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October 29, 2014

Hearing

Part II

	ADMINISTRATIVE REGULATION Department of Correctional Services State of Nebraska	NUMBER 201.12	PAGE 4 of 6
		Re-Entry Furlough Program	

Inmates will be required to submit to drug and alcohol testing upon request. Refusal to submit to drug or alcohol testing will result in the termination of the Re-Entry Furlough. Inmates will not possess or consume any alcoholic beverages or narcotics. Inmates may not consume alcoholic beverages, narcotics or medications that are not prescribed to them. Inmates will get approval from their transition manager prior to taking any vitamins, body building supplements, herbs or over the counter medications. Inmates will not be permitted to enter any establishment such as a liquor store or bar where the primary business of the establishment is the sale or consumption of alcoholic beverages.

E. Vehicles / Transportation

Inmates in the re-entry program must have an adequate means of transportation to fulfill the program requirements. Inmates may be granted approval to drive a personally owned vehicle provided they have a valid driver's license, current vehicle registration and proof of insurance. If an inmate is approved to drive a vehicle owned by an authorized sponsor, the authorized sponsor, who is the legal registered owner of the vehicle, must provide written permission for the inmate to use the vehicle and must also provide documentation of current insurance. The transition manager will complete the Driver Screening Checklist / Agreement (Attachment D) prior to approving the inmate to drive. Inmates may purchase a vehicle outright while assigned to the Re-Entry program, however, inmates will not be permitted to lease a vehicle or enter into a contract to make payments on a vehicle. Inmates and their vehicles are subject to routine searches at any time.

F. Financial Obligations

Inmates in the Re-Entry Furlough Program are expected to submit a monthly budget of anticipated expenditures to their transition manager. Payroll and spending requests will continue to be processed through Inmate Accounting. Inmates that receive payroll through direct deposit will be required to provide their transition manager with a copy of their payroll information. Inmates that receive payroll directly from their employers will be required to turn their paycheck in to their transition manager or the community center for processing. Inmates are responsible for the costs of housing, meals and general subsistence when assigned to the Re-Entry Furlough Program.

G. Associates / Law Enforcement

Inmates are required to immediately report any contact with a law enforcement agency. Inmates may not associate with persons known to be engaged in criminal activities or with persons known to have been convicted of a crime without the written approval of the transition manager.

H. Reporting

Inmates in the Re-Entry Furlough program will be required to meet with their transition manager once per week. The transition manager may meet with the inmate at the furlough residence, place of employment, furlough itinerary, community center or parole office. The transition manager will review the inmate's employment, program performance, itinerary for the following week and discuss any difficulties the

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		Re-Entry Furlough Program	

inmate may be having with their transition into the community. Inmates may be required to report as directed. Inmates are required to inform their transition manager or the community center if any monitoring device malfunctions or breaks.

IV. FURLOUGH DURATION

The furlough duration will be determined by the inmate's sentence length, parole hearing status or performance in the re-entry program. Staff will define the date the furlough begins and the date it ends on the Re-entry Furlough Program Agreement form (Attachment B). Inmates who successfully complete their Re-Entry Furlough will be required to return to the community center for discharge or for their scheduled parole hearings. The records center assigned to the community center will be responsible for releasing the inmate.

V. WEEKLY ITINERARY

Re-Entry Furlough Program participants will be required to submit a Re-Entry Furlough Program Weekly Itinerary (Attachment E) to their transition manager each week. Any deviation from the weekly itinerary will require the approval of the transition manager or the community center. The transition manager will be responsible for establishing the deadlines for submission, establishing curfew hours, approving the activities and forwarding a copy of the itinerary to the appropriate community center or parole office. Inmates may attend two support group activities per week, two personal needs activities per week, two shopping activities per week and one religious or volunteer activity per week. Employment must be listed on the weekly itinerary. Travel time to and from the inmate's employer and residence will be approved and established by the transition manager. Requests for overtime will be initiated by the inmate's employer and must be approved through the inmate's transition manager or community center as established in the furlough agreement. Substance abuse, mental health, vocational or educational programming will be considered on a case by case basis depending on the identified needs of the inmate with the duration of each program activity established by the, substance abuse or mental health professional, academic advisor and approved by the transition manager. Each activity listed on the approved itinerary will always include appropriate travel time to and from the activity. The transition manager may limit shopping, personal needs or program activities if public transportation is being used or the inmate's performance in the program is below standard for the previous week. Inmates will be required to meet in person with their transition manager once per week.

VI. DISCIPLINE

The warden or institutional duty officer will be notified any time an inmate in the Re-Entry Furlough Program receives a misconduct report. The nature of the report will be considered and a determination will be made to restrict the inmate to the furlough residence, return to the community center or place the inmate on immediate segregation status. Misconduct reports will be filed and logged at the community center within 24 hours after they are written. The community center will be responsible for investigating the report, conducting the principal and disciplinary hearings. The inmate's status on the Re-Entry Furlough Program will be reviewed after the disciplinary hearing is completed.

VII. MEDICAL

Re-Entry Furlough program participants will be required to report routine medical complaints to their transition manager. The transition manager will coordinate all sick call or medical

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		Re-Entry Furlough Program	

appointments with the community center. The DCS is responsible for the health care of inmates on furlough. Inmates who are injured at work will be required to go to the medical clinic or medical facility established by their employer's worker compensation procedures. If no treatment facility is established, inmates will contact their transition manager or community center, as established in the furlough agreement, for directions. Inmates that sustain a severe or life threatening injury should proceed to the nearest medical facility for treatment and contact the community center or transition manager as soon as possible after treatment is received. All medical contacts must be reported to the transition manager.

VIII. WALK-AWAY STATUS

Inmates that can not be located at their approved itinerary location or fail to respond to a furlough check may be placed on walk-away status. The inmate's transition manager and furlough sponsor will be contacted and the inmate's itinerary will be verified prior to placing the inmate on walk-away status. The community center staff will follow established institutional walk-away procedures.

REFERENCE

I. ATTACHMENTS

- A. Re-Entry Furlough Program Checklist
- B. Re-Entry Furlough Program Agreement
- C. Re-Entry Furlough Program Inmate Budget Plan
- D. Re-Entry Driver Screening Checklist
- E. Re-Entry Furlough Program Weekly Itinerary

II. AMERICAN CORRECTIONAL ASSOCIATION STANDARDS

- A. Adult Correctional Institutions (fourth edition): 4-4443, 4-4444, 4-4445, 4-4501 and 4-4502.
- B. Adult Community Residential Services (fourth edition): 4-ACRS-5A-14 and 4-ACRS-5A-16.
- C. Adult Probation and Parole Field Services (fourth edition):

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		Re-Entry Furlough Program	

This Administrative Regulation is to be made available in law libraries or other inmate resource centers.

EFFECTIVE: August 11, 2008
 REVISED: August 17, 2009
 August 18, 2010
 June 29, 2011

SUMMARY of REVISION/REVIEW
 Major changes throughout

APPROVED:

 Esther Casmer, Chairperson
 Nebraska Parole Board

 ROBERT P. HOUSTON, Director
 Department of Correctional Services

	ADMINISTRATIVE REGULATION Department of Correctional Services State of Nebraska	NUMBER 201.12	PAGE 2 of 7
		Re-Entry Furlough Program	

PURPOSE:

To establish policy and guidelines for the development and implementation of the Re-Entry Furlough Program (RFP) throughout NDCS.

GENERAL

The Re-Entry Furlough Program provides opportunity and incentive for inmates to prepare for release prior to the completion of their sentence. The intent of the Re-Entry Furlough Program is to enhance public safety by preparing inmates for successful reintegration back into the community. Participants in the Re-Entry Furlough Program will be under the supervision of the community corrections center staff and Adult Parole Administration. All Re-Entry Furlough Program placements will be approved by the Director (or designee) and the Board of Parole and are restricted to the State of Nebraska.

PROCEDURE

I. ELIGIBILITY

NDCS case managers will review their caseloads to identify potential participants for Re-Entry. Inmates will be considered for participation in the Re-Entry Furlough Program if they are within eighteen (18) months of their Parole Eligibility Date (PED) or Mandatory Discharge Date (MD). Each inmate's criminal history and facility adjustment performance will be closely reviewed. Consideration will also be given to the inmate's medical needs, financial obligations, pending legal actions, and whether NDCS approved programming is available in the community.

II. PROCESS

- A. NDCS case managers will begin by reviewing the eligibility guidelines, program performance and pre-release planning of potential participants. The NDCS case managers will complete a referral packet that contains the RFP checklist on WebSuite; Re-Entry Furlough Agreement (Attachment A); Inmate Interview Form (Attachment B); RFP Driving Privilege Agreement/Driver's License Screening Check (Attachment C), if applicable; for example, misconduct reports, programming involvement/needs and work reports; and personalized plan will be submitted to the Institutional Classification Committee who, upon approval will forward the packet to the NDCS RFP applications on Outlook. The NDCS case manager will ensure that the inmate being considered for RFP has the essential identification and documentation for transition into the community (Please refer to Pre-Release AR 209.01).
- B. Adult Parole Administration will investigate and make a recommendation regarding the Re-Entry Furlough Program including transportation, residence, employment, financial and program availability.
- C. If the inmate agrees to the conditions established in the furlough agreement and the parole officer approves the transition plan, the request will be forwarded to the appropriate community corrections center warden and the Director's Review Committee (DRC) for consideration. If approved, the request will be forwarded to the

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		Re-Entry Furlough Program	

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EFFECTIVE: August 11, 2008
 REVISED: August 17, 2009
 REVISED: August 18, 2010
 REVISED: June 29, 2011
 REVISED: August 10, 2012 *
 REVISED: 2013

SUMMARY of REVISION/REVIEW

Revisions include the addition of 'Nebraska' in the signature line.

APPROVED:

 Esther Casmer, Chairperson
 Nebraska Parole Board

 ROBERT P. HOUSTON, Director
 Nebraska Department of Correctional Services

	ADMINISTRATIVE REGULATION Department of Correctional Services State of Nebraska	NUMBER 201.12	PAGE 2 of 7
		Re-Entry Furlough Program	

PURPOSE:

To establish policy and guidelines for the development and implementation of the Re-Entry Furlough Program.

GENERAL

The Re-Entry Furlough Program provides opportunity and incentive for inmates to prepare for parole or discharge prior to the completion of their sentence. The intent of the Re-Entry Furlough Program is to enhance public safety by preparing inmates for successful reintegration back into the community. Participants in the Re-Entry Furlough Program will be under the supervision of the, community corrections center staff, Adult Parole Administration, State Probation or local law enforcement in the county of the furlough residence. All furloughs will be approved by the Director (or designee) and the Board of Parole and are restricted to the State of Nebraska.

PROCEDURE

I. ELIGIBILITY

Unit Case Managers ~~assigned to the community centers~~ will review their caseloads to identify potential participants for the Re-Entry Furlough Program. Inmates selected for the program will be scheduled for a parole hearing or nearing the date of their release. Each inmate's criminal history and performance on community custody will be closely reviewed. Inmates with violent criminal records, lengthy arrest records or multiple incarcerations may not be considered for the Re-Entry Furlough Program. Consideration will also be given to the inmate's medical needs, county of commitment, financial obligations, pending legal actions, institutional disciplinary record, program needs and preparation for discharge or parole.

II. PROCESS

- A. Unit case managers will initiate the Re-Entry Furlough Program Checklist (Attachment A) by reviewing the minimum eligibility guidelines, program performance and pre-release planning of potential participants. The unit case managers will also complete a referral packet that contains RFP Program Checklist, Reentry Furlough Agreement (Attachment B), Inmate Interview Form (Attachment C), RFP Driving Privilege Agreement (Attachment D), copy of most recent completed furlough agreement and personalized plan will be submitted to the appropriate Parole District Supervisor for investigation. The District Supervisor will assign a parole reentry officer to investigate the RFP request. The unit case manager will ensure that the inmate being considered for the RFP has the essential identification and documentation for transition into the community.
- B. A parole officer or designated NDCS staff will investigate and approve the residence for Re-Entry Furlough Program participants. He/she will interview the furlough sponsor and explain the conditions of the furlough agreement. Inmates may only furlough to the residence of an authorized sponsor. If the residence is approved the parole officer or designated NDCS staff will determine if the inmate has the means or transportation to maintain employment and programming in the community.

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Violent Offenders released to RFP
FY2009 - FY2014

	Year	Last name	Inmate Numbers	Offense
1	FY2009	[REDACTED]	[REDACTED]	Possession of stolen Firearm
2	FY2010	[REDACTED]	[REDACTED]	Manslaughter
3	FY2010	[REDACTED]	[REDACTED]	Possession of Firearm by felon
4	FY2010	[REDACTED]	[REDACTED]	Possession of stolen Firearm
5	FY2011	[REDACTED]	[REDACTED]	Murder 1st degree
6	FY2011	[REDACTED]	[REDACTED]	Assault 1st degree, Firearm, Robbery
7	FY2011	[REDACTED]	[REDACTED]	Murder 2nd degree
8	FY2011	[REDACTED]	[REDACTED]	Murder 2nd degree
9	FY2011	[REDACTED]	[REDACTED]	Murder 2nd degree
10	FY2011	[REDACTED]	[REDACTED]	Robbery
11	FY2011	[REDACTED]	[REDACTED]	Murder 2nd degree
12	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon, Firearm
13	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
14	FY2011	[REDACTED]	[REDACTED]	Murder 2nd degree
15	FY2011	[REDACTED]	[REDACTED]	Robbery
16	FY2011	[REDACTED]	[REDACTED]	Child Abuse, Robbery
17	FY2011	[REDACTED]	[REDACTED]	Manslaughter, Motor Vehicle Homicide
18	FY2011	[REDACTED]	[REDACTED]	Robbery, Assault, Deadly Weapon
19	FY2011	[REDACTED]	[REDACTED]	Robbery, Assault of a Peace Officer
20	FY2011	[REDACTED]	[REDACTED]	Manslaughter, Deadly Weapon
21	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats, Multiple Firearm charges
22	FY2011	[REDACTED]	[REDACTED]	Habitual
23	FY2011	[REDACTED]	[REDACTED]	Habitual
24	FY2011	[REDACTED]	[REDACTED]	Habitual
25	FY2011	[REDACTED]	[REDACTED]	Child Abuse, Assault on an Officer
26	FY2011	[REDACTED]	[REDACTED]	Assault 2nd degree, Habitual
27	FY2011	[REDACTED]	[REDACTED]	Manslaughter
28	FY2011	[REDACTED]	[REDACTED]	Habitual
29	FY2011	[REDACTED]	[REDACTED]	Assault 2nd degree, Deadly Weapon
30	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon, Possession Weapon by Felon, etc
31	FY2011	[REDACTED]	[REDACTED]	Robbery, Possession of Firearm
32	FY2011	[REDACTED]	[REDACTED]	Manslaughter, Deadly Weapon
33	FY2011	[REDACTED]	[REDACTED]	Manslaughter
34	FY2011	[REDACTED]	[REDACTED]	Possession of Firearm by Felon
35	FY2011	[REDACTED]	[REDACTED]	Assault 1st degree
36	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
37	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
38	FY2011	[REDACTED]	[REDACTED]	Robbery
39	FY2011	[REDACTED]	[REDACTED]	Robbery, Assault in 1st, 2nd, and 3rd degrees
40	FY2011	[REDACTED]	[REDACTED]	Manslaughter
41	FY2011	[REDACTED]	[REDACTED]	Manslaughter
42	FY2011	[REDACTED]	[REDACTED]	Robbery
43	FY2011	[REDACTED]	[REDACTED]	Kidnapping, Assault 1st degree
44	FY2011	[REDACTED]	[REDACTED]	Deadly Weapon
45	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree, Deadly Weapon

Violent Offenders released to RFP
FY2009 - FY2014

46	FY2011	[REDACTED]	[REDACTED]	Sexual Assault, Kidnapping, Terroristic Threats
47	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree, Deadly Weapon
48	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon, Assault on Peace Officer
49	FY2011	[REDACTED]	[REDACTED]	Robbery
50	FY2011	[REDACTED]	[REDACTED]	Manslaughter
51	FY2011	[REDACTED]	[REDACTED]	Assault 1st and 2nd degrees, Deadly Weapon
52	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
53	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree, Deadly Weapon
54	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
55	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
56	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
57	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
58	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
59	FY2011	[REDACTED]	[REDACTED]	False Imprisonment, Terroristic Threats, Deadly Weapon
60	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats, Deadly Weapon, Violate Domestic Abuse Protection Order
61	FY2011	[REDACTED]	[REDACTED]	Possession of Firearm by Felon
62	FY2011	[REDACTED]	[REDACTED]	Domestic Assault 3rd degree, Assault on Officer, 3rd degree
63	FY2011	[REDACTED]	[REDACTED]	Accessory to use of firearm
64	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
65	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
66	FY2011	[REDACTED]	[REDACTED]	Robbery
67	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon, Possession of Deadly Weapon
68	FY2011	[REDACTED]	[REDACTED]	Strangulation, Resisting Arrest with Weapon, Deadly Weapon
69	FY2011	[REDACTED]	[REDACTED]	Vulnerable Adult Abuse, Escape
70	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats
71	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
72	FY2011	[REDACTED]	[REDACTED]	Robbery
73	FY2011	[REDACTED]	[REDACTED]	Deadly Weapon, Assault 3rd degree
74	FY2011	[REDACTED]	[REDACTED]	Assault 2nd degree
75	FY2011	[REDACTED]	[REDACTED]	Robbery, Deadly Weapon
76	FY2011	[REDACTED]	[REDACTED]	Robbery
77	FY2011	[REDACTED]	[REDACTED]	Assault on Peace Officer 3rd degree
78	FY2011	[REDACTED]	[REDACTED]	Assault 2nd degree
79	FY2011	[REDACTED]	[REDACTED]	Child Abuse
80	FY2011	[REDACTED]	[REDACTED]	Robbery, Escape
81	FY2011	[REDACTED]	[REDACTED]	Possession of Firearm by Felon
82	FY2011	[REDACTED]	[REDACTED]	Robbery
83	FY2011	[REDACTED]	[REDACTED]	Assault of Officer 3rd Degree
84	FY2011	[REDACTED]	[REDACTED]	False Imprisonment 1st degree
85	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats, Firearm to commit felony

Violent Offenders released to RFP
FY2009 - FY2014

86	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats
87	FY2011	[REDACTED]	[REDACTED]	Robbery, Assault Confined Person, Possess deadly weapon
88	FY2011	[REDACTED]	[REDACTED]	Assault 2nd degree
89	FY2011	[REDACTED]	[REDACTED]	Strangulation, Domestic Assault 3rd degree
90	FY2011	[REDACTED]	[REDACTED]	Assault on Officer 3rd Degree
91	FY2011	[REDACTED]	[REDACTED]	Assault 2nd Degree
92	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
93	FY2011	[REDACTED]	[REDACTED]	Assault 2nd Degree, Strangulation, Domestic Assault 3rd degree
94	FY2011	[REDACTED]	[REDACTED]	Robbery
95	FY2011	[REDACTED]	[REDACTED]	Robbery
96	FY2011	[REDACTED]	[REDACTED]	Strangulation, Domestic Assault 3rd degree
97	FY2011	[REDACTED]	[REDACTED]	Domestic Assault 1st degree
98	FY2011	[REDACTED]	[REDACTED]	Manslaughter
99	FY2011	[REDACTED]	[REDACTED]	robbery, terroristic threats
100	FY2011	[REDACTED]	[REDACTED]	Sexual Assault Child 1st degree
101	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
102	FY2011	[REDACTED]	[REDACTED]	Robbery
103	FY2011	[REDACTED]	[REDACTED]	Assault on Officer 3rd Degree
104	FY2011	[REDACTED]	[REDACTED]	Assault on Officer with Motor Vehicle, Assault 3rd degree
105	FY2011	[REDACTED]	[REDACTED]	Robbery
106	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats
107	FY2011	[REDACTED]	[REDACTED]	Domestic Assault, Strangulation, Child abuse
108	FY2011	[REDACTED]	[REDACTED]	Assault 2nd Degree
109	FY2011	[REDACTED]	[REDACTED]	Possession of Stolen Firearm
110	FY2011	[REDACTED]	[REDACTED]	Domestic Assault 2nd degree
111	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
112	FY2011	[REDACTED]	[REDACTED]	Accessory to use of deadly weapon
113	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats
114	FY2011	[REDACTED]	[REDACTED]	Assault of Officer 3rd Degree
115	FY2011	[REDACTED]	[REDACTED]	Assault of Officer 3rd Degree
116	FY2011	[REDACTED]	[REDACTED]	Manslaughter, Firearm to commit felony
117	FY2011	[REDACTED]	[REDACTED]	Manslaughter
118	FY2011	[REDACTED]	[REDACTED]	Robbery
119	FY2011	[REDACTED]	[REDACTED]	Motor vehicle homicide
120	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
121	FY2011	[REDACTED]	[REDACTED]	Assault 2nd Degree
122	FY2011	[REDACTED]	[REDACTED]	Terroristic Threats
123	FY2011	[REDACTED]	[REDACTED]	Abuse of Vulnerable Adult
124	FY2011	[REDACTED]	[REDACTED]	Robbery
125	FY2011	[REDACTED]	[REDACTED]	Assault 1st Degree
126	FY2012	[REDACTED]	[REDACTED]	Murder 2nd
127	FY2012	[REDACTED]	[REDACTED]	Murder 2nd, firearm
128	FY2012	[REDACTED]	[REDACTED]	Murder 2, Firearm, Habitual Crim
129	FY2012	[REDACTED]	[REDACTED]	Robbery (2x), Deadly weapon (2x) Firearm

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Violent Offenders released to RFP
FY2009 - FY2014

130	FY2012	[REDACTED]	[REDACTED]	Manslaughter, Motor vehicle Homicide
131	FY2012	[REDACTED]	[REDACTED]	Child Abuse, 3rd degree assault on officer
132	FY2012	[REDACTED]	[REDACTED]	Assault 2nd, deadly weapon
133	FY2012	[REDACTED]	[REDACTED]	Manslaughter, deadly weapon
134	FY2012	[REDACTED]	[REDACTED]	Robbery(3x) Deadly weapon (3x)
135	FY2012	[REDACTED]	[REDACTED]	kidnapping, Assault 1st degree
136	FY2012	[REDACTED]	[REDACTED]	Assault 1st, deadly weapon
137	FY2012	[REDACTED]	[REDACTED]	Assault 1st degree
138	FY2012	[REDACTED]	[REDACTED]	Robbery (2x) deadly weapon
139	FY2012	[REDACTED]	[REDACTED]	Robbery, deadly weapon, deadly weapon/ felon (2x)
140	FY2012	[REDACTED]	[REDACTED]	vuln. Adult abuse, escape
141	FY2012	[REDACTED]	[REDACTED]	Child Abuse
142	FY2012	[REDACTED]	[REDACTED]	Robbery, assault by a confined person, deadly weap by prohib person
143	FY2012	[REDACTED]	[REDACTED]	Strangulation, Domestic Assault 3rd
144	FY2012	[REDACTED]	[REDACTED]	Assault 2nd
145	FY2012	[REDACTED]	[REDACTED]	Assault 1st
146	FY2012	[REDACTED]	[REDACTED]	Possession of a deadly weap by prohib pers
147	FY2012	[REDACTED]	[REDACTED]	Domestic Assault 1st
148	FY2012	[REDACTED]	[REDACTED]	Manslaughter
149	FY2012	[REDACTED]	[REDACTED]	Sexual Assault child, 1st degree
150	FY2012	[REDACTED]	[REDACTED]	possession of a stolen firearm
151	FY2012	[REDACTED]	[REDACTED]	Domestic Assault 2nd
152	FY2012	[REDACTED]	[REDACTED]	Strangulation, Domestic Assault 3rd
153	FY2012	[REDACTED]	[REDACTED]	Manslaughter, use firearm to commit fel.
154	FY2012	[REDACTED]	[REDACTED]	vuln. Adult abuse
155	FY2012	[REDACTED]	[REDACTED]	Assault 2nd
156	FY2012	[REDACTED]	[REDACTED]	Abuse of a Vulnerable Adult
157	FY2012	[REDACTED]	[REDACTED]	Assault 1st
158	FY2013	[REDACTED]	[REDACTED]	Habitual Criminal
159	FY2013	[REDACTED]	[REDACTED]	Habitual Criminal
160	FY2013	[REDACTED]	[REDACTED]	Habitual Criminal
161	FY2014	[REDACTED]	[REDACTED]	Murder 2, Firearm to commit, Habitual Crim
162	FY2014	[REDACTED]	[REDACTED]	Habitual Criminal

LEGISLATURE OF NEBRASKA
ONE HUNDRED SECOND LEGISLATURE
FIRST SESSION
LEGISLATIVE BILL 191
Final Reading

Introduced by Council, 11; Ashford, 20.
Read first time January 07, 2011
Committee: Judiciary

A BILL

1 FOR AN ACT relating to the Nebraska Treatment and Corrections Act; to
2 amend sections 83-1,107 and 83-1,108, Reissue Revised
3 Statutes of Nebraska; to change provisions relating to
4 sentence reductions; to repeal the original sections; and
5 to declare an emergency.
6 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 83-1,107, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 83-1,107 (1)(a) Within sixty days after initial
4 classification and assignment of any offender committed to the
5 department, all available information regarding such committed
6 offender shall be reviewed and a committed offender department-
7 approved personalized program plan document shall be drawn up. The
8 document shall specifically describe the department-approved
9 personalized program plan and the specific goals the department
10 expects the committed offender to achieve. The document shall also
11 contain a realistic schedule for completion of the department-
12 approved personalized program plan. The department-approved
13 personalized program plan shall be fully explained to the committed
14 offender. The department shall provide programs to allow compliance
15 by the committed offender with the department-approved personalized
16 program plan.

17 Programming may include, but is not limited to:

18 (i) Academic and vocational education, including teaching
19 such classes by qualified offenders;

20 (ii) Substance abuse treatment;

21 (iii) Mental health and psychiatric treatment, including
22 criminal personality programming;

23 (iv) Constructive, meaningful work programs; and

24 (v) Any other program deemed necessary and appropriate by
25 the department.

1 (b) A modification in the department-approved
2 personalized program plan may be made to account for the increased or
3 decreased abilities of the committed offender or the availability of
4 any program. Any modification shall be made only after notice is
5 given to the committed offender. The department may not impose
6 disciplinary action upon any committed offender solely because of the
7 committed offender's failure to comply with the department-approved
8 personalized program plan, but such failure may be considered by the
9 board in its deliberations on whether or not to grant parole to a
10 committed offender.

11 ~~(2)~~ (2)(a) The department shall reduce the term of a
12 committed offender by six months for each year of the offender's term
13 and pro rata for any part thereof which is less than a year.

14 (b) In addition to reductions granted in subdivision (2)
15 (a) of this section, the department shall reduce the term of a
16 committed offender by three days on the first day of each month
17 following a twelve-month period of incarceration within the
18 department during which the offender has not been found guilty of (i)
19 a Class I or Class II offense or (ii) more than three Class III
20 offenses under the department's disciplinary code. Reductions earned
21 under this subdivision shall not be subject to forfeit or withholding
22 by the department.

23 (c) The total reductions under this subsection shall be
24 credited from the date of sentence, which shall include any term of
25 confinement prior to sentence and commitment as provided pursuant to

1 section 83-1,106, and shall be deducted from the maximum term, to
2 determine the date when discharge from the custody of the state
3 becomes mandatory.

4 (3) While the offender is in the custody of the
5 department, reductions of terms granted pursuant to ~~subsection (2)~~
6 subdivision (2)(a) of this section may be forfeited, withheld, and
7 restored by the chief executive officer of the facility with the
8 approval of the director after the offender has been notified
9 regarding the charges of misconduct.

10 (4) The department shall make treatment programming
11 available to committed offenders as provided in section 83-1,110.01
12 and shall include continuing participation in such programming as
13 part of each offender's parolee personalized program plan.

14 (5)(a) Within thirty days after any committed offender
15 has been paroled, all available information regarding such parolee
16 shall be reviewed and a parolee personalized program plan document
17 shall be drawn up and approved by the Office of Parole
18 Administration. The document shall specifically describe the approved
19 personalized program plan and the specific goals the office expects
20 the parolee to achieve. The document shall also contain a realistic
21 schedule for completion of the approved personalized program plan.
22 The approved personalized program plan shall be fully explained to
23 the parolee. During the term of parole, the parolee shall comply with
24 the approved personalized program plan and the office shall provide
25 programs to allow compliance by the parolee with the approved

1 personalized program plan.

2 Programming may include, but is not limited to:

3 (i) Academic and vocational education;

4 (ii) Substance abuse treatment;

5 (iii) Mental health and psychiatric treatment, including
6 criminal personality programming;

7 (iv) Constructive, meaningful work programs;

8 (v) Community service programs; and

9 (vi) Any other program deemed necessary and appropriate
10 by the office.

11 (b) A modification in the approved personalized program
12 plan may be made to account for the increased or decreased abilities
13 of the parolee or the availability of any program. Any modification
14 shall be made only after notice is given to the parolee. Intentional
15 failure to comply with the approved personalized program plan by any
16 parolee as scheduled for any year, or pro rata part thereof, shall
17 cause disciplinary action to be taken by the office resulting in the
18 forfeiture of up to a maximum of three months' good time for the
19 scheduled year.

20 (6) While the offender is in the custody of the board,
21 reductions of terms granted pursuant to ~~subsection (2) subdivision~~
22 (2)(a) of this section may be forfeited, withheld, and restored by
23 the administrator with the approval of the director after the
24 offender has been notified regarding the charges of misconduct or
25 breach of the conditions of parole. In addition, the board may

1 recommend such forfeitures of good time to the director.

2 (7) Good time or other reductions of sentence granted
3 under the provisions of any law prior to July 1, 1996, may be
4 forfeited, withheld, or restored in accordance with the terms of the
5 Nebraska Treatment and Corrections Act.

6 Sec. 2. Section 83-1,108, Reissue Revised Statutes of
7 Nebraska, is amended to read:

8 83-1,108 (1) The board shall reduce, for good conduct in
9 conformity with the conditions of parole, a parolee's parole term by
10 ~~two~~ten days for each month of such term. The total of such
11 reductions shall be deducted from the maximum term, less good time
12 granted pursuant to section 83-1,107, to determine the date when
13 discharge from parole becomes mandatory.

14 (2) Reductions of the parole terms may be forfeited,
15 withheld, and restored by the board after the parolee has been
16 consulted regarding any charge of misconduct or breach of the
17 conditions of parole.

18 Sec. 3. Original sections 83-1,107 and 83-1,108, Reissue
19 Revised Statutes of Nebraska, are repealed.

20 Sec. 4. Since an emergency exists, this act takes effect
21 when passed and approved according to law.

SENATOR ASHFORD: Any...(laugh). Okay, go ahead, I'm sorry, Mr.... [LB133]

SENATOR LATHROP: Are we on opponents? [LB133]

SENATOR ASHFORD: I think we're to opponents quickly. [LB133]

SENATOR LATHROP: Are we? Any opponents? [LB133]

SENATOR ASHFORD: We've moved off proponents. [LB133]

SENATOR LATHROP: Anybody here in the neutral capacity, like say the Director of Corrections? [LB133]

SENATOR ASHFORD: And I'll waive my... [LB133]

SENATOR LATHROP: Nobody here in the neutral capacity. [LB133]

SENATOR ASHFORD: Senator Council, LB191. [LB133]

SENATOR COUNCIL: Chairman Ashford, Vice Chairman Lathrop, Vice Vice Chair McGill, other members of the Judiciary Committee, I am Senator Brenda Council, and for the record, the last name is spelled C-o-u-n-c-i-l not C-o-u-n-s-e-l. I represent the 11th Legislative District, and I appear before you this afternoon to introduce LB191. And I am introducing LB191 on behalf of the Department of Corrections and the Nebraska Parole Board, and because it represents one of the components of an approach that I have been exploring with both the Corrections Department and the Parole Board for a number of years. And that approach is earned time as a means of not only reducing corrections costs, but better preparing inmates for reentry. As all of you know, Nebraska currently has a good time law that reduces an individual's sentence by one day for every day served. There are very limited circumstances under which an inmate can lose any good time. Conversely, there is no way to grant additional good time if inmates comply with disciplinary rules and/or complete all recommended programming. As a result of lack of capacity in funding, we are unable at this time to pursue a part of the approach that I've been discussing and I really support, and that is granting additional good time for program completion. But we're not in a financial position or a capacity position to provide that in a fair and equitable basis. And to give you an example, we have a substantial number of individuals who enter the Nebraska Department of Corrections without having earned a high school diploma. And as an incentive for them to obtain a GED or their high school diploma, because now the Department of Corrections is in a position to grant high school diplomas, to grant additional earned time, but there's only so much capacity, and we have inmates who are being released at different times. But what LB191 does and is able to capture is the ability to grant additional good time to inmates who comply with the Correctional Department's disciplinary rules, and it allows

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for parolees to earn reductions in their parole time if they conduct themselves in a manner and in conformity with all the conditions of their parole. So, essentially, LB191 provides that the Correctional Department shall reduce the term of a committed offender by three days per month, beginning on the first month after they've served a year. So after they've served a year, beginning on the first month after the completion of that year, they can earn three additional days of good time. For parolees, parolees could earn up to ten additional days of reduction of their parole term for each month that they conduct themselves in conformance with the conditions of their parole. I direct your attention to the fiscal note which shows a savings of \$108,000 a year upon the first full year of implementation of this...I'll call it earned time, but it's actually increasing good time that...and I think is a conservative figure. And it kind of relates to the discussion that just occurred on what figure do you give the court when you're determining the cost of incarceration. There's the daily per diem rate which is about \$15 per inmate per day which only includes the cost of food and clothing and basic incidentals. And then there is the actual cost per annum to incarcerate someone that includes all expenditures from General Fund, Cash Fund, and federal, and that approach is about \$28,000 per year. And I think the conservative estimate of the fiscal analyst is that conservatively the reduction in time would be the equivalent of 19 inmates. And if you multiply that 19 inmates by the per diem rate, that's where you get to \$108,000. If you multiplied it by the annual cost per inmate, that nearly doubles. So for those reasons, I would urge this committee's favorable consideration of advancing LB191. It serves two purposes, and that is to improve the safety and security of inmates and staff by encouraging inmates to conduct themselves in accordance with disciplinary rules, resulting in the increase in the number of good time that they could earn. And it will result in a cost savings to both the Corrections Department and the Probation Department, because as parolees, time on parole is reduced; it increases the number of individuals that can move into parole without having to increase parole officers. With that, I'd answer any questions that you may have. [LB191]

SENATOR ASHFORD: Thanks, Senator Council. And this also was, I think, one of our... [LB191]

SENATOR COUNCIL: LR542. [LB191]

SENATOR ASHFORD: ...but clearly, it's the work you've been doing... [LB191]

SENATOR COUNCIL: But it's an LR542 recommendation. [LB191]

SENATOR ASHFORD: ...but we did think about it, at least, in LR542. But I think Bob also had it on his modifications as well. [LB191]

SENATOR COUNCIL: As well, yes. And as I indicated, Mr. Houston, Ms. Casmer, and I have been discussing various ways of granting additional good time to parolees and

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inmates. [LB191]

SENATOR ASHFORD: Thank you very much. Okay, proponents of this measure? Bob Houston. [LB191]

SENATOR LAUTENBAUGH: Now he testifies. [LB191]

SENATOR ASHFORD: Yeah, yeah. Picking favorites, but we'll let it go (laughter). [LB191]

BOB HOUSTON: (Exhibit 5) Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Bob Houston, H-o-u-s-t-o-n. I'm Director of the Nebraska Department of Correctional Services. I'd like to thank Senator Council...thank you, Senator, for introducing the bill on behalf of the department. This bill was a department budget modification resulting in savings to the...and could result in the savings to the department of \$108,000 in the second year due to the population reduction. The savings have been incorporated into the Governor's recommended budget. As of December 2, 2010, 2,760 inmates have been incarcerated for more than a year. Of this number, 687 or approximately 25 percent, did not have a Class I or Class II, or more than three Class III misconduct reports. The current good time provision will remain the same. This legislative bill would add a component to the current good time law for those inmates who are incarcerated with the department after its effective date. Under this bill, inmates could earn an additional three days of good time following a 12-month period, during which he or she had not been found guilty of a Class I and II offense nor more than three Class III offenses under the department's disciplinary code. Examples of Class I and II offenses are assault, possession of a weapon, escape, refusing to submit to a search, disobeying a direct order, gang/security group activities, and false reporting. A Class III offense includes things as possession or receiving unauthorized articles, violations of sanctions, swearing, cursing, and use of abusive language or gestures. This provision has the potential to lower the prison population, and, therefore, reduce costs. It also rewards good behavior within the prison system. Inmates under this bill would have the ability to positively impact their release date by engaging in appropriate actions and refraining from negative ones. LB191 also changes the good time earned by offenders on parole. Currently, inmates on parole receive an additional two days of good time per month for compliance with their parole plan. This bill would change that amount of good time on parole from two days to ten days. The provision incentivizes compliance with the parole plan by offering offenders the opportunity to decrease the amount of time they spend on parole by exhibiting good citizenship. I believe this bill is a positive step in managing both the behavior and the size of the inmate population, and I'd be pleased to answer any questions. [LB191]

SENATOR ASHFORD: Any questions of Bob? Again, Bob, thank you and all of your team for the good work you've been able to do this last year in addressing the prison

Earned Time

Premise:

Violent offenders (current offense only) earn up to 25%, serving at least 75% of their sentences.

Non-Violent offenders (current offense only) earn up to 50%, serving at least 50% of their sentences.

Application/Implementation:

Violent: Earn 7 days per month

4 days for appropriate behavior (lack of "guilty" misconduct reports)

No Class I; No Class II; and no more than one Class III

3 days for compliance with personalized plan

Personalized plan includes all recommendations for work, education, treatment, etc.

Non-Violent: Earn ~~15~~³⁰ days per month

~~15~~¹⁵ days for appropriate behavior (lack of "guilty" misconduct reports)

No Class I; No Class II; and no more than one Class III

~~15~~¹⁵ days for compliance with personalized plan

Personalized plan includes all recommendations for work, education, treatment, etc.

A checklist would be created for staff to complete regarding compliance with personalized plan. This would be an "all or nothing" decision. For example, if an inmate went to work each day as required by the personalized plan, but did not attend GED classes as recommended, he/she would not receive the earned time for compliance with the personalized plan for that month.

If an inmate is on a waiting list for treatment programming and has accepted the recommendation (meaning written acknowledgement of his/her acceptance into the program when space permits) he/she receives earned credit for those months. If, however, the time for program participation comes and the inmate refuses treatment, all credit earned toward compliance with personalized plan would be forfeited. This would require either the earned credit be "contingent upon final program participation" or a misconduct report be written for failure to comply with personalized plan. However, it would require a change in the amount of good time that could be taken so this could be cumbersome to manage.

Some points of concern:

"Satisfactory participation or successful completion" can be subjective terms

Judges, victims won't know TRD up front

29-2204 (1) B (b) and (c) require the inmate know the maximum amount of time he/she must serve on minimum and maximum sentence - this statute may need revision

Inmate could serve more time than necessary since good time would be applied after it is earned.

Error rate could be higher due to applying monthly rather than all at once.

Is PED impacted? Parole board doesn't know TRD when looking at paroling

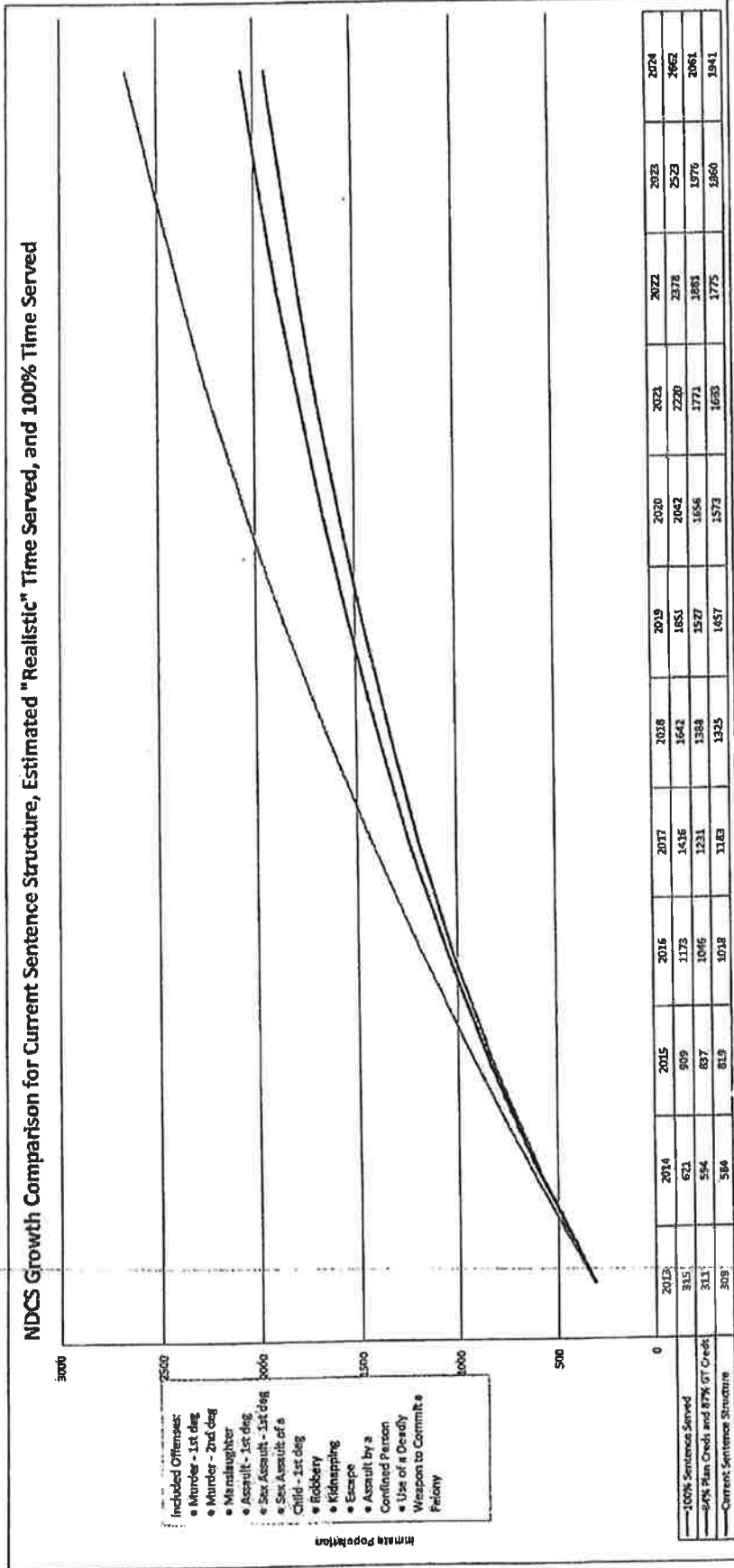
Will calculation of "consecutive" sentences be impacted?

Currently NDCS decides whether an MR goes to UDC or IDC

There is no appeals process in UDC; appeals are allowed in IDC

DCS would not be able to take good time for misconduct as it may or may not have been earned. Can we take good time to be subtracted from future earnings?

Projected NDCS Population based on GTL Changes
12/19/2013



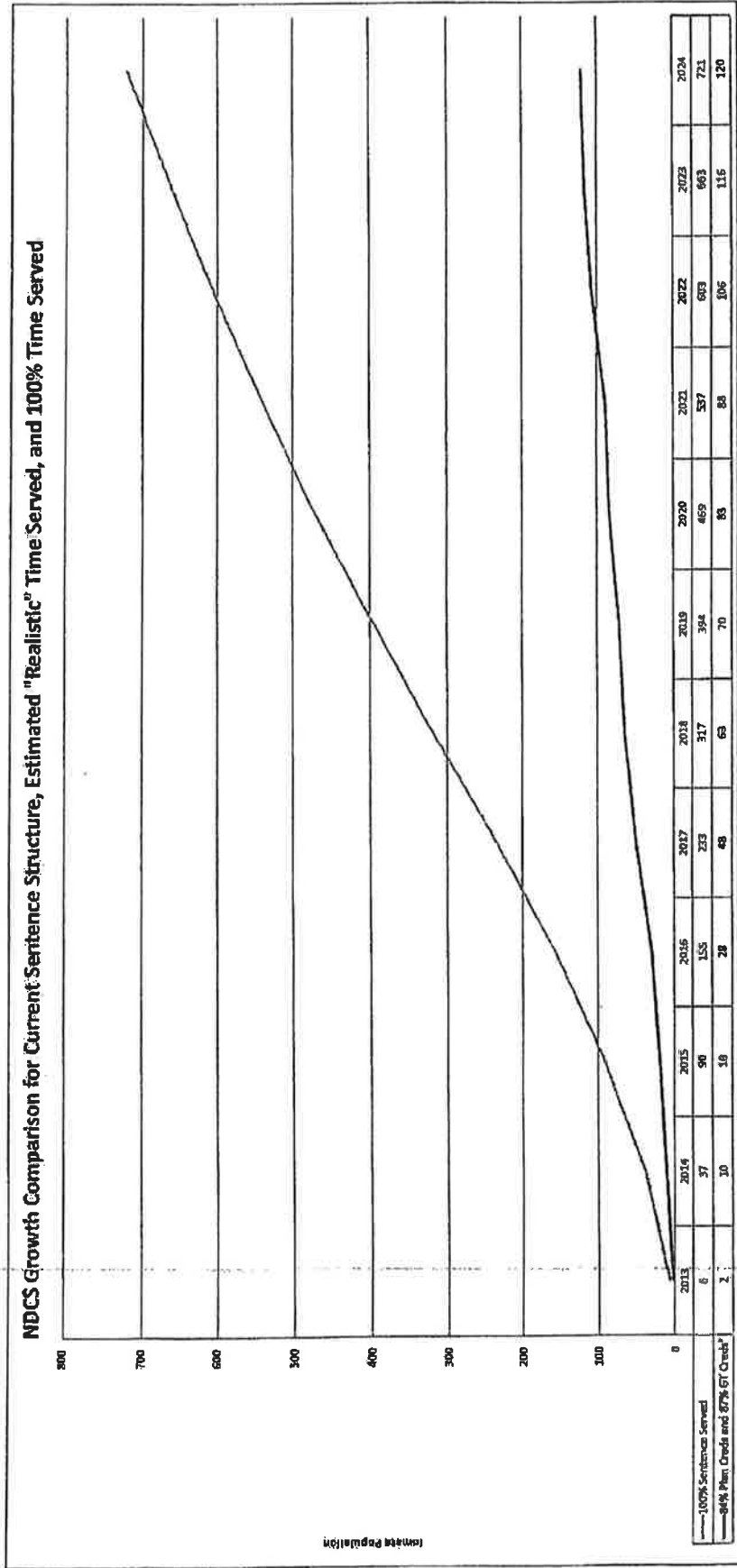
- Included Offenses:
- Murder - 1st deg
 - Murder - 2nd deg
 - Manslaughter
 - Assault - 1st deg
 - Sex Assault - 1st deg
 - Sex Assault of a Child - 1st deg
 - Robbery
 - Kidnapping
 - Escape
 - Assault by a Confined Person
 - Use of a Deadly Weapon to Commit a Felony

By: Abby L. Vandenberg

Source: NDCS Inmate and Location History Records

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Projected NDCS Population Difference from GTL Changes
12/19/2013



Source: NDCS Inmate and Location History Records

By: Abby L. Vandenberg

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2-4

indeterminate sentencing 10-20

- 1. Current Good Time Law →
- 2. Legislative Bill 379 (Senator John Nelson)
 - a. Fiscal Impact (\$6,454 per inmate) → Change will have impact.
 - b. Habitual Criminal, use of a deadly weapon to commit a felony, possession of a deadly weapon by a prohibited person.

- 3. AG Bills
 - a. Earned time for all
 - b. Earned time for violent only → ~~70-80%~~ 50% by 2024

- 4. Options
 - a. What crimes • Homicide / 1st degree assault / Sexual assault / Robbery / Kidnapping / Escape / assault of officer / use a commit
 - b. Maximum Time
 - c. How earned -
 - d. Effective date

5. CSG
 Goal: Enhance public safety at lower costs.
 Engagement by all three branches.

Process * Approval in April. Team arrives works with agencies in preparation for legislation in 2015, ⇒ the implementation
 Focus on reducing recidivism / programs that work

Ashford

- ① Add. programs in prison
- ② statutory groups guide
- ③ supervised release
- ④ engage w/ CS6
- ⑤ Probation

No longer sentencing.

LB 371
 - Ombudsman report
 of Jenkins

[West Reporter Image \(PDF\)](#)

274 Neb. 916, 744 N.W.2d 410

[Briefs and Other Related Documents](#)
[Judges and Attorneys](#)

Supreme Court of Nebraska.
David J. ANDERSON, appellee,
v.

Robert HOUSTON, director, Nebraska Department of Correctional Services, appellant.

Nos. S-05-1561, S-06-206.
Feb. 1, 2008.

Background: Inmate filed petition for writ of habeas corpus requesting sentence credit for time he spent at liberty after the Department of Correctional Services mistakenly released him long before his sentences were to expire. The District Court, Douglas County, Marlon A. Polk, J., granted writ and Inmate's request that Department pay court costs. Department appealed and filed petition to bypass the Court of Appeals.

Holdings: The Supreme Court, Heavican, C.J., held that:

- (1) on appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo;
- (2) district court had jurisdiction to review habeas petition, even though it was not in county in which Inmate was confined;
- (3) prematurely released prisoners who had knowledge of a governmental mistake and yet made no effort to correct it do not deserve sentence credit under the equitable doctrine;
- (4) a prisoner who does not try to inform officials that his release was premature carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature;
- (5) remand was necessary for the trial court to determine whether Inmate tried to inform officials of their mistake and, if not, whether Inmate reasonably did not know his release was premature;
- (6) district court lacked jurisdiction when it issued order granting Inmate's request for payment of court costs; and
- (7) an order granting habeas relief qualifies as a final order for purposes of an appeal.

Judgment granting writ reversed, and cause remanded; judgment granting request for costs vacated.

Connolly and Gerrard, JJ., concurred in result.

Wright, J., concurred and filed opinion.

West Headnotes

[1] [KeyCite Citing References for this Headnote](#)

110 Criminal Law

110XXIV Review

110XXIV(L) Scope of Review in General

110XXIV(L)4 Scope of Inquiry

110k1134.39 k. Jurisdiction and venue. Most Cited Cases
(Formerly 110k1134(3))

70

A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

[2] KeyCite Citing References for this Headnote

197 Habeas Corpus

- 197III Jurisdiction, Proceedings, and Relief
 - 197III(D) Review
 - 197III(D)2 Scope and Standards of Review
 - 197k842 k. Review de novo. Most Cited Cases

· 197 Habeas Corpus KeyCite Citing References for this Headnote

- 197III Jurisdiction, Proceedings, and Relief
 - 197III(D) Review
 - 197III(D)2 Scope and Standards of Review
 - 197k846 k. Clear error. Most Cited Cases

On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.

[3] KeyCite Citing References for this Headnote

197 Habeas Corpus

- 197III Jurisdiction, Proceedings, and Relief
 - 197III(B) Jurisdiction and Venue
 - 197III(B)2 Personal Jurisdiction and Venue
 - 197k634 k. State or territorial courts. Most Cited Cases

District court in which inmate filed his habeas petition had jurisdiction to review petition, even though court was not in county in which inmate was confined; Department of Correctional Services submitted to the court's "jurisdiction" at the initial hearing by failing to object to venue, and inmate was later transferred to correctional center in same county as district court.

[4] KeyCite Citing References for this Headnote

110 Criminal Law

- 110XXIV Review
 - 110XXIV(B) Nature and Grounds of Appellate Jurisdiction
 - 110k1016 Appellate Jurisdiction
 - 110k1017 k. In general. Most Cited Cases

If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.

[5] KeyCite Citing References for this Headnote

106 Courts

- 106I Nature, Extent, and Exercise of Jurisdiction in General
 - 106I(A) In General
 - 106k22 Consent of Parties as to Jurisdiction
 - 106k24 k. Of cause of action or subject-matter. Most Cited Cases

Litigants can not confer subject matter jurisdiction upon a tribunal by acquiescence or consent.

[6] KeyCite Citing References for this Headnote

- 110 Criminal Law
 - 110IX Venue
 - 110IX(C) Objections and Exceptions
 - 110k145 k. In general. Most Cited Cases

Venue provisions confer a personal privilege which may be waived by the defendant.

[7] KeyCite Citing References for this Headnote

- 197 Habeas Corpus
 - 197III Jurisdiction, Proceedings, and Relief
 - 197III(B) Jurisdiction and Venue
 - 197III(B)1 In General
 - 197k612 State Courts; Judges, or Officers
 - 197k612.1 k. In general. Most Cited Cases

Any and all district courts have subject matter jurisdiction over habeas claims. Neb.Rev.St. § 29-2801.

[8] KeyCite Citing References for this Headnote

- 197 Habeas Corpus
 - 197III Jurisdiction, Proceedings, and Relief
 - 197III(B) Jurisdiction and Venue
 - 197III(B)2 Personal Jurisdiction and Venue
 - 197k634 k. State or territorial courts. Most Cited Cases

An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined.

[9] KeyCite Citing References for this Headnote

- 197 Habeas Corpus
 - 197III Jurisdiction, Proceedings, and Relief
 - 197III(C) Proceedings
 - 197III(C)1 In General
 - 197k691 Dismissal
 - 197k691.1 k. In general. Most Cited Cases

Where habeas proceedings are instituted in a county other than the one in which prisoner is confined, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

[10] KeyCite Citing References for this Headnote

- 197 Habeas Corpus
 - 197III Jurisdiction, Proceedings, and Relief
 - 197III(B) Jurisdiction and Venue
 - 197III(B)3 Waiver and Transfer
 - 197k651 k. Waiver of objections. Most Cited Cases

Where application is made for a writ of habeas corpus to the district court of a county other than that in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his restraint.

[11] KeyCite Citing References for this Headnote

197 Habeas Corpus

- 197I In General
 - 197I(A) In General
 - 197I(A)1 Nature of Remedy in General
 - 197k206 Purpose and Use of Writ
 - 197k207 k. Release from restraint. Most Cited Cases

The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.

[12] KeyCite Citing References for this Headnote

197 Habeas Corpus

- 197II Grounds for Relief; Illegality of Restraint
 - 197II(A) Ground and Nature of Restraint
 - 197k441 k. Improper restraint or detention in general. Most Cited Cases

To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.

[13] KeyCite Citing References for this Headnote

350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

Sentence credit for time erroneously spent at liberty is a common-law doctrine rooted in equity and is often called the "equitable doctrine."

[14] KeyCite Citing References for this Headnote

350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

A prisoner is eligible for sentence credit under the equitable doctrine when his premature release is due to simple negligence by officials.

[15] KeyCite Citing References for this Headnote

- 92 Constitutional Law
 - 92XXVII Due Process

92XXVII(H) Criminal Law92XXVII(H)11 Imprisonment and Incidents Thereof

- 92k4830 k. Discharge and release. Most Cited Cases

- 310 Prisons KeyCite Citing References for this Headnote

- 310II Prisoners and Inmates

- 310II(F) Duration of Confinement

- 310k241 k. Discharge and release in general. Most Cited Cases
(Formerly 310k14)

Department of Correctional Services did not commit misconduct rising to the level of a due process violation when it mistakenly prematurely released prisoner from incarceration. U.S.C.A. Const. Amend. 14.

[16] KeyCite Citing References for this Headnote

350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed

- 350HV(D) Credits

- 350Hk1164 Release

- 350Hk1169 k. Erroneous release. Most Cited Cases

Sentence credit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application.

[17] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed

- 350HV(D) Credits

- 350Hk1164 Release

- 350Hk1169 k. Erroneous release. Most Cited Cases

Two rights are served by the equitable doctrine providing sentence credit for time erroneously spent at liberty: the first right is society's right to expect that once a defendant has been incarcerated, the time will not be served in bits and pieces, and the second right is the right of a prisoner to pay his debt to society in one stretch, not in bits and pieces.

[18] KeyCite Citing References for this Headnote

350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed

- 350HV(D) Credits

- 350Hk1164 Release

- 350Hk1169 k. Erroneous release. Most Cited Cases

No equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty.

[19] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed

- 350HV(D) Credits

350Hk1164 Release

- 350Hk1169 k. Erroneous release. Most Cited Cases

Where it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time erroneously at liberty.

[20] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment
 - 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

Prematurely released prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine.

[21] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment
 - 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake.

[22] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment
 - 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

Although a prisoner who knows his or her release is erroneous need not, in attempting to notify authorities of the mistake to preserve the right to credit for time spent at liberty, continue to badger the authorities, a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.

[23] KeyCite Citing References for this Headnote

- 350H Sentencing and Punishment
 - 350HV Sufficiency and Construction of Sentence Imposed
 - 350HV(D) Credits
 - 350Hk1164 Release
 - 350Hk1169 k. Erroneous release. Most Cited Cases

A prisoner who seeks credit for time erroneously spent at liberty and who does not try to inform officials that his release was premature carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature.

[24] KeyCite Citing References for this Headnote350H Sentencing and Punishment

- 350HV Sufficiency and Construction of Sentence Imposed
- 350HV(D) Credits
- 350Hk1164 Release
- 350Hk1169 k. Erroneous release. Most Cited Cases

When a prisoner seeks credit for time erroneously spent at liberty but did not try to inform officials that his release was premature, the government has what essentially amounts to a burden of production to provide the prisoner, who carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature, with any and all records relevant to inquiry; such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

[25] KeyCite Citing References for this Headnote197 Habeas Corpus

- 197III Jurisdiction, Proceedings, and Relief
- 197III(D) Review
- 197III(D)3 Determination and Disposition
- 197k862 Remand
- 197k864 Criminal Cases
- 197k864(5) k. Sentence and punishment. Most Cited Cases

On appeal from grant of habeas relief to inmate who sought sentence credit for time erroneously spent at liberty under the equitable doctrine, remand was necessary for the trial court to determine whether inmate tried to inform officials of their mistake and, if not, whether inmate reasonably did not know his release was premature.

[26] KeyCite Citing References for this Headnote197 Habeas Corpus

- 197III Jurisdiction, Proceedings, and Relief
- 197III(D) Review
- 197III(D)1 In General
- 197k821 Effect of Proceeding for Review; Stay
- 197k821.1 k. In general. Most Cited Cases

District court was divested of jurisdiction when the Department of Correctional Services perfected its appeal of the district court's order granting inmate's petition for habeas relief, and thus district court lacked jurisdiction when it subsequently issued orders granting inmate's request for payment of court costs and motion to withdraw a prior request for legal fees.

[27] KeyCite Citing References for this Headnote110 Criminal Law

- 110XXIV Review
- 110XXIV(F) Proceedings, Generally
- 110k1083 k. Effect of transfer or proceedings therefor. Most Cited Cases

A trial court is divested of jurisdiction when a party perfects appeal of a final order.

[28] KeyCite Citing References for this Headnote

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(D) Review

197III(D)1 In General

197k814 k. Decisions reviewable. Most Cited Cases

The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment.

[29] KeyCite Citing References for this Headnote

197 Habeas Corpus

197III Jurisdiction, Proceedings, and Relief

197III(D) Review

197III(D)1 In General

197k814 k. Decisions reviewable. Most Cited Cases

An order granting habeas relief qualifies as a final order for purposes of an appeal.

****413 Syllabus by the Court**

***916 1. Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.

***917 2. Habeas Corpus: Appeal and Error.** On appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.

3. Jurisdiction: Appeal and Error. If the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.

4. Jurisdiction: Venue: Waiver. Litigants cannot confer subject matter jurisdiction upon a tribunal by acquiescence or consent. In contrast, venue provisions confer a personal privilege which may be waived by the defendant.

5. Habeas Corpus. An application for habeas relief may be made to any one of the judges of the district court or to any county judge.

6. Habeas Corpus: Jurisdiction. An application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. And where proceedings are instituted in another county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

7. Habeas Corpus: Jurisdiction. Where application is made for a writ of habeas corpus to the district court of a county other than that in which the prisoner is confined and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his or her restraint.

8. Habeas Corpus. The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.

9. **Habeas Corpus: Proof.** To secure habeas corpus relief, the prisoner must show that he or she is being illegally detained and is entitled to the benefits of the writ.

10. **Sentences: Equity.** Credit for time erroneously at liberty is an equitable doctrine and should be applied only where equity demands its application.

11. **Sentences: Equity.** No equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty.

12. **Sentences: Equity.** Where it is clear that a prisoner had knowledge of a government mistake and made no effort to correct it, equity does not demand credit for time at liberty.

13. **Sentences: Equity.** Prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes **414 while at liberty—do not deserve sentence credit under the equitable doctrine.

14. **Sentences: Notice.** To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake.

15. **Sentences: Notice.** Although the prisoner need not continue to badger the authorities, a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status.

16. **Sentences: Proof.** The prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. The government has what essentially *918 amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

17. **Jurisdiction: Final Orders: Appeal and Error.** A trial court is divested of jurisdiction when a party perfects appeal of a final order.

18. **Habeas Corpus: Final Orders: Proof.** The test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment.

19. **Habeas Corpus: Final Orders.** An order denying habeas corpus relief qualifies as a final order.

20. **Habeas Corpus: Final Orders.** An order granting habeas corpus relief qualifies as a final order.

Jon Bruning, Attorney General, Kimberley Taylor-Riley, and Ryan Gilbride for appellant.

Michael D. Nelson and Cathy R. Saathoff, Omaha, of Nelson Law, L.L.C., and April L. O'Loughlin, of O'Loughlin Law, P.C., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ,

HEAVICAN, C.J.

I. INTRODUCTION

David J. Anderson, an inmate at the Nebraska State Penitentiary in Lancaster County, filed a writ of habeas corpus in the district court for Douglas County. In his writ, Anderson requested sentence credit for time he spent at liberty after the Nebraska Department of Correctional Services

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(Department) mistakenly released Anderson long before his sentences were to expire. After concluding that it had jurisdiction over the matter, the district court granted Anderson's writ. The Department appealed and also filed a petition to bypass the Nebraska Court of Appeals, which we granted. We reverse, and remand for reasons set forth below. We also vacate the district court's orders for related legal fees and costs.

***919 II. BACKGROUND**

Anderson was convicted in Douglas County District Court of a Class III felony, theft by unlawful taking, and a Class IV felony, theft by unlawful taking. The court sentenced Anderson to 3 to 5 years' imprisonment for the Class III felony and ****415** 20 months' imprisonment for the Class IV felony. The court ordered the sentences to run concurrently.

On July 8, 2003, the Department mistakenly released Anderson from incarceration a mere 3 months into his sentence. If Anderson had remained in custody, he would have been eligible for parole on July 14, 2004, with a mandatory release date of July 14, 2005. The Department eventually discovered its mistake and, on September 16, 2003, filed a motion for *caus* and notice of hearing in the Douglas County District Court. The record is unclear, however, whether notice of this hearing was sent to Anderson, nor is it clear whether he received it. Anderson claims he did not receive the notice. Either way, Anderson did not appear at the hearing scheduled for September 24. That same day, the district court issued an order directing any law enforcement officers to arrest Anderson if they located him. Although the record does not explain why, the clerk's office did not issue that warrant for approximately 14 months.

In the interim, however, Douglas County filed a motion for declaration of forfeiture of Anderson's bail bond for the reason that Anderson failed to appear at the September 24, 2003, hearing. This motion, which was filed on March 17, 2004, and an accompanying letter were mailed to Anderson at an address specified in the certificate of service. Had Anderson received these documents, he certainly would have had reason to believe that something was amiss with his status as a released prisoner. It is not clear, however, where the county obtained that address or whether the address was, in fact, accurate. On March 26, the court entered a default judgment forfeiting Anderson's bond.

On January 3, 2005, a little more than 9 months after the bond forfeiture proceeding, police arrested Anderson during a routine traffic stop. Anderson was then returned to the Nebraska State Penitentiary in Lancaster County. After accounting for the time Anderson was absent from prison, the Department found that his ***920** recalculated parole eligibility date was January 9, 2006, and that his new mandatory release date was January 9, 2007.

Anderson then filed a writ of habeas corpus in Douglas County District Court. At the initial hearing, the Department waived any objection to jurisdiction in Douglas County. Anderson was then transported from the state penitentiary to the Douglas County Correctional Center by the Douglas County sheriff. Sometime later, however, the Department attempted to quash Anderson's habeas corpus petition on the ground that the Douglas County District Court lacked subject matter jurisdiction. After an evidentiary hearing, the district court concluded that it had jurisdiction. This conclusion was based on *Gillard v. Clark*,^{FN1} which the district court read as standing for the proposition that jurisdiction in habeas proceedings can effectively be transferred from one county to another. The district court noted that the Department waived jurisdiction at the initial hearing and therefore concluded that jurisdiction was proper in Douglas County.

FN1. *Gillard v. Clark*, 105 Neb. 84, 179 N.W. 396 (1920).

The court then held an evidentiary hearing to address the merits of Anderson's underlying habeas claim. Here, the court cited our decision in *State v. Texel*,^{FN2} in which we held that prisoners must serve their sentences continuously and therefore may not consent to serving sentences intermittently. As a result, the court granted Anderson's writ. In response, the Department ****416** filed a notice of appeal, our case No. S-05-1561.

FN2. *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989).

Shortly thereafter, the district court entered two additional orders. In its first order, filed on January 20, 2006, the court granted Anderson's request that the Department pay court costs. Then, in an order filed on February 10, 2006, the court permitted Anderson to withdraw his request that the Department pay his legal fees. The Department appealed these orders, our case No. S-06-206, and filed a petition to bypass the Court of Appeals. We consolidated both appeals for our review.

*921 III. ASSIGNMENTS OF ERROR

On appeal, the Department assigns that the district court erred by (1) finding that it had subject matter jurisdiction over Anderson's habeas petition, (2) granting habeas corpus relief to Anderson, and (3) entering the January 20 and February 10, 2006, orders after the Department perfected its initial appeal.

IV. STANDARD OF REVIEW

[1] A jurisdictional question that does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.^{FN3}

FN3. *State v. Loyd*, 269 Neb. 762, 696 N.W.2d 860 (2005).

[2] It appears that Nebraska case law has not yet expressly identified the exact standard of review on appeal of a habeas petition. Drawing insight from other jurisdictions, we hold that on appeal of a habeas petition, an appellate court reviews the trial court's factual findings for clear error and its conclusions of law de novo.^{FN4}

FN4. See *Garcia v. Mathes*, 474 F.3d 1014 (8th Cir.2007).

V. ANALYSIS

We think it prudent to address the arguments in the order in which they were presented to us. Accordingly, we begin our analysis by addressing whether the district court had jurisdiction and then consider the Department's claim that Anderson was not entitled to habeas relief. We conclude our analysis by addressing the orders of the district court issued after the Department's notice of appeal.

1. JURISDICTIONAL QUESTION

[3] [4] The Department claims that the district court for Douglas County did not have subject matter jurisdiction over Anderson's habeas petition because Anderson was confined in Lancaster County. It is well established that if the court from which an appeal was taken lacked jurisdiction, the appellate court acquires no jurisdiction.^{FN5} Thus, if the district court lacked jurisdiction to *922 entertain Anderson's habeas petition, we, too, would have no jurisdiction to review the merits of Anderson's petition.

FN5. *State v. Jacques*, 253 Neb. 247, 570 N.W.2d 331 (1997).

[5] [6] Before we proceed to the substance of the jurisdictional issue, we pause to note our belief that the Department may have misspoken when it fashioned its argument. The argument that the case should have been brought in the district court for Lancaster County as opposed to the district court for Douglas County is perhaps a challenge to venue rather than subject matter jurisdiction. The difference is significant. For one, litigants cannot confer subject matter jurisdiction upon **417 a tribunal by acquiescence or consent.^{FN6} In contrast, venue provisions confer a personal privilege

which may be waived by the defendant.^{FN7}

^{FN6}. Muir v. Nebraska Dept. of Motor Vehicles, 260 Neb. 450, 618 N.W.2d 444 (2000) (citing Hagelstein v. Swift-Eckrich, 257 Neb. 312, 597 N.W.2d 394 (1999)).

^{FN7}. *Id.*

In addition, we think it clear that the Douglas County District Court had subject matter jurisdiction in this case. Under Nebraska law, an application for habeas relief may be made to "any one of the judges of the district court, or to any county judge."^{FN8} Because "any" district judge obviously includes the district court for Douglas County, it is beyond dispute that the district court for Douglas County had subject matter jurisdiction over Anderson's habeas claim.

^{FN8}. Neb.Rev.Stat. § 29-2801 (Reissue 1995) (emphasis supplied).

[7] [8] But while the above language makes clear that any and all district courts in Nebraska have subject matter jurisdiction over habeas claims, it does not identify *which county's* district courts may hear habeas claims. This issue—essentially a question of venue—is the issue which lies at the heart of the Department's argument. To resolve that question, we turn to Gillard.^{FN9} In which this court held that

^{FN9}. Gillard, supra note 1, 105 Neb. at 87, 179 N.W. at 398. See, also, Addison v. Parratt, 204 Neb. 656, 284 N.W.2d 574 (1979).

an application for a writ of habeas corpus to release a prisoner confined under sentence of court must be brought in the county where the prisoner is confined. [Citation omitted.] And where proceedings are instituted in another *923 county, it is the duty of the court, on objection to its jurisdiction, to dismiss the proceedings.

Relying on Gillard, the Department points out that Anderson was confined in the Nebraska State Penitentiary in Lancaster County, yet sought habeas relief in the district court for Douglas County. In effect, the Department appears to suggest that the district court for Douglas County was not the proper venue to litigate the merits of Anderson's habeas claim.

[9] [10] While the Department would be correct under Gillard's general rule, other language in Gillard provided for a narrow exception:

[W]here application is made for a writ of habeas corpus to the d[ist]ric[t] court of a county other than that in which the prisoner is confined, and the officer in whose custody the prisoner is held brings the latter into court and submits to the jurisdiction without objection, the prisoner is then under confinement in the county where the action is brought, and the court has authority to inquire into the legality of his restraint.^{FN10}

^{FN10}. Gillard, supra note 1, 105 Neb. at 87, 179 N.W. at 398.

We believe this exception applies here. Although Anderson filed his habeas petition in Douglas County—a county other than the one in which he was confined—Anderson was later transferred to the Douglas County Correctional Center. Moreover, the Department submitted to the court's "jurisdiction" at the initial hearing by failing to object to venue in Douglas County. As such, Anderson was under confinement in Douglas County. The Douglas County District Court therefore had authority to consider

the legality of Anderson's restraint.

2. ANDERSON'S CLAIM FOR HABEAS RELIEF

[11] [12] Having resolved that the district court had jurisdiction over Anderson's habeas claim, we turn now to address the **418 merits of the habeas claim itself. The habeas corpus writ provides illegally detained prisoners with a mechanism for challenging the legality of a custodial deprivation of liberty.^{FN11} To secure habeas corpus relief, the prisoner must show that he *924 or she is being illegally detained and is entitled to the benefits of the writ.^{FN12}

FN11. See *Tyler v. Houston*, 273 Neb. 100, 728 N.W.2d 549 (2007).

FN12. See *id.*

Anderson argues that he is entitled to day-for-day credit toward his sentence for the time that he, an erroneously released prisoner, spent at liberty. Anderson essentially believes that his sentence continued to run from July 8, 2003, the date of erroneous release, to January 3, 2005, the date he was picked up by officers, as though he were in prison the entire time. Therefore, Anderson believes the Department was obligated to release him no later than July 14, 2005, the date his sentence was originally set to expire, and that detaining him beyond that date was illegal.^{FN13}

FN13. See *Piercy v. Parratt*, 202 Neb. 102, 273 N.W.2d 689 (1979).

In making this argument, Anderson invokes a line of cases under which erroneously released prisoners received sentence credit based on the belief that prematurely releasing and then reincarcerating a prisoner impermissibly interferes with the prisoner's right to expeditiously pay his or her debt to society.^{FN14} We review this authority immediately below, then address what impact it may have on the present case in a subsequent section.

FN14. See, *In re Roach*, 150 Wash.2d 29, 74 P.3d 134 (2003) (collecting cases); Gabriel J. Chin, *Getting out of Jail Free: Sentence Credit for Periods of Mistaken Liberty*, 45 Cath. U.L.Rev. 403 (1996) (same).

(a) Theories Permitting Relief to Prematurely Released Prisoners

As set forth in the seminal case of *White v. Pearlman*,^{FN15} a prisoner's "chance to re-establish himself and live down his past" is frustrated if the prisoner is prevented from serving his sentence continuously. This is because "a prisoner sentenced to five years might be released in a year; picked up a year later to serve three months, and so on ad libitum, with the result that he is left without even a hope of beating his way back." ^{FN16} Therefore, on the theory that the government should not be "permitted to *925 play cat and mouse with the prisoner, delaying indefinitely the expiation of his debt to society and his reintegration into the free community," ^{FN17} numerous courts now employ various remedies in cases involving interrupted sentences.

FN15. *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir.1930).

FN16. *Id.*

FN17. *Dunne v. Keohane*, 14 F.3d 335, 336 (7th Cir.1994).

Specifically, courts have developed three distinct theories for granting relief to a prematurely released prisoner.^{FN18} The first theory is based on notions of due process and is often called the "waiver-of-jurisdiction theory."^{FN19} It appears that courts apply the waiver-of-jurisdiction theory when the premature release resulted from gross negligence by prison officials and lasted "a long period of time."^{FN20} In such cases, the **419 government is said to have waived its right to reincarcerate the prisoner and thus the remedy is a complete exoneration of the prisoner's sentence.^{FN21} The rationale is that it would be "unequivocally inconsistent with 'fundamental principles of liberty and justice' to require a legal sentence to be served" after such an interruption.^{FN22}

FN18. See, *Tyler, supra* note 11; *In re Roach, supra* note 14.

FN19. *Schwichtenberg v. ADOC*, 190 Ariz. 574, 577, 951 P.2d 449, 452 (1997).

FN20. *In re Roach, supra* note 14, 150 Wash.2d at 34, 74 P.3d at 137. See, also, *Schwichtenberg, supra* note 19.

FN21. *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

FN22. *Green v. Christiansen*, 732 F.2d 1397, 1399 (9th Cir.1984).

The second theory, devised by the Ninth Circuit, is known as the "estoppel theory" and is also rooted in notions of due process.^{FN23} Under this theory, the government is estopped from reincarcerating the prisoner when a particular set of circumstances are present. Essentially, those circumstances arise when (1) the government knew the facts surrounding the release, (2) the government intended that the prisoner would rely upon its actions or acted in such a manner that the prisoner had a right to rely on them, (3) the prisoner was ignorant of the facts, and (4) the prisoner relied on the government's actions to his or her detriment.^{FN24}

FN23. *U.S. v. Martinez*, 837 F.2d 861, 865 (9th Cir.1988). Accord *Schwichtenberg, supra* note 19 (citing *Martinez, supra*).

FN24. *Green, supra* note 22.

*926 Notably, a prisoner who knew that his or her release was erroneous cannot claim to have been "ignorant of the facts" and therefore cannot invoke the estoppel theory.^{FN25} Further, because the estoppel theory is rooted in due process, and because a due process challenge to executive action requires behavior that is "egregious [and] outrageous,"^{FN26} the estoppel theory requires some affirmative misconduct by authorities.^{FN27}

FN25. *Martinez, supra* note 23, 837 F.2d at 865.

FN26. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n. 8, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

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FN27. *Martinez, supra* note 23.

[13] [14] The third and final remedy courts use in interrupted-detention cases is to grant a prisoner day-for-day credit for the time spent at liberty. FN28 However, numerous federal appellate courts have held that the Due Process Clause does not require credit for the time spent at liberty in cases of an interrupted sentence. FN29 Instead, credit for time spent at liberty is a common-law doctrine rooted in equity and is often called the "equitable doctrine." FN30 In contrast to the waiver-of-jurisdiction or estoppel theories, a prisoner is eligible for credit under the equitable doctrine when the premature release is due to simple negligence by officials. FN31

FN28. *Tyler, supra* note 11; *In re Roach, supra* note 14.

FN29. See, e.g., *Vega v. U.S.*, 493 F.3d 310 (3d Cir.2007); *Thompson v. Cockrell*, 263 F.3d 423 (5th Cir.2001); *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir.1999); *Dunne, supra* note 17.

FN30. *Tyler, supra* note 11, 273 Neb. at 108, 728 N.W.2d at 556. Accord, *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

FN31. *In re Roach, supra* note 14; *Schwichtenberg, supra* note 19.

[15] By asking for day-for-day credit toward his sentence, Anderson relies solely on the equitable doctrine of credit for time spent at liberty. He does not advance an argument under the waiver-of-jurisdiction or estoppel theories, nor do we find evidence in the record suggesting that the Department committed misconduct rising to the level of a due process violation when it prematurely released Anderson. As such, today's decision focuses solely on **420 whether Anderson is entitled to credit for time spent at liberty under the equitable doctrine.

*927 For decades, the common-law rule in Nebraska was harsh but simple: Prisoners were not entitled to credit for time spent outside the prison, regardless of the circumstances. FN32 The first sign that this longstanding rule might be in jeopardy came in *Texel*. FN33 In dicta, the *Texel* court observed that prisoners have the right to serve their sentences in a continuous manner, FN34 a conclusion which, as noted above, is universally cited as a reason to provide a remedy in interrupted-sentence cases. FN35

FN32. See, *Ulrich v. O'Grady*, 136 Neb. 684, 287 N.W. 81 (1939); *Goodman v. O'Grady*, 135 Neb. 612, 283 N.W. 213 (1939); *Mercer v. Fenton*, 120 Neb. 191, 231 N.W. 807 (1930).

FN33. *Texel, supra* note 2.

FN34. *Id.*

FN35. See, e.g., *White, supra* note 15.

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More recently, we had occasion to discuss credit for time spent at liberty in *Tyler v. Houston*.^{FN36} In *Tyler*, a prisoner sought day-for-day credit for time spent out on bond while the state appealed, and ultimately succeeded in overturning the district court's grant of habeas relief. Although we surveyed court decisions applying the equitable doctrine, we found it unnecessary to formally adopt or reject the doctrine in that case. As we explained, even jurisdictions recognizing the equitable doctrine refused to grant credit for time spent at liberty while the government appeals an adverse habeas ruling.^{FN37}

^{FN36}. *Tyler*, *supra* note 11.

^{FN37}. *Id.* (citing *Hunter v. McDonald*, 159 F.2d 861 (10th Cir.1947)).

Resolving Anderson's claim requires that we finally confront questions hinted at in *Texe* and left unresolved in *Tyler*. Are prisoners in Nebraska ever entitled to day-for-day credit for time erroneously spent at liberty under the equitable doctrine, and if so, under what circumstances will such credit be forthcoming? It is to those questions that we now turn.

(b) Variations of the Equitable Doctrine

In considering whether to adopt the equitable doctrine in Nebraska, we note that there are numerous variations to choose from. The Ninth Circuit, for example, simply grants credit for time erroneously spent at liberty so long as the prisoner did *928 not contribute to his or her release.^{FN38} In so holding, the Ninth Circuit does not take into account whether the prisoner misbehaves while at liberty.^{FN39} Several other courts, however, find that prisoners who "abscond[] legal obligations while at liberty" are not entitled to credit for time spent at liberty under the equitable doctrine.^{FN40}

^{FN38}. *Martinez*, *supra* note 23.

^{FN39}. See *Schwichtenberg*, *supra* note 19 (citing *Martinez*, *supra* note 23).

^{FN40}. *Tyler*, *supra* note 11, 273 Neb. at 109, 728 N.W.2d at 557. See, e.g., *In re Roach*, *supra* note 14; *Brown v. Brittain*, 773 P.2d 570 (Colo.1989); *In re Messerschmidt*, 104 Cal.App.3d 514, 163 Cal.Rptr. 580 (1980).

Similarly, courts recognizing the equitable doctrine disagree about whether to grant credit to prisoners who remained silent when released, even though they knew the release was premature. A few courts, including the Ninth Circuit and Arizona Supreme Court, conclude that such "informed silence" is inconsequential. Those courts grant credit for time spent at liberty even where the prisoner knew the release was erroneous and yet said nothing to authorities.^{FN41} In contrast, several other **421 courts have either denied credit in cases of informed silence^{FN42} or, conversely, granted credit specifically because the prisoner informed officials of the mistake.^{FN43}

^{FN41}. See, *Martinez*, *supra* note 23; *Schwichtenberg*, *supra* note 19. See, also, *Vega*, *supra* note 29; *People ex rel. Bilotti v. Warden*, 42 A.D.2d 115, 345 N.Y.S.2d 584 (1973).

^{FN42}. *Diaz v. Holder*, 136 Fed.Appx. 230 (11th Cir.2005); *Gaines v. Florida Parole Com'n*, 962 So.2d 1040 (Fla.App.2007); *Pugh v. State*, 563 So.2d 601 (Miss.1990). See,

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punishment to which they have been sentenced, regardless of ... negligent error attributable to the government." FN50

FN48. *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

FN49. *In re Roach, supra* note 14, 150 Wash.2d at 38, 74 P.3d at 139 (Chambers, J. concurring).

FN50. *Com. v. Blair*, 699 A.2d 738, 743 (Pa.Super.1997). See, also, *Artez v. Mulcrone*, 673 F.2d 1169 (10th Cir.1982).

That leaves us with the other interest served by the equitable doctrine: The right of "a prisoner ... to pay his debt to society in one stretch, not in bits and pieces." FN51 Drawing upon this language, Anderson reminds us that he "had the right to serve his sentence in one single period of incarceration under Nebraska law." FN52 Of course, a prisoner who genuinely cherishes his right to a continuous sentence, as Anderson purports to be, should at least "call[] attention to the mistake being made" before being "ejected from the penitentiary." FN53

FN51. *Texel, supra* note 2, 230 Neb. at 814, 433 N.W.2d at 544.

FN52. Brief for appellee at 9.

FN53. See *White, supra* note 15, 42 F.2d at 789.

In contrast, a prisoner who remains in informed silence when erroneously released and then asks for equitable relief upon reincarceration is not truly motivated by the right to a continuous sentence. Rather, such a prisoner is motivated by nothing more than the unsurprising desire to avoid as much jail time as possible. It takes little imagination to see that prisoners who know their release is premature might nevertheless remain silent in the hope that the mistake will go unnoticed by officials. Predictably, when officials discover the mistake, these prisoners try to obtain credit for time spent at large by arguing that the mistaken release—a mistake they declined to point out—deprived them of the right to a continuous sentence. It seems plain to us, however, that the equitable doctrine ^{*931} was not meant to encourage such a blatant attempt to game the system.

[18] [19] [20] Like a majority of courts, we agree that no equitable relief is required where a prisoner causes his or her own premature release from prison, thwarts governmental attempts at recapture, or misbehaves while at liberty. But we also believe that "[w]here it is clear that a prisoner had knowledge of a governmental mistake and made no effort to correct it, equity does not demand credit for time at liberty." FN54 As such, we hold that prisoners who had knowledge of a governmental mistake and yet made no effort to correct it—like prisoners who actively cause or prolong a premature release or commit crimes while at liberty—do not deserve sentence credit under the equitable doctrine. Such a prisoner has essentially acquiesced in the loss of his or her right to a continuous sentence.

FN54. See *In re Roach, supra* note 14, 150 Wash.2d at 39–40, 74 P.3d at 139 (Chambers, J., concurring).

[21] [22] To preserve the right to credit for time spent at liberty, a prisoner who knows his or her release is erroneous must make a reasonable attempt to notify authorities of the mistake. Although the prisoner need not "continue to badger the authorities," a reasonable attempt may well include voicing an objection at the time of release or contacting authorities a short time later in order to clarify his or her status. ^{FN55}

^{FN55}. *Merritt, supra* note 43, 478 F.Supp. at 807.

Having determined that informed silence disqualifies a prisoner from receiving ****423** credit for time spent at liberty, we next address how lower courts should determine whether the prisoner knew that the release was, in fact, premature. It has been argued elsewhere that determining whether a prisoner knew the release was premature would be "difficult or impossible." ^{FN56} The argument is that the complex nature of modern sentencing schemes would make it difficult for prisoners to identify a precise release date and therefore recognize that they are being released prematurely. ^{FN57}

^{FN56}. *Schwichtenberg, supra* note 19, 190 Ariz. at 579, 951 P.2d at 454.

^{FN57}. See *id.* See, also, *In re Roach, supra* note 14 (Chambers, J., concurring).

[23] [24] ***932** In responding to these concerns, we note that "[a]mong our most cherished rights, as American citizens, are the freedom of choice as to our movements, to be free to go where and when we wish, and the right to control and use our worldly possessions as we see fit." ^{FN58} Given the significance of those interests, we believe that unless the sentence has been extensively modified by things such as earned release time, work release, or a commutation, a prisoner ought to know the date of his or her release with some precision. We therefore hold that the prisoner carries the burden to show that the complexity in calculating his or her release date, or some cognitive deficiency, prevented him or her from realizing the release was premature. At the same time, the government has what essentially amounts to a burden of production to provide the prisoner with any and all records relevant to this inquiry. Such records would include any copies of the original sentencing order, as well as any records related to earned release time, work release, commutations, and any other such materials.

^{FN58}. *Boockholdt v. Brown*, 224 Ga. 737, 739, 164 S.E.2d 836, 838 (1968).

[25] The record in this case does not conclusively resolve whether Anderson tried to inform officials that his release was premature. We therefore find it necessary to remand this cause for the trial court to determine whether Anderson tried to inform officials of their mistake and, if not, whether Anderson reasonably did not know his sentence was set to expire.

On remand, the district court is directed to make findings regarding the circumstances surrounding the 14-month lag from the date the district court authorized Anderson's recapture and the date the warrant was actually issued. Specifically, the district court is to determine whether Anderson had or should have had notice of the September 24, 2003, hearing on the Department's motion for *capias*. The parties should also present evidence with regard to Douglas County's motion to declare a forfeiture of Anderson's bond. If notice of either hearing was mailed to Anderson's residence, it could be evidence that Anderson knew his release was premature from that point forward. We reemphasize that the Department has a duty to provide any records and documents that may be relevant to this inquiry.

***933** On remand, the parties should also present evidence as to why the arrest warrant for

Anderson was not issued immediately after it was authorized by the district judge on September 24, 2003. Since the Department has a responsibility to provide any records relevant to this issue, the district court's inquiry in this regard should include a determination as to whether the delay was the part of an organized and diligent plan to notify, find, and reapprehend Anderson, or was instead the product **424 of misconduct—negligent or affirmative—by public officials. If the latter, the district court shall determine what impact, if any, this should have on the equities of denying Anderson credit for any or all of the 14 months after the warrant was authorized, but before it was issued. Obviously, this equitable analysis should be conducted in a manner consistent with the rationale and policies expressed in this opinion.

3. PROPRIETY OF ORDERS FOLLOWING DEPARTMENT'S NOTICE OF APPEAL

[26] The only issue remaining for our resolution is whether the district court exceeded its authority when it issued orders granting Anderson's request for payment of court costs and granting Anderson's motion to withdraw a prior request for legal fees. To refresh, these orders, filed on January 20 and February 10, 2006, respectively, were issued *after* the Department had already filed notice of its intent to appeal the district court's decision to grant Anderson habeas relief.

[27] It is well settled that a trial court is divested of jurisdiction when a party perfects appeal of a final order. FN59. The question here is whether an order granting habeas relief to the petitioner qualifies as a final order. Anderson argues that the order granting the writ of habeas corpus was not a final order because there were still matters left for the court to resolve. The Department argues the district court's order granting Anderson habeas relief was the final, appealable order. We agree.

FN59. See, *Billups v. Scott*, 253 Neb. 293, 571 N.W.2d 607 (1997); *McLaughlin v. Helbusch*, 251 Neb. 389, 557 N.W.2d 657 (1997); *WBE Co. v. Papio-Missouri River Nat. Resources Dist.*, 247 Neb. 522, 529 N.W.2d 21 (1995).

[28] [29] *934 Long ago, this court held that "[t]he test of finality for the purpose of an appeal in a habeas corpus proceeding is not necessarily whether the whole matter involved in the action is concluded, but whether the particular proceeding or action is terminated by the judgment." FN60. We have previously held that an order denying habeas corpus relief qualifies as a final order. FN61. Therefore we hold that an order granting habeas relief also qualifies as a final order. As such, the district court was divested of jurisdiction when the Department perfected its appeal of the district court's order granting Anderson's petition for habeas relief. We therefore vacate the orders filed January 20 and February 10, 2006, for lack of jurisdiction.

FN60. *In re Application of Tall, Tall v. Olson*, 144 Neb. 820, 825, 14 N.W.2d 840, 843 (1944).

FN61. *Olson, supra* note 60.

VI. CONCLUSION

We conclude that the Douglas County District Court had jurisdiction over Anderson's habeas petition. Anderson was confined in Douglas County at the time of the initial hearing in this case, and the Department waived jurisdiction at the initial hearing.

We further conclude that the district court erred in granting Anderson's habeas claim. The equitable doctrine of sentence credit for time spent at liberty should not apply in cases where the prisoner (1) caused or prolonged the premature release, (2) committed crimes while at liberty, or (3) knew the release was premature yet failed to bring the mistake to the government's attention. Because we cannot determine, based on this record, whether Anderson attempted to inform authorities of their mistake, we find it necessary to remand the cause to the district court. On

89

remand, the court is to determine whether Anderson made a reasonable attempt to inform authorities of their mistake and, if ****425** not, whether Anderson legitimately did not know his release was premature. As expressed above, the court is also directed to make factual findings and conclusions regarding the circumstances surrounding the 14-month period between the ***935** time the district court authorized an arrest warrant for Anderson and when it was issued.

Finally, we hold that the district court lacked jurisdiction when it issued two orders after the Department perfected its appeal of the court's decision to grant Anderson's petition. Accordingly, those orders are hereby vacated.

JUDGMENT IN NO. S-05-1561 REVERSED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

JUDGMENT IN NO. S-06-206 VACATED.

CONNOLLY and GERRARD, JJ., concur in the result.

WRIGHT, J., concurring.

I concur. The issue is whether Anderson is entitled to credit for time spent at liberty as a result of being prematurely released. This is an equitable doctrine.

If the prisoner is obligated to notify the proper authority when he knows his release was premature, the State has an obligation to act when it discovers the error. The State is permitted one error, but not two.

The Department discovered its mistake and sought a warrant in Douglas County District Court. The court signed the warrant, but the clerk's office did not issue the warrant for approximately 14 months.

When considering what is fair, the State cannot be twice negligent at the prisoner's expense. Once the State discovered the premature release, it had a duty to act promptly.

If the State cannot establish a valid reason why the warrant was not issued immediately after it was signed by the court, Anderson should be entitled to credit for the time the State knowingly failed to act. There is no evidence that Anderson caused his premature release, nor is there evidence that he committed any crimes while he was at liberty. Equity must shine on both sides of the coin.

Neb., 2008.

Anderson v. Houston

274 Neb. 916, 744 N.W.2d 410

Briefs and Other Related Documents ([Back to top](#))

- [2006 WL 5529674](#) (Appellate Brief) Reply Brief of Appellant (Jul. 28, 2006) [Original Image of this Document \(PDF\)](#)
- [2006 WL 5529673](#) (Appellate Brief) Brief of Appellee David J. Anderson (Jul. 14, 2006)

Judges and Attorneys ([Back to top](#))

[Judges](#) | [Attorneys](#)

Judges

- **Connolly, Hon. William M.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Gerrard, Hon. John Melvin**

FOR IMMEDIATE RELEASE
June 26, 2014, 10:20 a.m. CT

CONTACT 048
Sue M. Roush
Shannon Kingery, AG's Ofc.

SHARE 

Governor Heineman and Attorney General Bruning Provide an Update on Department of Correctional Services

(Lincoln, Neb.) Today, Gov. Dave Heineman and Attorney General Jon Bruning provided an update regarding the review of mandatory minimum sentences issued since 1995.

"The Department of Correctional Services, the Attorney General and I have had several conversations on the most judicious way to handle the early release of inmates from Nebraska's correctional system," said Gov. Heineman. "The State of Nebraska is pursuing a balanced legal strategy, thanks to the leadership of Attorney General Bruning and his legal team."

"We are moving forward with public safety at the forefront, including the safety of law enforcement officers," said Bruning. "We requested orders and arrest warrants for a number of inmates who were released erroneously in the counties where they were sentenced. Every judge presented with this request signed an order and issued an arrest warrant."

All mandatory minimum sentences imposed since 1995 have been reviewed on an individual case-by-case basis. This was necessary because the Legislature changed the law in 1995, so that good time does not apply until a mandatory minimum sentence has been served.

As of today, 567 current inmates had their sentence recalculated. None of these inmates were released early.

The Department of Correctional Services released 306 inmates early. Of the 306, 257 individuals have been back in his or her community longer than his or her recalculated release date. According to Anderson vs. Houston, 277 Neb. 907 (2009) any individual who was released early, and who has not committed a crime since their release is entitled to be credited with the time served in the community toward their release date. Therefore, these 257 individuals have completed their sentence requirement and will not be returned to incarceration. Three inmates are deceased, and five were discharged successfully from parole.

Of the remaining individuals, some are already in the custody of the Department of Correctional Services, some qualify for the re-entry furlough program one is in the process of being paroled, and 20-25 will be returned to the corrections system.

Oct 10 hearing P 48

FOR RELEASE
August 7, 2014, 10:00 a.m. CT

CONTACT
Governor's Deputy Communications Office, 402-471-1970

Governor Heineman and Attorney General Bruning Announce Criminal Investigation of Sentencing Miscalculations

(Lincoln, Neb.) Today Gov. Dave Heineman and Attorney General Jon Bruning announced they have directed the Nebraska State Patrol to begin a criminal investigation of the sentencing miscalculations of inmates by the Nebraska Department of Correctional Services.

"Those responsible for these errors will be held accountable," said Gov. Heineman. "As I said earlier, a decision on a criminal investigation would be made once the personnel investigation was complete. Now is the time to move forward with a criminal investigation."

Heineman said the results of the criminal investigation will be provided to Attorney General Bruning and Lancaster County Attorney Joe Kelly to determine whether criminal charges are warranted.

"Accountability and transparency are critical to restoring the public trust. Access to the details uncovered through this process and investigation will be available to the public at the earliest possible date," said Attorney General Bruning.

In addition to directing the Nebraska State Patrol to begin a criminal investigation, Gov. Heineman sent an email today to all Corrections Department employees emphasizing that no one is above the law and when the Nebraska Supreme Court issues a ruling, the expectation is that every state employee and every state agency comply with the law.

"Public safety is priority number one. The citizens have lost their trust and confidence in the Department and there's a lot of work to be done to rebuild that," said Gov. Heineman.

###

Note: Governor Heineman's email to Department of Correctional Services employees follows:

I want every Corrections Department employee to understand that no one is above the law. When the Nebraska Supreme Court issues a ruling, I expect every state employee and every state agency to comply with the law.

If you are asked or told by someone in your chain of command to ignore or to not follow a court order, I want you to contact your Director, Mike Kenney, and me immediately. I want to emphasize that you are to contact both of us and that contact should be made immediately.

I also want you to be aware that the independent personnel investigation by the Jackson Lewis law firm is complete and Director Kenney is in the process of taking disciplinary action.

Today Attorney General Bruning and I directed the Nebraska State Patrol to begin a criminal investigation regarding the sentencing miscalculations.

To the extent legally allowed, I am determined to hold those responsible for these mistakes fully accountable. No one is above the law.

The Corrections Department employees who made these mistakes have embarrassed the Corrections Department and the State of Nebraska. All of us need to acknowledge that the citizens of Nebraska have lost their trust and confidence in the Department and I want to challenge every Corrections Department employee to work very hard every day to regain the public's trust and confidence.

Public safety is priority number one and I want to work with you to make sure that we accomplish that goal.

Governor Dave Heineman

6/12/14

Ⓞ

Mike	DRS
Mikki	Kyle
Sharon	

State v Castellias

P&D we're calculating appropriately
TRD not calculated appropriately
we use 1/2 of top #

how many discharged since 2/8/13 -
date of Castellias decision about 200
how/what effect would the calculation
have been? ^{September}

time/crime info - all for Larry Bane

mounting recalculate sentences.

96

6/13/14

①

Mike

Mikki

Kyle

Sharon

DRS

• Jim Smiki to Mike Supt rule applies to all inmates in custody

• Mikki emergency rule memorandum use of emails. call Angela immediately she sorted mand min list, has already taken care of list through 7/30, arrested sentences. facilities have not been notified.

• Mike memo to inmates, staff announcements. inmate allowed to call family until he makes connection @ state expense. Mike to call Barb L.

• CCC inmate & CCC-D inmate notified personally by staff today

• notify wardens today, agency-wide notification. contact ward office or rec mgr.

(2)

- Middy will call records mgis personally today.
- statement for media
- Castillas dees explained application of law necessary because statute didn't explain fully application of mand min and good time credits.

~~XXXXXXXXXX~~ DCs will follow guidance issued in Castillas case.

Todd Cooper

- we found 9700 inmates either had early release dates or time shaved off top #
- Mand min
- why just now recalculating sentence.

6/25/14

CG-B, KB

9L

file parole recalculation

3 people paroled - not eligible for parole

① [redacted] interstate in Texas 7/26/06
~~paroled~~ 7/17/15
paroled

② [redacted] elig 5/4/20
on parole 6/22/12

③ [redacted] elig
9/6/17 paroled 8/30/13

2 & 3 being picked up now will contact Brad H about #3

paroled now but have not discharged on prior sentences

99

11/23/14

①

Linda Willard

Atty Gen has turned over emails

Jeanne to Geo: in conversation w/ Linda

Linda has a vague recollection on Castillo's not out of Civil Rights case prior contracted. Thus regardless of what judge says so sent to Geo. ^{September} ^{reporter} Jim Smith sent [unclear]

Linda called to [unclear] included

Jeanne to Geo: Linda was told

do what was in [unclear]'s best interest
no independent memory

Linda Willard was confused about [unclear]

OWB sent to Linda written

- Jim Smith memo ^{after the fact}
- forward to Jeanne & Kyle

7/31

MK, in ^{his} office

- Showed her memo to LW ^{label 7/31} not copied
- Bare, Bruning, Fredenberg, Smith, Gov, Kintner, Bell in office when decs made re. lost boys
- correct goals served by leaving last ones in community
- knows stat requires Par Bd approval - Bd not going to give it
- go ahead w/ LW memo
- knows to have DCS' interest in mind
- doesn't mind or object to this ^{September 24}
- doesn't have luxury of urgency or stat compliance

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Michael L. Kanney
Director



Dave Heineman
Governor

CONFIDENTIAL ATTORNEY CLIENT COMMUNICATION

Date: July 31, 2014

To: Larry Wayne, Deputy Director, Program & Community Services

From: George D. Green, General Counsel

Re: Alternative placement for inmates

On July 30, 2014, Sharon Lindgren, Kathy Blum and I met with you in my office to discuss an administrative decision to place certain inmates in the community. You informed us that there are four inmates who were released from incarceration prior to their tentative release dates because the Nebraska Department of Correctional Services did not properly calculate their mandatory minimum sentences. You further stated that after properly calculating these inmates' sentences, they have less than six months to serve on their sentences but would not be eligible for parole, nor be eligible for placement on Reentry Furlough because either the Board of Parole or the County Attorney would not approve of that placement. You informed us that the inmates would be placed on electronic monitoring and be required to have contact with a Parole Officer at least twice a week. I along with Sharon and Kathy advised you that we did not think there was a legal basis for the Department to allow these inmates to remain in the community on this status, without the approval of the Board of Parole.



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Source: **Combined Source Set 8 1 - NE - Revised Statutes of Nebraska, Constitution, Court Rules & ALS, Combined**

TOC: Revised Statutes of Nebraska, Constitution, Court Rules & ALS > / . . . / > (F) CORRECTIONAL SERVICES, PAROLE, AND PARDONS > § 83-184. Person committed; visit outside facility; work at paid employment; funds; disposal; withholding; use; violations; effect.

Terms: 83-184 (Suggest Terms for My Search)

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R.R.S. Neb. § 83-184

Handwritten notes:
 director's duties 7/28
 regarding escapes MK in
 taking inmates into office
 custody ^{September 24} Penitentiary
 "lost boys"

§ 83-184. Person committed; visit outside facility; work at paid employment; funds; disposal; withholding; use; violations; effect.

(1) When the conduct, behavior, mental attitude, and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests of the people of the state and the person committed to the department will be served thereby, in that order, and upon the recommendation of the board in the case of each committed offender, the director may authorize such person, under prescribed conditions, to:

(a) Visit a specifically designated place or places and return to the same or another facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services, the contacting of prospective employers, or for any other reason consistent with the public interest; or

(b) Work at paid employment or participate in a training program in the community on a voluntary basis whenever;

(I) Such paid employment will not result in the displacement of employed workers, or be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality, or impair existing contracts for services; and

(II) The rates of pay and other conditions of employment will not be less than those paid or provided for work of similar nature in the locality in which the work is to be performed.

(2) The wages earned by a person authorized to work at paid employment in the community under the provisions of this section shall be credited by the chief executive officer of the facility to such person's wage fund. The director shall authorize the chief executive officer to withhold up to five percent of such person's net wages. The funds withheld pursuant to this subsection shall be remitted to the State Treasurer for credit as provided in subsection (2) of section 33-157.

(3) A person authorized to work at paid employment in the community under the provisions of this section may be required to pay, and the director is authorized to collect, such costs incident to the person's confinement as the director deems appropriate and reasonable. Collections shall be deposited in the state treasury as miscellaneous receipts.

(4) The willful failure of a person to remain within the extended limits of his or her confinement or to return within the time prescribed to a facility designated by the director may be deemed an escape from custody punishable as provided in section 28-912.

(5) No person employed in the community under the provisions of this section or otherwise released shall, while working in such employment in the community or going to or from such employment or during the time of such release, be deemed to be an agent, employee, or servant of the state.

HISTORY: Laws 1969, c. 817, § 15, p. 3081; Laws 1978, LB 748, § 46; Laws 1999, LB 106, § 1; Laws 2010, LB 510, § 5.

NOTES: EFFECTIVE DATE: July 15, 2010

EFFECT OF AMENDMENTS.

The 2010 amendment substituted "the board" for "the Board of Parole" in the introductory language of (1); substituted "the director" for "the Director of Correctional Services" each time it appears in the introductory language of (1), in the first sentence of (3), and in (4); and added the last two sentences of (2).

JUDICIAL DECISIONS

ANALYSIS

Civil suits

Due process.

"Willful"

Work release

CIVIL SUITS

A prison inmate has no absolute constitutional right to be released from prison so that he can be present at a hearing in a civil action, and there is no authority which requires the appointment of counsel to represent him in a private civil matter. *Caynor v. Caynor*, 213 Neb. 143, 327 N.W.2d 633 (1982).

3 DUE PROCESS.

An inmate did not have a constitutionally protected property right to the full amount of his salary because: (1) his participation in the work-release program was voluntary, and (2) he exchanged a portion of his otherwise protected salary for participation in that program. *Christiansen v. Clarke*, 147 F.3d 655 (8th Cir. 1998).

4 "WILLFUL"

The word "willful" only means "intentional" and not accidental or involuntary. *State v. Gascolgen*, 191 Neb. 15, 213 N.W.2d 452 (1973).

4 WORK RELEASE

While on work release a prisoner remains subject to the supervision, control, and custody of the penal and correctional complex. *State v. Coffman*, 213 Neb. 560, 330 N.W.2d 727 (1983).

The director of corrections may refuse to release a prisoner for work notwithstanding a favorable recommendation by the board of parole. *Housand v. Sigler*, 186 Neb. 414, 183 N.W.2d 493 (1971).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

3 Employment

3 Furlough

3 EMPLOYMENT

The decision as to whether a prisoner should be removed from a post care program may be made solely by DCS personnel; the board of parole need not conduct a hearing on the removal. 1983 Op. Att'y Gen. No. 63.

3 FURLOUGH

Department of correctional services with the proper recommendation from the board of parole may place certain inmates on an extended work furlough program outside the physical confines of a correctional institution and place them in their own home and or an approved independent living residence. 1991 Op. Att'y Gen. No. 1.

State prisoners placed upon work release, educational release and furlough pursuant to this section are not considered "parolees" for the purposes of § 83-1,123. 1981 Op. Att'y Gen. No. 152.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.


Source: Combined Source Set 8 **4** - NE - Revised Statutes of Nebraska, Constitution, Court Rules & ALS, Combined

TOC: Revised Statutes of Nebraska, Constitution, Court Rules & ALS > / . . . / > (f) CORRECTIONAL SERVICES, PAROLE, AND PARDONS > § 83-184. Person committed; visit outside facility; work at paid employment; funds; disposal; withholding; use; violations; effect.

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September 24, 2014



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*** Current through the 2013 103rd First Session ***
*** Annotations current through September 6, 2013 ***

CHAPTER 83. STATE INSTITUTIONS
ARTICLE 1. MANAGEMENT
(f) CORRECTIONAL SERVICES, PAROLE, AND PARDONS

Go to the Nebraska Code Archive Directory

R.R.S. Neb. § 83-176 (2013)

§ 83-176. Director of Correctional Services; designate place of confinement

(1) Whenever any person is sentenced or committed under any provision of law to a specific facility within the department or to the custody of the warden or superintendent of such facility, he or she shall be deemed to be sentenced or committed to the department.

(2) The director may designate as a place of confinement of a person committed to the department any available, suitable, and appropriate residence facility or institution, whether or not operated by the state, and may at any time transfer such person from one place of confinement to another.

HISTORY: Laws 1969, c. 817, § 7, p. 3075; Laws 1973, LB 57, § 1; Laws 1988, LB 790, § 35; Laws 1993, LB 31, § 27; Laws 1996, LB 1044, § 923.

JUDICIAL DECISIONS

COURT SUPERVISION

The matter of the internal management of prisons or correctional institutions is vested in and rests with the heads of those institutions operating under statutory authority, and their acts and administration of prison discipline and overall operation of the institution are not subject to court supervision or control, absent most unusual circumstances or absent a violation of a constitutional right. *Douglas v. Sigler*, 386 F.2d 684 (8th Cir. 1967).

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

157HRQ

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4 of 17 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEBRASKA

Opinion No. 91001

1991 Neb. AG LEXIS 1

January 3, 1991, Submitted

January 3, 1991, Filed

SYLLABUS:

[*1]
Extended Work Furlough Program

REQUESTBY:

Harold W. Clarke, Director
Nebraska Department of Correctional Services

OPINIONBY:

Donald A. Kohtz, Assistant Attorney General;
Approved: Robert M. Spire, Attorney General

OPINION:

You have requested our opinion regarding whether or not the Department of Correctional Services and the Board of Parole have the legal authority to place certain inmates on an extended work furlough program outside the physical confines of a correctional institution and place them in their own homes. It is our opinion that the Department of Correctional Services with the proper recommendation from the Board of Parole may place certain inmates on an extended work furlough program outside the physical confines of a correctional institution and place them in their own home and or an approved independent living residence.

The statutory authority which allows the release of committed offenders on furlough status is set forth at *Neb.Rev.Stat. § 83-184* (Reissue 1987).

(1) When the conduct, behavior, mental attitude and conditions indicate that a person committed to the department and the general society of the state will be benefited, and there is reason to believe that the best interests [*2] of the people of the state and the person committed to the department will be served thereby, in that order, and upon the recommendation of the Board of Parole in the case of each committed offender, the Director of Correctional Services may authorize such person, under prescribed

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Source: Combined Source Set 8
Search Terms: 83-184

September 24, 2014

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NEBRASKA DEPT OF CORRECTIONAL SERVICES
FOLSOM & WEST PROSPECT PLACE
BUILDING 1

conditions, to:

(a) Visit a specifically designated place or places and return to the same or another facility. An extension of limits may be granted to permit a visit to a dying relative, attendance at the funeral of a relative, the obtaining of medical services, the contacting of prospective employers, or for any other reason consistent with the public interest;

Id.

Neb.Rev.Stat. § 83-184 (Reissue 1987) provides that the Board of Parole must approve and or recommend the placement of a committed offender on a furlough. The ultimate decision as to whether a committed offender is placed on a furlough rests entirely with the Director of the Department of Correctional Services, notwithstanding a favorable recommendation by the Board of Parole. See *Housand v. Sigler*, 186 Neb. 414, 416, 183 N.W.2d 493, 494 (1971); *Neb.Rev.Stat. §§ 83-173(7)* (Reissue 1987); 83-176 (Reissue 1987); 83-184 (Reissue [*3] 1987).

The extended work furlough program is proposed to place eligible committed offenders on extended work furlough status from anywhere up to a six month period. While on an extended work furlough a committed offender remains subject to the supervision, control, and custody of the Nebraska Department of Correctional Services even though he or she has been given the privilege of being temporarily outside of the institution. *Neb.Rev.Stat. § 83-184* (Reissue 1987).

The length of time an eligible committed offender is afforded the privilege of participating in the extended work furlough program is left to the discretion of the Director of the Department of Correctional Services. *Neb.Rev.Stat. §§ 83-173* (Reissue 1987); 83-4,111 (Reissue 1987); Administrative Regulation 209.1. The Supreme Court of the United States has stressed repeatedly the importance of judicial recognition of the expertise of prison administrators, and the need for deference to the judgments of experienced prison officials. *Bell v. Wolfish*, 441 U.S. 520, 547, 99 S.Ct. 1861, 1878-79, 60 L.Ed.2d 447, 474 (1979); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 126, 97 S.Ct. 2532, 2538, 53 [*4] L.Ed.2d 629, 638-39 (1977). Deference to prison administrators stems from the inherent nature of the judicial branch as separate from those branches that administer our prisons, and lacking in the expertise to run correctional facilities. See *Bell v. Wolfish*, 441 U.S. at 547-48, 99 S.Ct. at 1879, 60 L.Ed.2d at 474-75. Running a prison is "at best an extraordinary difficult undertaking." *Wolff v. McDonnell*, 418 U.S. 539, 566, 94 S.Ct. 2963, 2980, 41 L.Ed.2d 935, 957 (1974).

In *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974), the Supreme Court identified four basic goals of the correctional system: the deterrence of crime; the rehabilitation of criminals; the protection of the public; and the maintenance of institutional security. *Id.* at 822-23, 94 S.Ct. at 2804, 41 L.Ed.2d at 501-02. The Pell court identified this last goal as the central goal of incarceration, essential to successful attainment of all corrective goals. *Id.* at 823, 94 S.Ct. at 2804, 41 L.Ed.2d at 502. The court also observed that policies involving rehabilitation and institutional security "are peculiarly within the province and professional expertise of corrections officials" [*5] *Id.* at 827, 94 S.Ct. at 2806, 41 L.Ed.2d at 504, and admonished courts to defer to prison officials' decisions in these areas unless the evidence indicates that the officials had greatly exaggerated their response to prison conditions.

This opinion stands for the proposition that the Director of the Department of Correctional Services may upon appropriate recommendation by the Board of Parole place an eligible committed offender in the extended work furlough program.

Legal Topics:

For related research and practice materials, see the following legal topics:
Criminal Law & Procedure Postconviction Proceedings Imprisonment Criminal Law & Procedure Postconviction Proceedings Parole

157HRQ

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2 of 4 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEBRASKA

Opinion No. 152

1981 Neb. AG LEXIS 316

November 4, 1981, Submitted

November 9, 1981, Filed

SYLLABUS:

[*1]

Department of Correctional Services; Statutory Good Time; Work Release, Education Release and Furlough; Parole.

REQUESTBY:

Charles Benson, Director, Department of Correctional Services

September 24, 2014

QUESTION:

Are state prisoners placed upon work release, educational release and furlough pursuant to § 83-184 to be considered "parolees" for the purposes of § 83-1,123?

OPINIONBY:

J. Kirk Brown, Assistant Attorney General;
Approved: Paul L. Douglas, Attorney General

OPINION:

No.

You have requested our opinion regarding the effect of *Neb.Rev.Stat. § 83-1,123* (Reissue 1976), and our opinion No. 121 of June 15, 1981, upon prisoners of the State of Nebraska who may be removed from work release, educational release and furlough programs administered by the Department of Correctional Services (DCS). In opinion No. 121 we reiterated the conclusion reached in earlier opinions of this office that the Constitution of the State of Nebraska requires the approval of the Board of Parole before a prisoner may be released to any of the activities here in question. However, this conclusion is based upon an interpretation of the term "parole" as employed in our state constitution and, in our opinion, is not necessarily dispositive of the question before [*2] us here. Here we are concerned with the interpretation of the term "parole" not as employed in our state constitution but as employed by the Legislature in the enactment of § 83-1,123.

At the outset it must be noted that the authority for the release of state prisoners to the types of programs in question here is found in *Neb.Rev.Stat. § 83-184* (Reissue 1976). That section, which was enacted as a part of the same legislative package which created section 83-1,123 makes no reference to the status to which an offender is released pursuant to section 83-184 as "parole." Furthermore, the ultimate authority to release a prisoner under section 83-184 rests with the Director of the Department of Correctional Services and not the Board of Parole. *Housand v. Sigler*, 186 Neb. 414, 183 N.W.2d 493 (1971). Both of these factors strongly indicate the Legislature intended to distinguish the status a

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1981 Neb. AG LEXIS 316, *

prisoner achieves under a section 83-184 release from the status of a prisoner who receives a "parole" pursuant to *Neb.Rev.Stat. § 83-188*, et seq. (Reissue 1976).

Thus, in our opinion, section 83-1,123 was only intended to apply to those prisoners receiving a parole pursuant to sections 83-188, et seq. A prisoner of this state admitted to work release, educational release or furlough pursuant to section 83-184 is not intended to suffer the same loss of good time for failure to satisfactorily perform on such programs as is contemplated for a prisoner released on parole pursuant to sections 83-188, et seq. Therefore, the conclusions reached in our Opinion No. 121 would in no respect affect the statutory good time calculations of prisoners released pursuant to section 83-184. This type of prisoner would continue to have his statutory good time calculated as any other prisoner committed to DCS.

This opinion should in no way be interpreted as a deviation from our previous opinions that work release, educational release and furlough programs all fall within the intended definition of the term "parole" as employed in Article IV, Section 13, Constitution of Nebraska. Nebraska Attorney General's Opinions Nos. 185, 190 and 249 (1975-1976). The Board of Parole must approve all situations in which a prisoner of the State of Nebraska is released from the direct supervision of DCS personnel. This opinion does, however, stand for the proposition that the Legislature may create and classify [*4] various types of parole within the broad, constitutional definition of that term and establish distinct penalties for violation of each such type of parole.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Criminal Law & Procedure Sentencing Supervised Release Criminal Law & Procedure Postconviction Proceedings Imprisonment Criminal Law & Procedure Postconviction Proceedings Parole

September 24, 2014



3 of 4 DOCUMENTS

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEBRASKA

Opinion No. 121

1981 Neb. AG LEXIS 285

May 26, 1981, Submitted

June 15, 1981, Filed

SYLLABUS:

[*1]
Paroles, forfeiture of good-time; work release and furloughs.

REQUESTBY:

Donald F. Best, Acting Director of Department of Correctional Services

QUESTION:

1: Under the provisions of *Neb.Rev.Stat. § 83-1,123* (Reissue 1976) does a parolee forfeit, by operation of statute, his statutory good-time upon a parole revocation?

2: May a prisoner committed to the custody of the Department of Correctional Services following a parole revocation have any portion of the statutory good-time forfeited pursuant to *Neb.Rev.Stat. § 83-1,123* (Reissue 1976) restored to him by the Director of the Department of Correctional Services?

3: Are work release and furloughs considered a form of parole?

OPINIONBY:

J. Kirk Brown, Assistant Attorney General;
Approved: Paul L. Douglas, Attorney General

OPINION:

1: Yes, but he remains eligible for reparole at the discretion of the Board of Parole.

2: No.

3: Yes.

1. You have asked whether *Neb.Rev.Stat. § 83-1,123* (Reissue 1976) requires the automatic forfeiture of statutory good-time when a prisoner's parole is revoked. The Supreme Court clearly answered this question in the case of *Lyle v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979). The petitioner in that case challenged whether he was properly deprived [*2] of good-time credits earned prior to his parole. The Supreme Court held that once a prisoner's parole was revoked § 83-1,123 required that he be recommitted for the remainder of his maximum prison term.

After reviewing § 83-1,123 the court stated that the "statute specifically deals with a parolee whose parole is revoked. It requires that such a prisoner be recommitted for the remainder of his maximum prison term, deducting only

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the period served on parole prior to the violation." *Id.* 203 Neb. at 828, 280 N.W.2d at 656. It should be noted that § 83-1,123 was not amended by the passage of LB 567, Laws 1975, and would thus be applicable to both pre-LB 567 and post-LB 567 sentences. See, *Gochenour v. Bolin*, 208 Neb. 444 at 449, N.W.2d .77 SCJ 456 at 461 (1981).

The court further held that the provisions of § 83-1,123 automatically established a new prison term. However, the prisoner remains eligible for reparole at the discretion of the Board of Parole. He is not entitled to a discharge from custody until the remainder of his maximum prison term has been served. Section 83-1,123 makes no provision for or reference to the application of statutory good-time to [*3] this "new" term of imprisonment.

2. The second question raised is whether a prisoner may have any portion of the statutory good-time forfeited pursuant to *Neb.Rev.Stat. § 83-1,123* (Reissue 1976) restored to him by the Director of the Department of Correctional Services following a parole revocation. If a new prison term is established by operation of statute, we find no authority for its administrative alteration by the Department of Correctional Services. Therefore, in our opinion, the Department of Correctional Services presently lacks the authority to alter any sentence affected by § 83-1,123 as we discussed in number one above.

3. Finally, you ask whether work release and furloughs are considered a form of parole. We have consistently stated that furloughs and work and educational training programs fit within the definition of "parole." See, Opinion of the Attorney General No. 184, February 23, 1976; and Opinion of the Attorney General No. 249, September 2, 1976. We see no basis for altering this previous conclusion.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Criminal Law & Procedure Sentencing Alternatives Community Confinement Criminal Law & Procedure Postconviction Proceedings Parole

September 24, 2018

From: Green, George
Sent: Friday, April 05, 2013 10:15 AM
To: Houston, Bob
Cc: Kroeger, Concha
Subject: statute for Monday meeting at 1200
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September 4, 2014

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4 of 7 DOCUMENTS

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*** Current through the 2012 102nd Second Session ***
*** Annotations current through March 1, 2013 ***
*** **

CHAPTER 83. STATE INSTITUTIONS
ARTICLE I. MANAGEMENT
(f) CORRECTIONAL SERVICES, PAROLE, AND PARDONS

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R.R.S. Neb. § 83-1,107 (2012)

§ 83-1,107. Reductions of sentence; personalized program plan; ^{now} credited; forfeiture; withholding; restoration.

(1) (a) Within sixty days after initial classification and assignment of any offender committed to the department, all available information regarding such committed offender shall be reviewed and a committed offender department-approved personalized program plan document shall be drawn up. The document shall specifically describe the department-approved personalized program plan and the specific goals the department expects the committed offender to achieve. The document shall also contain a realistic schedule for completion of the department-approved personalized program plan. The department-approved personalized program plan shall be fully explained to the committed offender. The department shall provide programs to allow compliance by the committed offender with the department-approved personalized program plan.

Programming may include, but is not limited to:

- (i) Academic and vocational education, including teaching such classes by qualified offenders;
- (ii) Substance abuse treatment;
- (iii) Mental health and psychiatric treatment, including criminal personality programming;
- (iv) Constructive, meaningful work programs; and
- (v) Any other program deemed necessary and appropriate by the department.

(b) A modification in the department-approved personalized program plan may be made to account for the increased or decreased abilities of the committed offender or the availability of any program. Any modification shall be made only after notice is given to the committed offender. The department may not impose disciplinary action upon any committed offender solely because of the committed offender's failure to comply with the department-approved personalized program plan, but such failure may be considered by the board in its deliberations on whether or not to grant parole to a committed offender.

(2) (a) The department shall reduce the term of a committed offender by six months for each year of the offender's term and pro rata for any part thereof which is less than a year.

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(b) In addition to reductions granted in subdivision (2)(a) of this section, the department shall reduce the term of a committed offender by three days on the first day of each month following a twelve-month period of incarceration within the department during which the offender has not been found guilty of (i) a Class I or Class II offense or (ii) more than three Class III offenses under the department's disciplinary code. Reductions earned under this subdivision shall not be subject to forfeit or withholding by the department.

(c) The total reductions under this subsection shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to *section 83-1,106*, and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

(3) While the offender is in the custody of the department, reductions of terms granted pursuant to subdivision (2)(a) of this section may be forfeited, withheld, and restored by the chief executive officer of the facility with the approval of the director after the offender has been notified regarding the charges of misconduct.

(4) The department shall make treatment programming available to committed offenders as provided in *section 83-1,110.01* and shall include continuing participation in such programming as part of each offender's parolee personalized program plan.

(5) (a) Within thirty days after any committed offender has been paroled, all available information regarding such parolee shall be reviewed and a parolee personalized program plan document shall be drawn up and approved by the Office of Parole Administration. The document shall specifically describe the approved personalized program plan and the specific goals the office expects the parolee to achieve. The document shall also contain a realistic schedule for completion of the approved personalized program plan. The approved personalized program plan shall be fully explained to the parolee. During the term of parole, the parolee shall comply with the approved personalized program plan and the office shall provide programs to allow compliance by the parolee with the approved personalized program plan.

Programming may include, but is not limited to:

- (i) Academic and vocational education;
- (ii) Substance abuse treatment;
- (iii) Mental health and psychiatric treatment, including criminal personality programming;
- (iv) Constructive, meaningful work programs;
- (v) Community service programs; and
- (vi) Any other program deemed necessary and appropriate by the office.

(b) A modification in the approved personalized program plan may be made to account for the increased or decreased abilities of the parolee or the availability of any program. Any modification shall be made only after notice is given to the parolee. Intentional failure to comply with the approved personalized program plan by any parolee as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the office resulting in the forfeiture of up to a maximum of three months' good-time for the scheduled year.

(6) While the offender is in the custody of the board, reductions of terms granted pursuant to subdivision (2)(a) of this section may be forfeited, withheld, and restored by the administrator with the approval of the director after the offender has been notified regarding the charges of misconduct or breach of the conditions of parole. In addition, the board may recommend such forfeitures of good time to the director.

(7) Good time or other reductions of sentence granted under the provisions of any law prior to July 1, 1996, may be forfeited, withheld, or restored in accordance with the terms of the Nebraska Treatment and Corrections Act.

HISTORY: Laws 1969, c. 817, § 38, p. 3092; Laws 1972, LB 1499, § 7; Laws 1975, LB 567, § 2; Laws 1992, LB 816, § 2; Laws 1995, LB 371, § 20; Laws 1997, LB 364, § 19; Laws 2003, LB 46, § 20; Laws 2011, LB 191, § 1.

NOTES: EFFECTIVE DATE: March 17, 2011

EFFECT OF AMENDMENTS.

The 2011 amendment added the (2)(a) and (2)(c) designation; added (2)(b); added "under this subsection" in (2)(c); and updated the internal references.

Laws 2003, LB 46, effective May 24, 2003, in (1)(a), deleted "During incarceration, the committed offender shall comply with the department-approved personalized program plan and" following "committed offender", in (1)(b), substituted "The department ... offender" for "Intentional failure to comply with the department-approved personalized program plan by any committed offender as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the department resulting in the forfeiture of up to a maximum of three months' good time for the scheduled year", in (2), substituted "department" for "chief executive officer of a facility", in (3), substituted "notified" for "consulted", added (4) and (5) and redesignated remainder of section accordingly, in (6), substituted "notified" for "consulted", and made a stylistic change.

JUDICIAL DECISIONS

ANALYSIS

Applicability
 Forfeiture of credit
 Good time credit
 Indeterminate sentences ...
 Jurisdiction
 Parole
 Restoration of credit
 Sentencing
 Statutory right

APPLICABILITY

Defendant, who pled guilty to being a habitual criminal and was sentenced under *Neb. Rev. Stat. § 29-2221(1)* to maximum and mandatory minimum sentences of 10 years each, was not entitled to have good time credit under *Neb. Rev. Stat. § 83-1,107(1)* applied so as to reduce his mandatory minimum sentence. *Johnson v. Kenney*, 2002 Neb. LEXIS 243, 265 Neb. 47, 654 N.W.2d 191 (2002).

Where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amended act unless the Legislature has specifically held otherwise. *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

The new good time law is inapplicable to those offenders who started serving their sentences before the effective date of the statute, absent approval of the board of pardons, even if the offenders are resentenced pursuant to the Convicted Sex Offender Act. *Duff v. Clarke*, 247 Neb. 345, 526 N.W.2d 664 (1995).

The good time provisions are not applicable to persons who started their sentences prior to the effective date of 1975 act, absent approval of the board of pardons. *SapaNajin v. Johnson*, 219 Neb. 40, 360 N.W.2d 500 (1985).

This section applies toward eligibility for parole or release under supervision, rather than for absolute discharge as under previous statutes. *Von Bokelman v. Sigler*, 186 Neb. 378, 183 N.W.2d 267 (1971).

FORFEITURE OF CREDIT

Inmate's release date was miscalculated, because the inmate was sentenced to 25 years and by crediting him with six months of good time per year of such term, plus 159 days for time served, the inmate's mandatory discharge date was 12 years six months from the date on which he was sentenced, when *Neb. Rev. Stat. § 83-1,107(3)* required that a prisoner be credited with good time for participation in a personal program at the beginning of his sentence, based on the maximum sentence at that time, at the rate of three months per year, and such was to be deducted from his maximum term in order to determine his mandatory discharge date in addition to the three months per year of his maximum term for good time under *Neb. Rev. Stat. § 83-1,107(2)*. *Worley v. Houston*, 2008 Neb. App. LEXIS 83, 16 Neb. Ct. App. 634, 747 N.W.2d 639 (2008).

Neb. Rev. Stat. § 83-1,107 did not except the duty to approve the forfeiture of good time from the chief executive officials to delegate duties; the Nebraska Department of Correctional Services, by setting up a practical system of determining the forfeiture of good time with due process preserved, did not abdicate its power and responsibility and preserved its right to make the final decision. *Martin v. Neb. Dept of Corr. Servs.*, 2003 Neb. LEXIS 179, 267 Neb. 33, 671 N.W.2d 613 (2003), writ of certiorari denied by 540 U.S. 1196, 124 S. Ct. 1451, 158 L. Ed. 2d 110, 2004 U.S. LEXIS 1302, 72 U.S.L.W. 3536 (2004).

There can be a forfeiture of credit for meritorious behavior earned before release on mandatory parole. *Wounded Shield v. Gunter*, 225 Neb. 327, 405 N.W.2d 9 (1987).

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R.R.S. Neb. § 83-1,107

Neither mandatory good time earned pursuant to this section nor meritorious good time earned pursuant to former *Neb. Rev. Stat. § 83-1,107.01* (now see § 83-1,108) is automatically forfeited upon revocation of parole; such forfeiture must occur upon either the recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the department of correctional services; once forfeited or withheld, good time credits may be restored to the offender in like manner. *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985).

Pursuant to this section and former *Neb. Rev. Stat. § 83-1,107.01* (now see § 83-1,108) the board of parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the board of parole; the discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the department of correctional services and in the parole administrator when the offender is in the custody of the board of parole, in each instance subject to the approval of the director of the department of correctional services. *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985).

State prisoners can only lose good-time credits if they are guilty of serious misconduct; the procedure for determining whether such misconduct has occurred must observe certain minimal due process requirements consonant with the unique institutional environment and therefore involve a more flexible approach reasonably accommodating the interests of the inmates and the needs of the institution. *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).

GOOD TIME CREDIT

When defendant was released on bond in July 2003, he had accumulated more than two years of disciplinary segregation; although *Neb. Rev. Stat. § 83-1,107(3)* allowed for restoration of good time, defendant provided no authority which would suggest he was entitled to such restoration of good time. *State ex rel. Tyler v. Houston*, 2007 Neb. App. LEXIS 15, 15 Neb. Ct. App. 374, 727 N.W.2d 703 (2007).

An inmate's good time should be computed under the version of this section as amended in 1992 where the inmate's convictions and sentences, suspended during the pendency of an appeal pursuant to *Neb. Rev. Stat. § 29-2301*, did not become final until after the effective date of the 1992 amendment. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997).

Because city and county jail inmates are not similarly situated to state prison inmates, granting good time credit to the former on an unequal basis with the latter does not violate equal protection. *State v. Atkins*, 250 Neb. 315, 549 N.W.2d 159 (1996).

The good time reductions provided in this section are used to determine eligibility for release on parole or supervision and are subject to forfeiture. *Brown v. Sigler*, 186 Neb. 800, 186 N.W.2d 735 (1971); *Wycoff v. Vitek*, 201 Neb. 62, 266 N.W.2d 211 (1978).

INDETERMINATE SENTENCES

Where an indeterminate sentence has been imposed, a prisoner's earliest possible parole eligibility date under subdivision (1)(a) is to be determined by crediting good behavior time on the basis of the length of his minimum, not his maximum, term. *Ebert v. Black*, 216 Neb. 814, 346 N.W.2d 234 (1984).

JURISDICTION

District court lacked subject matter jurisdiction over mandamus action against department of correctional services by inmate seeking correction of sentence because nothing in the statutes governing mandamus (*Neb. Rev. Stat. §§ 25-2156 through 25-2169*) indicates a legislative intent to waive sovereign immunity for mandamus actions against a state agency. *Henderson v. Department of Correctional Servs.*, 256 Neb. 314, 589 N.W.2d 520 (1999).

PAROLE

If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility, the statement of the minimum limit shall control the calculation of the offender's term. *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

Court's statement of minimum sentence controlled the calculation of term, which then determines parole eligibility. A misstatement of parole eligibility cannot be used to "bootstrap" a reduced term of sentence. *State v. Glover*, 3 Neb. App. 932, 535 N.W.2d 724 (1995).

A prisoner who has had his parole revoked after hearing need not be further consulted about the statutory effect of the parole revocation and its effect on the date of his ultimate release from custody before any meritorious good time can be forfeited. *Lytie v. Vitek*, 203 Neb. 825, 280 N.W.2d 654 (1979), modified on other grounds, *Malone v. Benson*, 219 Neb.

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28, 361 N.W.2d 184 (1985), and modified on other grounds, *Wounded Shield v. Gunter*, 225 Neb. 330, 405 N.W.2d 9 (1987).

A parolee is only entitled to have credited on his sentence the time elapsing between the date when he was placed on parole and the date of his violation thereof, the date of declaration by the board that the parole had been violated being of no importance in so far as the length of time to be served after violation of the parole is concerned. *Blackwell v. Pszanowski*, 145 Neb. 256, 16 N.W.2d 158 (1944).

RESTORATION OF CREDIT

The chief executive officer, in his discretion, may provide for the restoration of good time which has been forfeited or withheld; however, nothing in this section compels the chief executive officer to provide for the restoration of all good time which is forfeited or withheld. *Wycoff v. Vitek*, 201 Neb. 62, 266 N.W.2d 211 (1978).

SENTENCING

The fact that a sentencing judge announces that in imposing sentence he has considered the possible effect of statutes which make it possible for prison authorities to ameliorate the sentence does not, in and of itself, violate the due process provisions of the state and federal constitutions. *State v. Houston*, 196 Neb. 724, 246 N.W.2d 63 (1976).

STATUTORY RIGHT

The elimination or withholding of statutory or meritorious good time cannot be imposed as punishment, except in flagrant or serious cases of misconduct, such as assault, escape, or attempt to escape. The reduction of a sentence "for good behavior and faithful performance of duties" is a mandatory requirement and that reduction of sentence, therefore, becomes a statutory right, as opposed to a mere privilege. *Sawyer v. Sigler*, 320 F. Supp. 690 (D. Neb. 1970), aff'd, 445 F.2d 818 (8th Cir. 1971).

UNPUBLISHED OPINIONS

FORFEITURE OF CREDIT

Dismissal of an inmate's petition for a writ of habeas corpus was proper because the law did not require the director of correctional services to personally approve the warden's recommendation of forfeiture of good time. *Tyler v. Warden*, 2003 Neb. App. LEXIS 166 (2003).

OPINIONS OF THE ATTORNEY GENERAL

ANALYSIS

Good time credit.

Personalized program plan

GOOD TIME CREDIT.

The statutory good time credits provided by Laws 1995, LB 371, apply only to sentences imposed for crimes committed on or after July 1, 1996. 1997 Op. Atty. Gen. No. 5.

PERSONALIZED PROGRAM PLAN

The department of correctional services may hold an inmate responsible for intentional failure to comply with his personalized program plan when the inmate has failed to comply with the plan as a result of being placed in segregation. 1999 Op. Atty Gen. No. 42.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading.

83-1,107. Reductions of sentence; personalized program plan; how credited; forfeiture; withholding; restoration; release or reentry plan.

(1)(a) Within sixty days after initial classification and assignment of any offender committed to the department, all available information regarding such committed offender shall be reviewed and a committed offender department-approved personalized program plan document shall be drawn up. The document shall specifically describe the department-approved personalized program plan and the specific goals the department expects the committed offender to achieve. The document shall also contain a realistic schedule for completion of the department-approved personalized program plan. The department-approved personalized program plan shall be fully explained to the committed offender. The department shall provide programs to allow compliance by the committed offender with the department-approved personalized program plan.

Programming may include, but is not limited to:

(i) Academic and vocational education, including teaching such classes by qualified offenders;

(ii) Substance abuse treatment;

(iii) Mental health and psychiatric treatment, including criminal personality programming;

(iv) Constructive, meaningful work programs; and

(v) Any other program deemed necessary and appropriate by the department.

(b) A modification in the department-approved personalized program plan may be made to account for the increased or decreased abilities of the committed offender or the availability of any program. Any modification shall be made only after notice is given to the committed offender. The department may not impose disciplinary action upon any committed offender solely because of the committed offender's failure to comply with the department-approved personalized program plan, but such failure may be considered by the board in its deliberations on whether or not to grant parole to a committed offender.

(2)(a) The department shall reduce the term of a committed offender by six months for each year of the offender's term and pro rata for any part thereof which is less than a year.

(b) In addition to reductions granted in subdivision (2)(a) of this section, the department shall reduce the term of a committed offender by three days on the first day of each month following a twelve-month period of incarceration within the department during which the offender has not been found guilty of (i) a Class I or Class II offense or (ii) more than three Class III offenses under the department's disciplinary code. Reductions earned under this subdivision shall not be subject to forfeit or withholding by the department.

(c) The total reductions under this subsection shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted from the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

(3) While the offender is in the custody of the department, reductions of terms granted pursuant to subdivision (2)(a) of this section may be forfeited, withheld, and restored by the chief executive officer of the facility with the approval of the director after the offender has been notified regarding the charges of misconduct.

(4) The department shall ensure that a release or reentry plan is complete or near completion when the offender has served at least eighty percent of his or her sentence. For purposes of this subsection, release or reentry plan means a comprehensive and individualized strategic plan to ensure an individual's safe and effective transition or reentry into the community to which he or she resides with the primary goal of reducing recidivism. At a minimum, the release or reentry plan shall include, but not be limited to, consideration of the individual's housing needs, medical or mental health care needs, and transportation and job needs and shall address an individual's barriers to successful release or reentry in order to prevent recidivism. The release or reentry plan does not include an individual's programming needs included in the individual's personalized program plan for use inside the prison.

(5) The department shall make treatment programming available to committed offenders as provided in section 83-1,110.01 and shall include continuing participation in such programming as part of each offender's parolee personalized program plan.

(6)(a) Within thirty days after any committed offender has been paroled, all available information regarding such parolee shall be reviewed and a parolee personalized program plan document shall be drawn up and approved by the Office of Parole Administration. The document shall specifically describe the approved personalized program plan and the specific goals the office expects the parolee to achieve. The document shall also contain a realistic schedule for completion of the approved personalized program plan. The approved personalized program plan shall be fully explained to the parolee. During the term of parole, the parolee shall comply with the approved personalized program plan and the office shall provide programs to allow compliance by the parolee with the approved personalized program plan.

Programming may include, but is not limited to:

- (i) Academic and vocational education;
- (ii) Substance abuse treatment;
- (iii) Mental health and psychiatric treatment, including criminal personality programming;
- (iv) Constructive, meaningful work programs;
- (v) Community service programs; and
- (vi) Any other program deemed necessary and appropriate by the office.

(b) A modification in the approved personalized program plan may be made to account for the increased or decreased abilities of the parolee or the availability of any program. Any modification shall be made only after notice is given to the parolee. Intentional failure to comply with the approved personalized program plan by any parolee as scheduled for any year, or pro rata part thereof, shall cause disciplinary action to be taken by the office resulting in the forfeiture of up to a maximum of three months' good time for the scheduled year.

(7) While the offender is in the custody of the board, reductions of terms granted pursuant to subdivision (2)(a) of this section may be forfeited, withheld, and restored by the administrator with the approval of the director after the offender has been notified regarding the charges of misconduct or breach of the conditions of parole. In addition, the board may recommend such forfeitures of good time to the director.

(8) Good time or other reductions of sentence granted under the provisions of any law prior to July 1, 1996, may be forfeited, withheld, or restored in accordance with the terms of the Nebraska Treatment and Corrections Act.

Source: Laws 1969, c. 817, § 38, p. 3092; Laws 1972, LB 1499, § 7; Laws 1975, LB 567, § 2; Laws 1992, LB 816, § 2; Laws 1995, LB 371, § 20; Laws 1997, LB 364, § 19; Laws 2003, LB 46, § 20; Laws 2011, LB191, § 1; Laws 2014, LB907, § 17.

Operative Date: July 18, 2014

Annotations

1. Reduction of term
2. Good-time credit forfeited
3. Applicability of section
4. Miscellaneous

1. Reduction of term

Under former law, the director and chief executive officer of a correctional facility have the authority to delegate to subordinate officials the duty to approve the forfeiture of reductions of terms granted pursuant to subsection (2) of this section. *Martin v. Dept. of Corr. Servs.*, 267 Neb. 33, 671 N.W.2d 613 (2003).

When an indeterminate sentence is imposed, a prisoner's earliest parole eligibility date is determined by crediting good behavior time on the basis of his minimum, not his maximum, term. *Ebert v. Black*, 216 Neb. 814, 346 N.W.2d 254 (1984).

The good time reductions provided in this section are used to determine eligibility for release on parole or supervision and are subject to forfeiture. *Wycoff v. Vitek*, 201 Neb. 62, 266 N.W.2d 211 (1978); *Brown v. Sigler*, 186 Neb. 800, 186 N.W.2d 735 (1971).

2. Good-time credit forfeited

Pursuant to the Nebraska Treatment and Corrections Act, there may be a forfeiture of credit for meritorious behavior earned before release on mandatory parole. *Nichols v. Gunter*, 225 Neb. 638, 407 N.W.2d 203 (1987); *Anderson v.*

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Gunter, 225 Neb. 637, 407 N.W.2d 202 (1987); Wounded Shield v. Gunter, 225 Neb. 327, 405 N.W.2d 9 (1987).

Neither mandatory good time earned pursuant to this section nor meritorious good time earned pursuant to section 83-1,107.01 is automatically forfeited upon revocation of parole. Such forfeiture must occur upon recommendation of the chief executive officer of the facility to which the offender is entrusted or the parole administrator, depending upon who has custody at the time of revocation, subject to approval of the director of the Department of Correctional Services. Once forfeited or withheld, good time credits may be restored to the offender in like manner. *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985).

Pursuant to this section and section 83-1,107.01, the Board of Parole merely has the right to make recommendation of forfeitures of good time when the offender is in the custody of the Board of Parole. The discretion referred to by statute vests solely in the chief executive officer of the facility when the offender is in the custody of the Department of Correctional Services and in the parole administrator when the offender is in the custody of the Board of Parole, in each instance subject to the approval of the director of the Department of Correctional Services. *Malone v. Benson*, 219 Neb. 28, 361 N.W.2d 184 (1985).

Fighting and threatening an officer's life would amount to flagrant or serious misconduct for which statutory good time may be withheld. Certain activities which would not, or which are best left to judgment of adjustment committee, are outlined. *McDonnell v. Wolff*, 342 F.Supp. 616 (D. Neb. 1972).

3. Applicability of section

"New good time law" inapplicable to those offenders who started serving sentences before the effective date of July 15, 1992, absent approval of the Board of Pardons, even if the offender is resentenced pursuant to the new Convicted Sex Offender Act, also effective July 15, 1992. *Duff v. Clarke*, 247 Neb. 345, 526 N.W.2d 664 (1995).

This section governs an offender's good time computation even though offender was sentenced before this section changed, effective July 15, 1992, because the offender's judgment was not final until after appeal. *State v. Schrein*, 247 Neb. 256, 526 N.W.2d 420 (1995).

The good time provisions of LB 567 are not to be retroactively applied to those who were initially incarcerated prior to its effective date, regardless of whether the incarceration is on a consolidated sentence made up of crimes committed both before and after LB 567's effective date, without Board of Pardons approval. *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983).

This section through section 83-1,111 applies retroactively to prisoners only with approval of the Board of Pardons. *Johnson & Cunningham v. Exon*, 199 Neb. 154, 256 N.W.2d 869 (1977).

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This section governs eligibility for parole or release under supervision rather than for absolute discharge as under previous statutes. *Von Bokelman v. Sigler*, 186 Neb. 378, 183 N.W.2d 267 (1971).

The reduction of sentence for good behavior and faithful performance of duties is a statutory right and cannot be eliminated or withheld for failure to perform work which a prisoner is unable to do because of physical infirmity not caused by his misconduct, nor as punishment except for flagrant or serious misconduct. *Sawyer v. Sigler*, 320 F.Supp. 690 (D. Neb. 1970).

4. Miscellaneous

Good time credit under subsection (1) of this section does not apply to mandatory minimum sentences imposed on habitual criminals pursuant to subsection (1) of section 29-2221. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

Pursuant to subsection (1)(b) of this section, an inmate who has been given proper notice that certain conduct could result in disciplinary segregation and that disciplinary segregation could prevent the inmate from participation in the program plan can be found to have intentionally violated the program plan. *Ponce v. Nebraska Dept. of Corr. Servs.*, 263 Neb. 609, 641 N.W.2d 375 (2002).

Good time is figured under the statutory scheme in existence at the time the offender's sentence becomes final; therefore, if this section is amended while the offender's sentence is suspended pending direct appeal, the amended version of this section applies. *Jones v. Clarke*, 253 Neb. 161, 568 N.W.2d 897 (1997).

Sentencing judge's announcement he considered possible effect of statutes permitting prison authorities to ameliorate sentences did not violate constitutional due process, and sentences were not excessive. *State v. Houston*, 196 Neb. 724, 246 N.W.2d 63 (1976).

Prisoner's statutory right to good time may not be taken away from him without following minimum appropriate due process procedures. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

The decision to impose discipline is discretionary with the chief executive officer of a penal facility and imposition of a greater penalty for infraction of a prison rule than would have been sustained by a citizen prosecuted in a court of law for a similar offense is neither an abuse of that discretion nor a violation of the U.S. Constitution. *Glouster v. Parratt*, 605 F.2d 419 (8th Cir. 1979).