

# HOUSE RESEARCH ORGANIZATION

session focus

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## **Mandatory Supervision Release: Safety, Cost and Legal Issues**

The Legislature is again considering revisions to the mandatory supervision release law that requires some convicted criminals to be released from prison automatically without the approval of the Board of Pardons and Paroles and before their sentences are complete. Since enacting the mandatory supervision law in 1977, the Legislature has periodically amended it to restrict who must be set free under the program. In 1995 the Legislature authorized the parole board to deny automatic mandatory release under certain conditions to inmates whose crimes were committed after August 31, 1996.

The current proposals would allow the board to veto release on mandatory supervision of any inmate whose crime was committed after 1977. However, questions have been raised about the proposals' impact on public safety, the constitutionality of retroactively applying new restrictions to prisoners sentenced under old laws and the potential cost of the proposal.

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Gov. George W. Bush declared legislation relating to the mandatory release law an emergency, allowing it to be considered early in the 1997 session. On January 30th the Senate passed SB 250 by Whitmire, Patterson, et al., allowing the parole board to veto the automatic release of inmates, and a similar proposal, HB 201 by Hamric, has been filed in the House. The governor has said he supports retroactively abolishing mandatory supervision release for violent and sex offenders, and he included \$42.9 million in his fiscal 1998-99 budget proposal to pay for housing inmates who would not be released.

### **The Mandatory Supervision Program**

Felons can be released from prison in three ways: by serving all of their sentence, by being released on parole or by being released through a special program called *mandatory supervision*, sometimes called mandatory release. The mandatory supervision law *requires* persons to be released when their calendar time served plus good conduct time equals the length of their sentence. Felons who commit certain violent offenses are not eligible for release on mandatory supervision, but for most inmates who qualify for the program, mandatory supervision release is automatic.

Depending on their classification within the prison system and other factors, inmates accrue good conduct time. This is used to calculate an inmate's eligibility for parole or release on mandatory supervision. In general, inmates are eligible for *discretionary* release on parole when their time served plus good conduct time equal one-quarter,

one-third or one-half of their sentences, depending on their crime and when it was committed.

The Board of Pardons and Paroles — an 18-member constitutionally established board appointed by the governor — normally has no say over the automatic release of inmates who qualify for the program. The board, however, now has veto power over the release of inmates eligible for mandatory supervision who committed crimes after August 31, 1996.

Persons released under mandatory supervision are supervised by a parole officer and subject to parole conditions set by the parole board until their time served in prison plus time on mandatory supervision equals their sentence. Parole conditions can include reporting to a parole officer, not owning firearms and avoiding persons with criminal backgrounds. Persons on mandatory supervision can be arrested and reincarcerated if they violate conditions set by the parole board.

## History of Mandatory Supervision

Mandatory supervision was created in 1977 in part to ensure that felons who were being released from prison before their sentences were complete would be supervised by parole officers for the remainder of their sentences. For many years Texas statutes had required inmates to be released from prison when their good conduct time plus time served in prison equaled their sentence. These inmates were released without either the supervision of a parole officer or the conditions that could be imposed on parolees. Under the mandatory supervision law, inmates who were automatically released served the remainder of their sentence under supervision of a parole officer.

The 1977 mandatory supervision law also *allowed* the parole board to release inmates to mandatory supervision up to six months before the date of their *required* release. Release under these conditions was sometimes called “early mandatory release” and was used at times to help manage the overcrowded prison population.

Advocates of mandatory supervision said the program would ensure that felons released after serving only part of their sentence were subject to parole-like

supervision. With mandatory supervision, these inmates would be supervised by parole officers rather than simply released into society, supporters said. Mandatory supervision generally would apply to two categories of offenders — those who had been denied parole and those who refused parole so they could serve out their sentences and be free of supervision after release. Both society and these inmates would benefit by post-release supervision, supporters said.

Opponents of the mandatory supervision law argued that good behavior should be rewarded and that those inmates who accumulated enough good conduct time should have their sentences reduced and be released without additional supervision. Mandatory supervision would further stretch an already overburdened parole system, they said.

Originally, all inmates whose crimes were committed after August 28, 1977, were subject to mandatory supervision after their automatic release. However, the Legislature has amended the law periodically to restrict eligibility for early, automatic release. Inmates who committed crimes before August 28, 1977, continue to be governed by the law that was in effect when they committed their crimes. In general, their good conduct time reduces their time served, and they are not subject to further supervision once released. The prison system now houses approximately a thousand inmates who committed crimes prior to the 1977 law. Most of these inmates will either be paroled, serve their complete sentence or die in prison. Only about 300 of these inmates may eventually be automatically released with no supervision under the pre-1977 law when their good conduct time and time served equals their sentences, according to data from the Texas Department of Criminal Justice (TDCJ).

## Current Restrictions on Mandatory Supervision

### Statutory exclusions

Beginning in 1987 persons convicted of certain violent offenses were no longer allowed to be automatically released to mandatory supervision. These offenders may be released on parole or must serve all of their sentences. The list of those ineligible for automatic mandatory supervision release has been modified over the years; there are currently 13 of-

fenses that make a felon ineligible for mandatory supervision release. They are:

- ◆ first-degree murder;
- ◆ capital murder;
- ◆ first- or second-degree aggravated kidnapping;
- ◆ second-degree sexual assault;
- ◆ first- or second-degree aggravated assault;
- ◆ first-degree aggravated sexual assault;
- ◆ first-degree injury to a child, elderly individual or disabled individual;
- ◆ first-degree arson;
- ◆ second-degree robbery;
- ◆ first-degree aggravated robbery;
- ◆ first-degree burglary;
- ◆ certain felonies occurring in a drug-free zone; and
- ◆ indecency with a child involving contact.

Attorney General Dan Morales ruled in Letter Opinion No. 96-126 issued November 1996 that the Legislature intended to include on the list indecency with a child involving contact because legislative history and other parts of the statute indicate that it should be included. HB 432 by Place and HB 52 by Greenberg, introduced this session, would put into law Morales' interpretation. HB 52 also would add to the list indecency with a child involving exposure.

In 1995 the 74th Legislature, in HB 1433 by Hamric, et al., prohibited automatic release on mandatory supervision for inmates who had *previously* served a sentence for an ineligible offense and those who had previously committed a felony that involved a deadly weapon.

Supporters of these exclusions said they would increase public safety by making the most dangerous felons — those with previous convictions for serious offenses and those who have used a deadly weapon — ineligible for automatic release. Opponents of the changes said denying eligibility for release on mandatory supervision to persons just because of previous offenses would unfairly judge them on the basis of their past. Denying release to anyone whose felony involved a deadly weapon would be inflexible and would exclude from the program some felons who may have had a weapon but did not use it, opponents said.

### **Parole panel veto authority**

The 74th Legislature, in HB 1433, also authorized the Board of Pardons and Paroles to review inmates' records and veto the automatic release of all felons

whose crimes are committed after August 31, 1996. A parole panel must veto a release on mandatory supervision if it finds that the inmate's good conduct time inaccurately reflects his or her potential for rehabilitation *and* that the release would endanger the public. The panel's decision is not subject to administrative or judicial review. If release is denied, the parole panel must reconsider the person for release on mandatory supervision at least twice in the two years after the initial decision. For offenses committed before August 31, 1996, the parole board has no discretion: persons eligible for automatic release must be released to mandatory supervision when their calendar time served plus good time equals their sentence.

Supporters of HB 1433 said it would ensure that all offenders who commit crimes after August 1996 can be reviewed before being released from prison instead of being released automatically based on a calculation involving their sentence and good conduct time. Giving parole panels discretion over the process would ensure offenders are not automatically set free with no consideration of their records and potential threat to the public, they argued.

Opponents countered that changing the mandatory supervision program to require parole board review rather than automatic release could affect an inmate's constitutionally protected right to due process that is triggered whenever a state deprives a person of liberty. Before revoking an inmate's right to automatic release, the parole board would have to provide in its review a higher level of due process, such as granting a full hearing, opponents said. In addition to increasing the burden on parole panels, mandatory reviews could increase demand for prison beds, driving up prison system costs, they said.

### **Number of Inmates Eligible for Mandatory Supervision**

Despite the restrictions placed on mandatory supervision over the years, many inmates still remain eligible for automatic release under mandatory supervision, because in general their release is governed by the law in effect at the time they committed their offense. About 26,000 former inmates who have been released under the mandatory supervision law are currently being supervised by parole officers. About 71,000 of the approximately 133,000 inmates currently in state facilities are eli-

gible for automatic release under the mandatory supervision statute through 2010, although some may be released on parole before they reach their mandatory supervision release date, according to TDCJ. The number eligible for automatic release without parole panel review will decrease annually after 1997. About 16,200 will be eligible for release in 1997, about 14,200 in 1998, about 9,500 in 1999 and about 2,100 in 2005, according to TDCJ.

In 1978, the first year of mandatory supervision, 139 persons were released from prison under the program. That number grew steadily until 1986, when almost 13,000 inmates were released through the program. In 1995 about 12,700 persons were released under mandatory supervision, and in 1996 the number again grew to about 16,100.

Between April 1997 and March 1999, about 19,300 inmates will be released through the program, according to the Criminal Justice Policy Council.

## Proposed Changes to Mandatory Supervision

A number of proposals have been made to revise or eliminate automatic release under the mandatory supervision law. Although the governor has proposed retroactively repealing automatic release under mandatory supervision for violent and sex offenders who committed offenses before 1987, to date no bill has been filed proposing this specific change. Legislative proposals on other aspects of the law include:

◆ **HB 201 by Hamric**, which would authorize parole panels to review the cases of all inmates eligible for automatic release on mandatory supervision, regardless of when their offenses were committed. A parole panel could veto release of inmates if the panel found that their good conduct time inaccurately reflected their potential for rehabilitation and that their release would endanger the public. The 74th

### Estimated Number of Inmates Eligible for Automatic Release on Mandatory Supervision Under Current Law

Year	Violent/Sex Offenders	Other Offenders	Total
1997	2,621	13,559	16,180
1998	1,945	12,257	14,202
1999	1,381	8,165	9,546
2000	1,040	5,948	6,988
2001	761	4,511	5,272
2002	581	4,010	4,591
2003	471	3,491	3,962
2004	373	2,584	2,957
2005	315	1,774	2,089
2006	400	1,097	1,497
2007	193	984	1,177
2008	175	787	962
2009	182	567	749
2010	130	514	644

Note: Inmates eligible under current law for automatic release on mandatory supervision may be released on parole before they reach their mandatory supervision release date.

Source: Texas Department of Criminal Justice

Legislature in 1995 applied this requirement to inmates committing offenses after August 31, 1996.

◆ **SB 250 by Whitmire, Patterson et al.**, which would eliminate the term “mandatory supervision.” SB 250 would require release on parole when calendar time plus good conduct time equaled an inmate’s sentence *unless* a required review by a parole panel found that the release would pose “a significant threat to public safety.” The bill outlines factors to be considered in the pre-release review, including whether the inmate had a history of violent acts or sexual offenses, and would require TDCJ’s pardons and parole division to recommend whether or not the inmate should be released.

SB 250 would apply to inmates who committed crimes after the 1977 mandatory supervision program began and whose time served plus good conduct time equal their sentence regardless of the law in effect when they committed their crime. Inmates who committed violent offenses and are currently excluded from automatic release would remain ineligible for the mandatory supervision program.

## The Debate Over Changing Mandatory Supervision

The debate concerning changes in mandatory supervision release focuses on public safety, constitutionality and cost issues.

### Public safety

**Supporters** of restricting or eliminating mandatory supervision say:

Inmates should not be released from prison automatically simply on the basis of a calculation involving their sentence and their good conduct time. Inmates scheduled to be released before their sentences are served should first be reviewed by the parole board and then released only if they are not a threat to public safety.

Requiring review and authorizing the parole board to veto release would allow the state to keep in prison for the maximum time heinous criminals such as convicted child molester Larry Don McQuay and confessed killer Coral Eugene Watts. When McQuay was released on mandatory supervision in 1996 he claimed to have molested hundreds of children and said he was likely to molest additional children and

possibly murder them. Watts, who under current law will be released on mandatory supervision in 2007, was convicted of burglary but has admitted killing several women. Under current law, the state can do nothing to keep these people in prison.

Testimony from victims and families of those who have been harmed or murdered by persons automatically released on mandatory supervision illustrates that supervision by parole officers is inadequate to prevent additional crimes by some dangerous felons.

**Opponents** of restricting or eliminating mandatory supervision say:

Some inmates whose release on mandatory supervision would be vetoed under these proposals will eventually be released from prison when they have completed their sentences. These inmates will have to make the difficult transition from prison to the free world with no intermediate supervision. It would be better to retain the mandatory supervision program so that these felons are released under some form of supervision. Inmates who are released from prison under mandatory supervision are still under the control of the state through the supervision of parole officers and can have serious restrictions placed on them. If they violate conditions of mandatory supervision they can be returned to prison where they forfeit good conduct time and could have to serve the remainder of their sentence.

The state should make good conduct time a meaningful reward for good behavior and continue to allow inmates who behave well in prison to be released when their good conduct time and time served equal their sentences.

Since almost all inmates eventually will be released, even without automatic release under mandatory supervision, the state should use its scarce resources to increase prison rehabilitation programs to help prevent future offenses rather than enacting policies to simply hold more inmates for longer periods.

### Constitutionality

**Supporters** of restricting or eliminating mandatory supervision say:

A growing number of court cases indicates there is no constitutional bar to retroactively requiring parole board review before granting early release to

those inmates whose release would be automatic under current law.

Reviewing both violent and nonviolent offenders would ensure that all inmates are treated alike, thus bolstering the constitutionality of the proposals. Reviewing all inmates before automatic release also would ensure that those who may be incarcerated on a nonviolent charge but who have a violent past would be screened along with violent and sex offenders who remain eligible for automatic early release because they committed their crimes before 1987.

**Ex post facto issues.** A review process prior to automatic release would not fall under any of the three criteria recently established by the Texas Court of Criminal Appeals in *Ex Parte Hallmark*, 883 S.W.2d 672 and the U.S. Supreme Court in *Collins v. Youngblood*, 110 S.Ct. 2715 (1990) for defining unconstitutional *ex post facto* laws. In the Texas case the court said that to be unconstitutional, a retroactive statute would have to: criminalize an act that was not a crime when the act was committed; increase the punishment after the act was committed; or remove a defense that was available when the act was committed.

Applying a review process with authority to veto release on mandatory supervision would not be unconstitutional because it would not meet these tests: it would not change or increase the *punishment* or *length* of a sentence, only the conditions under which an inmate serves the sentence. For example, an inmate with a 20-year prison sentence would still have that sentence regardless of any decision concerning release to parole or mandatory supervision. The same sentence would be served in prison or on parole or mandatory supervision. In the *Hallmark* case the court said good conduct time has no effect on the length of the sentence imposed and that punishment in the case was not affected by the forfeiture of good time.

**Due process and liberty interest issues.** Reviewing and deciding whether to release inmates when their good conduct time plus time served equal their sentence would be a discretionary, administrative decision — like a parole decision — and would not violate U.S. constitutional prohibitions against states depriving persons of liberty without due process. Recent court cases indicate that only specific types of action by the state, such as imposing atypical or significant hardships on an inmate's prison life, would infringe on an inmate's "liberty interest"

under the due process clause. Requiring review before automatically releasing an inmate would not fit this definition.

An automatic review before release would not force the state to provide any more due process for inmates than it currently provides for parole decisions. For example, parole panels could continue to review files without allowing inmates to examine or respond to them.

**Opponents** of restricting or eliminating mandatory supervision say:

Inmates should be dealt with under the laws in effect when they committed their offense; the state should not make unfair, retroactive changes after the fact. The state should honor the implicit contract made with felons to release them under mandatory supervision, especially since the expectation of early release may have caused some inmates to plead guilty.

**Ex post facto issues.** Inmates have a right to be dealt with under the laws in effect when their crimes were committed. Changing those laws retroactively would be unfair and would violate the U.S. Constitution's prohibition against *ex post facto* laws by retroactively restricting automatic mandatory supervision release in a way that would be disadvantageous to inmates who committed their crimes before the change took effect. In such cases as *Weaver v. Graham*, 101 S.Ct. 960 (1981), and *Miller v. Florida*, 107 S.Ct. 2446 (1987), courts have indicated that this type of retroactive change can unconstitutionally increase punishment by increasing an inmate's incarceration time. Increasing incarceration time would meet the criteria for unconstitutional *ex post facto* changes in laws laid out by the Texas Court of Criminal Appeals in the *Hallmark* case.

Other cases also indicate that the proposed changes to mandatory supervision in Texas may be on shaky constitutional ground. In late 1996 a Florida Supreme Court ruling in *Gwong v. Singletary*, No. 87,824, dealing with changes in Florida's good time laws, resulted in the release of about 350 inmates after the state was forced to award good time that it had been withholding.

**Due process and liberty interest issues.** Courts, including some in Texas, also have recognized a difference between statutes involving

discretionary and mandatory release of inmates. Statutes restricting the once automatic release of inmates may violate the U.S. Constitution's prohibition against states depriving persons of liberty without due process. Inmates who accrue enough good conduct time may have a constitutionally protected liberty interest in being released at a particular time. Retroactively changing a law that has created a constitutionally protected liberty interest for inmates could be unconstitutional.

Also, a mandatory review process that involves offenders' liberty interest in the parole panel's decision could force the state to provide a higher level of due process for the inmate. Currently, parole board members review files of inmates being considered for parole and make their decision based largely on that information. Much of the file is confidential, and an inmate does not review or respond to the information. The state might need to let inmates respond to information considered in the decision to release them. In fact, in January 1997 the Fifth U.S. Circuit Court of Appeals remanded a Texas case (*Madison v. Parker*, No. 96-40240) to district court to determine whether an inmate was eligible for mandatory supervision and, if so, whether the inmate had a liberty interest that required a higher level of due process in a disciplinary hearing that reduced his good conduct time.

## Cost

**Supporters** of restricting or eliminating mandatory supervision say:

Any expenses necessary to revise the mandatory supervision program would be money well spent, especially considering the cost that crime exacts on victims and society. A portion of the projected state budget surplus should be spent to keep the most dangerous and violent felons locked up as long as possible.

The standard that would be used to decide whether to keep an inmate incarcerated is less stringent than the standard currently used for parole releases. This could result in a release rate for persons considered for mandatory supervision that is higher than the regular parole rate, thereby reducing the proposal's costs from that estimated in the fiscal note for the original version of SB 250. That note estimates a cost of \$126.3 million for fiscal 1998-99 to incarcerate inmates who, after a mandatory review, would not be released on mandatory supervision. The to-

tal would be \$412.2 million over five years, according to the fiscal note. This estimate may be high since the fiscal note assumes persons being reviewed would be released at the same rate that other felons are released on parole — about 7 percent of violent offenders and 24 percent of nonviolent offenders. Decisions to release inmates on parole are based, in part, on whether the inmate's release "will not increase the likelihood of harm to the public." Under HB 201 or SB 250, however, parole panels would have to consider whether the inmate's release would "pose a significant threat to public safety" or "would endanger the public."

For the first time in a decade Texas has sufficient prison and jail capacity to deal with any increase in inmates that might result from tightening the mandatory supervision laws. Between 1989 and 1996 the state increased prison and state jail beds by about 103,000, reaching a capacity of about 144,000 in January 1997. With thousands — perhaps as many as 8,000 — empty state correctional beds, about 12,000 empty county jail beds and approximately 5,000 out-of-state inmates in county facilities, there is ample room to house any increase in inmates due to these proposals.

The work for the parole board and TDCJ's parole division would not increase significantly since they already must prepare files for persons being considered for automatic mandatory supervision release and set the conditions for their release.

**Opponents** of restricting or eliminating mandatory supervision say:

Authorizing parole panels to veto the release of inmates who would otherwise be automatically released under mandatory supervision would result in some inmates being incarcerated longer, increasing the demand for prison beds and costing the state millions of additional dollars in prison operating costs. The state should not pour more money into the adult criminal justice system when scarce resources are needed in other areas, such as education and juvenile crime prevention.

While the state may now have some empty prison and state jail beds, these will quickly fill up. About 1,000 beds recently were transferred from the adult prison system to the Texas Youth Commission. Other empty beds that are scattered throughout the prison system cannot be used because certain prison populations cannot be housed together. Even if state

law affecting mandatory supervision remains unchanged, about 1,340 state prisoners again will be backlogged in county jails by August 1999, with the number growing to 5,523 by August 2001, according to the state's Criminal Justice Policy Council. If parole panels are authorized to veto the release of inmates who would be released automatically under current law, the state may need an additional 9,770 beds through fiscal 1999 and about 7,000 beds annually for the years 2000 through 2002, according to the criminal justice policy impact statement on SB 250 as introduced.

The fiscal note on the original version of SB 250 estimates a cost to operate these additional prison beds of about \$126.3 million in fiscal 1998-99, with a total cost through fiscal 2002 of about \$412.2 million. However, these estimates only include the costs of housing the larger prison population in existing state beds or contracting with counties for beds. They do not include any new construction to handle the increased backlog of inmates that could result from the proposal. Other estimates have placed these costs as high as \$800 million over five years. The cost of reviewing violent and sex offenders would still be high; the governor's budget set aside \$42.9

million for fiscal 1998-99 to retrospectively repeal mandatory supervision for violent and sex offenders.

Even the highest cost estimates may be too low since they assume that if the parole board has discretion over releasing inmates on mandatory supervision, it will release them at the same rate that felons are paroled — about 7 percent for violent inmates and 24 percent for nonviolent inmates. Inmates whose good conduct time plus time served equal their sentence have most likely been denied parole at least one time, maybe more. It is unlikely that, given a choice, the parole board would suddenly release such inmates under mandatory supervision, even with a less stringent statutory decision standard. If fewer of these inmates are released than estimated, the state's cost would be even higher.

In addition, the proposals would create expenses for the parole board and TDCJ's parole division which would have to compile information to consider for each inmate's release. The proposals call for repeated reviews after an inmate has been denied automatic release, further increasing the costs for the division and the board.

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