

Challenges to Inmate Sentencing Calculations: Common Pitfalls in Time Calculation Habeas Petitions

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Most criminal defense lawyers are well acquainted with filing post-conviction habeas petitions challenging an inmate's sentence or conviction but may be less familiar with its other uses. Post-conviction habeas petitions are also used to challenge purported errors in the Nevada Department of Corrections' (NDOC) calculation of an inmate's sentence or the application of credits to that sentence. Habeas petitions may also challenge the loss of credit associated with disciplinary proceedings or the revocation of parole. Understanding the computation of prison credit is critical when negotiating sentencing structure as part of a plea agreement on behalf of a client.

1. Habeas petitions challenging time computations are governed by NRS 34.720 to 34.830, inclusive. The first rule to know is that a time challenge must be filed as a habeas petition. Under NRS 34.724(2)(c), habeas is the inmate's exclusive remedy and must be used in place of other common-law or statutory alternatives. Habeas is unique because it has its own procedures and appellate process.
2. Time challenge habeas petitions are filed under their own case number separate from the criminal case. Your client – the inmate – becomes the petitioner. The warden of the facility where your client is held—and by extension the Offender Management Division, NDOC's timekeeper—is the respondent. The state of Nevada is not a party to these proceedings.
3. Time challenge petitions must be filed in the county where the inmate is imprisoned, not in the county where the inmate was convicted. Prisoners housed outside the state of Nevada must file in the First Judicial District Court. Filing in the incorrect county is not cause for dismissal, but doing so wastes time and other resources. *See* NRS 34.738.
4. Your client must attempt to resolve the time challenge issue by exhausting NDOC's grievance process before filing a habeas petition. Failure to complete the grievance process is grounds for dismissal. An inmate exhausts administrative remedies after submitting an informal, first, and second level grievance to the NDOC. *See* NRS 34.724(1); 34.810(4); NDOC Administrative Regulation 740 (available online at http://doc.nv.gov/About/Administrative_Regulations/Administrative_Regulations/).
5. The one-year statute of limitation to file a habeas petition challenging a judgment of conviction (NRS 34.726) does not apply to a time-challenge habeas petition. Time challenges can be filed at any point during incarceration. But, if the petition challenges application of credits to the minimum sentence, which determines when an offender will be eligible for parole, the court cannot grant relief when the offender has already had a parole hearing on that sentence. Likewise, the court cannot grant relief when the inmate has expired the sentence, even if they are serving a consecutive sentence. *See Niergarth v. Warden*, 105 Nev. 26, 29, 768 P.2d 882, 883-84 (1989) (recognizing no statutory authority or caselaw allows for retroactive grant of parole); *Johnson v. Dir., Nev. Dep't of Prisons*, 105 Nev. 314, 316, 774 P.2d 1047, 1049 (1989) (“any question as to the method of computing” a sentence is rendered moot when the sentence is expired); *Howard v.*

Sandie, No. 72131, 2017 WL 6547856, at *2 n.2 (Nev. Dec. 14, 2017) (when a prisoner has appeared before the parole board for the sentence he is serving, “the court cannot grant any [further] relief” to remedy an allegedly incorrect sentence computation).

6. Make sure your client is eligible for the credit he or she seeks. Inmates may receive several different types of credit. Flat time is the credit earned for each day served. Good time, also called stat time, refers to credit granted as an incentive for good behavior. Work credit is awarded for work actually performed at a prison job. Monthly study credit is awarded while an inmate is attending daily classes in pursuit of approved educational programs. Lump sum educational credit is awarded for achievement of certain goals. For instance, obtaining a GED will lead to an award of 60 days, obtaining a high school diploma will lead to an award of 90 days and obtaining an associate degree will lead to an award of 120 days. *See* NRS 209.4465(2).¹ Completing vocational programming may also lead to an award of 60 credits. *See* NRS 209.449. However, the inmate must successfully complete the program to earn credit. If the inmate takes a test but fails to earn a passing score, the inmate will not be eligible for credit. *See* NRS 209.449(1). And the inmate can only earn credit for a class or achievement one time. In other words, you only get one high school diploma. An inmate cannot retake a class or program already successfully completed. The date of the offense determines the amount of credit received. Inmates with offense dates prior to July 17, 1997, receive only 10 days per month good time credit, whereas inmates with later offense dates receive 20 days per month. Conversely, inmates whose offenses

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were committed before June 30, 1997, are eligible in some cases for more credit against their minimum sentences than those inmates with offense dates after July 1, 1997. In 1997, the Nevada Legislature modified NRS 209.4465 to add subsection 8, which restricts the application of credit to four categories of offenses: (a) any felony involving the use or threatened use of force or violence; (b) any felony sexual offense; (c) certain felony DUI offenses; and (d) category A or B felonies. So, keep in mind that negotiating an offense to a category C felony will not circumvent the other three categories of prohibited offenses.

7. Determine if the claim is meritorious. Under NRS 209.451(1)(d) and (5), the district court may refer a habeas petitioner to the NDOC for credit forfeiture if the court finds the petition: (1) contains a claim or defense included for an improper purpose; (2) is not supported by existing law or a reasonable argument for a change in existing law; or (3) contains allegations or information presented as fact for which evidentiary support is not available or is not likely to be discovered after further investigation. NRS 209.451(1). *See also Jones v. Eighth Jud. Dist. Ct.*, 130 Nev. 493, 500, 330 P.3d 475, 480 (2014); *Hosier v. State*, 121 Nev. 409, 412, 117 P.3d 212, 214 (2005).

If your client has a unique issue or if you have a question, please contact the Post-Conviction Division of the Nevada Attorney General’s Office. (The best way to initiate a discussion is to send your telephone contact information via email to the authors of this article, Gerri Hardcastle at ghardcastle@ag.nv.gov or Allison Herr at aherr@ag.nv.gov.) Laugh all you want about the old adage “we’re from the government and we’re here to help,” but when it comes to time application claims, we would rather spend a few minutes on the phone than a few months (or more) in litigation.

1. NRS 209.4465(2) applies to inmates who committed their crimes on or after July 17, 1997. Inmates who committed their crimes before July 17, 1997, are subject to NRS 209.443 and NRS 209.446 for the amount of credits the inmate may earn.

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