibility factors for parole and mandatory supervision are not the same. There is a big difference between the two.

3. I HAVE OVER 100% OF MY SENTENCE SERVED, WHY AM I STILL HERE?

Answer: You are probably serving a sentence that is not eligible for mandatory supervision release. If so, you will not be released until approved for a parole release or until you reach your maximum expiration date and discharge the conviction.

4. WHY DON'T I HAVE A PROJECTED RELEASE DATE?

Answer: You have received a conviction that is not eligible for mandatory supervision release. The projected release date, or short-way discharge date, is the date that an eligible offender would be released to mandatory supervision. If you do not have a projected release date on the TDCJ computer system, more than likely, you are not eligible for mandatory supervision release or you have received a DMS (Deny Mandatory Supervision) vote on an offense that was committed on or after 9-1-96.

5. HOW CAN I GET A NR (NEXT REVIEW) OR A SERVE ALL REMOVED?

Answer: You cannot get a NR or a serve all removed from your records. You do not have a right to protest, appeal, or file a grievance for a serve all or a NR. You do not have a right to a parole release. The decision to grant or deny parole is made by the Parole Board. Parole is considered to be a privilege and not a right. Therefore, you do not have a right to be released on parole.

6. WHILE I WAS ON PAROLE/MANDATORY SUPERVISION I COMMITTED A NEW CRIME. I WAS ARRESTED FOR THE NEW CRIME AND LATER A PAROLE/MANDATORY SUPERVISION REVOCATION WARRANT WAS ISSUED. THE NEW CRIME WAS DISMISSED. CAN THEY STILL REVOKE MY PAROLE/MANDATORY SUPERVISION AND RETURN ME TO PRISON?

Answer: Yes, just because the county decided not to prosecute you on the new crime does not mean that your parole/mandatory supervision cannot be revoked. Failure to abide by all of the conditions of your release may result in revocation of your parole/mandatory supervision. The opposite could also occur. The county could decide to prosecute you on the new conviction and the Parole Board could decide not to revoke your parole. In this case, you would come to prison on the new conviction, yet remain on parole for the old case(s).

7. I AM UNDER THE ONE-FOURTH (1/4) LAW. WHY IS TDCJ MAKING ME DO MORE OF MY SENTENCE?

Answer: You are probably serving more than one sentence in TDCJ. You must serve the time required by law on each conviction before you will be reviewed for a parole release. In a situation of multiple convictions each conviction will be reviewed for eligibility. You may have cases that fall under the one-fourth (1/4) law as well as the one-third

(1/3) law. You must be **approved** for release on **all** of your convictions in order to be released.

8. I HAVE ONE CONVICTION THAT HAS A LONGER SENTENCE THAN ANOTHER CONVICTION, THEREFORE, IT IS MY HOLDING CASE. IT IS “EATING UP” MY OTHER CONVICTION. BUT, TDCJ IS KEEPING ME IN PRISON ON THE SHORTER SENTENCE. SINCE THE LONGER SENTENCE “EATS UP” THE SHORTER ONE HOW CAN I MAKE THEM RELEASE ME?

Answer: One conviction does not “eat up” another conviction. You must serve the time required by law on each and every conviction that you receive. You will not be released from prison until you are eligible, and have approval, for release on every conviction that you are serving in TDCJ.

9. I WAS RELEASED ON PAROLE/MANDATORY SUPERVISION TO THE CUSTODY OF ANOTHER JURISDICTION (FEDERAL, STATE, ETC.). I SERVED TIME IN THE CUSTODY OF THIS JURISDICTION AND THEN I WAS RELEASED FROM CUSTODY. LATER I WAS RETURNED TO TDCJ FOR VIOLATION OF MY PAROLE/MANDATORY SUPERVISION. I WANT CREDIT FOR THE TIME I SERVED IN THE OTHER JURISDICTION TOWARD MY TEXAS VIOLATION.

Answer: The time that you served in custody on the other charge was not related to your Texas parole/mandatory supervision release. Only time served in custody for a Texas parole/mandatory supervision violation warrant will apply to the Texas revocation.

10. I HAVE A LIFE SENTENCE THAT IS NOT AGGRAVATED; HOWEVER, TDCJ IS STILL NOT GIVING ME A SHORT WAY RELEASE DATE. WHY NOT?

Answer: There is no way to calculate the flat time and good time together to equal the sentence length of life. Therefore, there is no mandatory supervision release date.

CHAPTER 7 REFERENCES

SCFO REF 7.1 – Parole and Mandatory Supervision Eligibility Chart

SCFO REF 7.2 – Discretionary Mandatory Supervision – House Bill 1433

§7.7 - Table of Authorities

Cases

Clark v. State, 754 S.W.2d 499 (Tex. App. - Fort Worth 1988)..... 7

Ex parte Adams, 941 S.W.2d 136 (Tex. Crim. App. 1997)..... 5

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Ex parte Pee, 626 S.W.2d 767 (Tex. Crim. App. 1982) 5

Ex parte Rutledge, 741 S.W.2d 460 (Tex. Crim. App. 1987)..... 6

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Ex parte Snow, 899 S.W.2d 201 (Tex. Crim. App. 1995) 6

Ex parte Taylor, 957 S.W.2d 43 (Tex. Crim. App. 1997) 5

Ex parte Williams, 738 S.W.2d 257 (Tex. Crim. App. 1987) 5

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Yarbrough v. State, 703 S.W.2d 645 (Tex. Crim. App. 1985) 16

CHAPTER 8 TABLE OF CONTENTS

CHAPTER 8 - ADMINISTRATIVE MATTERS AND OTHER LEGAL ISSUES

8.1 - TDCJ Reentry Services for Offenders.....1
8.2 - Bankruptcy.....2
 8.2.1 - 3rd Party Bankruptcy2
8.3 - Social Security2
8.4 - Military Discharge Upgrade4
 8.4.1 - Military Discharge Upgrading Manual.....6
8.5 - Power of Attorney6
 8.5.1 - Creating a Power of Attorney6
 8.5.2 - Revoking a Power of Attorney7
8.6 - Unsworn Declarations7
8.7 - Restoration of Rights8
8.8 - Expunction of Arrest Records9
8.9 - Legislation Prohibiting Contact with Victims10
8.10 - Inheritance Matters11
8.11 - Civil Matters Outside the State of Texas11
8.12 - DNA Collection11
8.13 - DNA Post-Conviction Testing.....12
8.14 - Sex Offender Registration14
 8.14.1 - General Information14
 8.14.2 - Sex Offender Treatment Program.....15

CHAPTER 8 - ADMINISTRATIVE MATTERS & OTHER LEGAL ISSUES

§8.1 – TDCJ Reentry Services for Offenders

The Texas Department of Criminal Justice Reentry and Integration Division offers assistance to offenders by helping them prepare for a successful return to the community after release from TDCJ. The Reentry Program provides services inside a three-phased reentry program:

Phase I: Identification Processing – assist eligible offenders in obtaining a replacement social security card, certified birth certificate, and a state identification card at time of release.

Phase II: Assessment and Reentry Planning – completion of risk and needs assessment with individual case planning provided to those at moderate to high risk of re-offending.

Phase III: Community Reentry Services – provide post-release individual case management, employment readiness training and employment services.

The Reentry Program also provides Veterans Reentry Services, assisting veterans with the following issues:

1. obtaining records of military service;

2. completion of veteran's benefits application;
3. linkage to military peer support services; and
4. continuity of care issues.

The Reentry and Integration Division provides its services in conjunction with the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI), which coordinates the continued mental health and medical needs of offenders leaving TDCJ under supervision.

For more information regarding TCOOMMI Medical/Mental Health Continuity of Care Services, Reentry Services or Resources, Identification Documents, or the Wrongfully Imprisoned Program, contact your unit case manager for further assistance.

§8.2 - Bankruptcy

Bankruptcy is not a constitutional right. You cannot receive a bench warrant to attend bankruptcy and you are not entitled to have appointed counsel in a bankruptcy proceeding. You cannot be bench-warranted to attend a bankruptcy hearing that requires a debtor to attend. Also, bankruptcy court does not allow for a waiver of fees Pursuant to an *in forma pauperis* declaration. For all of these reasons, **you cannot file a bankruptcy while you are incarcerated.**

Once you are released from TDCJ, SCFO cannot assist you with bankruptcy matters. Upon your release, retain an attorney to assist and advise you if you intend to pursue entering into bankruptcy.

§8.2.1 - 3rd Party Bankruptcy

If you are named in a bankruptcy that you did not file, you are not entitled to a court-appointed attorney. You can either write a clear and concise letter to the trustee of the court directly advising them of your situation, by certified mail if possible, or refer to the Texas Legal Directory located in your unit law library for the names and addresses of attorneys who practice in this area of law.

§8.3 - Social Security

The regulations regarding social security benefits are found at 42 United States Code §401 et seq. For a person confined in TDCJ the most significant question is obviously, “Can an offender receive social security benefits while incarcerated?” The simple answer to this question is “No.” The basic provisions of the social security regulations and federal legislation state that social

security benefits and determinations of disability for prisoners and persons convicted of felonies will be restricted.

According to Social Security Regulation 83-21, no monthly benefits shall be paid, by reason of being under a disability, to any individual for any month during which such individual is confined in a jail, prison, or other institution or correctional facility pursuant to conviction for an offense constituting a felony under applicable law. When a prisoner's benefits are suspended, payment of auxiliary benefits will continue to be made (as though the prisoner were receiving benefits) to others who are entitled on the basis of the wages and self-employment income of the prisoner.

The restrictions against providing social security benefits to prisoners have been expanded since the SSR 83-21 ruling. As of February 1995, no benefit payments will be made to individuals convicted of a criminal offense punishable by more than one year's imprisonment (regardless of the actual sentence imposed). Benefits will not be paid for any month(s) a person is imprisoned for a criminal conviction.

Eligible family members, however, may continue to receive social security benefits. The ruling also prohibits benefits for individuals confined by court order in an institution at public expense if they have been found: (1) guilty but insane, or (2) not guilty by reason of insanity or similar factors (such as mental disease, mental defect, or mental incompetence), or (3) incompetent to stand trial.

42 United States Code §423 (d)(6) specifically states that no prisoner is eligible to receive benefits for any physical or mental impairment which arises in connection with the commission of an offense by an individual (after October 19, 1980) if the offense constitutes a felony under applicable law, for which such individual is subsequently convicted, or which is aggravated in connection with such an offense. For example, a claimant who pled guilty to aggravated assault and was subsequently incarcerated, was denied disability benefits since the injury occurred when the claimant was shot as he left a residence while he pointed his gun at a man standing nearby. Since the injury occurred during the commission of a felony, that injury cannot be the basis of his entitlement to disability benefits.

The 1996 amendments of the Social Security Act added denial of Supplemental Security Income (SSI) benefits for fugitive felons and probation or parole violators. The amendment tightened up the restriction of the receipt of SSI benefits by fugitive felons, probation or parole

violators. Specifically, the new law provides that no assistance may be provided to an individual who is fleeing to avoid prosecution, custody or confinement after conviction for a crime (or an attempt to commit a crime) that is a felony, or who violates probation or parole imposed under Federal or State law.

There is one important thing to note regarding this amendment. Any safeguards established by the State against use or disclosure of information about individual recipients do not prevent the agency, under certain conditions, from providing the address, Social Security number, and photograph of a recipient to a law enforcement officer who is pursuing a fugitive felon or parole or probation violator.

The 1996 amendments also require that the Commissioner of the Social Security Administration (SSA) enter into an agreement with an interested State or local institution (defined as a jail, prison, other correctional facility, or institution where the individual is confined due to court order). Under any such agreement the institution shall provide monthly the names, social security numbers, dates of birth, confinement dates and other identifying information.

The complexity of this highly specialized area of law requires the expertise of attorneys who are knowledgeable and more able to handle a claim to conclusion. **SCFO is unable to assist or represent you in this area of the law.**

Since a person who is incarcerated or confined in jail, prison, other institution, or correctional facility is ineligible to receive monthly benefits, any claim you feel you may have must be made either after the discharge of your sentence or upon release to parole or mandatory supervision. You may contact the SSA when you are within ninety (90) days of discharge or release on parole or mandatory supervision.

You may choose to have a representative help you when you do business with the SSA. In fact, the SSA will provide you with information about your right to representation and what a representative can do for you in most social security matters.

Located in SCFO REF 8.1 is a copy of SSA Publication No. 05-10133 and No. 05-10913 (en español), What Prisoners Should Know about Social Security. You may also contact the nearest SSA office where you plan to live or reside for additional information or assistance.

§8.4 - Military Discharge Upgrade

Any U.S. military veteran with a discharge that is less than Honorable has a right to try to upgrade the discharge to Honorable.

The first step is obtaining your service record. The next step is applying to the Discharge Review Board (DRB) or the Board of Correction of Military Records (BCMR).

The Board will examine the official records, the application form you submit, and other supporting letters you may wish to send.

1. Ordering Records - Standard Form 180 is used to order your records. Usually this form is submitted to the Records Center in St. Louis, Missouri. See SCFO REF 8.2 for a copy of the form.

Normally it takes several months to actually receive the records. You can also request records of investigations, transcripts of courts-martial and hospital records.

2. Discharge Review Board (DRB) and Board of Correction of Military Records (BCMR) - If your discharge is **less** than 15 years old and was a General, Undesirable or Bad Conduct Discharge, you may use a Form DD-293 to apply to the DRB. If the DRB denies the upgrade, you can then file with the BCMR.

If your discharge is **older** than 15 years, you may use a Form DD 149 to apply to the BCMR. Additionally, if you had a Bad Conduct or Dishonorable Discharge from a **general** court-martial, you may use a Form DD-149 to apply to the BCMR.

3. Form DD 293 - See SCFO REF 8.3. The form is self-explanatory. Be sure to check the first box under Block 9. This calls for a record review. There is no way an offender can make a personal appearance.
4. Form DD 149 - See SCFO REF 8.4. This form is also self-explanatory. Use it if your discharge is older than 15 years.
5. For Both - Form DD 293 and Form DD 149 - These forms have an expiration date. **Do not use expired forms.** If they have expired, contact the law librarian on your unit. Use these forms to explain why you want an upgrade. Examples of reasons that can be used to help you get an upgrade:

- A. Under current standards, I would not receive the same type of discharge.
- B. I received awards, decorations, and letters of recommendation.
- C. I had combat service.
- D. I was wounded in action.
- E. I was so close to finishing my enlistment that it was unfair to give me the type of discharge I received.
- F. My record of Non-Judicial Punishments (Uniform Code of Military Justice, Article 15) shows only minor, isolated offenses.

- G. Personal and/or financial problems impaired my ability to serve.
- H. Medical, physical or psychiatric problems impaired my ability to serve.
- I. The punishment I received was too severe compared with today's standards.
- J. My ability to serve was impaired by my youth and immaturity.
- K. My ability to serve was impaired by my deprived background.
- L. My ability to serve was impaired because of marital and family problems.
- M. My ability to serve was impaired because I could not speak English very well.

The above are just examples that you may consider using. There are many other reasons you may wish to consider.

You will need to elaborate on the reasons you use for an upgrade. Offenders have a burden in that they cannot claim to have been good citizens since the discharge. However, by taking advantage of educational and/or vocational training in TDCJ and by not getting into any trouble while in TDCJ, you may be able to soften the impact of your imprisonment. It can take from 6 to 18 months to get a decision. If you lose at the DRB, your first appeal is to the BCMR and eventually to the Federal Court system.

§8.4.1 - Military Discharge Upgrading Manual

If you desire to purchase the Military Discharge Upgrading Manual or any other material from the National Veteran's Legal Services Program, for information write:

National Veteran's Legal Services Program
P. O. Box 65762
Washington, D.C. 20035

§8.5 - Power of Attorney

§8.5.1 - Creating a Power of Attorney

Understandably, just because an individual is sentenced to serve time in the Texas Department of Criminal Justice, his or her interests in the free world are not terminated. Often, however, matters exist that cannot easily be handled while incarcerated. Provided that another person exists who can be trusted to take care of a matter, a power of attorney can be executed to allow another person the legal authority to act on behalf of an offender.

A power of attorney enables the legally designated individual to act for another. The grantor of the power of attorney is typically called the Principal. The individual who is acting for the Principal is called the Agent or Attorney in Fact. Powers of attorney are typically used to authorize another to use a bank account, buy or sell property, make decisions in transactions, or enroll children in school.

A general power of attorney can be executed by you while in prison. Since our office does not provide advice relating to matters involving finances or property, you may want to make arrangements to create a specific power of attorney rather than granting general powers. When a power of attorney relating to Internal Revenue Service matters or Bankruptcy proceedings is needed, special forms are required. In that event, a general power of attorney form is insufficient.

An illustration of the appearance of a general “Statutory Durable Power of Attorney” appears at SCFO REF 8.5. **Do not sign this form or any similar power of attorney form unless you understand it completely.** Contact SCFO about any unresolved questions **before** assigning the power to act.

§8.5.2 - Revoking a Power of Attorney

In most situations, the grant of a power of attorney can be revoked by the Principal because the power requires the consent of the Principal along with the Agent. A few situations do exist where a power of attorney cannot be revoked. This is usually where the Attorney in Fact (the Agent) also has a financial stake or interest in the subject. Normally, all a revocation requires is notice to the Agent that the power of attorney is revoked.

If the original power of attorney was recorded in the files of a court, then the revocation should be filed in the same location. Additionally, even though a power of attorney has been terminated, the Agent can still bind the Principal when a third party reasonably believes that the power of attorney is still in existence. For this reason, when revoking a power of attorney, you should also notify any parties who may be involved in dealings with the Agent. Note that sending the notification of revocation of a power of attorney via registered or certified mail return receipt requested is advisable in order to preserve a personal record of the termination.

§8.6 - Unsworn Declarations

Title 6 of the Texas Civil Practices and Remedies Code, Chapter 132, now permits you to utilize unsworn declarations in place of written sworn declarations, verifications, certifications, oaths, or affidavits required by statute or by a rule, order, or requirement as provided by law. **This means you no longer need a notary public’s services for most documents.**

Note: The chapter does not apply to an oath of office or an oath required to be taken before a specified official other than a notary public.

§132.002. REQUIREMENTS OF DECLARATION

An unsworn declaration made under this chapter must be:

1. in writing; and
2. signed by the person making the declaration as true under penalty of perjury.

§132.003. FORM OF DECLARATION

The form of a declaration under this chapter must be substantially as follows:

“I, *(insert name and offender identifying number from Texas Department of Criminal Justice or county jail)*, being presently incarcerated in *(insert Texas Department of Criminal Justice unit name or county jail name)* in _____ County, Texas, declare under penalty of perjury that the foregoing is true and correct.

Executed on _____.

(Date)

(Signature)

§8.7 - Restoration of Rights

Many of the rights forfeited at the time of conviction may be reinstated upon complete discharge of your sentence. Please note the difference between the terms “release” and “discharge.” The term “release” refers to the status of an offender that is released from TDCJ, but still under the supervision of the Texas Board of Pardons and Paroles. “Discharge” refers to the status of one who has completely discharged his/her sentence, including any period of parole.

1. Right to Vote - Hold Public Office - Serve on a Jury - Upon complete discharge of a sentence or successful completion of the period of release on parole or mandatory supervision, a convicted felon’s voting rights are reinstated - he must only register to vote to be eligible. A convicted felon that seeks to run for public office or reinstate his right to serve on a felony jury must have his civil rights restored by:
 - A. petitioning the convicting court to set aside the indictment, information or complaint; and
 - B. obtaining a pardon from the governor.
 - C. List of Authorities:
 - Texas Election Code §11.002 - Qualifications and Requirements for Voting
 - Texas Election Code §13.001 - Eligibility for Registration
 - Texas Constitution Article VI, §1 - Suffrage
 - Texas Election Code §141.001 - Eligibility for Public Office
 - Texas Constitution Article XVI, §2 - General Provisions
 - Texas Code of Criminal Procedure, Article 42.12, §20

2. Right to Name Change - A convicted felon may petition for a name change two years after the complete discharge of his sentence, if the change is in the interest or to the benefit of the petitioner and in the interest of the public. *See* Texas Family Code §45.103
3. The Right to Possess a Firearm - A convicted felon may possess a firearm only in his or her habitation and then only following five years after the discharge of his/her sentence. However, be advised that a convicted felon may be in violation of federal law as it pertains to the possession of firearms even though he is in compliance with state law. *See* Texas Penal Code §46.04 - Unlawful Possession of Firearm by Felon.

§8.8 - Expunction of Arrest Records

In certain limited circumstances, you may be entitled to have records and files related to an arrest expunged or erased. The statutes governing this area of the law are located in the Texas Code of Criminal Procedure Articles 55.01-55.06. Depending on the type of situation you may have, your right to expunction can either be absolute or within the discretion of the trial judge.

Texas Code of Criminal Procedure Article 55.01(a) sets out the circumstances when the right to expunction of arrest records is mandatory. They are when: (1) you are arrested, tried, and acquitted by the trial court—which should include not guilty verdicts by a jury; (2) you are arrested, convicted, and subsequently pardoned; or (3) if either no indictment or information was presented against you, or if the indictment was dismissed because of mistake or insufficient evidence, AND you have been released and no conviction or probation has resulted, AND you have not been convicted of a felony in the five years preceding arrest.

Texas Code of Criminal Procedure Article 55.01(b) sets forth when a judge may, in his discretion, order an expunction. It is when you are arrested, tried, convicted, and “acquitted by the Court of Criminal Appeals.” The intermediate Courts of Appeals are split as to whether this includes an acquittal by one of them.

The procedure to be followed when seeking an expunction is set forth in Texas Code of Criminal Procedure Article 55.02, and includes the requirements of the petition.

A sample petition and order follow this section as well as a sample letter to Jeanine Hudson of the Criminal Records Division of DPS, requesting certified copies of the DPS arrest records. The sample petition includes a listing of the most common agencies which may have records of your arrest and which will be sent a copy of the expunction order if you are successful.

Texas Code of Criminal Procedure Article 55.01, §2 requires that the court set an expunction petition for a hearing not less than thirty (30) days from the date of the filing of the petition. **Because a hearing necessitating a court appearance is required, it is the policy of State Counsel for Offenders not to file expunctions for offenders.** This is mainly due to our limited resources and personnel which generally prevents us from traveling to all 254 counties in the state. It is possible a trial judge would hear your petition without your being present for the hearing, but there is no guarantee. You may have to wait until you are released to seek an expunction. If you have been a client of our Trial Section and if your trial ended in an acquittal, we will assist you with the expunction upon your request.

A sample Petition for Expunction of Records and related documents is located at SCFO REF 8.6. That packet includes a cover letter, the Petition, Declaration of Inability to Pay Costs (if you are indigent, you should file this declaration with the Petition), Motion for Bench Warrant or Conference Call (so you can appear in court), the Order of Expunction, and a sample letter to send to DPS for information.

§8.9 - Legislation Prohibiting Contact with Victims

Due to recent legislation, under certain circumstances, you may be subject to punishment for contacting the victim of your offense. See the governing statute set out below. Please note that merely sending a letter of apology to the victim may invoke the provisions of the statute. Please note also that the statute prohibits indirect contact; e.g., letters, or messages delivered by or through a third person. The Texas Government Code §498.0042, entitled “Forfeiture for Contacting Victims,” states:

- (a) The department shall adopt policies that prohibit an offender from contacting by letter, telephone, or any other means, either directly or indirectly, a victim of the offense for which the offender is serving a sentence or a member of the victim’s family, if:
 - (1) the victim was younger than 17 years of age at the time of the commission of the offense; and
 - (2) the department has not, before the offender makes contact:
 - (A) received written consent to the contact from:
 - (i) a parent of the victim or the member of the victim’s family, other than the offender;

- (ii) a legal guardian of the victim or the member of the victim’s family;
or
 - (iii) the victim of the member of the victim’s family, if the victim is 17 years of age or older at the time of giving the consent; and
- (B) provided the offender with a copy of the consent.
- (b) If, during the actual term of imprisonment of an offender in the institutional division or a transfer facility, the offender violates a policy adopted under Subsection (a) or an order entered under the Code of Criminal Procedure Article 42.24, the department shall forfeit all or any part of the offender’s accrued good conduct time. The department may not restore good conduct time forfeited under this subsection.
- (c) In this section, “family” has the meaning assigned by §71.003 of the Family Code.”

§8.10 - Inheritance Matters

You are not entitled to a court-appointed attorney to pursue any inheritance rights whether by will or intestacy laws. You can either write a clear and concise letter to the court directly advising them of your situation, by certified mail if possible, or refer to the Texas Legal Directory located in your unit law library for the names and addresses of attorneys who practice in this area of law.

§8.11 - Civil Matters Outside the State of Texas

The attorneys at SCFO do not practice law outside of the State of Texas and cannot advise you regarding the laws of another state. Refer to the Texas Legal Directory located in your unit law library to find the names and addresses of lawyers licensed to practice in that state, or contact the State Bar of the state in which the civil matter is pending for assistance.

§8.12 - DNA Collection

The authority to collect DNA samples from offenders is found in §411.148 of the Texas Government Code and in TDCJ Administrative Directive 03.17 [AD-03.17 (rev.4), March 8, 2006]. An offender serving a sentence in a TDCJ unit or facility under contract with TDCJ shall provide one or more blood samples or other specimens for the purpose of creating a DNA record. TDCJ will take the blood sample or other specimen during the diagnostic process or as soon as practicable if the offender is confined in another penal institution.

AD-03.17 sets out the procedures TDCJ follows in order to obtain a DNA blood sample or other specimen. If an offender refuses to provide a DNA specimen as required by law, the offender

may be subject to disciplinary action and shall then be compelled to submit the DNA specimen by force in accordance with the TDCJ Use of Force Plan. Major disciplinary action, to include loss of good time, may be taken for the offender's refusal to submit to DNA specimen collection. If use of force is necessary, the use of chemical agents is prohibited during the collection of a DNA specimen.

§8.13 - DNA Post-Conviction Testing

The previous section deals with the collection of DNA samples or specimens by the State of Texas (via TDCJ) from offenders who are processed into or who are about to be discharged from TDCJ. What if you were convicted on the basis of evidence that was not tested to confirm whether or not you committed the crime? On May 27, 2015, the Governor signed SB 487/HB 2435, which expands access to post-conviction DNA testing for innocence claims.

Chapter 64 of the Code of Criminal Procedure allows a convicted person to submit a motion to the convicting court for forensic DNA testing of evidence that has a reasonable likelihood of containing biological material. In addition to the motion, the convicted person must submit a sworn affidavit, which contains statements of fact in support of the motion.

The motion may request forensic DNA testing only of evidence that has a reasonable likelihood of containing biological material that was secured (obtained or collected) in relation to the case and was in the possession of the State during the trial of the case, but was not previously subjected to DNA testing because DNA testing was not available or, if available, was not technologically capable of providing probative results. Other reasons would be, through no fault of the convicted person, the nature of such that the interests of justice require DNA testing. Finally, another reason would be, although previously subjected to DNA testing, such evidence can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.

A convicted person is entitled to counsel during a proceeding under Chapter 64. The convicting court shall (which means it must) appoint counsel for the convicted person if the person informs the court that he or she wishes to submit a motion under this chapter. There are two qualifiers that the court must make before it is required to appoint counsel for the convicted person. First, the court must determine (make a finding) that the person is indigent. The court will not be able to make this determination unless the person submits either an affidavit of indigency or a declaration of the inability to pay along with the motion and affidavit in support of the motion.

Second, the court must find reasonable grounds for a motion to be filed under this Chapter. This last finding is perhaps most important, since it gives the convicting court discretion to rule for or against the appointment of counsel. In the absence of any of the above supportive documents, the convicting court will more than likely deny the request for appointment of counsel and ultimately, deny the motion for DNA testing. Unfortunately, SCFO is unable to represent you in this matter.

Once the convicting court receives the motion, it must provide the attorney representing the State with a copy of the motion and require that the evidence be delivered to the court, along with a description of its condition, or explain in writing to the court why the state cannot deliver the evidence to the court.

A convicting court may order forensic DNA testing under this chapter **only if** it makes two findings. First, it must find that the evidence still exists and is in a condition making DNA testing possible. Such evidence must have been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect. Second, it must find that identity was or is an issue in the case.

Additionally, the convicted person must establish by a preponderance of the evidence that he or she would not have been convicted if exculpatory results had been obtained through DNA testing, and the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice. Even a convicted person who pleaded guilty or nolo contendere in the case may submit a motion under this chapter. The convicting court may not use the fact the convicted person pleaded guilty or nolo contendere as the sole basis of finding that identity was not an issue in the case.

Chapter 64 describes what the convicting court should do if it makes findings with respect to the above issues and the convicted person meets the requirements of the statute. The convicting court is required to issue an order that the requested DNA testing be conducted. After examining the results of testing under this chapter, the convicting court must hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted.

An appeal under this chapter is to a court of appeals in the same manner as an appeal of any other criminal matter, except a capital case where a sentence of death is imposed. The appeal of a death penalty case is a direct appeal to the Court of Criminal Appeals.

If you want to apply for DNA testing, see SCFO REF 8.7 for examples of a cover letter, Motion for Appointment of Counsel and Order, and Affidavit of Indigency.

§8.14 - Sex Offender Registration

§8.14.1 - General Information

Information concerning the legal requirement for sex offenders to register with law enforcement authorities upon their release from prison is found in Chapter 62 of the Texas Code of Criminal Procedure. You can find a copy of the Code of Criminal Procedure in the unit law library. Read it very carefully because many people are arrested for technical violations of this statute. Any violation is a felony. For a few, the punishment is a state jail felony; for most, it's either a third or second degree felony. Multiple failure to register convictions are also enhanced. Furthermore, prior felonies can enhance even a first offense, resulting in punishment of 25 to 99 years, or life, in prison for a single failure to register conviction.

The law was passed retroactively, so regardless of your offense date, you are required to comply with this statute.

To register, you will need photo identification such as a driver's license or DPS photo I.D. To get a DPS photo I.D. or driver's license, you must have a birth certificate. Be sure to order your birth certificate in plenty of time before your release because you only have 7 days or 10 days (out of state) to register with your local law enforcement agency upon your release. If you wait until you are released to start this process, you will not complete it within 7 days. Failure to register within 7 days may result in your arrest and prosecution for a felony. The address for ordering your birth certificate in Texas is:

Texas Vital Records
Department of State Health Services
P. O. Box 12040
Austin, TX 78711-2040

A sample of the form the Bureau of Vital Statistics will have you fill out is located in SCFO REF 08.08.

Unless you are more than 75 years old, you must include a photocopy of a valid photo ID issued by a governmental entity. The following are acceptable forms of ID:

1. State issued driver's license
2. State/city/county ID card

3. Student ID
4. Government employment badge or card
5. Prison ID
6. Military ID

If you do not have a photo ID, you can instead send a copy of the photo ID of an immediate family member, or you can send copies of two documents showing your name, such as a utility bill and your Social Security card. One of the documents must have your signature.

§8.14.2 - Sex Offender Treatment Program

If you have any conviction for a sexual offense in your past, whether it be in Texas or in any other state and even if you are not currently incarcerated for that offense, TDCJ may require you to go through the Sex Offender Treatment Program (SOTP), or release a DNA sample for the state database.

Since parole is not a right, but a privilege, it can be taken away easily. If the parole board decides that you need to go through the SOTP before you can be released (which is becoming more and more common) then you must successfully complete the program or your parole date will be taken away. If you are in the SOTP but have not completed it on your parole approval date, then you will be kept until you complete the program. If you fall out of the program, your parole date will be taken away. If your release is conditional (discretionary mandatory supervision or parole) then you may be required to successfully complete the SOTP as a pre-condition of your parole.

The only exception to this is a mandatory release date which is not discretionary (these are for eligible offenses committed prior to September 1996). If you have a firm mandatory date, or a maximum discharge date (day for day discharge), TDCJ will have to release you on that date. In the alternative, discretionary mandatory dates (mandatory-eligible offenses committed after September 1996) are tied to good time, and TDCJ can take away good time for failing to follow orders, like submitting to the programs they order you to attend.

Parole is a conditional release and is not a right, meaning that there is no legal challenge to an SOTP requirement. Even though you must admit guilt to complete the program, this is not seen by the courts as a coercion because you are not losing a right, but a privilege and if you don't want to admit your guilt you don't have to (even though by not doing so you will lose your parole date).

Offenders going through the program should also be aware that if they are eligible for the civil commitment proceedings, what is said at SOTP is not privileged and may be used against them in those proceedings.

CHAPTER 8 REFERENCES

- SCFO REF 8.1** – SSA Publication No. 05-10133 and No. 05-10913 (en español), What Prisoners Should Know about Social Security
- SCFO REF 8.2** – Form 180 (for requesting military records)
- SCFO REF 8.3** – Form DD 293 (for review of military discharge or dismissal)
- SCFO REF 8.4** – Form DD 149 (for correction of military records)
- SCFO REF 8.5** – General Statutory Durable Power of Attorney
- SCFO REF 8.6** – Petition for Expunction of Records and related documents with cover letter
- SCFO REF 8.7** – DNA Testing Request and related documents
- SCFO REF 8.8** – Texas Department of Health Services Form VS-142.3 (for requesting birth certificates by mail)

CHAPTER 9 - TABLE OF CONTENTS

CHAPTER 9 - FAMILY LAW

9.1 - Termination of Parental Rights..... 1
 9.1.1 - Procedure..... 1
 9.1.2 - Appointment of an Attorney in Termination Proceedings 2
 9.1.3 - Grounds for Termination 3
 9.1.4 - The Best Interests of the Child 4
 9.1.5 - Imprisonment, Abandonment, and Danger..... 4
 9.1.6 - Voluntary Termination of Parental Rights 4
 9.1.7 - Contact with the Child Following Voluntary Termination 5
 9.1.8 - Practical Considerations when Faced with Termination 5
 9.1.9 - Case Law 5
9.2 - Adoption 7
9.3 - Determination of Parentage 8
 9.3.1 - Introduction 8
 9.3.2 - Statutory Provisions on Determination of Parentage 9
 9.3.3 - Case Law 9
9.4 - Divorce 10
 9.4.1 - Procedure 10
 9.4.2 - Grandparent Visitation 12
9.5 - Child Custody 12
9.6 - Getting Married While Incarcerated 14
9.7 - Common-Law Marriage 14
9.8 - Child Support and Suits by the Attorney General 15
9.9 - Questions Offenders Often Ask..... 17
9.10 - Table of Authorities..... 21

CHAPTER 9 - FAMILY LAW

In Texas, most family law issues are governed by the Texas Family Code. This chapter discusses some issues that an incarcerated individual may encounter.

§9.1 - Termination of Parental Rights

§9.1.1 - Procedure

Although the right to parent one’s own biological or adopted child is a bedrock right of our society, this right can be taken away under a certain set of circumstances. Termination of parental rights eliminates all rights and duties to a child, but preserves the child’s right to inherit from the parent. In Texas, the Family Code specifies the circumstances in which a party may sue to terminate parental rights. As the Family Code is readily available for individual research in each unit’s law library, and as the Family Code may be modified or added to by each session of the

Texas Legislature, the statutory language from relevant sections of the Family Code are not provided here. For reference, *see* Texas Family Codes §161.001-161.003.

To terminate the parental rights of an individual, a court must establish that at least one statutory ground for termination exists **and** that termination is in the “best interest of the child.” Because the right to parent a child is a right of constitutional dimension, an order terminating a parent-child relationship must be supported by clear and convincing evidence that justification for termination exist.

Each statutory ground for termination in the Family Code has been extensively discussed in the Texas appellate court system. In order to protect their rights, offenders facing a challenge to their parental rights who are not represented by an attorney should consult the unit law library to examine case law surrounding the specific statutory ground(s) alleged in a termination suit.

☑ NOTE: Quick action is required in termination cases if you wish to preserve your parental rights.

If you are served with legal papers, either by personal service or by certified mail, stating you that you are being sued, and someone wants to terminate your parental rights, a response *must* be sent to the court clerk by the first Monday following 20 days from the date you were served. If you receive such legal papers, you must act quickly to prevent the termination of your parental rights. You will be in danger of losing the case by default judgment if a response is not sent to the court within the required time period. A default judgment occurs when the person who is served with a lawsuit does not respond to the lawsuit before the deadline. *See* Texas Rules of Civil Procedure 239.

SCFO has provided a sample Answer, Request for Appointment of an Attorney, Motion for Bench Warrant, Declaration of Indigency, and an Affidavit of Testimony appears at SCFO REF 9.1. A copy of this filing should be sent to the court without delay via Certified Mail Return Receipt Requested. A second copy should be mailed to opposing counsel listed on the original petition. If you are unable to send documents by certified mail, use regular U.S. mail.

§9.1.2 - Appointment of an Attorney in Termination Proceedings

If the termination lawsuit was filed by a **state agency**, Texas Family Code §107.013 requires the court to appoint counsel to represent you if: (1) you file an answer with the court in opposition to the termination; and (2) you are indigent. In addition, if a state agency is seeking temporary managing conservatorship of a child, the court shall appoint an attorney ad litem to represent the

interests of an indigent parent who responds in opposition to the suit. The Family Code no longer provides for the appointment of counsel to represent respondents who are sued by a **private** party. A sample request for a court-appointed attorney with an Affidavit of Inability to Pay Costs is included in SCFO REF. 9.1.

If the termination lawsuit is filed by someone other than a state or other governmental agency (private termination), there is no statutory right to appointed counsel. *See In re J.C.*, 250 S.W.3d 486, 489 (Tex. App. - Fort Worth 2008, pet. filed). An offender's due process rights are satisfied by appearance by affidavit, if it is a private termination and the court determines for valid reasons that appearance in person or telephonically is not necessary. For example, if the lawsuit for termination is brought by the child's other parent, a grandparent, or other interested party, then the aforementioned would apply.

Because the Family Code does not provide for the appointment of counsel in private termination cases, offenders who are indigent should consult whatever resources are available to obtain an attorney. Family members or close friends on the outside of TDCJ can be a useful tool, as can the Texas Legal Directory, located in the law library of each prison unit. Offenders are also encouraged to seek out low-cost or *pro bono* legal aid clinics within this state.

The sections that follow provide a starting point for legal research on termination cases. This information not only provides an explanation of the applicable law, but may be used by for the purposes of *pro se* representation for offenders who wish to represent themselves.

§9.1.3 - Grounds for Termination

The reasons why the State or a private entity may wish to seek the termination of a parent's rights to a child are varied, including, among many other reasons the fact that a parent was convicted of a certain crime, that a parent abandoned a child, and that a parent mistreated a child. As previously indicated, Texas Family Code §161.001 provides the numerous grounds for which an individual may have their rights taken away against their will. Section 161.002 of the Family Code concerns the termination of parental rights for an alleged father.

Section 161.003 controls the termination of parental rights when a parent is unable to care for a child who is mentally or emotionally ill or has a mental deficiency, and that debilitating condition will persist beyond the child's eighteenth birthday. See §9.019 below case law on this topic.

§9.1.4 - The Best Interests of the Child

The second prong of the test for termination of parental rights, whether termination is in the best interests of the child, depends on a court's consideration of a multitude of factors. In 1976, the Texas Supreme Court articulated a list of factors which, while not exhaustive have proven to be useful to courts in reviewing whether a certain action is within the best interest of a child. *See Holley v. Adams* 544 S.W.2d 367 (Tex. 1976). These factors include:

1. the desires of the child;
2. the emotional and physical needs of the child now and in the future;
3. the emotional and physical danger to the child now and in the future;
4. the parental abilities of the individuals seeking custody;
5. the programs available to assist these individuals to promote the best interest of the child;
6. the plans for the child by these individuals or by the agency seeking custody;
7. the stability of the home or proposed placement;
8. the acts or omissions of the parent which may indicate that the existing parent-child relationship is not a proper one; and
9. any excuse for the acts or omissions of the parent.

Id. at 372. Because the above list is not exhaustive, courts will often take other considerations into account.

§9.1.5 - Imprisonment, Abandonment, and Danger

Courts in Texas have consistently held that a parent being incarcerated does not, in itself constitute placing a child in danger within the meaning of the Family Code. Furthermore, as a matter of law, incarceration alone does not constitute abandonment under §161.001. *See In the Interest of D.T.*, 34 S.W.3d 625 (Tex. App. Fort Worth 2000, pet. denied); but *see* Tex. Fam. Code §161.001(1)(Q).

It is therefore in the best interest of an offender to maintain contact with their child (if not legally prohibited) and provide for their children as well as they are able to while confined within a penal institution.

§9.1.6 - Voluntary Termination of Parental Rights

The Texas Family Code §161.005 provides for the voluntary termination of parental rights. Specifically, the statute provides that a parent may file a suit for termination of the parent-child

relationship. The court may order termination if termination is in the best interest of the child. §161.005 (c) provides the requirements for a parent who wishes to file for the voluntary termination of their parental rights.

§9.1.7 - Contact with the Child Following Voluntary Termination

QUESTION: If my parental rights are terminated, can I still contact my child? The answer is maybe. Under §161.2061 of the Texas Family Code, if a court finds it to be in the best interest of the child, the court may provide that the biological parent who filed an affidavit of voluntary relinquishment of parental rights under §161.103 shall have limited post-termination contact within the agreement of the biological parent and the Department of Family and Protective Services. See Texas Family Code §161.2061(b).

§9.1.8 - Practical Considerations when Faced with Termination

If a termination case has been filed, ultimately, a parent should consider what is best for the children. Would they be better off in someone else's care? Are there other members of the family who will be able to care for the children in an acceptable manner?

For the parent who wishes to avoid the termination of parental rights, the following are some considerations:

1. Keep communicating with the children (**UNLESS the children were the victims of your offense**. See §8.8 of this Handbook for further information regarding prohibited contact with victims).
2. If contact is not prohibited, write them letters and send them cards (birthday, Christmas, etc.).
3. Buy them gifts if possible.

If you have **any** money, or if someone is sending you money, you should pass some of this on to your children. Doing these things may show that you have not abandoned your children and that you are attempting to support your children to the best of your ability.

§9.1.9 - Case Law

As a general starting point for research on termination of parental rights, see the following cases:

In re S.S.G., 153 S.W.3d 479 (Tex. App. Amarillo 2004, pet. denied). The court discusses termination under §161.001(1) (A).

In re J.R., 319 S.W.3d 773 (Tex. App. El Paso 2010, no pet.). Court discussion of termination under §161.001(1)(C), (F), and (Q).

C.H. v. Texas Dep't of Family & Protective Servs., 389 S.W.3d 534 (Tex. App. El Paso 2012, no pet.). Court discussion of termination under § 161.001(1)(D) and citing Texas Dep't of Human Servs. v. Boyd, 727 S.W.2d 531 (Tex. 1987).

In the Interest of I.G., 383 S.W.3d 763 (Tex. App. Amarillo 2012, no pet.). Court discussion of termination under §161.001(1)(D).

In re T.G.R. –M., 404 S.W.3d 7 (Tex. App. Houston 1st Dist. 2013, no pet.). Court discussion of termination under §161.001(1)(E).

In re R.M., 180 S.W.3d 874 (Tex. App. – Texarkana 2005). Court discussion of termination under §161.001(1)(F).

In re T.B.D., 223 S.W.3d 515 (Tex. App. – Amarillo 2006, no pet.). Court discussion of termination under §161.001(1)(H) and citing In re J.F.C., 96 S.W.3d 256 (Tex. 2002).

Yonko v. Texas Dep't of Family & Protective Servs., 196 S.W.3d 236 (Tex. App Houston 1st Dist. 2006, no pet.). Court discussion of termination under §161.001(1)(J).

In the Interest of V.R.W., 41 S.W.3d 183 (Tex. App Houston 14th Dist. 2001, no pet.). Court discussion of termination under §161.001(1)(K), overruled in part by In the Interest of J.F.C., 96 S.W.3d 256 (Tex. 2002).

In the Interest of Castillo, 101 S.W.3d 174 (Tex. App. Amarillo 2003, pet. denied). Court discussion of termination under §161.001(1)(L).

R.F. v. Texas Dep't of Family & Protective Servs., 390 S.W.3d 63 (Tex. App. El Paso 2012, no pet.). Court discussion of termination under §161.001(1)(L).

Taylor v. Texas Dep't of Protective & Regulatory Servs., 160 S.W.3d 641 (Tex. App Austin 2005, pet. denied). Court discussion of termination under §161.001(1)(M).

In the Interest of N.L.T., 420 S.W.3d 469 (Tex. App Dallas 2014, pet. denied). Court discussion of termination under §161.001(1)(M).

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In re A.V., 113 S.W.3d 355 (Tex. 2003). Court discussion of termination under §161.001(1)(Q).

In the Interest of C.D.E., 391 S.W.3d 287 (Tex. App. Fort Worth 2012, no pet.). Court discussion of termination under § 161.001(1)(Q).

In the Interest of D.D.G., 423 S.W.3d 468 (Tex. App. Fort Worth 2014, no pet.). Court discussion of termination under § 161.001(1)(R).

§9.2 - Adoption

Section 162.001 of the Texas Family Code, entitled “Who May Adopt and be Adopted,” governs the requirements that must be met before a child may be adopted. For the offender who has had his or her parental rights terminated, or who wishes to relinquish their parental rights to facilitate adoption of a child, this section of Family Code provides the starting point for research and information on the potential adoption of their child or children while serving a sentence in TDCJ-ID.

Children are usually adopted in one of two ways. If an incarcerated parent is divorced, custody of any children born during the marriage usually goes to the free-world spouse, if living. When the free-world spouse remarries, the child now has a step-parent. In some circumstances, the free-world spouse (or free-world parent) may want to legally complete the family unit by having the step-parent become a legal parent to the offender’s child. To do this, the step-parent must adopt the offender’s child. In certain situations outlined in the statute, a child can be adopted without termination of parental rights. If one parent has his or her parental rights terminated, a former step-parent may adopt a child if the step-parent has had actual care and custody for six

months provided the non-terminated parent consents to the adoption. If the non-terminated parent does not consent, then the step-parent must have care and custody for one year and then can adopt the child.

Although the Texas courts have recognized that the rights of the natural parents are an important aspect in adoption cases, the best interest of the child is the primary consideration in adoption proceedings. Section 162.016 of the Family Code provides:

- a) If a petition requesting termination has been joined with a petition requesting adoption, the court shall also terminate the parent-child relationship at the same time the adoption order is rendered. The court must make separate findings that the termination is in the best interest of the child and that the adoption is in the best interest of the child.
- b) If the court finds that the requirements for adoption have been met and the adoption is in the best interest of the child, the court shall grant the adoption.
- c) The name of the child may be changed in the order if requested.

The best way to avoid adoption proceedings is to keep in contact with your children. Send cards and gifts, if possible, for their birthdays and Christmas. Write letters to them. If you have money in your trust fund account, you should help provide for your children. It is important to show you have not abandoning your children and that you are trying to support them to the best of your ability.

Before deciding what action to take when you learn that someone wants to adopt your children, think about the following questions:

1. What is best for your children?
2. Would they be better off in someone else's care?
3. If a stranger wants to adopt your children, are there family members who are willing to hire an attorney to intervene in the case to try to win custody of the children?

§9.3 - Determination of Parentage

§9.3.1 - Introduction

Texas Family Code §160.601 provides a method for a person to be recognized as the legal parent of their biological children. While you are incarcerated in TDCJ this may become important to you if someone is trying to terminate whatever rights you may have to your children as the biological parent. If you receive notice that someone is trying to terminate your rights, you have

the opportunity to fight the termination while at the same time petitioning the court to designate you as the parent.

§9.3.2 - Statutory Provisions on Determination of Parentage

Texas Family Code §160.601-160.637 govern the adjudication of parentage. To begin a proceeding to adjudicate parentage, the biological father of a child, the mother of the child, the child, the support enforcement agency, or other authorized agency must file a petition for a decree to name the father as a parent of the child. *See* Texas Family Code §160.602.

A proceeding to adjudicate parentage may be joined with a suit for termination of parental rights. If someone is trying to terminate your rights as a biological parent, you may want to consider a proceeding to adjudicate parentage to attempt to preserve your parental rights.

If there is no presumed parent, a lawsuit to establish parentage can be brought at any time. *See* Texas Family Code §160.606. If there is a presumed parent, §160.607 provides that in most cases the suit must be brought prior to the child's fourth birthday. *See* §160.607 for a statement of the rule, as well as the exceptions that may affect this deadline.

§9.3.3 - Case Law

In the Interest of Z.L.T., 124 S.W.3d 163 (Tex. 2003). The court did not err in implicitly denying a bench warrant to transport a prison inmate to paternity hearing.

In the Interest of R.A.H., 130 S.W.3d 68 (Tex. 2004). A putative father who was not a party in a prior lawsuit has four years from the date that the adjudication was signed to assert his parentage.

Texas Dept. of Protective & Regulatory Services v. Sherry, 46 S.W.3d 857 (Tex. 2001). A purported father of a child lacks standing to bring a paternity action if a prior, final judgment of paternity has been rendered by a court of competent jurisdiction.

Baize v. Baize, 93 S.W.3d 197 (Tex. App. Houston 14th Dist. 2002, pet. denied). A mother could not file a SAPCR (suit affecting the parent-child relationship) after her divorce was final denying her ex-husband's paternity of her six-year-old son. Note that the divorce decree that held that the son was a child of the marriage was a final adjudication of paternity.

In re Z.J.W., 185 S.W.3d 905 (Tex. App. Tyler 2006, no pet.). In an appeal of a default judgment naming Appellant the father and ordering him to pay child support, the court of appeals reversed the default judgment because of a failure to strictly comply with Texas Rule of Civil Procedure 105 in serving citation.

In the Interest of K.M.S., 68 S.W.3d 61 (Tex. App. Dallas 2001, no pet.). An adjudicated father failed to give notice to an alleged father, which allowed the alleged father to later file a bill of review on the paternity issue.

In the Interest of T.S.S., 61 S.W.3d 481 (Tex. App. San Antonio 2001, pet. denied). A father could not raise the issue of parentage after the divorce, when he had the opportunity to do so during the divorce proceeding.

§9.4 - Divorce

§9.4.1 - Procedure

Chapter 6 of the Texas Family Code governs suits for dissolution of a marriage. Be advised that **State Counsel for Offenders cannot advise, represent, or otherwise initiate divorce proceedings on behalf of an offender**. The reasons our office cannot initiate the proceedings are as follows:

1. Before granting a divorce, the Judge must have legally admissible testimony in court on which to base a judgment of divorce. Usually the spouse who files for the divorce testifies in person before the judge. **Since offenders are incarcerated, the major problem is that, without a bench warrant, the offender will be unable to testify.**
2. A divorce suit may be filed in Texas only if one of the spouses has lived in Texas for at least six months, and must be filed in the county where either spouse has lived for at least 90 days.
3. The person filing the lawsuit must: (A) get service on the spouse being sued; and (B) pay the court costs (filing fee, sheriff's fee for service, bench warrant fee, etc.) unless he can prove at a hearing in the county where the divorce is to be filed that he is too poor to pay the costs. Again, it is very difficult for an offender to attend this hearing to testify that he or she is unable to pay these costs.

The only way an offender can attend divorce proceedings is to have the district judge issue a bench warrant to have the offender appear in court. A few courts have accepted divorce petitions from people who are incarcerated and allowed them to file an affidavit with the court instead of appearing in person. In Boulden v. Boulden, 133 S.W.3d 884 (Tex. App. Dallas 2004, no pet.), an inmate filed a divorce. The trial court dismissed his divorce petition for want of prosecution. The court of appeals held, "Although there is no absolute right for an inmate to appear in person in a

civil case, where the trial court determines personal appearance is not warranted, it should allow the inmate to proceed by affidavit, deposition, telephone, or other effective means.” *Id.* at 886-87. The order dismissing the case for want of prosecution was reversed.

The best way to obtain a divorce and avoid all these problems is to have the free-world spouse file the divorce. If this is done, your spouse can give the testimony the judge needs to grant the divorce.

Sometimes, a spouse will send a Waiver of Citation. A Waiver of Citation is specifically provided for under §6.4035 of the Texas Family Code. By signing the waiver, an offender is basically saying that the filing spouse can go ahead with the divorce, and that the offender does not wish to take part in the proceedings. The filing spouse can then get the divorce with no further input from the offender. Generally speaking, if there are no children of the marriage, and there is no property, signing the waiver will provide the desired divorce without further issue. **However, it is not a good idea to sign a Waiver of Citation unless** both spouses have agreed to everything that will go into the final decree of divorce. If spouses still have disputed issues, an offender should not sign the waiver.

It is possible to negotiate an agreed decree of divorce. An offender can contact your spouse’s attorney to tell them what specifically terms they wish to have in the final decree. If there is specific property that an offender wishes to keep, they should tell that attorney, and also let him or her know of someone who can keep your property for until release. It is not advisable to contact a spouse directly if the spouse is represented; communicate only with the spouse’s attorney.

With regards to child support, some courts will agree to defer it until after an offender’s release from prison. However, there is no right to have child support deferred. Imprisonment does not excuse an obligation to support children. An offender can ask his or her spouse’s attorney if they will agree to a deferment.

If they will not, the court will usually order the standard child support amount based on minimum wage, since you do not have a salary on which to base the calculations.

If the parties are able to agree on the terms of the divorce, both parties can sign the Waiver of Citation and the Final Decree of Divorce at the same time. An offender should make sure to ask their spouse’s attorney to provide a copy of the divorce decree that is signed by the judge and filed with the court for their records.

If the parties are not able to reach an agreement as to the terms, then the offender spouse will most likely be served with a citation. This is done either by a sheriff's deputy or by certified mail from the District Clerk's office. There will be a cover page that states, "You have been sued." If you are sued for divorce, **do not** send your legal documents to SCFO. Refer to SCFO REF 9.1 and 9.2 of Vol. II of the Legal Handbook for sample answers that you can use to respond. The deadline for filing your answer is listed on the Citation you received. As a note, if there are children born during the marriage, they **must** be included in the divorce proceedings under Texas Family Code §6.406.

The form at SCFO REF. 9.3 can be used to answer a divorce petition when there are children involved. The form at SCFO REF. 9.2 can be used to answer a divorce petition when there are no children involved.

§9.4.2 - Grandparent Visitation

Grandparents are mentioned in the Texas Family Code and have various rights to seek custody or visitation of their grandchildren. Grandparent's rights to their grandchildren are outlined in the Texas Family Code, §§153.431 through 153.434. If an offender is having problems concerning the care and custody of his or her children, one option is to contact the child's grandparents and let them know that they have legal rights regarding their grandchildren. Specifically, §153.433 mentions incarceration of a child's parent as one reason to grant the parents of the incarcerated person access to their grandchild. To learn more about these rights, your parents should contact an attorney or their local legal aid office.

§9.5 - Child Custody

A suit for child custody is called a Suit Affecting the Parent-Child Relationship (also referred as a "SAPCR"). Chapter 153 of the Texas Family Code governs child custody. Texas law presumes that parents are the best suited persons to raise children. *See* Texas Family Code §153.131.

As a result, the natural father and natural mother of the child will first be considered by the court for the position of having custody of their children, or legally speaking, will be named as joint managing conservators. If one parent is incarcerated, both parents can still be named as joint managing conservators, but the court will probably order that the non-incarcerated parent has the right to establish the child's residency.

If one parent wishes to overcome the presumption that both parents will be joint managing conservators, he or she must show that it “would not be in the best interest of the child because the appointment would significantly impair the child’s physical health or emotional development,” or that there is a “history of family violence involving the parents of a child...” For further information, refer to the different options outlined in Chapter 153 of the Family Code.

Under §153.133 of the Family Code, the parents can submit an “agreed parenting plan” to the court. The court can order joint managing conservatorship under §153.134. If both parents are incarcerated, a family member will most likely be appointed as a managing conservator. However, even though it is presumed that a parent will be the managing conservator of the children, this presumption can be rebutted by evidence that it is not in the child’s best interest for the parent, or grandparents, to be appointed managing conservator of the children. Admissible witness testimony or documentary evidence may be presented before the court to prove the child’s best interests will be served, or otherwise will be harmed in a physical, psychological, or emotional manner.

If you are served with papers by someone seeking custody of your children, **you must respond**. If you fail to respond, for whatever reason, custody of your children could be given to someone else. Additionally, it is important to note that anyone who has actual physical custody of a child for at least one year may petition a court to be named managing conservator of the child. *See Texas Family Code §153.373.*

If a governmental agency (Texas Department of Family and Protective Services, or any other authorized agency) files a lawsuit seeking temporary custody of a child, the sued parent is entitled to representation by counsel under the Texas Family Code §107.013. The court must appoint counsel to represent an indigent parent.

An offender may be served with citation in two ways: 1) by receiving a copy of the petition from a Sheriff’s Deputy, Constable, or other authorized person appearing at the prison unit and hand delivering a copy to you; or 2) by receiving from the district clerk for the county in which the suit has been filed, a document entitled “Citation” stating that suit has been filed and stating the deadline for the filing of an answer. Most likely, this letter will be served by certified mail, return receipt requested.

For more information on your rights and responsibilities as a parent, please refer to the remainder of this chapter as well as the Texas Family Code, which can also be found in your unit law library. A sample answer for custody lawsuits is provided SCFO REF 9.1.

§9.6 - Getting Married while Incarcerated

In September of 2013, the Texas Family Code §2.203(b) was amended to disallow incarcerated persons from marrying by proxy. As amended, a person can marry by proxy **only** if he or she is a member of the armed forces stationed in another country and unable to attend the ceremony. *Id.*

TDCJ has since amended its procedures to allow marriage ceremonies on prison premises. An offender who wishes to be married on TDCJ premises must submit an Inmate Request to an Official (I-60) to the unit's Access to Courts supervisor. The request must include the following information:

1. The non-incarcerated intended spouse's name; and
2. The name of the officiant who will be performing the marriage.

The non-incarcerated intended spouse is responsible for the following:

1. Obtaining the required licenses and bring to the unit the day of the marriage;
2. Arranging for the officiant to preside over the ceremony;
3. Being responsible for any payment due to the officiant; and
4. Making all other necessary arrangements.

An individual seeking to perform a marriage ("officiant") on TDCJ property or contracted facilities must complete the "Application of Person Requesting to Perform a Marriage" and submit it to the Access to Courts headquarters at least one week prior to the scheduled marriage date.

For specific information regarding marriage ceremonies on TDCJ premises, please contact your unit Access to Courts supervisor.

§9.7 - Common-Law Marriage

Texas recognizes common law or informal marriage as an alternative to traditional ceremonial marriage or proxy marriage. An informal or common-law marriage may be established as a matter of law under §2.401 of the Texas Family Code. A common law marriage can be proven where a man and woman: (1) agree to be married; and (2) after agreement, reside together in the State of Texas; and further (3) represent to others that they are married. Common law marriage

can only be accomplished prior to an offender's incarceration. TDCJ may require additional paperwork to prove that a couple actually lived together prior to incarceration.

Declaration of Informal Marriage forms are available from the county clerk's office. If a declaration of informal marriage has not been filed with the County Clerk, and the couple has been separated for two or more years, the courts presume that the parties did not enter into an agreement to be married. *See* Texas Family Code §2.401. This presumption is rebuttable, however, meaning that evidence can be presented in court to contradict the presumption that no marriage existed.

§9.8 - Child Support and Suits by the Attorney General

An offender may have been served, or may be served, with papers by the Attorney General of Texas seeking child support or reimbursement for government funds expended on behalf of a child. In most cases, the Attorney General's office files a suit seeking child support or reimbursement of money expended on behalf of the children and serves both the legal father and the legal mother of the child. In some cases, this is required by state law.

If the father has not yet been determined, the Attorney General may file a suit seeking to have a court determine the identity of the father of the child. Pursuant to this suit, the court may order paternity testing.

NOTE: If a person is named as a possible/probable father, and fails or refuses to give a blood sample in order to be tested by a DNA expert, that person may be declared the father by default.

Under §231.001 of the Texas Family Code, the Attorney General's office is designated as the state agency that will seek and enforce child support orders. The agency is designated as the Title IV-D agency, a reference to the federal law that requires the State to seek and enforce child support. Under §231.101, the Attorney General's office has authority to provide parent locator services, paternity determination, child support and medical support establishment, review and adjustment of child support orders, enforcement of child support orders, and collection of child support payments.

If you are served with documents from the Attorney General's office, and you do not want paternity testing, you may file SCFO REF 9.6 with the court. If you want to have paternity testing, you should file SCFO REF 9.5, which denies paternity and requests testing. Note that both of these forms request appointment of counsel. You are not entitled to appointed counsel in this type of lawsuit, but the court can still consider your request.

Under Texas Law, both parents have an obligation to provide support for their children. The person who has physical custody of your child may have sought the assistance of Medicaid, Social Security, Aid to Families with Dependent Children or some other federal or state agency. Because they have sought this aid, and money has been spent for your child's benefit, the State of Texas is required by law to seek reimbursement of these funds.

Incarcerated persons may be able to demonstrate an **inability** to pay. This, however, does not relieve an offender of the **responsibility** to provide either the support for their child or reimbursement to the State of Texas and the federal government for the support the government provided to the child in the parent's place.

Offenders who are indigent or unable to earn money will continue to accrue child support debt while incarcerated. The Attorney General's office has issued a brochure entitled "Incarcerated Parents and Child Support." It is included in this Legal Handbook at SCFO REF 9.7. It provides helpful information regarding child support and how to best handle the problem of not being able to pay. Note that the Attorney General's office can seek contempt if you are behind in child support payments, but your inability to pay may be asserted as a defense to this charge. An offender with child support obligations should keep the Attorney General's office informed of his or her status and/or indigency as a way to possibly avoid contempt charges.

Although a contempt of court charge finding may be avoided, an offender will continue to be responsible for payment of support. Further, incarceration will not reduce the amount of outstanding child support owed. Therefore, an offender owing child support should make every attempt to begin paying, as well as to pay toward any arrears that are past due. **BE SURE TO KEEP RECEIPTS FOR CHECKS OR MONEY ORDERS WHEN YOU PAY YOUR CHILD SUPPORT.** These documents are essential to show that you have paid child support and when it was paid. The trend nationwide is for states to enact laws prohibiting a person from obtaining a driver's license if they are delinquent in their child support. If you have a driver's license, a State may suspend that license and do other things that may involve the suspension or prohibition of hunting and fishing licenses, state professional licenses, and other items that might make it difficult or impossible to obtain employment. Refer to Chapter 232 of the Texas Family Code for more information on suspension of licenses due to child support arrearages.

If you are faced with a child support suit, you may request that the court issue a bench warrant to allow you to personally appear in court. The court is not required to grant this request. In the

alternative, you may request a continuance of any hearings until your release from TDCJ. Last, you can ask if the court will allow you to participate in any hearings from your unit by telephone conference or video conference.

Offenders may also seek to initiate the involvement of the Attorney General themselves. Child support obligations may be lowered or modified when there is a material and substantial change in circumstances since the last child support order was set. Imprisonment can be taken into consideration in determining whether there has been a material and substantial change in circumstances. Towards the back of the Attorney General's brochure, located at SCFO REF 9.7, is a form called "Inquiry Form for Incarcerated Parents." An offender can submit this form to the Attorney General to request their child support order be reviewed to determine whether they qualify for a lower monthly child support payment. The offender should check the appropriate box indicating that they want their child support case reviewed for qualification of lower payments. The form should then be mailed to the address listed.

After submitting the form to the Attorney General's Office, the offender should be contacted by an "Incarcerated Parent & Reentry Specialist" who will inform them of whether or not they qualify for a lower child support payment. If the offender qualifies for lower payments, the offender will receive an "Incarcerated Non-Custodial Parent Affidavit of Income/Assets" form. The offender should fill this out and return it according to the instructions provided. The Attorney General's Office can then present this affidavit in court to justify the request to lower child support payments. The incarcerated parent will be served with copies of all pleadings filed in court.

Remember that the child support obligations will not change until there has been a new order issued by the court. Any arrearages and interest on previously owed and unpaid child support obligations will likely still be responsibility of the offender, therefore it is in the best interest of the offender to contact the Attorney General as soon as possible if the offender is unable to meet child support obligations while incarcerated.

§9.9 - Questions Offenders Often Ask

1. IS THERE A FREE OR ONE DOLLAR DIVORCE AVAILABLE TO ME WHILE I AM INCARCERATED?

Answer: No. This is a common misconception or rumor that continuously circulates in the TDCJ system. However, there is no such thing as a free divorce nor one available to an offender for the price of one dollar.

2. DO I HAVE TO PAY CHILD SUPPORT WHILE I AM INCARCERATED?

Answer: Yes. Although you are not allowed to handle money while you are incarcerated, you have a duty under Texas law, if you are ordered to pay child support, to support your children. Therefore, if you have money available to you, either inside or outside the system, you should either pay your child support or direct the person in control of the funds and assets to pay your child support for you. The fact that you are incarcerated does not relieve you of your obligation to pay child support. Therefore, it is in your best interest to remain current in your child support payments, if possible.

3. SOMEONE HAS TAKEN MY CHILDREN. WHAT CAN I DO TO GET THEM BACK?

Answer: As long as you are incarcerated, it is difficult, if not impossible, for you to initiate court proceedings in order to recover custody of your children. Ultimately, even if you were awarded possession of your child by the court, being physically incarcerated you would be unable to physically have your child with you. However, you may designate any competent adult over the age of 18 to both pick up and redeliver your children for periods of visitation and access. A court may allow someone to bring your child to visit you, however this is quite a separate and distinct matter from someone taking your child and your being able to do something about it while you are incarcerated. The best alternative is for you to have friends or family members that have a legal right to custody of the child hire a free-world lawyer and litigate this issue for you.

4. I HAVE JUST RECEIVED NOTICE FROM THE COURT THAT A HEARING HAS BEEN SCHEDULED TO REVIEW THE PLACEMENT OF MY CHILD IN FOSTER CARE. WHAT CAN I DO?

Answer: This is a rather routine hearing required to be held by law every six months that the child is in foster care. This hearing is for the sole purpose of the court to review the placement of the children in foster care to determine the progress, if any, in the permanent placement plan formulated by TDPRS and to review the actual care, physical and emotional condition, and living circumstances of the children. You may write a letter to the court and to TDPRS expressing your desire to work with them or the foster parents in formulating a permanent placement plan for the children and

pledge your assistance in formulating a plan to reintegrate yourself into the children's lives. You may request the court to bench warrant you to this hearing or, in the alternative, allow you to participate in the hearing by telephone or video conference. If you are not bench warranted you may write a letter to the court expressing your love and concern for the child and your willingness and desire to work with officials to formulate a plan for caring for your children.

5. I HAVE BEEN SUED BY THE ATTORNEY GENERAL OF TEXAS FOR BACK CHILD SUPPORT AND CURRENT CHILD SUPPORT. I AM INCARCERATED AND UNABLE TO PAY. CAN I DELAY THESE PAYMENTS UNTIL I AM RELEASED?

Answer: You may, of course, write the Attorney General of Texas and ask them to defer or delay payments ordered for child support. However, this is an individual decision up to the individual Assistant Texas Attorney General handling your case. You cannot force the Texas Attorney General to defer payments until you are released. Read §9.8 of this Chapter and SCFO REF 9.7, Incarcerated Parents and Child Support.

6. I LEFT MY CHILDREN WITH SOMEONE PRIOR TO COMING TO PRISON AND NOW THEY HAVE SUED ME FOR CUSTODY. CAN THEY DO THAT?

Answer: Yes. Under Texas law, anyone who has physical custody of a child for whatever reason, for at least one year, may petition a court of competent jurisdiction to be named the custodian and managing conservator of the child. If suit is filed, the natural parents of the child must be served with citation of this suit. Do not confuse loss of custody with termination of parental rights. Custody is a temporary situation; termination is permanent.

CHAPTER 9 REFERENCES

SCFO REF 9.1 - Pro se Response to Child Custody Termination Suit

SCFO REF 9.2 - Pro se Response to Divorce - No Children

SCFO REF 9.3 - Pro se Response to Divorce - Children

SCFO REF 9.4 - Denial of Paternity packet with cover letter

SCFO REF 9.5 - Admission of Paternity packet with cover letter

SCFO REF 9.6 - Attorney General Pamphlet - Incarcerated Parents and Child Support

SCFO

§9.10 - Table of Authorities

Cases

Baize v. Baize, 93 S.W.3d 197 (Tex. App. Houston 14th Dist. 2002) 9

Boulden v. Boulden, 133 S.W.3d 884 (Tex. App. Dallas 2004) 10

C.H. v. Texas Dept. of Family & Protective Servs., 389 S.W.3d 534 (Tex. App. El Paso 2012, no pet.).....6

Holle v. Adams, 544 S.W.2d 367 (Tex. 1976) 4

H.N. v. Texas Dept. of Family & Protective Servs., 397 S.W.3d 802 (Tex. App. El Paso. 2013, pet. denied).....6

In the Interest of C.D.E., 391 S.W.3d 287 (Tex. App. Fort Worth 2012, no pet.) 7

In the Interest of Castillo, 101 S.W.3d 174 (Tex. App. Amarillo 2003) 6

In the Interest of D.D.G., 423 S.W.3d 468 (Tex. App. Fort Worth 2014, pet. denied) 7

In the Interest of D.T., 34 S.W.3d 625 (Tex. App. Fort Worth 2000, pet. denied) 4

In the Interest of E.S.S., 131 S.W.3d 632 (Tex. App. Fort Worth 2004, no pet.)..... 7

In the Interest of I.G., 383 S.W.3d 763 (Tex. App. Amarillo 2012, no pet.)..... 6, 7

In the Interest of J.E.H., 384 S.W.3d 864 (Tex. App. San Antonio 2012, no pet.) 7

In the Interest of K.G., 350 S.W.3d 338 (Tex. App. Fort Worth 2011, pet. denied) 6

In the Interest of K.M.S., 68 S.W.3d 61 (Tex. App. Dallas 2001) 10

In the Interest of M.C.G., 329 S.W.3d 674 (Tex. App. Houston 14th Dist. 2010, pet. denied). 7

In the Interest of N.L.T., 420 S.W.3d 469 (Tex. App. Dallas 2014, pet. denied)..... 6

In the Interest of R.A.H., 130 S.W.3d 68 (Tex. 2004)..... 9

In the Interest of T.S.S., 61 S.W.3d 481 (Tex. App. San Antonio 2001) 10

In the Interest of V.R.W., 41 S.W.3d 183 (Tex. App. Houston 14th Dist. 2001, no pet.)..... 6

In the Interest of Z.L.T., 124 S.W.3d 163 (Tex. 2003)..... 9

Interest of Estate of A.Q.W., 395 S.W.3d 285 (Texas App. San Antonio 2013, pet. denied)..... 7

<u>In re A.V.</u> , 113 S.W.3d 355 (Tex. 2003)	7
<u>In re J.C.</u> , 250 S.W.3d 486 (Tex. App. Fort Worth 2008, pet. filed)	3
<u>In re J.F.C.</u> , 96 S.W.3d 256 (Tex. 2002).....	6
<u>In re J.R.</u> , 319 S.W.3d 773 (Tex. App. El Paso 2010, no pet.).....	6
<u>In re R.M.</u> , 180 S.W.3d 874 (Tex. App. Texarkana 2005)	6
<u>In re S.S.G.</u> , 153 S.W.3d 479 (Tex. App. Amarillo 2004, pet. denied).....	5
<u>In re T.B.D.</u> , 223 S.W.3d 515 (Tex. App. Amarillo 2006, no pet.).....	6
<u>In re T.G.R.-M.</u> , 404 S.W.3d 7 (Tex. App. Houston 1st Dist. 2013, no pet.).....	6
<u>In re Z.J.W.</u> , 185 S.W.3d 905 (Tex. App. Tyler 2006, no pet.).....	9
<u>R.F. v. Texas Dept. of Family & Protective Servs.</u> , 390 S.W.3d 63 (Tex. App. El Paso. 2012, no pet.).....	6
<u>Texas Dep't of Human Services v. Boyd</u> , 727 S.W.2d 531 (Tex. 1987)	6
<u>Taylor v. Texas Dept. of Protective and Regulatory Servs.</u> , 160 S.W.3d 641 (Tex. App. Austin 2005, pet. denied).....	6
<u>Texas Dept. of Protective & Regulatory Services v. Sherry</u> , 46 S.W.3d 857 (Tex. 2001).....	9
<u>Yonko v. Texas Dept. of Family & Protective Servs.</u> , 196 S.W.3d 236 (Tex. App. Houston 1st Dist. 2006, no pet.).....	6

CHAPTER 10 TABLE OF CONTENTS

CHAPTER 10 – COMMUNITY SUPERVISION AND TIME-CUTS

10.1 - Community Supervision	1
10.1.1 - Introduction	1
10.1.2 - Statutory Provisions on Community Supervision	1
10.1.3 - Case Law	2
10.1.4 - Instructions for Forms	3
10.1.5 - Forms	4
10.1.6 - Summary	4
10.2 - State Jail Offenses	4
10.2.1 - Basic Information	4
10.2.2 - Instructions for Forms	4
10.2.3 - Forms	5
10.2.4 - Summary	5
10.3 - Commutations or Time-Cuts	5
10.3.1 - Introduction	5
10.3.2 - Source of Right	5
10.3.2.1 - Basis for a Commutation or Time-Cut	5
10.3.2.2 - Requirements	6
10.3.2.3 - Instructions for Forms	7
10.3.2.4 - Forms	7
10.3.2.5 - Summary	7
10.3.3 - Questions Offenders Often Ask	8
10.4 - Table of Authorities	9

CHAPTER 10 - COMMUNITY SUPERVISION AND TIME-CUTS

§10.1 - Community Supervision

§10.1.1 - Introduction

Within the first 180 days after being sentenced to TDCJ, your trial judge has the authority to place you on community supervision. Community supervision imposed after a period of incarceration is known as “shock probation.” The purpose of this type of community supervision is to “SHOCK” you into realizing that prison is not where you want to reside for the remainder of your sentence. Hopefully, this will encourage you to avoid engaging in conduct that could result in revocation of your community supervision and your return to TDCJ.

§10.1.2 - Supervision Provisions on Community Supervision

Article 42.12 §6(a) of the Texas Code of Criminal Procedure enables the trial court to place you on community supervision during the first 180 days following the execution of your sentence. The requirements set out below are effective for all offenses committed on or after September 1,

1993. For offenses committed prior to that date, you may contact SCFO for information on eligibility for community supervision.

Community supervision may be granted under the following circumstances (*see* Article 42.12 §3 of the Texas Code of Criminal Procedure):

1. You are eligible for community supervision under normal circumstances when your sentence is 10 years or less;
2. You have never before been incarcerated in a penitentiary serving a sentence for a felony;
3. There has not been a finding that a deadly weapon as defined in §1.07(a)(17)(A) and (B) of the Penal Code was used or exhibited in the commission of your offense; and
4. You were not convicted of any of the following offenses:
 - a. Murder, §19.02;
 - b. Capital Murder, §19.03;
 - c. Indecency with a Child (by contact), §21.11(a)(1);
 - d. Aggravated Kidnapping, §20.04;
 - e. Aggravated Sexual Assault, §22.021;
 - f. Aggravated Robbery, §29.03;
 - g. A controlled substance offense that was committed (or priors increased under this section) within a “drug free zone,” i.e. schools, school property, etc., Chapter 481 Health and Safety Code §481.140, §481.134(c), (d), (e), or (f);
 - h. Sexual Assault, §22.011 (a)(2);
 - i. Injury to a child, elderly individual, or disabled individual, §22.04(a)(1);
 - j. Sexual performance by a child, §43.25;
 - k. Criminal Solicitation, §15.03 of the Penal Code, if the offense is punishable as a felony of the first degree;
 - l. Compelling Prostitution, §43.05 of the Penal Code;
 - m. Trafficking of persons, §20A.02 of the Penal Code; or
 - n. Burglary under §30.02 of the Penal Code, if the offense is punishable under subsection (d) of that section and the actor committed the offense with the intent to commit a felony under §21.02, §21.11, §21.011, §22.021, or §25.02 of the penal code.

You must send the request to the court before the expiration of 180 days from the date the execution of the sentence actually begins because after 180 days the trial court loses jurisdiction. If these requirements are met, the trial judge will decide whether to place you on community service.

§10.1.3 - Case Law

O’Hara v. State, 626 S.W.2d 32 (Tex. Crim. App. 1981). When a court grants shock probation under this article, it suspends the execution, rather than the imposition of sentence. The

defendant actually serves a portion of the sentence. The convicting court may then suspend the execution of the remainder of the sentence.

Rodgers v. State, 744 S.W.2d 281, 286 (Tex. App. Fort Worth 1987, pet. ref'd). “A grant of ‘shock probation’ is not a final conviction.”

Ex Parte Hale, 117 S.W.3d 866 (Tex. Crim. App. 2003). “The limits on the period of conditional release are set by statute. For mandatory supervision, the period is computed by subtracting from the term for which the inmate was sentenced the calendar time served on the sentence. A person may not be supervised after that period expires.”

§10.1.4 - Instructions for Forms

1. While the law no longer specifies a minimum number of days, you should file your motion only after a reasonable number of days have passed from the date the execution of your sentence actually begins. The 60 days set out in the old law likely would be a reasonable number of days.
2. The court cannot grant community supervision more than 180 days after the date upon which the execution of your sentence began. File your motion with the district clerk after a reasonable number of days have passed, but before the 180th day.
3. On the date you mail your motion, **sign all copies (total of 3) in the two places** for your signature on each sheet.
4. On the date you mail your motion, (a) **sign the letter to the district clerk**, (b) **fill in your address under your signature**, (c) **put the date at the top of the letter to the clerk**.
5. Keep one copy for yourself.
6. Mail one copy to the district clerk and one copy to the district attorney at the county courthouse in the town in Texas where you were convicted. On the Certificate of Service, fill in the date you mail it, and sign the Motion. Fill out and sign the Declaration of Inability to Pay Costs. Do not fill out or sign the two Orders; these are for the judge’s signature. The address of the district clerk and district attorney are in the Texas Legal Directory in the unit law library. If possible, mail these documents by certified mail, return receipt requested. If you do not have the funds to pay for certified mail, use regular U.S. mail.

§10.1.5 - Forms

SCFO REF 10.1 is a complete packet for applying for community supervision if you are serving a TDCJ sentence. The packet contains a cover letter, the Motion, a Declaration of Inability to Pay Costs if you are indigent, orders regarding the appointment of counsel and request for a hearing.

§10.1.6 - Summary

The judge of the court in which you were sentenced is the only person who can grant you community supervision. It would be helpful if friends, relatives, or others would personally try to convince the judge in writing that you are a good person for community supervision and that they will help you with the community supervision terms that the judge may order. In addition to filing the motion, we suggest you write the judge a convincing letter that you feel (1) being in TDCJ has turned your attitude around, (2) you are a good person for community supervision, and (3) you will follow the terms of community supervision.

§10.2 - State Jail Offenses

§10.2.1 - Basic Information

If you are in TDCJ for a State Jail offense(s) only, you are eligible for community supervision. It is very unlikely, however, that the judge will consider granting you community supervision unless you have never before been incarcerated in a penitentiary serving a sentence for a felony. Article 42.12 §15(f)(2) of the Texas Code of Criminal Procedure permits the court to grant community supervision in a State Jail case at any time after the 75th day following your arrival at the TDCJ State Jail. The decision whether to grant you community supervision is completely within the discretion of the judge.

§10.2.2 - Instructions for Forms

1. File your motion with the district clerk only after 75 days have passed from the date you arrived at the state jail.
2. On the date you mail your motion, **sign all copies (3 in total) in the two places** for your signature on each sheet.
3. On the date you mail your motion, (a) **sign the letter to the district clerk**, (b) **fill in your address under your signature**, (c) **put the date at the top of the letter to the clerk**. On the Certificate of Service, fill in the date you mail it, and sign the Motion. Fill out and sign the Declaration of Inability to Pay Costs. Do not fill out or sign the two Orders; these are for the judge's signature.
4. Keep one copy for yourself.

5. Mail one copy to the district clerk and one copy to the district attorney at the county courthouse in the town in Texas where you were convicted. The addresses are in the Texas Legal Directory in the unit law library. If possible, mail these documents by certified mail, return receipt requested. If you do not have the funds to pay for certified mail, use regular U.S. mail.

§10.2.3 - Forms

See SCFO REF 10.2 for the packet to apply for Community Supervision if you are serving a state jail felony sentence. The packet contains a cover letter, the Motion, a Declaration of Inability to Pay Costs if you are indigent, and orders regarding appointment of counsel and the request for a hearing.

§10.2.4 - Summary

The judge of the court in which you were sentenced is the only person who can grant you community supervision. It would be helpful if friends, relatives, or others would personally try to convince the judge in writing that you are a good community supervision risk and that they will help you with any community supervision terms that the judge may order.

In addition to filing the motion, we would suggest you write the judge a convincing letter that you feel (1) being in state jail has turned your attitude around, (2) you are a good community supervision risk, and (3) you will abide by the terms of community supervision.

§10.3 - Commutations or Time-Cuts

§10.3.1 - Introduction

If you receive a sentence which, based on the facts, you believe is excessively long, you may try to have your sentence commuted (reduced). Commutation, also referred to as a time-cut, is a form of clemency granted by the Governor following a recommendation from the Texas Board of Pardons and Paroles (hereinafter “Parole Board”).

§10.3.2 - Source of Right

The Governor, upon the advice of the Parole Board, may grant a time-cut under authority of article 48.01 of the Texas Code of Criminal Procedure.

§10.3.2.1 - Basis for a Commutation or Time-Cut

Commutation of a sentence involves the modification of the punishment assessed by the court. Therefore, such action must be based upon facts directly related to the case and not upon other matters. Commutation is not the same as parole.

The Parole Board will **not** consider any of the following reasons as a sufficient basis for commutation of sentence:

1. Hardship to offender or family;
2. Position or standing of offender or family in the community;
3. Comparison of punishments;
4. Good behavior or adjustment in prison;
5. Rehabilitative qualities of the offender; or
6. Any other reason not directly connected to the facts upon which the conviction rests.

To be considered for a commutation or time-cut, you must have a **written recommendation on the official letterhead of the trial official** with an original signature (not stamped). It must be sent **directly** to the Parole Board from a majority of the trial officials without solicitation by the Parole Board. Trial officials are the judge of the court of conviction, the prosecuting attorney, and the sheriff of the county of conviction currently holding office. Their addresses can be found in the Texas Legal Directory in the unit law library.

If the requester has the recommendation of a majority of the trial officials and no written communication is received from the third trial official, the Parole Board is required by statute to give that remaining officer at least 10 days' notice that such clemency is being considered by the Parole Board or by the Governor.

In cases tried before the current trial officials took office, the recommendation of persons holding such offices at the time of trial of the cases may be used to support the recommendation of the current trial officials. Any such recommendations should comply with the following requirements.

§10.3.2.2 - Requirements

The written recommendation of the trial officials for commutation of sentence must include:

1. A statement that the penalty now appears to be excessive;
2. A recommendation of a definite term now considered by the officials as just and proper; and
3. A statement of the reasons for the recommendation based upon facts directly related to the facts of the case existing but not available to the court or jury at the time of the trial, or a statutory change in penalty for the crime which would appear to make the original penalty excessive.

It is important that the reasons given are based on facts existing at the time of the trial, connected with the case, but not available to the court or jury at the time of the trial. Such facts should be plainly set out.

The Parole Board will consider all applications submitted in compliance with the above rules, but compliance does not necessarily mean that favorable action will result. The decision to commute a sentence involves consent of the Parole Board and the Governor; therefore, **it is extremely difficult to obtain.**

If the convicted person is not confined to TDCJ, a certified copy of the judgment and sentence must be furnished.

§10.3.2.3 - Instructions for Forms

SCFO REF 10.3 is a sample letter of a request for a time-cut. You should write three of these letters in your own handwriting: one each to the 1) district judge, 2) district attorney, and 3) sheriff of the county in which you were convicted, who are currently holding office.

To be considered for a time-cut, you must obtain a recommendation from two of these three officials: judge, district attorney, and sheriff. If this is done, the Parole Board will consider the matter and then either recommend or deny commutation and forward its decision to the Governor. Addresses for the trial officials are in the Texas Legal Directory in the unit law library.

§10.3.2.4 - Forms

See SCFO REF 10.3.

§10.3.2.5 - Summary

When you list the reasons why you feel your sentence was excessive, you must state facts that were existing at the time of the trial. Hardship to you or your family, adjustment in prison, or rehabilitation are not considered sufficient by themselves, to warrant a time-cut, although you should also include this information in your letter.

It has been the experience of employees at SCFO that time-cuts will not be granted on sentences of less than twenty (20) years.

§10.33 - Questions Offenders Often Ask

1. I HAVE NOT RECEIVED ANY INFORMATION. HOW WILL I KNOW IF MY TIME-CUT REQUEST WAS GRANTED?

Answer: Requests for time-cuts are rarely granted. The Governor and the Parole Board receive numerous time-cut requests from offenders. Very few of these requests are granted. If your request is granted you will receive notification. However, offenders are not normally notified when their request is denied.

2. I HAVE NOT RECEIVED ANY INFORMATION. HOW WILL I KNOW IF MY SHOCK PROBATION REQUEST WAS GRANTED?

Answer: If your request is granted you will receive notification from the court. However, the court does not normally notify offenders when their request is denied. You will need to contact the court to check on the status of your request.

3. THE JUDGE TOLD ME WHEN I WAS SENTENCED THAT I WOULD BE GIVEN COMMUNITY SUPERVISION. WHY AM I STILL IN TDCJ?

Answer: Community supervision requires a minimum period of time to be served in TDCJ custody before the community supervision term begins. This is done to shock individuals to the realities of prison life. The hope is to encourage the successful completion of the community supervision period and deter future criminal behavior. After you have served a minimum time period, the court may have you returned to the county on a bench warrant. At that time the judge will review your prison records and make a determination to grant or deny community supervision.

CHAPTER 10 REFERENCES

- SCFO REF 10.1** – Packet for Community Supervision from TDCJ sentence
SCFO REF 10.2 – Packet for Community Supervision from State Jail sentence
SCFO REF 10.3 – Sample letter of a request for a time-cut

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Rodgers v. State, 744 S.W.2d 281 (Tex. App. - Fort Worth 1987) 3
Ex Parte Hale, 117 S.W.3d 866 (Tex. Crim. App. 2003) 3

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CHAPTER 11 TABLE OF CONTENTS

CHAPTER 11 - IMMIGRATION PROCEEDINGS

11.1 - Overview	1
11.2 - Law on Removal.....	2
11.3 - Grounds for Discretionary Relief	3
11.3.1 - Cancellation of Removal	3
11.3.2 - Asylum.....	3
11.3.3 - Withholding of Removal	3
11.3.4 - Deferral of Removal	4
11.3.5 - Adjustment of Status	4
11.4 - Citizenship.....	4
11.5 - Prisoner Transfer	4
11.6 - Questions Offenders Often Ask.....	5

CHAPTER 11 - IMMIGRATION PROCEEDINGS

§11.1 - Overview

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) was signed into law on April 24, 1996. Five months later, on September 30, 1996, the President signed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). These Acts eliminated many types of relief for aliens convicted of aggravated felonies and added more felonies and probated misdemeanors to the definitions of crimes under Immigration Law.

The Immigration Section was created in 1996 to assist an alien with the United States Citizenship and Immigration Service (USCIS) and the Immigration and Customs Enforcement (ICE). USCIS and ICE were formerly known as the Immigration and Naturalization Service (INS).

The felony offense for which an alien is sentenced to serve time in the Texas Department of Criminal Justice (TDCJ) is usually the basis for removal (formerly “deportation”) from the United States. ICE will attempt to remove all non-citizens of the United States (i.e., illegal aliens, non-immigrant visitors, and residents – “green card holders”) if they have been convicted of a felony.

The immigration courtroom is located at the Goree Unit in Huntsville. The facility allows removal matters to be resolved while an alien is in the custody of TDCJ.

If ICE seeks an order of removal, a Notice to Appear will be issued. If the laws provide that an alien can be administratively removed without appearing before the Immigration Judge, SCFO will be unable to assist the alien. If SCFO is notified, it will make arrangements to advise the alien of legal rights and will assist in preparing a defense, if applicable. If SCFO determines that no

relief is available, it will refer the alien to the List of Free Legal Services Providers. *See* SCFO REF 11.1.

§11.2 - Law on Removal

If an offender is not a citizen of the United States, there is a good possibility that ICE will attempt to remove that person from the United States upon release from TDCJ. Proceedings under the Immigration and Nationality Act are civil, not criminal in nature. Removal is an administrative proceeding, not a criminal trial.

There is no statute of limitations or time period in which a removal proceeding must begin. The formal rules of evidence used in criminal trials are not required. The person will probably be removed when ICE proves two facts:

1. a person was born outside the United States, **and either**
 - A. the person has not obtained legal documentation to stay here, or
 - B. the person has committed a crime in the United States.

However, the person may be able to obtain relief from removal in certain instances (discussed below), if the person can prove that the relief from removal is applicable in his/her case.

Removal proceedings begin with the issuance of a Notice to Appear (NTA). The NTA states the legal authority for the proceedings and the factual allegations supporting the charges against the alien offender. The NTA is similar to an indictment in a felony case. It provides notice of the general nature of the charges against a person.

The proceedings will not necessarily be invalidated because of errors or omissions in the NTA if the correct facts are developed in the merits hearing (trial) and are reflected in the ultimate finding.

Unless the laws provide that an alien can be administratively removed without appearing before the Immigration Judge, regulations require that an alien:

1. be given a hearing;
2. be given notice of the time and place of the hearing;
3. may be represented by counsel at his/her own expense;
4. have an opportunity to examine the evidence;
5. have an opportunity to cross-examine government witnesses; and
6. may present evidence on his/her behalf.

The hearing is conducted by an Immigration Judge who will base the decision on the record made during the merits hearing (the equivalent of a trial).

§11.3 - Grounds for Discretionary Relief

An offender alien may ask the Immigration Court to grant relief if one of a variety of circumstances exists. The most common grounds for relief are as follows:

§11.3.1 - Cancellation of Removal

Relief may be available if an alien proves he has:

1. been an alien lawfully admitted for permanent residence for not less than five (5) years;
2. resided in the United States continuously for seven (7) years after having been admitted in any status;
3. not been convicted of an aggravated felony; and
4. can demonstrate good moral character for the prior ten (10) years.

In the above proceeding, the court will determine whether there are enough positive factors to allow the offender alien to stay. Factors include: (1) length of time in the United States, (2) sincere regret for the offense committed, (3) hardship to family members that are United States citizens or those that have a green card, (4) employment prospects, (5) community involvement, (6) rehabilitation, (7) have a United States Citizen parent, spouse, or child over 21, etc.

§11.3.2 - Asylum

Absent extraordinary circumstances, an alien who has been convicted of an aggravated felony (as defined by Immigration laws) will not qualify for asylum. Further, the Immigration Court will not grant asylum unless an alien can show a well-founded fear of persecution if returned to the home country. An alien from Mexico or from another country that is a friend of the United States will probably not be granted asylum. Although there are some limited exceptions, aliens cannot apply for asylum if they have been in the United States for over one year.

§11.3.3 - Withholding of Removal

This relief is similar to asylum. See §11.3.2. An alien may qualify for this type of relief, even with an aggravated felony conviction, so long as the aggregate (total) sentence(s) is/are less than five (5) years. The alien must prove to the court that it is very likely he/she will be persecuted if removed to the home country.

§11.3.4 - Deferral of Removal

This form of relief is available under the Convention Against Torture Treaty and the implementing regulations. This treaty prevents the signatory countries, including the United States, from removing anyone to a country where it is probable that the person will be tortured or killed. The offender's criminal record is not relevant.

The availability of this relief is limited. The torture must be done by the government or a government official, either with the government's approval or due to the government's inability to protect its citizens. Danger from rebels or other non-governmental groups is not applicable.

§11.3.5 - Adjustment of Status

Some lawful permanent residents may be able to adjust their status in limited circumstances even if convicted of an aggravated felony. Factors include: having either U.S. citizen parents, spouse, or children over 21; length of time in the United States; hardship to U.S. citizen (or resident) family-such as parents, spouse, parents of minor children; community ties; employment prospects; remorse over committing the convicted offense, and rehabilitation.

A resident who qualifies for adjustment may contact a free-world attorney, or they may have family members contact an attorney on their behalf.

§11.4 - Citizenship

Citizens of the United States are not subject to removal. Even if a person was born outside the United States, the person **may** be able to claim citizenship if at least one parent is a U.S. citizen by birth or naturalization. This is a complex area in which an attorney from SCFO may assist an alien, if applicable.

§11.5 - Prisoner Transfer

This program allows a non-citizen to be transferred to a prison in their home country if the following three criteria are met:

1. the home country must agree to accept the offender;
2. the U.S. and Texas must agree that the offender can be transferred; and
3. the non-citizen's home country has a treaty with the U.S. authorizing transfer of prisoners.

§11.6 - Questions Offenders Often Ask

1. HOW CAN I HAVE THE IMMIGRATION DETAINER REMOVED?

Answer: Only ICE can request that TDCJ remove its detainer. SCFO can help with this process if one of the following occurs: (a) the alien proves he is not removable, (b) the Immigration Judge orders the immigration case terminated, (c) the Judge grants relief from removal, or (d) USCIS recognizes that the person is a U.S. citizen. If this happens, write to SCFO - Immigration Section for assistance in getting the ICE detainer removed.

2. WILL THERE BE A DETAINER ON MY RECORD IF I AM ORDERED REMOVED?

Answer: Yes.

3. AFTER THE REMOVAL ORDER IS ISSUED, WHEN WILL I RETURN TO MY NATIVE COUNTRY?

Answer: After the Parole Board releases an alien, ICE will take the alien into custody and make arrangements for the alien's return to the native country.

4. WHAT WILL HAPPEN IF I AM PAROLED OR RELEASED ON MANDATORY SUPERVISION (OR DISCHARGE MY SENTENCE) PRIOR TO BEING ORDERED REMOVED?

Answer: ICE will take an alien to a Federal Detention Center (or local jail where ICE rents space), until the hearing. If the judge orders removal, the alien will remain in custody until arrangements are made for return to the home country.

5. WILL I BE ALLOWED TIME TO GO HOME TO MAKE ARRANGEMENTS AND COMPLETE MY PERSONAL BUSINESS BEFORE BEING REMOVED?

Answer: Unfortunately, no.

6. I WOULD PREFER TO BE SENT TO A COUNTRY OTHER THAN MY NATIVE COUNTRY. CAN THAT BE ARRANGED?

Answer: Generally, no. If an alien has a family member or spouse who is a citizen of a third country other than the alien's birth country or the U.S., the alien **may** be removed to that country **if** it agrees. Otherwise, an alien will be removed to the country of the alien's birth. Removal to Mexico or Canada is limited to aliens who were either born or became citizens of Mexico or Canada.

7. WHAT WILL HAPPEN IF MY COUNTRY WILL NOT ACCEPT ME?

Answer: This was previously a problem primarily for Cubans and Vietnamese. If an alien is still in ICE custody 90 days after the removal order, the alien **may** be paroled into the United States if the alien is not considered a threat to the community. This is **not** admittance to the United States; as soon as arrangements can be made to return the alien to the home country, the alien will be removed. This parole from a detention center is very similar to a parole from TDCJ with requirements and conditions. Be advised that ICE can detain an alien indefinitely.

To comply with a recent Supreme Court decision, ICE implemented a procedure to review “indefinite detainees” to determine whether they qualify for parole into the U.S. pending ICE’s removal of the detainee to the home or other predetermined country. Once ICE determines that actual removal from the United States is not likely, they will evaluate the threat that the detainee presents to the public to determine if the detainee should be released. If a detainee is not released, ICE will reevaluate the case on a regular basis.

8. WHAT WILL HAPPEN TO MY FAMILY WHEN I AM REMOVED?

Answer: If an alien’s family members are U.S. citizens or Lawful Residents (green card holders), the alien’s removal will not affect their right to remain in the U.S. If an alien’s family members are illegally in the U.S., it is possible that removal proceedings will also be brought against them.

9. WILL MY REMOVAL ORDER PREVENT ME FROM MAKING PRISONER TRANSFER?

Answer: No. Prisoner transfer and removal are entirely separate. A non-citizen may qualify for prisoner transfer with or without a removal order.

10. HOW WILL REMOVAL PROCEEDINGS AFFECT PAROLE FROM TDCJ?

Answer: Alien status is not a factor in granting or denying parole. An alien will parole to the immigration detainer in the same manner as any other detainer.

11. CAN I BE RELEASED ON BOND FROM THE IMMIGRATION DETENTION CENTER?

Answer: No. Convicted felons do not qualify for bond.

CHAPTER 11 REFERENCES

SCFO REF 11.1 - List of Free Legal Services Providers.

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CHAPTER 12 TABLE OF CONTENTS

CHAPTER 12 - CIVIL COMMITMENT PROCESS

12.1 - What is Civil Commitment?..... 1
12.2 - Civil Commitment History 1
12.3 - Who is a Target..... 2
12.4 - The Selection Process..... 4
12.5 - The Pre-Trial Process 5
12.6 - The Trial Process 6
12.7 - Commitment Terms..... 6
12.8 - The Appellate Process 7
12.9 - Criminal Penalties..... 7
12.10 - Biennial Review and Hearing..... 7
12.11 - Petition for Release..... 8
12.12 - Questions Offenders Often Ask..... 8
12.13 - Table of Authorities..... 11

CHAPTER 12 - CIVIL COMMITMENT PROCESS

§12.1 - What is Civil Commitment?

Civil commitment is a legal process whereby the State commits persons adjudicated as “sexually violent predators” to an inpatient facility, for an indefinite time, upon their release from the TDCJ. In order to be civilly committed as a sexually violent predator, a judge or jury must determine beyond a reasonable doubt that the offender is: (1) a repeat sexually violent offender; and (2) suffers from a behavioral abnormality which predisposes him to commit predatory acts of sexual violence, to the extent that he is a menace to the health and safety of another person.

§12.2 - Civil Commitment History

In 1999, the Texas Legislature enacted Chapter 841 of the Texas Health and Safety Code, finding that “a small but extremely dangerous group of sexually violent predators exists and that those predators have a behavioral abnormality that is not amenable to traditional treatment modalities and that makes predators likely to engage in repeated predatory acts of sexual violence.” Texas Health & Safety Code §841.001. The Civil Commitment Defense Section of SCFO was created by the same statute to represent indigent offenders alleged to be “sexually violent predators.” A civil commitment proceeding conducted under this law is a **civil and not a criminal proceeding**. This means that being committed as a sexually violent predator does not violate double jeopardy because you are not being re-punished for the same crime. Since this law’s enactment in 1999, more than 350 men have been civil committed as “sexually violent predators.”

Other states with civil commitment statutes have been subject to constitutional challenge all the way to the United States Supreme Court. Kansas's civil commitment statute was upheld twice by the Supreme Court before Texas created its statute. *See Kansas v. Hendricks*, 521 U.S. 346 (1997). Kansas's statute was upheld again after the creation of the Texas statute in *Kansas v. Crane*, 534 U.S. 407 (2002).

In 2005, the Texas Supreme Court overturned a lower court's decision declaring the statute unconstitutional. *See In re Fisher*, 164 S.W.3d 637 (Tex. 2005), overturning *Fisher v. State*, 123 S.W.3d 828 (Tex. App. Corpus Christi 2003). SCFO attorneys filed a petition for certiorari with the U.S. Supreme Court challenging the Texas Supreme Court's decision, but it was denied. *See Fisher v. Texas*, 126 S.Ct. 428 (2005).

In 2015, SB 746 was passed by the Texas Legislature, and substantially revised the civil commitment process in Texas. Prior to the enactment of this legislation, all civil commitment trials, regardless of where the person was convicted, were held in the 435th Judicial District Court, in Montgomery County, Texas. With the passage of SB 746, a person who is targeted for civil commitment will face their trial in the county of conviction for their most recent sexually violent offense.

Another significant amendment to Chapter 841 was the change from an outpatient treatment program to an inpatient program. Prior to June 2015, all persons who had been civilly committed were legally required to undergo outpatient treatment. SB 746 amended Chapter 841, making all SVP's live at an inpatient facility. At the time of this writing, the Texas Civil Commitment Office (TCCO) currently houses most persons who have been civilly committed at the Billy Clayton Center, located in Littlefield, Texas.

§12.3 - Who Is a Target

A sexually violent predator (SVP) according to the statute is a "repeat sexual offender" who suffers from a "behavioral abnormality" that makes the offender likely to engage in predatory acts of sexual violence. *See* §841.002 of the Health & Safety Code. The offenses that could qualify a person as an SVP under the Texas Penal Code are:

1. §21.11(a)(1) Indecency with a Child (Sexual contact);
2. §21.011 Sexual Assault;
3. §22.021 Aggravated Sexual Assault;
4. §20.04(a)(4) Aggravated Kidnapping (intent to sexually abuse or violate);

5. §30.02 Burglary (if punishable under §30.02(d), i.e., premise was a habitation **and** was entered with intent to commit (or did commit or attempt to commit) a felony in 1-4, above);
6. §19.02 or §19.03 Murder or Capital Murder, that, during the guilt or innocence phase or the punishment phase for the offense, during the adjudication or disposition of delinquent conduct constituting the offense, or subsequently during an initial civil commitment proceeding, is determined beyond a reasonable doubt to have been based on sexually motivated conduct;
7. Attempt, conspiracy, or solicitation to commit any offense in 1-6, above;
8. Offenses under prior state law with elements substantially like 1-7, above; and
9. Offenses under other state law, federal law, or the Uniform Code of Military Justice with elements substantially like 1-7, above.

A person is a sexually violent predator for the purposes of Texas Health & Safety Code §841.003(a) if the person:

1. is a repeat sexually violent offender; and
2. suffers from a behavioral abnormality that makes the person likely to engage in a predatory act of sexual violence.

A person is a repeat sexually violent offender if the person is convicted of more than one sexually violent offense and a sentence is imposed for at least one of the offenses or if:

1. the person:
 - (A) is convicted of a sexually violent offense, regardless of whether the sentence for the offense was ever imposed or whether the sentence was probated and the person was subsequently discharged from community supervision;
 - (B) enters a plea of guilty or no contest for a sexually violent offense in return for a grant of deferred adjudication;
 - (C) is adjudged not guilty by reason of insanity of a sexually violent offense; or
 - (D) is adjudicated by a juvenile court as having engaged in delinquent conduct constituting a sexually violent offense and is committed to the Texas Youth Commission under Texas Family Code § 54.04(d)(3) or (m); and

2. after the date on which under Subdivision (1) the person is convicted, receives a grant of deferred adjudication, is adjudged not guilty by reason of insanity, or is adjudicated by a juvenile court as having engaged in delinquent conduct, the person commits a sexually violent offense for which the person:
 - (A) is convicted, but only if the sentence for the offense is imposed; or
 - (B) is adjudged not guilty by reason of insanity.

§12.4 - The Selection Process

Prior to parole or discharge, TDCJ reviews each sex offender's file to determine if there are qualifying sex offenses. If so, the file is transferred to the Multidisciplinary Team (MDT) for review. The MDT is composed of (7) members:

1. One mental health professional from the Department of State Health Services;
2. One person from TDCJ's victim services;
3. One person from TDCJ's Sex Offender Rehabilitation Program, in the rehabilitation programs division;
4. One licensed peace officer who is employed by the Department of Public Safety;
5. Two persons from the Texas Civil Commitment Office; and
6. One licensed sex offender treatment provider from the Council on Sex Offender Treatment.

The MDT reviews available records of the person and assesses whether the person is a repeat sexually violent offender and is likely to commit a sexually violent offense after release. If the MDT determines that the sex offender is a repeat offender and is likely to commit a sexual offense in the future, they refer the sex offender to an expert for testing. TDCJ selects the expert who is authorized to do testing, a clinical interview, and use any other diagnostic tools necessary to determine if the sex offender suffers from a "behavioral abnormality" that makes the person likely to engage in a predatory act of sexual violence. If the offender refuses this examination, that fact may be used against the offender in the civil commitment case, the offender may be prohibited from offering his own expert evidence, and the offender may be subjected to contempt proceedings. **There is no patient/doctor privilege for this examination.**

If an indigent offender has sex offenses involving children, SCFO recommends the offender ask for an attorney to be appointed to represent him before the expert interview. SCFO does not recommend that offenders with child sex offenses refuse to be examined, but that they ask for counsel to be appointed so that they can be advised whether to assert privileges against

self-incrimination. If you are being considered for civil commitment based on sex offenses that do not involve children, SCFO recommends that you participate in the interview.

In addition, Sex Offender Treatment Program (SOTP) records are being used by the MDT and independent experts. **If you are enrolled in the SOTP program, you have no confidentiality with your treatment providers. SOTP treatment and testing records are being used against offenders in an effort to civilly commit them.**

The statute of limitations for most sex crimes is extremely long. For instance, sexual assault of an adult can be filed up to 10 years after the incident. Sexual assault of a child, including sexual assault and indecency with a child by contact, can be filed up to 10 years after the 18th birthday of the child. Where DNA evidence has been collected from an alleged victim, there may not be a statute of limitations at all. For other non-sex related felonies, the statute of limitations is usually three years. If a psychologist interviews you for SVP civil commitment, beware of confessing to unadjudicated offenses unless you are sure the statute of limitations has run. Otherwise, you may still be prosecuted for those offenses.

§12.5 - The Pre-Trial Process

After the assessment by an expert, a report is written and sent to TDCJ. If TDCJ then believes that the person suffers from a behavioral abnormality, they send notice of that fact and provide corresponding documentation to the “attorney representing the state.” The “attorney representing the state” is statutorily defined as the “district attorney, criminal district attorney, or county attorney with felony criminal jurisdiction who represents the state in a civil commitment proceeding.” Texas Health & Safety Code §841.002 (1).

More simply, if TDCJ believes you suffer from a behavioral abnormality, you could be referred for civil commitment as a sexually violent predator. The referral will go to the county of conviction for your most recent sexually violent offense. It is within the discretion of the “attorney representing the state,” meaning the criminal prosecutor in the county you were convicted in, to decide whether or not to file a lawsuit alleging that you are a sexually violent predator and be civilly committed to an inpatient facility.

If the “attorney representing the state” decides to file a petition alleging you are a sexually violent predator, it will be served on you as “soon as practicable.” SCFO attorneys will be notified that the lawsuit has been filed. If the court determines that an offender is indigent, it will appoint

SCFO to represent the offender unless the offender has requested and obtained representation prior to that time.

During the pre-trial preparation of the case, the parties will engage in the discovery process. This means that the offender may have to:

1. Respond to written questions from the State;
2. Give sworn testimony during a deposition;
3. Submit to additional examinations by psychiatrist(s) and/or psychologist(s).
 - A. Failure to participate in the examination may be used against the offender at trial and the offender may be prohibited from offering his own expert's testimony. Failure to participate in this examination may also subject the individual to contempt proceedings. *See* Tex. Health & Safety §841.061.
4. SCFO will seek expert witnesses willing to testify on behalf of the targeted offender. One or more SCFO experts may interview the offender. SCFO will notify the offender of the date and location of the expert interview.

§12.6 - The Trial Process

Although a commitment proceeding is technically civil in nature, there are similarities to a criminal trial. The State must prove beyond a reasonable doubt that the offender is a sexually violent predator. The burden of proof never shifts to the offender to prove he is not a sexually violent predator. It is common for details of prior offenses to be introduced into evidence. The jury's verdict that the person is a sexually violent predator must be unanimous.

Given that this is a civil proceeding, there are very few legal protections for the accused offender. In a civil trial, there is no right to blanket assert the Fifth Amendment and refuse to testify. The State can, and likely will, call you to testify against yourself. There may be limited circumstances where you can assert your Fifth Amendment Right against self-incrimination, but these are rare.

§12.7 - Commitment Terms

If the jury determines that the offender on trial is a sexually violent predator, the person will be committed for treatment and supervision at an inpatient facility, coordinated by the Texas Civil Commitment Office (TCCO). The judge will impose the necessary requirements to ensure compliance with the treatment program and the safety of the community.

Chapter 841 of the Texas Health and Safety Code sets forth the requirements that must be imposed by the judge, including:

1. Requiring the person to live where instructed by the TCCO;
2. Prohibiting the person from contacting any of his victims;
3. Requiring the person to participate in sex offender treatment;
4. Requiring the person to follow all written requirements set forth by the TCCO;
5. Requiring the person to submit to tracking, typically a GPS ankle monitor, and prohibiting tempering with, altering, obstructing or manipulating the tracking equipment; and
6. Prohibiting the person from leaving the state without prior authorization.

§12.8 - The Appellate Process

There may be a basis for an appeal of a judgment and order of civil commitment. If there is, and the committed person is indigent, SCFO will appeal the commitment at no cost to the committed person.

§12.9 - Criminal Penalties

If a person who has been adjudicated a sexually violent predator violates certain portions of the court's order, he can be charged with a third degree felony, which can be enhanced. A person adjudicated a sexually violent predator can be charged with a felony if he fails to reside where instructed, contacts a victim, refuses to submit to a tracking service, tampers with his tracking device, or leaves the state without prior authorization. Civil commitment may last for an indefinite period of time. However, civilly committed persons are entitled to a review of their case every two years, which is called a biennial review.

§12.10 - Biennial Review and Hearing

Biennial reviews are outlined in Subchapter F of the Texas Health and Safety Code. Civilly committed individuals are entitled to an examination every second year ("biennially"). The Texas Civil Commitment Office (TCCO) contracts with private parties for the exam. The examiner provides a biennial evaluation to the case manager. The case manager files a report with a district judge, generally the district judge who civilly committed the offender. A civilly committed individual is entitled to be represented by counsel at the biennial review.

Upon conducting the biennial review, the judge must make two decisions:

1. whether a requirement imposed on the person should be changed; and
2. whether there is probable cause to believe the person's behavioral abnormality has changed to the extent that the person is no longer likely to engage in a predatory act of sexual violence.

If the judge decides "no" on both issues, the civil commitment order is renewed for two more years. If the judge answers "yes" to either question, a hearing will be set. If a hearing is set, the committed person may hire an expert witness to examine him. If there is a hearing, the State may have another expert examine the person. If the purpose of the hearing is to address requirement changes, the judge may consider "reliable" hearsay evidence. If the purpose of the hearing is to address whether the person's behavioral abnormality has changed, the person is entitled to be present and may request a hearing before a jury. If a hearing to determine whether a committed individual's should be released from the program is held, the State must prove beyond a reasonable doubt that the person's behavioral abnormality has not changed.

§12.11 - Petition for Release

The statute gives a case manager a right to authorize an offender to file a petition for release prior to the biennial review(s). An offender also has the right to file an unauthorized petition for release, but caution is advised. If that unauthorized petition is denied, the court can deny all future unauthorized petitions filed by the offender. See Texas Health & Safety Code §841.123(c).

§12.12 - Questions Offenders Often Ask

1. HOW CAN THE SOTP USE MY RECORDS AGAINST ME FOR CIVIL COMMITMENT IF THEY SAY THAT THEY ARE TREATMENT PROVIDERS?

Answer: Records used by the Multi-Disciplinary Team (MDT) and others are usually collected before you start SOTP. SCFO attorneys frequently object to evidence coming directly from SOTP personnel. Be advised, however, that at the present time there is no clear language from a binding court case that anything you say to an SOTP tester or treatment provider cannot be reviewed by the MDT and used against you at trial.

2. ISN'T CIVIL COMMITMENT UNCONSTITUTIONAL?

Answer: The U.S. Supreme Court and Texas Supreme Court have held that SVP civil commitment statutes are constitutional. SCFO attorneys continue to challenge the

constitutionality of the statute. Until a favorable ruling is obtained, you must comply with any civil commitment proceedings and terms of commitment.

3. DO I STILL HAVE TO REGISTER UNDER THE SEX OFFENDER REGISTRATION ACT IF I AM COMMITTED?

Answer: Yes, and you must comply with all of the Registration Act's provisions.

4. CAN I RELOCATE TO A STATE THAT DOES NOT HAVE CIVIL COMMITMENT WHEN I AM RELEASED?

Answer: If you are released before you are committed, and you are not on mandatory supervision or parole, you are free to relocate anywhere as long as you comply with the Registration Act of that State. If the State of Texas is pursuing civil commitment, you must return to Texas for trial. If you are civilly committed, you may be required to reside in the State of Texas.

5. CAN YOU REPRESENT ME BEFORE MY INDIGENCY HEARING?

Answer: SCFO will advise offenders who may be subject to civil commitment. Write SCFO if you have questions. Depending on the circumstances, SCFO may represent you prior to the indigency hearing.

6. WHAT SHOULD I DO IF I AM SENT FOR PSYCHOLOGICAL TESTING?

Answer: If you are sent for psychological testing, you may request to speak to an SCFO attorney prior to testing. However, the testers do not have to grant the request. If you know in advance that you will be tested, contact SCFO and we will attempt to discuss your situation with you. If you refuse to cooperate with the testing, your refusal can be used against you at the civil commitment trial. Furthermore, the refusal may subject you to other sanctions imposed by the court. Remember, the person performing the testing works for the state and will use the information from the testing to possibly recommend that you be civilly committed. The testing results are also admissible at your civil commitment trial.

7. IF I AM CIVILLY COMMITTED IN TEXAS, CAN I SERVE MY CIVIL COMMITMENT IN THE STATE WHERE MY FAMILY LIVES?

Answer: The Council on Sex Offender Treatment used to allow this, however, it is hard for them to enforce orders for people serving their commitment out of Texas. As a result, they no longer permit offenders to leave Texas.

8. IS IT POSSIBLE FOR THE STATE TO AGREE TO PUT OFF COMMITTING ME AND ALLOW ME TO REGISTER AS A SEX OFFENDER THAT IS NOT COMMITTED, IN THE STATE WHERE MY FAMILY LIVES?

Answer: The Council on Sex Offender Treatment used to allow this, but has apparently changed its policy and is no longer willing to abate (put off) trials. It has brought at least one person back from out-of-state to civilly commit him as an SVP after previously abating the case.

9. MAY I BE CIVILLY COMMITTED AT MY HOME INSTEAD OF AT THE HALFWAY HOUSE?

Answer: No, the current policy is that everyone committed as an SVP is sent to a halfway house first. If you meet the program goals, they may allow you to live somewhere else. Likewise, persons living elsewhere who do not meet the program goals may be returned to the halfway house. Regardless of where the committed SVP resides, violation of the civil commitment order may result in prosecution.

CHAPTER 12 REFERENCES

NONE.

§12.13 Table of Authorities

Cases

Fisher v. State, 123 S.W.3d 828 (Tex. App. - Corpus Christi 2003) 2

Fisher v. Texas, 126 S.Ct. 428 (2005) 2

In re Fisher, 164 S.W.3d 637 (Tex. 2005) 2

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CHAPTER 13 TABLE OF CONTENTS

CHAPTER 13 – INNOCENCE CLAIMS

13.1 - Who Should File an Innocence Claim..... 1
13.2 - Choosing an Innocence Clinic..... 1
13.3 - The Texas Prisoner Innocence Questionnaire (TPIQ)..... 3
13.4 - What to Expect After Sending the TPIQ 5
13.5 - Questions Offenders Often Ask..... 5

CHAPTER 13 – INNOCENCE CLAIMS

§13.1 - Who Should File an Innocence Claim

Only offenders who did not commit the crime for which they were convicted should file a claim based on innocence. Claims that are based on insufficient evidence to prove guilt should use other avenues of relief discussed in this handbook. Unwarranted innocence claims detract attention from valid claims and waste precious resources.

If you were involved in criminal activity with others, but were not involved in the specific act for which you were convicted, the conviction may still be valid under the “law of parties.” For example, if you and a friend decide to rob a convenience store, and during the robbery your friend shoots someone, you may both be convicted of aggravated assault with a deadly weapon. Although you are technically “innocent” of the shooting (your friend did it, not you), you will not have a valid innocence claim.

§13.2 - Choosing an Innocence Clinic

At the time of publication of this handbook, five clinics associated with Texas law schools pursue innocence claims. They are the Innocence Project of Texas (IPOT) in Lubbock, Texas; the Actual Innocence Clinic associated with the University of Texas School of Law in Austin, Texas; the Texas Innocence Network (TIN) at the University of Houston Law School in Houston, Texas; the Thurgood Marshall School of Law Innocence Project (TMSLIP) associated with Texas Southern University in Houston, Texas; and the Joyce Ann Brown Innocence Clinic (JABIC) associated with the University of North Texas College of Law in Dallas.

In order to avoid duplicative investigations and to conserve scarce resources, only one clinic will investigate a person’s actual innocence claim. All four clinics share a common database. This means that if you write one clinic, it is noted in a database and the other three clinics can see the database entry. Consequently, it is not necessary to write all four clinics to have your claim

reviewed. You should be aware, however, that clinics vary in the type of cases they review. The clinic that first receives and logs your case into the common database will be the clinic that works on your case. All other clinics that receive your case will allow the first clinic to complete their investigation. If the first clinic closes your file, another clinic may decide to begin an investigation. For that reason, you should review the filing guidelines for each of the four clinics noted below.

All four innocence clinics share at least one thing in common: they only take cases involving **actual innocence**. This means you cannot have been involved in the crime in any way. For instance, if you and a co-defendant planned to rob a store and during that robbery your co-defendant unexpectedly shoots someone, the clinics will not assist you, even though you were not the shooter. The clinics will look at cases where the crime never happened (for example, a false claim of sexual abuse) or the victim of the crime has mistakenly identified you as the person responsible.

1. Innocence Project of Texas (IPOT) – Texas Tech Law School, Lubbock - For IPOT to accept your actual innocence claim the following must apply to you and your case:
 - A. direct state appeals have been exhausted
 - B. innocence claim involves a felony offense
 - C. crime took place in Texas and was prosecuted in Texas
 - D. not currently represented by an attorney
2. Texas Center for Actual Innocence (TCAI) – University of Texas Law School, Austin - TCAI focuses on felony cases where all direct appeals have been exhausted. TCAI will **NOT** handle innocence claims involving:
 - A. death penalty cases
 - B. federal cases
 - C. drug offenses
 - D. people who are not currently incarcerated
3. Texas Innocence Network (TIN) – University of Houston Law School, Houston - TIN will not pursue claims involving Constitutional violations by others such as misconduct by prosecutors, police or jurors; claims involving self-defense, defense of others, justification or accident; or claims where you were an accessory or party to the criminal scheme, even if you did not commit the physical act resulting in the conviction. In addition to the above, TIN will **NOT** pursue cases where the innocence claim involves:

- A. a misdemeanor offense
 - B. a sentence that has already been completed, even if the crime behind the actual innocence claim was later used to enhance a sentence in an unrelated crime
 - C. the reason parole or probation has been revoked
 - D. a plea of guilty or nolo contendere, unless there is physical evidence or a victim recantation that would show you did not commit the crime
 - E. a conviction for an offense arising out of TDCJ confinement
 - F. current or prior review from another innocence project
4. Thurgood Marshall School of Law Innocence Project (TMSLIP) – Texas Southern University, Houston - For TMSLIP to accept your actual innocence claim the following must apply to you and your case:
- A. direct state appeals have been exhausted
 - B. crime took place in Texas and was prosecuted in Texas
 - C. not currently represented by an attorney
 - D. not a death penalty case
5. Joyce Ann Brown Innocence Clinic (JABIC) – University of North Texas, Dallas - The law school at the University of North Texas is a new school. As of the publication of this article, the case parameters for acceptance by JABIC are unknown. Those interested in seeking assistance from this clinic should contact the clinic directly.

§13.3 The Texas Prisoner Innocence Questionnaire (TPIQ)

All four clinics noted above worked together to create the TPIQ. It is a very comprehensive form that will take several hours or days to complete. You should read through the entire TPIQ without writing anything so that you have an idea of the information you need to collect in order to answer all the questions. A copy of the TPIQ (without any space for writing) is reproduced in SCFO REF 13.1 so that you can study the form before you request one.

When you are ready to fill out the TPIQ, request a copy from your unit law library. If your library is out of the TPIQ forms, send an I-60 to Access to Courts. **Do not send a request to the clinics for a TPIQ.** They will only respond that you should visit your unit law library to request a TPIQ, and if one is not available, to send an I-60 to Access to Courts. If your I-60 request to Access to Courts is not addressed in a reasonable amount of time, send an I-60 to SCFO and include the date you sent the I-60 to Access to Courts.

Complete the TPIQ and send it to one of the four clinics listed above, paying careful attention to the criteria they list for the type of cases they accept. If your case does not meet the criteria for a particular clinic, do not send it there. If it meets the criteria for more than one clinic, you can either select just one clinic to send it to or you can make multiple copies of the TPIQ and send it to each clinic likely to take your case. Remember, the clinics share a database and will know that you have sent your TPIQ to another clinic, so your efforts at duplication may not be particularly helpful.

Write legibly so that your TPIQ can be read by the clinic staff. Write clearly and concisely. You may need to fill out more than one TPIQ if you are claiming innocence on more than one conviction. For example, if you were convicted in two or more sexual assaults, involving different victims who were attacked at different times, fill out a TPIQ for each conviction. However, if your convictions involve a sexual assault against the same victim on multiple days, fill out only one TPIQ. Likewise, if your convictions involve different crimes against the same person arising from the same incident (for example, kidnapping and sexual assault), fill out only one TPIQ. If you are filling out multiple TPIQs, mail all of them together to the same clinic.

If there is not enough room in the space provided on the TPIQ form for your answers, write as much as you can in the available space, then write “see attached.” On a clean sheet of paper, write the corresponding number of the question you are finishing and complete your answer. Before you send your TPIQ to a clinic, take time to carefully review it to make sure you have answered all the questions. An incomplete TPIQ wastes your time, the clinic’s time, and may also result in the denial of your request for assistance. When you mail the TPIQ remember to include any additional sheets of paper you used to complete your answers.

Do not send any other documents when you send in the TPIQ. If the clinic needs additional information it will request it from you.

The clinics you send your TPIQ to do not represent you. However, the information you provide in the TPIQ and send to the clinic is an effort by you to establish an attorney-client relationship with them. As such, that information is confidential and is protected in law by the attorney-client privilege. That is true whether or not an attorney-client relationship is ever formed between you and the clinic.

§13.4 - What to Expect After Sending the TPIQ

Any clinic you send the TPIQ to will respond to you. If you do not meet the criteria, you may receive a postcard or letter to that effect. If the clinic needs additional time to review your claim they will let you know. The clinic may also need supplemental information. Although the TPIQ form covers a lot of information, once the clinic understands your issue, they may send you an additional form to fill out. Do so as quickly as possible and return it to the clinic. If you do not understand their instructions, write them back and ask for clarification. It is important that the clinic knows you are serious about pursuing your case and that you are doing all you can to provide the clinic with needed information.

It takes a very long time to work up a case based on innocence, many times that is measured in years, even decades, rather than months. Do not be impatient and do not lose hope. If none of the Texas clinics accepts your case, pursue clinics outside the state for assistance.

§13.5 - Questions Offenders Often Ask

1. WHAT DO I DO IF MY UNIT LAW LIBRARY DOESN'T HAVE A COPY OF THE TEXAS PRISONER INNOCENCE CLAIM (TPIQ) FORM?

Answer: Send an I-60 to Access to Courts and tell them your library needs more TPIQs. Wait a reasonable time and check back with your library to see whether they have more. If they still do not have TPIQ forms, send an I-60 to SCFO. Tell SCFO the date you sent your I-60 to Access to Courts.

2. I HAVE A LOT OF DOCUMENTS I CAN SEND THE CLINICS TO PROVE MY INNOCENCE. SHOULD I SEND THOSE DOCUMENTS WITH MY TPIQ?

Answer: No. The clinics will write you back and let you know which documents, if any, to send them.

3. CAN I SEND A TPIQ TO MORE THAN ONE CLINIC?

Answer: Yes, but remember that a clinic will look at the database and know you have a request pending with another clinic. Duplication may not be helpful. You may want to wait until you hear from the first clinic before you send a TPIQ to a second clinic.

4. IF ONE CLINIC TURNS ME DOWN SHOULD I SEND ANOTHER CLINIC MY TPIQ?

Answer: Yes, so long as you fall within the criteria for that clinic.

5. I AM INNOCENT OF MORE THAN ONE CRIME THAT POLICE SAY HAPPENED AT THE SAME TIME. I DID NOT KIDNAP OR SEXUALLY ASSAULT THE VICTIM. DO I STILL FILL OUT TWO TPIQs?

Answer: For that situation, fill out only one TPIQ since the crimes were part of one incident against one victim.

6. I WAS CONVICTED FOR A STRING OF SEXUAL ASSAULTS AGAINST DIFFERENT VICTIMS BUT I DID NOT COMMIT ANY OF THOSE CRIMES. POLICE CLAIM THE SAME PERSON COMMITTED ALL OF THE CRIMES. DO I STILL FILL OUT TWO TPIQs?

Answer: For that situation, fill out a TPIQ for each conviction. If there were two different sexual assault victims (who were not assaulted together), fill out two TPIQs; if there were three sexual assault victims (who were not assaulted together), fill out three TPIQs, etc.

CHAPTER 13 REFERENCES

SCFO REF 13.1 – Texas Prisoner Innocence Questionnaire (TPIQ) - condensed