Defining "In the Custody of a Correctional Institution"

Appendix B to

Inequitable and Undemocratic:

A Research Brief on Jury Exclusion in Massachusetts and a Multipronged Approach to Dismantle It

Prepared by Katy Naples-Mitchell and Haruka Margaret Braun for the Jury Selection Working Group of the Roundtable on Racial Disparities in Massachusetts Criminal Courts

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Finding: a person on parole or probation is not in the custody of a correctional institution for the purposes of the jury eligibility statute.

General Definition of a "Correctional Facility"

Mass. Gen. Laws ch. 125, § 1
(d) ''correctional facility'', any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders and of such other persons as may be placed in custody therein in accordance with law;

Legal Custody of the Department of Correction or a Sheriff

When someone is still in legal custody of the Department of Correction or a Sheriff – even if in a location that looks like release from prison or jail – then they will still be deemed to be in the custody of a correctional facility/institution.

- A person assigned to a pre-release halfway house was still in the custody of a correctional facility/institution.
    - *DuPont v. Comm'r of Correction*, 59 Mass. App. Ct. 908, 909-910 (2003) ("The halfway house was a confining place of rehabilitation and comfortably fits the definition of 'correctional facility' and 'correctional institution' that appears in G.L. c. 125, § 1: 'any building, enclosure, space or structure used for the custody, control and rehabilitation of committed offenders....'").

- A person on furlough was still in the custody of a correctional facility.
    - *Commonwealth v. Hughes*, 364 Mass. 426, 428-429 (1973) (interpreting G.L. c. 127, § 90A, and defining the status of a prisoner on furlough as in the custody of a correctional facility).

- A person participating in a DOC or Sheriff-controlled work-release program was still in the custody of a correctional institution.
    - *Nimblett v. Comm'r of Correction*, 20 Mass. App. Ct. 988, 988 (1985) ("[A] person who is permitted to be outside the physical confines of a State correctional institution on a work-release program established under G.L. c. 127, § 48, as appearing in St.1972, c. 777, § 12, must be taken to be 'confined in a correctional institution of the commonwealth' within the meaning and for the purposes of the first sentence of the third paragraph of said § 129. 2.").
    - *Commonwealth v. Donohue*, 452 Mass. 256, 268-269 (2008) ("Unlike pretrial confinement to one's home, an inmate participating in the GPS program remains at all times under the supervision of the sheriff and must satisfy the requirements of the GPS

> program set forth in Policy and Procedure 467 as the inmate continues to serve the committed portion of his sentence. See G.L. c. 127, § 49 (committed offender enrolled in any program outside correctional facility "shall remain subject to the rules and regulations of the correctional facility and shall be under the direction, control and supervision of the officers thereof during the period of his participation in the program").").

- People who are detained on a probation or parole detainer and thus re-incarcerated, even if pending a final probation surrender or final parole revocation hearing, would be considered "in the custody of a correctional institution," in keeping with this case law.

Not in Legal Custody of the Department of Correction or a Sheriff but in a Quasi-Carceral Setting

By contrast, when someone is in a quasi-carceral setting (like pretrial home confinement, or an inpatient drug treatment facility, etc.) but NOT in legal custody of the Department of Correction or a Sheriff, they are not in custody and should remain eligible for jury service under the law.

- See *Commonwealth v. Speight*, 59 Mass. App. Ct. 28, 32 (2003) (holding that attendance at an inpatient drug facility as a condition of probation was not to be counted as a period of service of a committed sentence).

- See also *Commonwealth v. Beauchemin*, 410 Mass. 181, 186-187 (1991) (holding that confinement as a condition of stay of execution of a sentence pending appeal did not produce a credit for time served).

- *Commonwealth v. Morasse*, 446 Mass. 113, 116-117 (2006) (holding that a probationer is considered under the "supervision" of the probation department, not as committed to the "custody" of the probation department, and concluding that the defendant's conditions of pretrial probation were not equivalent to "confinement" for purposes of G.L. c. 279, § 33A):

> General Laws c. 127, § 129B, implicitly equates the term "in confinement" with "held in custody," as § 129B only pertains to those prisoners who were "held in custody awaiting trial." In its "usual" meaning, the term "held in custody" is not used to describe a person released on bail subject to pretrial probation conditions—indeed, being released on bail is the very antithesis of "custody." Although probation conditions may involve substantial and indeed severe restrictions on the probationer's liberty, we do not refer to such restrictions as "custody." Rather, our terminology refers to a probationer as under the "supervision" of the probation department, not as committed to the "custody" of the probation department. Moreover, the potential consequences of a violation of the terms of pretrial probation are the revocation of bail, acceleration of the

trial date, or an adjudication of contempt. See Jake J. v. Commonwealth, 433 Mass. 70, 76–78 & n. 6, 740 N.E.2d 188 (2000). Violation of geographic restrictions imposed by way of pretrial probation would not constitute the crime of escape, whereas a "prisoner who is held in custody for a court appearance" may be prosecuted for escape or attempted escape. G.L. c. 268, § 16. Thus, by common usage and understanding, probation conditions that restrict a probationer's freedom of movement are not considered a form of "custody," and the Legislature's use of the term "held in custody" does not suggest any intent to extend sentence credit for time spent subject to such pretrial probation conditions.

Legal Authority of the Parole Board

Finally, statutes clarify the legal authority of the Parole Board to issue a parole permit, and what that parole permit conveys, including that someone on parole is under the jurisdiction of the Parole Board, not the Department of Correction or a Sheriff:

- G.L. c. 127, § 133A: "After such hearing the parole board may, by a vote of two-thirds of its members, grant to such prisoner a parole permit to be at liberty upon such terms and conditions as it may prescribe for the unexpired term of his sentence. If such permit is not granted, the parole board shall, at least once in each ensuing five year period, consider carefully and thoroughly the merits of each such case on the question of releasing such prisoner on parole, and may, by a vote of two-thirds of its members, grant such parole permit. Such terms and conditions may be revised, altered and amended, and may be revoked, by the parole board at any time. The violation by the holder of such permit or any of its terms or conditions, or of any law of the commonwealth, may render such permit void, and thereupon, or if such permit has been revoked, the parole board may order his arrest and his return to prison, in accordance with the provisions of section one hundred and forty-nine."

- G.L. c. 127, § 130: "A prisoner to whom a parole permit is granted shall be allowed to go upon parole outside prison walls and inclosure upon such terms and conditions as the parole board shall prescribe, but shall remain, while thus on parole, subject to the jurisdiction of such board until the expiration of the term of imprisonment to which he has been sentenced . . . ."