

CHAPTER 40

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Imprisonment and Release from Custody

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PART I: OVERVIEW

§ 40.1 MASSACHUSETTS SENTENCING

Massachusetts sentencing law is a constantly changing landscape. In 1994 the “Truth-in-Sentencing” Act radically altered many aspects of Massachusetts sentencing law. The many changes included elimination of the following: the reformatory sentence,¹ forthwith sentences that extinguish previously existing reformatory sentences,² split and suspended state prison sentences,³ statutory good-time deductions,⁴ and parole eligibility at one-third or two-thirds of the minimum term for state prison sentences.⁵ These provisions of the Act took effect on July 1, 1994,⁶ and

¹ St. 1993, c. 432, §§ 14–15, 17–20, repealing G.L. c. 279, §§ 17–18 and 31–33.

² St. 1993, c. 432, § 17, repealing G.L. c. 279, § 28.

³ St. 1993, c. 432, § 11, amending G.L. c. 127, § 133. Section 133 governs parole eligibility for state prison sentences. The Act did not modify G.L. c. 279, §§ 1–1A, the statutes governing suspension of sentences, nor did the Act abolish a judge's authority to impose straight probation. *See generally* Younker v. District Court, 374 Mass. 31, 32 (1977).

⁴ St. 1993, c. 432, § 10, repealing G.L. c. 127, § 129.

⁵ St. 1993, c. 432, § 11, amending G.L. c. 127, § 133.

apply only to crimes committed on or after that date, but had no effect on sentences already in existence.

Although the intent of the Act was to make Massachusetts sentencing simpler, fairer, and easier to understand, it did not completely displace the previous system. Although the number of “old-law” sentences has diminished with time, many remain outstanding.

The Act also created the Massachusetts Sentencing Commission and charged it with proposing a system of sentencing guidelines containing a target sentence range for every criminal offense.⁷ However, the Act provided that the guidelines could take effect only if enacted into law by the Legislature.⁸ Although the Sentencing Commission submitted its recommended guidelines to the Legislature in 1996, the Legislature never approved them and they remain advisory only.

Massachusetts statutes authorize two basic types of sentences: imprisonment in either a county house of correction or a state prison.⁹ If the commission of a crime is punishable by a sentence to a state prison, the crime is a felony.¹⁰ A superior court judge may impose a state prison sentence;¹¹ a district court judge may not.¹²

A judge may also choose a particular sentencing scheme: concurrent, consecutive, forthwith (state prison sentence), split (house of correction sentence only), special, conditional, and intervening. For certain specified crimes, the defendant may also be sentenced to “community parole supervision for life.”¹³

An offender will generally serve a state sentence in the state prison system and a house of correction sentence in a county institution. However, movement within and

⁶ St. 1993, c. 432, § 21. The other provisions of the Act took effect on April 12, 1994, 90 days after the Act was enacted on January 12, 1994. The sentencing guidelines and related provisions will take effect only if adopted by the Massachusetts Legislature. G.L. c. 211E, § 3(a)(1), which is unlikely.

⁷ St. 1993, c. 432, §§ 1–6, codified at c. 279 App. (repealed by St. 1996, c. 12, § 16). In 1996 the Legislature revised the provisions creating the Commission and establishing its mandates. G.L. c. 211E, St. 1996, c. 12, § 9.

⁸ G.L. c. 211E, § 3(a)(1). *See also* G.L. c. 279 App., §§ 1–5. The Sentencing Commission submitted its recommended sentencing guidelines to the Legislature in April 1996, but the Legislature has never acted on them.

⁹ State prison sentences are indeterminate; the judge fixes both the minimum and maximum terms of sentence, with the minimum term controlling the parole eligibility. House of correction sentences are determinate; the court specifies only a maximum term of sentence. Determinate sentences include definite, indefinite, habitual criminal, and life sentences. A definite sentence is any sentence for a fixed term of time (years, months, days). An indefinite sentence is one for which the judge is silent as to the length of the sentence, as was the case for indefinite reformatory sentences authorized by G.L. c. 279, §§ 31–33 (repealed by St. 1993, c. 432, §§ 17–20).

¹⁰ G.L. c. 274, § 1. Crimes that are not felonies are misdemeanors. *See also* *Commonwealth v. Graham*, 388 Mass. 115 (1983) (citing 9 Op. Atty. Gen. 342-44 (1927) (the fact that the district court cannot impose a state prison sentence does not change the nature of a crime to a misdemeanor just because the district court exercises jurisdiction)).

¹¹ *See generally* G.L. c. 212, § 6. Nevertheless, the particular penal statute must authorize a state prison sentence in order for the superior court to impose one.

¹² G.L. c. 218, § 27.

¹³ *See* G.L. c. 265 §45; G.L. c. 127 § 133D. For limitations on lifetime community parole see *Commonwealth v. Williamson*, *_Mass._* (2012); *Commonwealth v. Kateley*, 461 Mass. 575 (2012).

between these systems is determined, with limited constraints, by the Commissioner of Correction and the various county sheriffs. Furthermore, the Commissioner may transfer a prisoner to any other state, the federal prison system, or another country's prison system.

§ 40.2 RELEASE FROM IMPRISONMENT

Discretionary release of a prisoner to the community before the expiration of sentence is possible either through parole or through furlough, training, pre-release or GPS bracelet programs run by the prison or jail.¹⁴

Prisoners in pre-release facilities may be released during the day to work and most Sheriffs maintain electronic monitoring programs for eligible prisoners.¹⁵ The Office of Community Corrections¹⁶ offers a variety of services to prerelease prisoners as well as to those offenders on probation or parole. Parole Board Regional Reentry Centers are designed to assist released prisoners with housing, health, and employment issue. Prisoners theoretically are eligible for furloughs unless serving a life sentence for first-degree murder or certain mandatory terms of incarceration, but except for emergency furloughs, which are granted so that prisoners may do such things as attending the wake of a close family member, regular furloughs have, for all intents and purposes, been abolished in the Department of Correction

Parole is the discretionary release of prisoners to serve the remainder of their sentences in the community. Parole Board regulations and the General Laws govern when an offender is eligible for parole, and calculation of this date becomes complicated where multiple sentences are involved. Once a parole release date is established, the Board may rescind it; and once a prisoner is released on parole, the Board may revoke that parole. The Parole Board may terminate parole supervision and end the sentence before the sentence maximum date after a period of positive community adjustment.

If the Parole Board denies parole or if the prisoner waives parole or the sentence precludes parole, the commitment term of a sentence will terminate at the maximum date minus deductions for good conduct.¹⁷ Because of the complexity of multiple sentences interacting with jail credits, good-time deductions, and mandatory terms of incarceration, quick calculations of sentence length can result in errors as great as several years. Counsel should remember that the Department of Correction, county correction officials, and the Parole Board rely on a paper trail from the court to calculate sentence lengths. If documents from the court are in error or unclear, the execution of a sentence may be in error. The best guardian for the proper execution of a sentence is a well-informed defendant.

¹⁴ See *infra* §§ 40.8ff.

¹⁵ See *Commonwealth v. Donohue*, 452 Mass. 256 (2008).

¹⁶ In 1996 the Legislature created the Office of Community Corrections to administer intermediate sanction programs. G.L. c. 211F (St. 1996, c. 12, § 9).

¹⁷ The good-time discharge date, often referred to as the “adjusted maximum sentence date,” the “maximum discharge date,” or the “wrap-up” date, is the maximum date of sentence reduced by any applicable good-time deductions. Pre–Truth-in-Sentencing sentences may be reduced by both statutory and earned good-time deductions; post–Truth-in-Sentencing sentences may be reduced only by earned good-time deductions.

§ 40.3 DEVISING A SENTENCING RECOMMENDATION

Counsel cannot evaluate a sentencing recommendation without knowing its effect on the maximum discharge date and the parole eligibility date, and the defendant has a right to know this information in evaluating a plea. Counsel should never assume that various sentences of the same lengths actually carry the same parole eligibility or wrap-up date without performing carefully projected sentence length calculations. Counsel should never make a decision as to how much time a defendant will serve based only on parole eligibility or a projected good-time discharge date. Parole eligibility does not guarantee release on that date, and a projected good-time discharge date may be affected substantially by the lack of program availability or eligibility rules that restrict accrual of earned good-time deductions, mandatory terms of incarceration, or loss of statutory good time (if a pre-Truth-in-Sentencing sentence). The following checklist is an overview of the concepts defined and detailed in the balance of this chapter.

1. *Know the following essentials:*

- a. Whether the crime was committed in whole or part before July 1, 1994, in which case the pre-Truth-in-Sentencing statutes and rules apply;
- b. Whether the defendant has a criminal record and what the Board of Probation Record contains;
- c. Whether there are sentences being served or waiting to be served;
- d. Whether the Massachusetts Parole Board has issued but not served a parole violation warrant and the pertinent information about the sentence(s);
- e. Whether there are pending criminal charges.

2. *Know the penalty provisions for each offense:*

- a. Is there a minimum term that the court must impose?
- b. Is probation prohibited? Look carefully at the crime's penalty provisions.
- c. Are there special provisions restricting parole eligibility, furloughs, and work release? If possible, pursue a disposition that avoids incarceration on such an offense by having the defendant plead to a lesser or related offense that does not carry restrictions. In the case of multiple charges, consider incarceration on an offense without these special penalty provisions and a straight probation or suspended “from-and-after” house of correction sentence on the crime with the restrictive provisions. If the pre-Truth-in-Sentencing rules apply, consider a suspended from-and-after state prison sentence.
- d. Is there a limitation on the type of sentence that the judge can give (such as no house of correction sentence alternative to a state prison sentence)? If so, where the defendant has been charged with multiple charges, consider advocating for a commitment on the offense allowing a house of correction sentence, with a straight probation “from-and-after” state prison sentence.
- e. Does the crime call for the possibility of community parole supervision for life?
- f. Does the crime make the defendant eligible for potential civil commitment under G.L. c. 123A? If so, parole release may be delayed because the Parole

Board will not release such a person without giving the district attorney six months advance notice.¹⁸

3. *Know the defendant's status:* Was the defendant on escape status or has the Parole Board issued but not served a parole warrant? Consider securing the return of the defendant to serve the pre-escape or pre-parole sentence before sentencing so that the new sentence does not become an “intervening sentence” as a matter of law.¹⁹

a. A defendant's return to a prior interrupted sentence is a prerequisite to the court imposing a concurrent or consecutive sentence for the new offense.

b. A defendant's return to a prior interrupted sentence is a prerequisite to the court extinguishing a pre-parole or pre-escape house of correction sentence by means of a “forthwith” state prison sentence.²⁰

4. *Consider the parole statutes and Parole Board regulations:*

a. G.L. c. 127, § 133, sets parole eligibility for state prison sentences at the minimum term of sentence, which is imposed by the judge. For pre-Truth-in-Sentencing crimes, this same statute sets parole eligibility at either one-third or two-thirds of the minimum term. Under both systems the parole eligibility date may be advanced by earned good-time deductions²¹ and may be retarded by mandatory terms of incarceration.²²

b. Parole Board regulations govern parole eligibility for county sentences. The eligibility date is not affected by earned good-time deductions but is subject to mandatory terms of incarceration.

c. If the defendant is already serving a sentence, will the Parole Board aggregate the parole ineligibility periods of the new sentence and old sentence to form a single eligibility date? If so, a concurrent sentence might be preferable to a consecutive sentence.

5. *Assess which type of discharge is most likely for the defendant — parole or wrap-up:* Counsel cannot guarantee a client parole on first eligibility, because the majority of offenders are not paroled at the initial hearing.²³ In assessing the likelihood of parole,

¹⁸ G.L. c. 123A, § 12.

¹⁹ See G.L. c. 127, § 149.

²⁰ See G.L. c. 279, § 27.

²¹ *Connery v. Commissioner of Correction*, 414 Mass. 1009 (1993). Although the court addressed the language in G.L. c. 127, § 133, before its amendment by St. 1993, c. 432, § 11, this amendment did not affect the court's decision that earned good-time deductions advance the parole eligibility date.

²² In *Barriere v. Hubbard*, 47 Mass. App. Ct. 79 (1999), the court affirmed the Parole Board's policy of using the mandatory term of incarceration to determine the aggregate parole eligibility date of consecutive sentences, even where the eligibility date set by G.L. c. 127, § 133, exceeds the mandatory minimum.

²³ The Parole Board keeps statistics on the paroling rate for prisoners in the state and county penal systems. The most up-to-date statistics can be obtained by contacting the Parole Board's public relations officer or research division. Since parole rates clearly tend to fluctuate depending on the composition and philosophy of the Board, the current rate may not be a good predictor of what the rate will be when the defendant appears before the Board. For example, in 1999 the paroling rate was 38 percent for state prisoners and 53 percent for county prisoners. See Mass. Parole Board “*10 Year Trends, Statistical Report 1990–1999*.” By 2009 the parole rate had risen to 66% for state prisoners and 68% for county prisoners. See Mass. Parole Board, *2010 Annual Statistical Report*. But in 2011 the rate dropped to 39% for state prisoners and 48%

factors to consider include: the defendant's prior record of convictions (both number and severity); the defendant's prior releases on parole and parole violations; the defendant's age; the nature and circumstances of the offense; the defendant's attitude toward the crime (is it someone else's fault?); the defendant's willingness to address the crime's causative factors (participation in drug, alcohol, sex offender treatment programs); and outstanding charges that might preclude parole.

a. A defendant with dim parole prospects will be more concerned with a discharge date than with the parole date; a defendant with good parole prospects might prefer a longer maximum term with a shorter parole eligibility date.

b. A defendant with dim parole prospects might be better served by a state prison sentence with a lengthy minimum term (setting parole eligibility) and a short period of time between this minimum date and the maximum date. A defendant with good parole prospects might be better served by a state prison sentence with a short minimum term and a substantial period between this minimum date and the maximum date.

c. A defendant with numerous prior parole failures might prefer to waive parole and be discharged on the good-time discharge date by receiving a sentence with only one day difference between the minimum and maximum term.

PART II: SENTENCE LENGTH COMPUTATION

§ 40.4 THE MITTIMUS

The mittimus is the document that authorizes transfer of the defendant from the sentencing court to a correctional institution in the Commonwealth.²⁴ It states the offense and the terms and duration of any sentence of imprisonment and is signed by a clerk-magistrate or an assistant clerk. The mittimus is the most important of the court

for county prisoners. Furthermore, the parole rate, which reflects the percentage of favorable votes given to individuals who appear before the Board, can be significantly higher than the percentage of prisoners who are actually released on parole. Over the last 25 years there has been a significant decline in parole as a mechanism for release. In 1990, 33% of all prisoners released from Department of Correction custody were placed on parole. This number dropped to 24% in 1999 and 19% in 2011. The disparity between the vote rate and the release rate is due to several factors. First, the vote rate does not take into account the fact that many prisoners never appear before the Board, either because they are serving a mandatory sentence or because they choose to waive the possibility of parole. In addition, the Board often makes parole release contingent upon the prisoner meeting certain conditions, such as a requirement that he spend six months in a pre-release facility or participate in specific programs, which the prisoner may be unable to satisfy.

²⁴ See generally *Commonwealth v. Hayes*, 170 Mass. 16 (1987). Although there is no specific statute authorizing the use of the mittimus as the judgment and commitment order, or defining mittimus, several statutes refer to its use. See G.L. c. 126, § 21, c. 127, §§ 7, 120; c. 218, § 61; c. 262, §§ 8, 21, 27, 47, 48, 49; c. 279, §§ 8, 35. G.L. c. 279, § 39 authorizes the issuance of a “precept” as a commitment order. Further, when the statutes using the term *mittimus* are read with G.L. c. 279, § 34, which speaks to a “certified transcript from the minutes of the court of the conviction and sentence,” it is clear that a mittimus and this transcript are the same.

documents that accompany the defendant to prison.²⁵ If the mittimus is in error, the correction authorities lack the essential document that determines execution of sentence.²⁶ If the mittimus is ambiguous, its interpretation could either be detrimental to the defendant or give the defendant an advantage never envisioned by the sentencing judge.²⁷

§ 40.5 SENTENCES

The two possible criminal sentences (house of correction or state prison) are the remnants of the judiciary's former authority to determine at which institution a defendant would serve the sentence imposed. The expansive reform statutes of 1955 abolished this authority²⁸ and, by abolishing the reformatory sentence — commonly referred to as the “Concord” or “Framingham” sentence — the Truth-in-Sentencing Act eliminated the last vestiges of the old nomenclature.

§ 40.5A. HOUSE OF CORRECTION

²⁵ G.L. c. 279, § 35 requires the superior court, on conviction of a felony, to transmit with the mittimus the complaint or indictment “under which such person was convicted”; a statement containing the statute of conviction where the indictment or complaint does state such; and, where there was a trial, the names and addresses of witnesses, presiding judge, district attorney, and defense attorney. G.L. c. 279, § 39, directs the district court to include the statutory names and the citation of the statute in the “warrant for the commitment of a person.”

²⁶ Although the preparation of the mittimus usually involves only an assistant clerk of the trial court, where there are jail credits, multiple sentences, or a sentence that the judge ordered served concurrently with a pre-parole sentence (where the court has ordered the parole warrant served), counsel should peruse the mittimus before it leaves with the defendant; alternatively, ask the defendant to obtain a copy from the records office at the institution on commitment. Without checking the wording of the mittimus, neither counsel nor the defendant may realize that its wording might cause the defendant to serve time beyond the correct release date.

²⁷ *See, e.g., Commonwealth v. Juzba*, 44 Mass. App. Ct. 457 (1998) (where a clearly worded mittimus would have avoided a search for the intended sentence through the notations on the indictment, the docket sheet, and the probation conditions document.) A mittimus that fails to give the subsection of a statute to which a defendant pleads guilty may cause problems. In this situation the corrections authorities must look to another court document, such as the indictment, to determine the subsection and might assume a mandatory term of incarceration unaware that the defendant pled to a subsection that carried no mandatory term. For example, G.L. c. 90, § 24G(a) (motor vehicle homicide) carries a one-year mandatory term of incarceration; § 24G(b) does not. Both carry the same general description. Counsel should take extra precautions where the defendant is convicted of violating a provision of the 1998 Gun Control Act since a statute may contain several different mandatory terms of incarceration (e.g., G.L. c. 265, § 18B and c. 269, § 10(h)). *See also, Commonwealth v. Burden*, 48 Mass. App. Ct. 232 (1999) (defendant’s multiple sentences “reordered” three times over 18 years, resulting in a multitude of mittimuses); *Commonwealth v. Morin*, 52 Mass. App. Ct. 780, 781 fn.2 (2001) (where the Appeals Court identified an error in the docket and the mittimus, which apparently neither the Commonwealth nor the defendant noticed); *Commonwealth v. Clark*, 53 Mass. App. Ct 342 (2001) 437 Mass. 1015 (2002).

²⁸ In 1955 an escape attempt and hostage-holding rebellion led to the creation of the Wessell Committee, which proposed legislation that reorganized the correctional system. 1955 Mass. Laws c. 770. *See also* McGrath, *Criminal Law, Procedure and Administration*, 2 ANNUAL SURVEY OF MASSACHUSETTS LAW, BOSTON COLLEGE c. 12 at 120–21 (1955).

A house of correction sentence is to a county correctional facility run by the County Sheriff.²⁹ Historically, house of correction sentences have been “determinate,” that is, the sentence contains a single term rather than maximum and minimum terms.³⁰

A judge may order a house of correction sentence served in any county; however, a mere recommendation by the judge that the prisoner serve the sentence in a particular county is not binding.³¹ While a judge may be reluctant to exercise this authority, a defendant may have a persuasive reason for wanting to serve the sentence in a different county and counsel should advocate for the desired institution.³²

Both district and superior courts may impose a house of correction sentence but such sentences cannot exceed two and one-half years for any one offense.³³ A defendant convicted of a crime punishable by “jail” may serve the sentence in a house of correction, and a crime punishable by a house of correction sentence may be served in a jail.³⁴

Counsel should be aware that there may be advantages to expressing a sentence in months instead of years. For example, correctional authorities treat a one year sentence as 365 days and a twelve-month sentence as 360 days.³⁵

§ 40.5B. STATE PRISON

A sentence to the state prison is often called a “Cedar Junction” or “Walpole” sentence. It defines the type of sentence rather than literally mandating that the defendant be physically housed at MCI Cedar Junction. Unless the prisoner is sentenced to life or as an habitual criminal a state sentence contains two numbers, a minimum term and a maximum term.³⁶ The minimum term controls the parole eligibility date;³⁷ the maximum term determines both when the prisoner will be discharged if not paroled and when parole will end should it be granted. By statute, the shortest permissible minimum is one year.³⁸ Both the minimum and maximum terms can be reduced by any applicable good conduct deductions.

§ 40.5C. REFORMATORY

²⁹ Since all counties have been abolished, the Sheriffs’ Departments, are now funded now by the State. See St. 2009, c. 61 (effective Jan. 10, 2010)(An Act Transferring County Sheriffs to the Commonwealth).

³⁰ However, if the Legislature were ever to approve the sentencing guidelines, county sentences would have both a maximum term and a minimum term. The minimum term would automatically be set at two-thirds of the maximum term. G. L. c. 211E, § 3(a)(3)(C).

³¹ G.L. c. 279, § 15. *See also* G.L. c. 279, § 38 (authority of sheriffs and court officers in differing counties).

³² For example, visitation by family located there, danger from enemies in the local county facility, or availability of programs that will enhance the defendant's chances of earning good-time deductions.

³³ G.L. c. 279, §§ 19, 23.

³⁴ *See* G.L. c. 279, §§ 5–6.

³⁵ G.L. c. 4, § 7, c. 19. However, prisoners are not entitled to extra days of credit if the sentence includes leap years. *Commonwealth v. Melo*, 65 Mass. App. Ct. 674 (2006).

³⁶ G.L. c. 279, § 24.

³⁷ G.L. c. 127 §133.

³⁸ G.L. c. 279 § 24.

Although the Truth-in-Sentencing Act abolished the reformatory sentence, a judge may still impose such a sentence for an offense committed fully or in part before July 1, 1994.³⁹ More importantly, given the length of many reformatory sentences (e.g. 20 year Concord sentence), defendants are still sometimes charged with crimes committed while on parole or escape from a reformatory sentence, and it therefore remains important for practitioners to understand the governing rules.

A reformatory sentence contains only a maximum term of sentence. A judge may impose a reformatory sentence for any offense unless the penal statute precludes imposition of such sentence.⁴⁰ Reformatory sentences may be either *definite* or *indefinite*. A definite reformatory sentence has a specified maximum term; an indefinite reformatory sentence does not.⁴¹ A district court was authorized to impose a reformatory sentence for any felony over which it exercises subject matter jurisdiction.

§ 40.5D. INTERMEDIATE SANCTION

The Truth-in-Sentencing Act directed the Massachusetts Sentencing Commission to recommend sentencing guidelines that establish “appropriate intermediate sanctions for offenders for whom imprisonment may not be necessary or appropriate.”⁴² Although the sentencing guidelines, including the recommendations relating to intermediate sanctions, were never approved by the Legislature, nothing prevents a judge from using the recommended guidelines as a justification for the sentence.⁴³

The Act directed the Sentencing Commission to specify the circumstances under which the imposition of intermediate sanctions may be appropriate for particular offenses.⁴⁴ Consistent with its statutory mandate,⁴⁵ the Sentencing Commission has recommended that the target sentence for many crimes be an intermediate sanction imposed as a condition of probation. Intermediate sanctions include such incarceration alternatives as day reporting, house arrest, electronic monitoring, and residential programming.⁴⁶

³⁹ The reformatory sentence was authorized by G.L. §§ 17–18, 31–33, repealed by St. 1993, c. 432, §§ 14–15, 17–20. The theory behind reformatory sentences was that the offender would be subject to a long sentence but with an early parole eligibility so that there would be a long period of accountability. Advocates of Truth-In-Sentencing believed the sentence was deceptive because it sounded tough, with its long maximum term, but was actually lenient because of the relatively short parole eligibility date.

⁴⁰ Commonwealth v. Hayes, 372 Mass. 505 (1977).

⁴¹ A court was permitted to impose an indefinite reformatory sentence if the crime is punishable by a house of correction sentence, a state prison sentence, or both, but only on a male defendant who has no more than three previous felony convictions. G.L. c. 279, § 31 (repealed by St. 1993, c. 432, § 17). For female defendants, there was no similar statutory restriction. *See generally* G.L. c. 279, §§ 17, 18 (repealed by St. 1993, c. 432, §§ 14–15).

⁴² G.L. c. 211E, § 3(3)(B).

⁴³ G.L. c. 211E, § 3(a)(1).

⁴⁴ G.L. c. 211E, § 3(3)(A). Under the Guidelines, no offender is eligible to participate in an intermediate sanction program if (1) convicted of a crime resulting in serious bodily harm; (2) convicted of rape, attempted rape, or sexual assault; or (3) convicted of a crime involving a firearm. G.L. c. 211F, § 3(d)(20). However, the Guidelines remain advisory only.

⁴⁵ G.L. c. 211F, § 3(a).

⁴⁶ G.L. c. 211F, § 1.

§ 40.6 SENTENCE SCHEMES

§ 40.6A. CONCURRENT

Concurrent sentences are two or more sentences served at the same time, in whole or in part.⁴⁷ A judge may order any sentence served concurrently with any other sentence — including a federal sentence⁴⁸ — if the defendant is serving the first sentence or will serve that sentence at a definite time in the future. *If the sentence being served was interrupted by an escape or the issuance of a parole violation warrant, the judge may not impose a concurrent sentence until the “interrupted” sentence is activated again.*⁴⁹ The effective date of any concurrent sentence is the date the court imposed that sentence, unless jail credits are authorized or the mittimus specifies otherwise, by, for example, imposing the sentence *nunc pro tunc* to another date.

Where a defendant is serving a sentence and the mittimus is silent, there is a presumption that the second sentence is concurrent with the one the defendant is serving.⁵⁰ This presumption does not operate to make a new sentence concurrent with a pre-parole or pre-escape sentence unless the defendant has been returned to serve the prior sentence before imposition of the new one.⁵¹

If there are several concurrent sentences imposed to different correctional facilities, the prisoner is housed in the institution specified on the mittimus for the sentence imposed on the earliest date.⁵²

§ 40.6B. CONSECUTIVE

A consecutive sentence is served “from and after” or “on and after” another sentence of imprisonment, with the defendant serving these sentences in the order named in the mittimusses. The mittimus may express the consecutive nature of a

⁴⁷ G.L. c. 279, § 8.

⁴⁸ *Abrahams v. Commissioner of Correction*, 57 Mass. App. Ct. 861 (2003).

⁴⁹ *See generally* *Commonwealth v. McGarty*, 351 Mass. 707 (1967); *Klecza v. Commonwealth*, 350 Mass. 74, 76 (1966) (no error for Parole Board to lodge parole warrant without serving it before trial or after commitment on new offense); *but see* *Royce*, Petitioner, 28 Mass. App. Ct. 397 (1990); *Kinney*, Petitioner, 5 Mass. App. Ct. 457, 459–60 (1977) (court's failure to remand defendant to prior sentence from which he escaped indicates court's desire not to have new sentence served concurrently with prior sentence). *See infra* § 40.7A(3) for information about how to re-activate an interrupted sentence.

⁵⁰ *Henschel v. Commissioner*, 368 Mass. 130, 133 (1975); *Baranow v. Commissioner*, 1 Mass. App. Ct. 831, 832 (1973); *see also* *West's Case*, 111 Mass. 443 (1873). However, if a defendant is serving a federal sentence the presumption of concurrency does not apply. *Abrahams v. Commissioner of Correction*, 57 Mass. App. Ct. 861 (2003).

⁵¹ However, in *Royce*, Petitioner, 28 Mass. App. Ct. 397 (1990), the court held that under the principles of fairness set forth in *Chalifoux v. Commissioner of Correction*, 375 Mass. 424, 428 (1978), an escapee from a state correctional institution resumes service of the interrupted sentence at the point when he is returned to the custody of the Department of Correction, even if he is returned under a new sentence for a crime committed while on escape status. *See also* *Bompastore v. DuBois*, Suffolk Sup. Ct., Civ. No. 93-3008 (1994).

⁵² G.L. c. 279 § 8.

sentence through the terms *from-and-after*, *on-and-after*, or *consecutive*, and should refer to the previously imposed sentence.

A judge may order any sentence served consecutive to any previously imposed sentence,⁵³ even where a defendant is not then serving the previously imposed unexpired sentence.⁵⁴ *However, a judge may not order a sentence served consecutive to a sentence that has been interrupted by the issuance of a parole violation warrant, without first serving the warrant.*⁵⁵

Counsel should give special attention to the wording of a from-and-after sentence when a defendant has a previously imposed consecutive sentence that has not yet begun. If the mittimus reads “from-and-after sentence now serving,” the defendant will serve the new sentence concurrently with the previously imposed consecutive sentence. If the mittimus reads “from-and-after sentence now serving *or to be served*,” the defendant will serve the new sentence consecutively to a previously imposed consecutive sentence.⁵⁶

The effective date of a consecutive sentence materializes when the previous sentence expires, that is, “when a prisoner serving such previous sentence shall have been released therefrom by parole or otherwise.”⁵⁷ Where the Parole Board paroles a prisoner from the first sentence to a from-and-after sentence, that prisoner is not discharged from the first sentence until the prisoner completes that sentence on parole.⁵⁸ Even where the Parole Board aggregates the parole ineligibility periods to form a single parole eligibility, *when parole occurs, the consecutive sentence begins and the parolee serves all sentences concurrently while on parole*. This, of course, dramatically reduces the time that the offender must serve on parole, or in prison if parole is revoked.⁵⁹

Where the judge imposes a fine and imprisonment in one of the consecutive sentences, the defendant is committed on the term of imprisonment first.⁶⁰ If a judge imposes a term of imprisonment for refusing to pay a fine, any subsequent sentence takes effect on the expiration of any such imprisonment, even if the consecutive

⁵³ In *Commonwealth v. Williams*, 34 Mass. App. Ct. 346 (1993), the defendant challenged the legality of the trial court, on withdrawal of appeal from a bench trial, reimposing a one-year house of correction sentence but ordering it served from-and-after a sentence imposed subsequent to the bench trial sentencing. The Appeals Court ruled that the sentence was lawful although it had the effect of making the defendant serve a longer aggregate time in prison.

⁵⁴ *Petition of Stewart*, 381 Mass. 777 (1980).

⁵⁵ G.L. c. 127, § 149. This statute prohibits the service of the parole violation warrant on conviction for a new offense. However, the Parole Board interprets “conviction” to mean “sentencing” to avoid constitutional claims by those defendants choosing trial instead of pleading. 120 C.M.R. 303.16(2)(b) (1997). A judge may serve the parole warrant by placing a defendant on personal recognizance. This remands the defendant to the parole warrant. Once this occurs, a judge may impose the consecutive (or concurrent or forthwith) sentence.

⁵⁶ *Baranow v. Commissioner of Correction*, 1 Mass App. Ct. 831 (1973).

⁵⁷ G.L. c. 279, § 8A.

⁵⁸ *Lussier v. Commissioner of Correction*, 2 Mass. App. Ct. 790 (1975). *See also Henschel v. Commissioner*, 368 Mass. 130 (1975).

⁵⁹ *Crooker v. Chairman, Massachusetts Parole Bd.*, 38 Mass. App. Ct. 915 (1995).

⁶⁰ G.L. c. 279, § 8.

sentence would not have taken effect if the defendant had paid the fine in the first instance.⁶¹

§ 40.6C. SPLIT

A split sentence is a sentence of imprisonment, a portion of which a judge suspends, mandating probation for a specified time under certain conditions.⁶² The Truth-in-Sentencing Act eliminated suspended and split state prison sentences.⁶³ Only sentences to the house of correction can now be split.

When a split sentence is imposed, a judge who revokes probation is required to impose the full original suspended sentence, if the time has expired within which the sentence may be revised or revoked.⁶⁴

If the Parole Board grants parole from the commitment term of a split sentence, the probation term commences, and the Parole Board and the Probation Department jointly assume supervision.⁶⁵ If the offender is returned as a probation violator and the Parole Board issues and lodges its warrant before disposition on the probation surrender, the commitment term of the split sentence is interrupted and sentence calculation can become difficult.

§ 40.6D. FORTHWITH

A court may order the service of a state prison sentence “forthwith,” which extinguishes a house of correction sentence then being served.⁶⁶ Judges often impose a single forthwith state prison sentence to remove many outstanding house of correction sentences.

Counsel should give special attention to the wording on a mittimus where a judge imposes a forthwith sentence when a defendant has a previously imposed consecutive sentence that is yet to be served. If the mittimus is worded “forthwith, notwithstanding the sentence the defendant is now serving,” a consecutive house of correction sentence might not be deemed extinguished, as it would be if worded “forthwith, notwithstanding any house of correction sentence now being served or to be served.”

⁶¹ G.L. c. 279, § 9. The sentence for nonpayment of the fine takes effect immediately even if the consecutive sentence would not have taken effect if the defendant had paid the fine in the first instance.

⁶² G.L. c. 279, §§ 1–1A.

⁶³ Although G.L. c. 279, § 1, has not been repealed, G.L. c. 127, § 133, as amended by St. 1993, c. 432, § 11, now provides that “sentences of imprisonment in the state prison shall not be suspended in whole or in part.” Even before Truth-in-Sentencing, G.L. c. 279, § 1, prohibited suspension of life sentences or sentences for crimes punishable by life.

⁶⁴ *Commonwealth v. Holmgren*, 421 Mass. 224, 228 (1995).

⁶⁵ G.L. c. 279, § 8A.

⁶⁶ G.L. c. 279, § 27. Under the Truth-in-Sentencing Act, the provision in this statute that allowed a forthwith state prison sentence from a reformatory sentence was repealed. Additionally, the Legislature repealed § 28, which authorized a forthwith house of correction sentence. St. 1993, c. 432, § 17. Where a defendant was sentenced under the pre-Truth-in-Sentencing statutes, a forthwith house of correction sentence only permitted a defendant to begin serving immediately the house of correction sentence concurrently with the reformatory sentence. *Dale v. Commissioner of Correction*, 17 Mass. App. Ct. 247, *rev. denied*, 391 Mass. 1102 (1983).

§ 40.6E. SPECIAL, CONDITIONAL, AND INTERVENING

A *special sentence*⁶⁷ is a house of correction sentence with a commitment term of less than one year ordered served in a noncontinuous manner. A judge may use this type of sentence to create a *weekend sentence*.⁶⁸ A conditional sentence is any sentence of imprisonment that involves articulated conditions. For example, a judge may order a defendant to pay a fine within a stated period or to be committed if the defendant does not pay the fine within the specified time.⁶⁹ An *intervening sentence* is one imposed on a defendant for whom the remainder of an unexpired sentence is left to be served. Intervening sentences occur where a defendant stopped serving a previous sentence due to an escape or due to the Parole Board issuing a parole violation warrant.⁷⁰ Where a defendant is serving an intervening sentence, the unexpired original sentence will commence on expiration of the intervening sentence. However, when a defendant is released on personal recognizance or posts bail on the new charge, the original sentence resumes when the warrant is served.⁷¹

§ 40.7 ADJUSTMENTS TO COMMITMENT TERMS

§ 40.7A. JAIL CREDITS

1. Credit for Pretrial Confinement

A defendant is statutorily entitled to receive credit for all of the time spent in confinement related to the case for which sentence was imposed.⁷² Jail credit is considered as time already served on the sentence rather than a reduction of sentence,⁷³ and so counts toward the parole ineligibility period.⁷⁴ A defendant is entitled to credit

⁶⁷ G.L. c. 279, § 6A.

⁶⁸ Where the court makes no specific order, the defendant reports to the institution no later than 6 P.M. Friday and is released no later than 7 A.M. Monday unless Monday is a holiday, in which case release is 7 A.M. Tuesday. The defendant receives credit for each part of a day served; thus for the nonholiday weekend, four days are credited toward service of the sentence.

⁶⁹ G.L. c. 279, § 10, provides for the detention of the defendant until the fine is paid, or until the time to pay the fine expires, at which time the prison sentence is executed. *See* G.L. c. 279, § 6, c. 218, § 48, c. 127, § 144 (credit of \$30 given per day served). *But see* G.L. c. 127, §§ 145–46 (where prisoner takes oath of indigency and court finds such person indigent, release is appropriate).

⁷⁰ *Petition of Stewart*, 381 Mass. 777 (1980). *But see*, *Royce*, *Petitioner, supra*, note 51.

⁷¹ *Harkey v. Superintendent*, 356 Mass. 722 (1969). *See also, infra* § 40.7A(3)

⁷² G.L. c. 279, § 33A (credit for days in confinement awaiting and during trial); G.L. c. 127, § 129B (directs correctional authorities to give jail credit unless sentencing court already awarded credits).

⁷³ Where the mittimus contains jail credits, the effective date of that sentence is moved to an earlier time by the number of days spent in jail. The jail credit is expressed separately from the sentence on the mittimus, generally as time “deemed to have been served.”

⁷⁴ However, although pretrial jail time is credited, a prisoner is not entitled to earned good-time deductions pursuant to G.L. c. 127, § 129D while awaiting trial. *McNeil v. Commissioner of Correction*, 417 Mass. 818 (1994).

from the date of arrest, not just from the date of arraignment.⁷⁵ Credit does not depend on whether or when bail was set during the period of custody.⁷⁶

A defendant held in custody because of a default warrant is entitled to jail credits.⁷⁷ Further, time spent in a police station or hospital, or in other restrictive settings may be credited.⁷⁸ However, a judge will probably not credit time spent in confinement in another county or state institution as a fugitive contesting extradition.⁷⁹ Even if the jail credit statutes do not apply to the particular periods of confinement, a defendant may nonetheless be entitled to credit if fairness demands it, such as crediting against a subsequent sentence a period of confinement in an unrelated case where the conviction was reversed.⁸⁰

2. Credit for Confinement on a Different Charge

⁷⁵ *Commonwealth v. Grant*, 366 Mass. 272 (1974); *Sterns, Petitioner*, 343 Mass. 53 (1961).

⁷⁶ *Commonwealth v. Grant*, 366 Mass. 272 (1974) (credit given toward state sentence for pretrial confinement on a federal charge prior to arraignment and setting of bail on state charges arising from the same incident). However, in *Reno v. Koray*, 515 U.S. 50 (1995), the Supreme Court held that a defendant is not entitled to pretrial credit for time held at a community treatment center while released on bail since this was not “official detention” within the meaning of 18 U.S.C. § 3585(b). Under old common law doctrine, a judge only gave credit to prevent the confinement period before and after sentencing from exceeding the maximum allowable for the offense. *Lewis v. Commonwealth*, 329 Mass. 445 (1952).

⁷⁷ *Commonwealth v. Walters*, 12 Mass. App. Ct. 389 (1981). *Commonwealth v. Aquafresca*, 11 Mass. App. Ct. 975 (1981) (defendant who defaulted on Massachusetts charges given credit for amount of time it “might reasonably have taken,” after arrest, for Federal authorities to bring him to Massachusetts).

⁷⁸ *Commonwealth v. McLaughlin*, 431 Mass. 506 (2000) (defendant is entitled to credit for time spent in jail and the Bridgewater State Hospital before sentencing and judge erred in staying the execution of defendant’s criminal sentence until his release from commitment for mental illness on those charges where the jury found him not guilty by reason of insanity); *Sterns, Petitioner*, 343 Mass. 53 (1961) (incompetent defendant committed to mental hospital); *Commonwealth v. Aquafresca*, 11 Mass. App. Ct. 975 (1981) (federal custody under federal fugitive warrant based on Massachusetts charges credited to Massachusetts sentence); *Commonwealth v. Grant*, 366 Mass. 272 (1974) (credit from date of arrest for confinement on federal charge arising from same occurrence as state charge). In Middlesex County, because of a court-ordered cap, prisoners released to a halfway house to alleviate overcrowding at the Cambridge Jail are given jail credits for such time. Other jurisdictions allow pretrial credit for placement in a restrictive circumstance, such as a halfway house or residential treatment program. *See Johnson v. Smith*, 696 F.2d 1334 (11th Cir. 1983); *In re McPhee*, 442 A.2d 1285 (Vt. 1982); *Lock v. State*, 609 P.2d 539 (Alaska 1980). *But see United States v. Zackular*, 945 F.2d 423, 425 (1st Cir. 1991) (federal prisoner not entitled to pretrial credit for time in home confinement).

⁷⁹ *Commonwealth v. Frias*, 53 Mass. App. Ct. 488 (2002) (no credit for jail time detained in custody in a foreign state before executing waiver of extradition); *Commonwealth v. Beauchamp*, 413 Mass. 60, 62–65 (1992) (prisoner who escaped on furlough and later spent 1,574 days in custody of another state while contesting rendition to Massachusetts is not entitled to credit against remaining sentence). *See also Beauchamp v. Superintendent, Old Colony Correctional Center*, 37 F.3d 700 (1st Cir. 1994) (reversing district court decision giving credit for time spent in custody by an escapee who was contesting rendition to Massachusetts).

⁸⁰ *Manning v. Superintendent*, 372 Mass. 387, 394 (1977) (court warns against “an overly legalistic approach” and gives credit “to remedy the injustice of a prisoner serving time for which he receives no credit”).

If a defendant facing two charges is held on bail on only one of the charges but is sentenced on the other charge, that defendant may be entitled to jail credit.⁸¹ If bail is set in different cases or by different courts, a defendant may be entitled to credit in both cases but only for the time before commitment on one of the charges.⁸² A judge should award credit when a defendant has been found to be in the “constructive custody” of the Commonwealth⁸³ or when confinement of a defendant on an unrelated charge served “the Commonwealth’s interest,” that is, where the Commonwealth took advantage of the defendant’s availability on the unrelated case and there existed something more than an outstanding complaint or indictment, such as the setting of bail or arraignment, in the unrelated case.⁸⁴ A defendant may be entitled to jail credit for confinement time in an unrelated case where fairness demands it.⁸⁵

If a defendant is held on multiple charges that result in consecutive sentences, a judge can grant credit for pretrial confinement on only one of the sentences.⁸⁶ Credit for a particular period of confinement stops when the defendant is either released from custody or incarcerated for any offense.⁸⁷ Thus, the time between commitment and resolution of an outstanding charge is not credited toward the pending case.

⁸¹ *Same incident*: McCormack v. Commonwealth, 345 Mass. 514 (1963) (multiple charges from same occurrence); Commonwealth v. Grant, 366 Mass. 272 (1974) (defendant, acquitted of federal charges, entitled to credit for federal pretrial confinement against state sentence for same incident); Commonwealth v. Carter, 10 Mass. App. Ct. 618, 620 (1980) (“[A] prisoner is to receive credit for all jail time . . . served before sentencing which relates to the criminal episode for which the prisoner is sentenced.”). *Different incident*: Commonwealth v. Foley, 17 Mass. App. Ct. 238, 243–44 (1983).

⁸² Libby v. Commissioner, 353 Mass. 472 (1968) (defendant entitled to credit on Norfolk sentence for confinement from Norfolk arraignment to commitment on Suffolk sentence, but not for confinement prior to the Norfolk arraignment or for confinement after the imposition of the Suffolk sentence and before the imposition of the Norfolk sentence).

⁸³ Commonwealth v. Grant, 366 Mass. 272, 276 (1974). In *Grant*, Massachusetts lodged its detainer with the federal authorities holding the defendant and remanded the defendant to jail when federal bail was reduced to personal recognizance. The court held that credit should be given for “any time spent in jail prior to sentencing by a defendant charged with . . . an offense which arises out of the same occurrence and of which he is acquitted, given a significant state interest and involvement in the confinement.” *But see* Commonwealth v. Blaikie, 21 Mass. App. Ct. 956, 957 (1986) (court denied credit without considering whether confinement served interest of Commonwealth); Kinney, Petitioner, 5 Mass. App. Ct. 457 (1977) (defendant sentenced for crime committed on escape not in constructive custody of Commonwealth for purposes of getting concurrent credit on pre-escape sentence).

⁸⁴ Commonwealth v. Grant, 366 Mass. 272 (1974). Defendants in this situation should make an effort to be brought into court on the outstanding charges.

⁸⁵ Commonwealth v. Foley, 17 Mass. App. Ct. 238 (1983) (where fairness demands, credit is given even where different offenses are involved); Chalifoux v. Commissioner of Correction, 375 Mass. 424, 427 (1978) (escaped Massachusetts prisoner given credit for time served on later concurrent California sentence where Massachusetts declined California’s offer to deliver the defendant to Massachusetts and the defendant was never informed of refusal). *See also* Commonwealth v. Milton, 427 Mass. 18 (1998) (14 months served awaiting trial on armed robbery of which defendant was acquitted could not be applied to sentence on unrelated probation surrender six months after acquittal).

⁸⁶ Commonwealth v. Carter, 10 Mass. App. Ct. 618 (1980).

⁸⁷ Libby v. Commissioner, 353 Mass. 472 (1968); Needel, Petitioner, 344 Mass. 260 (1962). However, no appellate decisions bar a judge from setting bail and awarding credit for

3. Credit for Pretrial Confinement Where Defendant on Escape or Parole

Credit for pretrial confinement will stop where a defendant is returned on a sentence from which that defendant escaped or was paroled. Thus, if a pretrial defendant is held under the sentence the defendant was serving when paroled or when the defendant escaped, credit is only given toward that sentence, not toward any sentence that may be imposed for the new charges.⁸⁸

Whether to seek release to the previous sentence or to request that the defendant be held on bail in the new case may depend in part on a determination of which case will cause the defendant to serve the most time and whether counsel is advocating for a concurrent sentence for the new crime.⁸⁹ If the defendant is not returned to serve the balance owed on the pre-escape or pre-parole sentence before the judge imposes the new sentence, the new sentence becomes an “*intervening*” sentence.⁹⁰ The defendant will then serve the balance of the old sentence after completion of the new sentence. Nevertheless, where a prisoner is serving an intervening sentence and there is a parole violation warrant, a judge, on a revise or revoke motion, can revoke sentence and set bail at personal recognizance. By this act, a judge has served the parole warrant, that is, returned a defendant to the custody of the Parole Board. A judge may then re-sentence a defendant to a concurrent sentence, giving jail credits for the time served on that sentence.

Where the judge intends the defendant to receive credit on the parole sentence from the time of the original sentence, the mittimus should reflect that the service of the parole warrant and the resentencing is “*nunc pro tunc*.” The Board will then recalculate service of its warrant as of the date of the original sentencing. However, generally the Board will not serve its warrant *nunc pro tunc* before the original sentencing date.

4. Safeguarding Credits at Sentencing

Counsel should not assume that a defendant will somehow get the proper jail credit without counsel's active participation. A state correctional facility will not give jail credits that are not recorded on the mittimus, although county facilities do.

Before sentencing, counsel should review carefully with the defendant all periods of confinement since the beginning of the prosecution of the case. Ask about all the places at which the defendant was confined. Be sure to include all case-related time spent in a hospital or in alcohol or drug programs instead of jail.⁹¹ Ask about all phases

time spent after bail is set where the defendant has already been committed on another case before the bail is set.

⁸⁸ Harkey v. Superintendent, 356 Mass. 722 (1969). But see Commonwealth v. Clark, 20 Mass. App. Ct. 962, 964 (1985) (indicating that confinement term prior to sentencing on new charges is not credited to either the old or new sentence).

⁸⁹ See *supra* § 40.6A (concurrent sentence scheme).

⁹⁰ By law a parole violation warrant cannot be served while the defendant is serving an intervening sentence; however, the Board may vote to withdraw such warrant as authorized by G.L. c. 127, § 149. See *supra* § 40.10F(3)(b) (parole violation warrant).

⁹¹ For example, commitments for competency and criminal responsibility examinations and aid in sentencing evaluations. G.L. c. 123, §§ 15, 16, 35. See also Commonwealth v. McLaughlin, 431 Mass. 506 (2000); and *supra* note 78.

of the prosecution and execution of sentence including confinement time resulting from default or probation warrants.

Counsel should review the complaint, docket entries, and other court records⁹² for documentary proof of confinement and, for periods not obvious from those records, be ready to offer verification of confinement directly from the appropriate institution. In counting the number of days of credit owed, each part of a day counts as a day of credit and every day before the sentencing date should be counted.⁹³

Even when counsel has requested a specific number of days and the judge appears to have ordered the amount requested, the mittimus might still not accurately reflect credit. Counsel should be aware of who actually records the credit and make sure the credit is written down at the time of sentencing.⁹⁴

Finally, counsel should inform the defendant of the amount of jail credit ordered; once committed the defendant can check to see that correctional authorities have credited this amount.

§ 40.7B. GOOD-TIME DEDUCTIONS FROM SENTENCE

1. Earned Good-Time Deductions

A prisoner may reduce the maximum term of both state and county sentences by earned good conduct deductions, also known as earned good-time or earned work credits. Earned good-time deductions also reduce the minimum term of a state prison sentence, thereby shortening the time to parole.⁹⁵ However, it has no effect on the parole eligibility date of a house of correction sentence. Earned good-time deductions also cannot reduce a life sentence or its parole eligibility;⁹⁶ however, such deductions earned during the life sentence reduce any from-and-after sentence if the sentences are aggregated.⁹⁷ But earned good time can reduce both the parole eligibility and wrap-up

⁹² For example, to show that the defendant was in custody for all or part of the time between arrest and arraignment counsel should refer to the police report or complaint, arrest or default warrant return in the file, probation interview records, or bail records.

⁹³ The day of sentencing will be counted as part of the post-trial custody. 1961–62 Op. Atty. Gen. 113.

⁹⁴ If the courtroom clerk insists that someone else will check the figures, ask to review the mittimus before the court sends it to the institution. Alternatively, speak with the person who will actually record the amount of credit on the mittimus to make sure the ordered credit is on the mittimus. If the mittimus cannot be reviewed before it is sent to the institution, counsel should review the copy in the court another day and request an amended mittimus from the clerk's office if it is in error. If this fails to produce the proper amount of credit, file a motion for credit and request a hearing before the sentencing judge.

⁹⁵ G.L. c. 127, §§ 129D and 133.

⁹⁶ The 2012 amendments to G.L. c. 279 § 24, that require a judge to fix both a minimum and maximum term when imposing a second degree life sentence have arguably had the effect of making such sentences eligible for good time.

⁹⁷ *Hamm v. Commissioner*, 29 Mass. App. Ct. 1011 (1991). *See also Hamm v. Superintendent*, 72 F.3d 947 (1st Cir. 1995). However, the parole eligibility of the consecutive sentence is only reduced by the earned good-time deductions accruing during the life sentence if the offender committed the crime that resulted in the consecutive sentence before January 1, 1988.

date of an habitual offender sentence.⁹⁸ Certain offenses that carry a mandatory term of incarceration also may not be reduced by earned good-time deductions.⁹⁹

A prisoner historically has been able to earn up to two and one-half days a month of earned good time by participating in a work, education, or treatment program, up to a maximum total of seven and one-half days per month.¹⁰⁰ However, on July 31, 2012, Governor Patrick stated that he will sign a bill approved by the Legislature that increases the cap to 5 days per month for each program, and the overall cap to 10 days per month. In addition, legislation permits an extra 10 days of good time to any prisoner who completes a six month program in a pre-release facility.¹⁰¹ Prisoners may also earn two and one-half days a month by being in a camp facility.¹⁰² Nonetheless, counsel should be cautious about advising a defendant that a sentence will be significantly shortened by earned good-time deductions because the unavailability of programs, or long wait-lists for some programs, may limit the impact of the statute.¹⁰³

Correctional authorities award earned good-time deductions in their discretion, although in practice almost all institutional achievement that warrants good time is credited.¹⁰⁴ Correctional authorities *cannot* take away earned good time for institutional

⁹⁸ G.L. 127, § 133B.

⁹⁹ *See, e.g.,* Lydon v. Sheriff, 393 Mass. 1002 (1984) (rescript opinion) (concerns the Bartley-Fox Gun Law, G.L. c. 269, § 10). Where certain mandatory terms have been interpreted to not prohibit good-time deductions, the Legislature has rectified the situation. For example, the decision in Rodriguez v. Superintendent, 24 Mass. App. Ct. 481 (1987), that good-time deductions could reduce the mandatory terms of drug offenses, resulted in the amendment of G.L. c. 94C, § 32H by St. 1989, c. 415.

¹⁰⁰ G.L. c. 127, § 129D. Previously, the Department of Correction only authorized two and one-half days of credits in each of the statutory categories: work, education, or programs; however, now a prisoner can collect the full seven and one-half days in any one area. Moreover, a few county institutions award more than seven and one-half days good time per month because of court orders in prison overcrowding cases. For example, the Middlesex House of Correction awards up to twelve and one-half days a month.

¹⁰¹ *See*, G.L. c. 127, § 129D, as amended in 2012.

¹⁰² G.L. c. 127, § 129C. However, there is only one camp facility, MCI Plymouth, and that only houses 200 prisoners. Since there is no camp for women, female prisoners are unable to earn 129C deductions. This discrimination is arguably a violation of equal protection. *See* M.C. v. Commissioner, 399 Mass 909 (1987).

¹⁰³ The availability of programs eligible for earned good time varies considerably from prison to prison with higher security prisons offering fewer opportunities to earn credits.

¹⁰⁴ However, in Piggott v. Commissioner of Correction, 40 Mass. App. Ct. 678 (1996), the Court upheld the DOC's practice of denying good time for participation in counseling, alcoholics anonymous, and narcotics anonymous. The DOC did not appeal the trial judge's order that the Commissioner of Correction retroactively award earned good-time deductions to prisoners who had participated in AA, NA and counseling programs between September 1987 and May 1993, finding a violation of the equal protection clause because certain institutions had given credit for such participation while other institutions did not. Distinguishing Cordeiro v. Commissioner of Correction, 37 Mass. App. Ct. 960 (1994), the Appeals Court also held that, except where a prisoner was now serving a from-and-after sentence for a crime committed while on parole, he was entitled to retroactive earned good-time deductions from the consecutive sentence that had been acquired, but not credited, while he was still serving the first sentence.

misbehavior.¹⁰⁵ Earned good time cannot be awarded as an equitable remedy to compensate prisoners who were unlawfully deprived of the opportunity to participate in programs.¹⁰⁶

2. Statutory Good-Time Deductions

Statutory good-time deductions have been abolished except where the defendant committed the crime in whole or part before July 1, 1994.¹⁰⁷ Since the stated legislative intent of the Truth-in-Sentencing Act was that the amount of time an offender actually serves in prison should not be increased “solely because of the repeal of good time,”¹⁰⁸ counsel may wish to advocate for a sentence that is equivalent to the sentence that a judge might have imposed under the old system.¹⁰⁹

Where statutory good-time deductions apply, when a defendant begins service of a sentence(s), correctional authorities automatically credit all statutory good-time deductions that may accrue during the total period of confinement.¹¹⁰ The rate of deductions is as shown in Table 40-1:

Table 40-1: Rate of Statutory Good-Time Deductions from Sentence

<u>Length of sentence</u>	<u>Days deducted from sentence</u>
4 months up to less than 1 year	2½ days/month
1 year up to less than 2 years	5 days/month
2 years up to less than 3 years	7½ days/month
3 years up to less than 4 years	10 days/month
4 years or more	12½ days/month

¹⁰⁵ However, if a prisoner intentionally submits an affidavit in support of a request for a waiver of filing fees or court costs in civil litigation, that was “frivolous and filed in bad faith in order to abuse the judicial process,” the court may order the forfeiture of up to 60 days of earned good conduct credit. G.L. c. 231, § 6F..

¹⁰⁶ *Haverty v. Commissioner of Correction*, 440 Mass. 1 (2003).

¹⁰⁷ G.L. c. 127, § 129, repealed by St. 1993, c. 432, § 10.

¹⁰⁸ G.L. c. 211E, § 3(c).

¹⁰⁹ For example, a prisoner with a 20 year sentence that is eligible for statutory good time would complete it in less than 12 years.

¹¹⁰ As a rule, sentences are aggregated for the purposes of computing the *rate* of statutory good-time deductions and establishing a single “good-conduct discharge date” from all of the sentences. Exceptions to this rule include where a judge orders a sentence for a crime committed on parole served concurrently or consecutively to the pre-parole sentence and where one of the crimes is ineligible for statutory good-time deductions. *But see* *Febonia v. Superintendent, MCI-Shirley*, 40 Mass. App. Ct. 933 (1996) (suggesting that sentences ineligible for good time should be aggregated both to compute the rate of statutory good time and to set a single release date). The rate of statutory good-time deductions for split sentences is based on the commitment term. If the offender violates probation and returns to custody to “serve the balance of the sentence,” correctional authorities adjust the statutory good-time rate to reflect the maximum length of sentence.

While a prisoner may lose statutory good-time deductions through misbehavior, the prisoner may petition for restoration of those deductions after a period of good behavior.¹¹¹

Certain offenses carry a mandatory term of incarceration that may not be reduced by statutory good-time deductions.¹¹² In addition, statutory good-time deductions cannot be given to certain sex offenses¹¹³ and for crimes committed while confined.¹¹⁴ Furthermore, because there is no ascertainable maximum date, statutory good-time deductions do not accrue during a life sentence.

A prisoner receives deductions only for actual incarceration time.¹¹⁵ When a prisoner is paroled, the sentence length is recalculated to reflect only the statutory good-time deductions that actually accrued, which, with earned good-time deductions, establishes the *parole discharge date* for pre-Truth-in-Sentencing crimes.

§ 40.7C. MANDATORY TERMS OF INCARCERATION

Some penal statutes require a mandatory term of incarceration¹¹⁶ that the prisoner must serve without the benefit of one or more of the following: probation, parole, furloughs, work release, or good-time deductions.¹¹⁷ Chart A, *infra*, outlines

¹¹¹ Although the General Laws determine a defendant's entitlement to statutory good-time deductions, the correctional facilities determine what if any good time the prisoner may forfeit for disciplinary infractions. 103 C.M.R. 410.14 (forfeiture of good conduct credits) (2000) and 410.15 (restoration of good conduct credits) (1993). The General Laws mandate forfeiture of all statutory good-conduct deductions for certain escapes or attempted escapes. G.L. c. 127, §§ 49, 83B. *See Henderson v. Commissions of Barnstable County*, 49 Mass. App. Ct. 455 (2000) (revocation of plaintiffs' statutory good-time deductions was improper under 103 CMR 943.00 et seq. (1992)).

¹¹² Deductions accrue during the mandatory term and reduce the maximum term of sentence as long as the discharge date does not fall below the mandatory term of incarceration.

¹¹³ G.L. c. 127, § 129 (repealed). The excluded sex offenses are those in violation of G.L. c. 265, §§ 13B, 22, 22A, 23, 24, 24B; c. 272, §§ 17, 35, 35A or attempts to commit any of these crimes. However, a prisoner committed for violation of these statutes may still accrue earned good-time deductions. *Pina v. Superintendent*, 376 Mass. 659 (1978).

¹¹⁴ G.L. c. 127, § 129 (repealed). *Amado v. Superintendent, MCI-Walpole*, 366 Mass. 45 (1974). The Department of Correction does not consider crimes committed on escape as crimes committed while confined, although crimes committed while on work release are crimes committed while confined. *Rachal, Petitioner*, 25 Mass. App. Ct. 126 (1987); *Nimblett v. Commissioner of Correction*, 20 Mass. App. Ct. 988 (1985).

¹¹⁵ *See Pina v. Superintendent*, 376 Mass. 659, 666–68 (1978).

¹¹⁶ The phrase *mandatory term of incarceration* is sometimes referred to as a "mandatory minimum term." This latter reference is easily confused with the minimum sentence a judge must impose under a penal statute if the judge imposes incarceration. *See, e.g., Commonwealth v. Brown*, 47 Mass. App. Ct. 616 (1999); *Commonwealth v. Brown*, 431 Mass. 772 (2000). Since these statutes do not prohibit the release of the prisoner prior to the minimum sentence that the judge must impose, they are not strictly considered to create "mandatory sentences."

¹¹⁷ In *Febonia v. Superintendent, MCI-Shirley*, 40 Mass. App. Ct. 933 (1996), the court held that a prisoner does not receive statutory good time for the period when he is serving a mandatory term of incarceration, even when that sentence is followed by a consecutive, non-mandatory sentence and the sentences are aggregated.

some of the offenses that carry mandatory terms of incarceration and notes, in each instance, what is prohibited during such mandatory term.¹¹⁸ However, counsel should examine the actual text of each applicable statute for its specific prohibition, especially because the law in this area often changes as the Legislature adds new mandatory sentences or modifies old ones. For example, on July 31, 2012, Governor Patrick stated that he would sign a bill approved by the Legislature that makes significant modifications to certain mandatory drug sentences, including reductions in the length of the mandatory minimum term, increases in the amounts of the controlled substance that trigger the mandatory, removal of restrictions on work release, and changes to the criteria necessary for conviction of a drug offense in a school zone.¹¹⁹ And in 2010 the Legislature significantly ameliorated the penalties for certain mandatory drug offenses that result in sentences to the house of correction.¹²⁰ On the other hand, in 2011 the Legislature enacted new statutes involving human trafficking that require mandatory periods of incarceration.¹²¹ Counsel should look at the effective date of each statute because the *ex post facto* clause prohibits application of enhanced penalties for crimes that occur before the statute went into effect; however, many of the 2012 and 2010 changes that shorten the mandatory minimums are retroactive

PART III: RETURN TO THE COMMUNITY BEFORE TERMINATION OF SENTENCE

§ 40.8 CLASSIFICATION AND TRANSFER OF PRISONERS

Classification is the single most important determinant of what daily life will be like for a prisoner. On commitment, prisoners in both the state and the county correctional systems are classified according to security concerns and treatment needs to determine where they will serve their sentences.¹²² There are separate processes for determining the institution where the prisoner will be placed, and for deciding where

¹¹⁸ Although the Truth-in-Sentencing Act allows a judge to “impose a sentence below any mandatory term prescribed by statute, if the judge sets forth the reasons in writing,” a judge cannot exercise this authority unless and until the Legislature adopts the guidelines. *Commonwealth v. Russo* 421 Mass. 317 (1995).

¹¹⁹ See H, 3818 “An Act Relative to Sentencing and Improving Law Enforcement Tools (2012).

¹²⁰ See St, 2010, c, 256. The new law applies to certain drug offenders convicted of distribution of Class A, Class B or Class C substances, trafficking, and school zone violations who are sentenced to the house of correction. These offenders are now eligible for parole after serving one-half the sentence unless (1) they used violence, or the threat of violence, or possessed a gun or other weapon during the drug offense; (2) “engaged in a course of conduct whereby he directed the activities of another” who committed a drug felony; or (3) sold drugs to minors or used minors to sell drugs. The new law also allows the Department of Correction or a county sheriff to grant permission for a drug offender to participate in education, training or employment programs outside of prison. G.L, c, 94C, § 32H. as amended by St. 2010, c. 256, §72,

¹²¹ See G.L. c. 265, §§ 50-53 as added by [St.2011, c. 178, § 23, eff. Feb. 19, 2012](#).

¹²² G.L. c. 124, § 1(f); c. 127, §§ 20–21 (male offenders are sent to a classification center at MCI Cedar Junction (which has replaced MCI Concord as the DOC reception center) unless committed to Bridgewater Treatment Center, and female offenders are classified at MCI-Framingham).

within the facility he will be housed. Correctional authorities have wide discretionary authority to determine where prisoners will be housed; however, male prisoners must be separated from female prisoners; minors separated from “notorious offenders”; and persons convicted of “infamous crimes” and pretrial detainees must be separated from all other prisoners.¹²³ There are also statutory restrictions on the placement of certain offenders in pre-release facilities, particularly sex offenders and persons serving mandatory terms.¹²⁴

Within these constraints, Department of Correction uses an objective point-based classification system to make classification decisions. The Department’s regulations establish a multi-step process, providing for an initial classification hearing and reclassification at least annually after that.¹²⁵ At each classification hearing, a correctional program officer presents to the classification board the prisoner’s “objective classification score” using a scoring sheet based on the substantive criteria set forth in the Department’s classification manual.¹²⁶ The manual requires that each prisoner be scored on a set of specified risk factors.¹²⁷ Depending on the overall point score, the manual designates a particular custody level for the prisoner, ranging from pre-release to maximum security.¹²⁸ The manual also provides that certain specified factors will bar a prisoner from medium or minimum custody (mandatory overrides), or permit the classification board to recommend to the commissioner that the prisoner be assigned to a higher or lower custody level than called for by the point score (discretionary overrides).¹²⁹

The prisoner’s objective score only determines his custody level; the decision to assign the prisoner to a particular state prison with that security rating is up to the

¹²³ G.L. c. 127, § 22. *See also* *Brown v. Commissioner of Correction*, 394 Mass. 89 (1985) (art. 12 of the Mass. Const. Declaration of Rights prohibits as “infamous punishment” incarceration at the maximum security prison of someone who neither was indicted nor waived indictment); *Commissioner of Correction v. McCabe*, 410 Mass. 847 (1991) (barring transfer of escaped prisoners designated as “sexually dangerous persons” under G.L. c. 123A, § 5 (repealed by St. 1990, c. 150, § 304), to correctional facility as pretrial detainees or after conviction for escape). A juvenile offender given an adult sentence serves the sentence in a segregated part of the Plymouth House of Correction. Those civilly committed as sexually dangerous persons under G.L. c. 123A, §§ 12–17 (St. 1999, c. 74, §§ 3–8) must be kept separate and apart from other prisoners at the Treatment Center.

¹²⁴ *See, e.g.*, G.L. c. 127, § 49 (barring certain sex offenders from work release)

¹²⁵ 103 CMR 420.08 and 09.

¹²⁶ The scoring sheets are contained in the manual and are set forth in Chart B, *infra*.

¹²⁷ 120 C.M.R. 420.08(3)(f). There are seven scored variables used to determine initial classification: the severity of the crime and criminal history, prior record of institutional violence, escape history, employment history, education and age. See Chart B. At subsequent classification hearings, eight variable are scored, some of which are different from those used to determine the initial classification: severity of the crime and criminal history, escape history, prior institutional violence, number and seriousness of disciplinary reports, age and program participation, *Id.*

¹²⁸ There is a separate classification scoring sheet for female prisoners, which differs from the sheets for males primarily in that there is no maximum security female prison in Massachusetts.

¹²⁹ The specific mandatory and discretionary overrides are set forth in Chart B.

board and the commissioner.¹³⁰The commissioner or his designee makes the final decision.¹³¹Prisoners serving state prison sentences may also be transferred to a county house of correction (except prisoners serving a life sentence), a federal prison¹³² or to a facility in any other state;¹³³ an alien may be repatriated to serve the Massachusetts sentence under any federal treaty.¹³⁴

The Department of Correction periodically reviews the classification of each prisoner using the standards set forth in the manual. Prisoners can also be temporarily transferred without a hearing if they are being investigated for a disciplinary infraction or are deemed to present security issues.¹³⁵o. State prisoners being held in other states or in a federal facility are reviewed in accordance with the classification procedures and guidelines of that jurisdiction.¹³⁶If a defendant is sentenced to a house of correction, the judge will specify which county facility, ensuring acceptance of the defendant at that particular house of correction.¹³⁷ However, a prisoner may serve a county sentence in the state correctional system, except at a state maximum security prison, and movement among the houses of correction is possible.¹³⁸

Prisoners do not have a constitutionally protected right to be given the same prison placement as other prisoners serving the same sentence for the same crime.¹³⁹ However, the Department must follow its regulations and policies concerning classification and transfer of prisoners.¹⁴⁰

¹³⁰ For example, the Department has seven medium security prisons for males, A prisoner with a medium security custody score can be assigned to any of these facilities at the discretion of the commissioner.

¹³¹ The commissioner has delegated the power to make final classification decisions to the director of classification.

¹³² G.L. c. 127, § 97A.

¹³³ The Interstate Corrections Compact authorizes the transfer of prisoners to any other state that is a signatory to the compact. [G.L. c. 125 App. § 2-1](#). See also, New England Interstate Corrections Compact [G.L. c. 125 App. § 1-1](#).

¹³⁴ G.L. c. 127, § 97B. The prisoner must submit such transfer request to the Department of Correction in the first instance. If approved by the Governor of Massachusetts and the receiving country, the International Affairs Office of the Department of Justice in Washington, D.C. orchestrates the transfer. A treaty for the transfer of prisoners must exist between the United States and the receiving country.

¹³⁵ 120 C.M.R. 420.09(6).

¹³⁶ 103 C.M.R. 420.14(1).

¹³⁷ G.L. c. 279, § 15.

¹³⁸ G.L. c. 126, § 5, c. 127, § 97; 103 C.M.R. 506 (1997).

¹³⁹ *Dougan v. Commissioner of Correction*, 34 Mass. App. Ct. 147 (1993); *Lyman v. Commissioner of Correction*, 46 Mass. App. Ct. 202 (1999) (no constitutionally protected interest in moving to or staying in lower security

¹⁴⁰ *Haverty v. Commissioner of Correction*, 437 Mass. 737 (2002) (due process rights violated where prisoners held in restrictive units at MCI Cedar Junction without being afforded hearings required before placement in segregation). Where policies are not followed, money damages may result. See *Blake v. Commissioner of Correction*, 403 Mass. 764 (1989)(damages awarded where prisoners moved out-of-state without classification hearing). In *Hoffer v. Commissioner of Correction*, 412 Mass. 450 (1992), the court awarded money damages and reinstatement of good-time deductions in an action under 42 U.S.C. § 1983 where the Department failed to comply with its regulations and a prisoner was confined in the segregation unit for two and one-half years.

§ 40.9 FURLOUGHS

The Department of Correction and each county correctional facility may release certain qualified prisoners for temporary, limited periods of time on “regular,” “emergency,” and “emergency under escort” furloughs.¹⁴¹ Release on furlough is a discretionary act of the Commissioner of Correction or the Sheriff from which there is no administrative appeal. The criteria established by the Department of Correction for granting a furlough include: (a) to attend the funeral of a relative; (b) to visit a critically ill relative; (c) to obtain medical, psychiatric, psychological or other social services when adequate services are not available at the facility; (d) to contact prospective employers; (e) to secure a suitable residence for use upon release on parole or discharge; (f) for any other reason consistent with the reintegration of a committed offender into the community.¹⁴² The Department also sets other eligibility requirements, such as that the prisoner to be within three years of his earliest possible release date.¹⁴³

All prisoners are potentially eligible for furloughs, except those serving offenses for which the statute precludes any type of furlough during the mandatory term of incarceration¹⁴⁴ and those prisoners serving life sentences for first-degree murder. Although DOC regulations provide that a prisoner is theoretically eligible for up to fourteen furlough days during the course of a “furlough year” and can take seven consecutive furlough days,¹⁴⁵ regular furloughs have been essentially abolished, and other furloughs are much rarer and shorter. If the Department of Correction grants a prisoner a furlough, written notification is provided to the police department of the community to which the prisoner will be furloughed, the Department of Public Safety, the prisoner's approved furlough sponsor, and victims cleared to receive this information.¹⁴⁶ A disciplinary report results if a prisoner fails to return from a furlough at the designated time, even if the prisoner notified the institution of the late arrival.¹⁴⁷ The Commissioner of Correction or institution superintendent may declare at any time during the furlough that a prisoner has escaped if there exists sufficient evidence to reasonably assume such escape.¹⁴⁸ The Department of Correction considers a prisoner's

¹⁴¹ G.L. c. 127, § 90A; 103 C.M.R. 463.11). Furlough criteria for prisoners serving houses of correction sentences at a county facility are provided in the procedure manual of each institution.

¹⁴² 103 C.M.R. 463.07(2).

¹⁴³ 103 C.M.R. 463.07(1).

¹⁴⁴ Some mandatory sentences preclude all furloughs, while others permit furloughs in certain circumstances, such as to visit a critically ill relative.

¹⁴⁵ G.L. c. 127, § 90A. A furlough day consists of 24 hours or 48 half-hour periods. A furlough year commences from the date of final approval of an initial furlough and ends 12 months later. 103 C.M.R. 463.06 (definitions). *See also* 103 C.M.R. 463.07 (eligibility requirements) and 103 CMR 463.08 (furlough time).

¹⁴⁶ 103 C.M.R. 463.14(1).

¹⁴⁷ 103 C.M.R. 463.18 (1993).

¹⁴⁸ 103 C.M.R. 463.18(2) (1993).

failure to return within two hours of the designated time an escape, regardless of prior notification.¹⁴⁹

§ 40.10 PAROLE

§ 40.10A. PAROLE BOARD

The Massachusetts Parole Board is an agency under the Executive Office of Public Safety. The term *Parole Board* refers to both the seven-member Board, appointed by the Governor, and the agency.¹⁵⁰ The Parole Board also acts as the Advisory Board of Pardons.¹⁵¹

1. Jurisdiction

Parole is generally the release of a prisoner to serve the remainder of a sentence under supervision in the community; however, since the Board can parole a prisoner to a subsequent sentence or a detainer from a foreign state, a prisoner can be on parole from one sentence, but still remain incarcerated. The Board has paroling authority over all prisoners serving a sentence of imprisonment — or aggregate sentences of imprisonment — of sixty days or more where the sentence does not prohibit parole.¹⁵²

The General Laws authorize the Parole Board to supervise parolees and to revoke parole status if necessary.¹⁵³ The Parole Board has jurisdiction over a parolee until the *parole discharge date*. The parole discharge date is the maximum date of sentence reduced by any applicable good-time deductions.¹⁵⁴

¹⁴⁹ 103 C.M.R. 463.17(3); penalty is provided by G.L. c. 268, § 16.

¹⁵⁰ G.L. c. 27, § 4. *Stewart v. Commonwealth*, 413 Mass. 664, 669 (1992) (parole is wholly an executive function).

¹⁵¹ G.L. c. 127, § 154.

¹⁵² G.L. c. 127, § 128. Therefore, if a prisoner is serving two, 30-day sentences, the Parole Board has jurisdiction and will set parole eligibility at 30 days.

¹⁵³ G.L. c. 27, § 5. *See also* *Commonwealth v. Amirault*, 415 Mass. 112 (1993) (in allowing a Rule 29 motion the judge improperly considered denial of parole, an event taking place after sentencing, usurping the rule of the Parole Board; this violated art. 30, Mass. Const. Declaration of Rights, the doctrine of separation of powers).

¹⁵⁴ G.L. c. 127, § 133, as amended by St. 1993, c. 432, § 11; 120 C.M.R. 100.00 (Parole Dates and Periods and Sentencing Periods and Dates). *See*, G.L. c. 127, § 129 (repealed by St. 1993, c. 432, § 10); 103 C.M.R. 411.00 *et seq.*. When the Parole Board returns a parolee serving a pre-truth-in-sentencing sentence to custody for violation of parole, correctional authorities withhold prospective statutory good-time deductions, i.e., deductions attributable to the portion of the sentence not yet served for a six-month period (“*Allen Rule*”). This rule was developed to deal with a quirk of the statutory good time system, which otherwise would have allowed an offender to deliberately violate parole because crediting the good time would cause the sentence to be over. After the end of the six months, the offender receives all the statutory good-time deductions to which he or she may be entitled under the sentence. If the sentence is completed during the six-month period — taking into account the time served in custody prior to parole, time served on parole, and the good-time deductions accrued prior to parole — then the offender is discharged prior to expiration of the six months. *Allen v. Massachusetts Parole Bd.*, 352 Mass. 471 (1967); *Diafarino v. Commissioner of Correction*, 371 Mass. 545, 548 (1976). *Burno v. Commissioner of Correction*, 399 Mass. 111 (1987)

2. Requesting Information from Parole Board

With few exceptions, information created and maintained by the Parole Board is protected from public dissemination as criminal offender record information (CORI)¹⁵⁵ or as evaluative information.¹⁵⁶ The Criminal History Systems Board governed the dissemination of this information until passage of CORI reform laws in 2010, which transferred this duty to a new Department of Criminal Justice Information Services in the Executive Office of Public Safety.¹⁵⁷ The offender,¹⁵⁸ an authorized representative,¹⁵⁹ and individuals cleared by the Criminal History Systems Board (or Department of CJIS)¹⁶⁰ may receive CORI from the Parole Board. Evaluative information is defined at G.L. c. 6, § 167, and access to this information is more limited than CORI.¹⁶¹ The Board will not give copies of CORI or evaluative information generated by another law enforcement agency.¹⁶² However, the requester will be told in writing what information is not generated by the Board and where to request copies of the information. Information deemed confidential, such as victim statements, will not be disclosed unless due process requires disclosure and then disclosure may be a fair oral or written summary.

The Parole Board will also provide information in response to public inquiry through the public information officer about whether an identified offender is currently confined;¹⁶³ eligible for parole and the estimated parole date; or on parole, and if on parole, the conditions of parole and when parole supervision began and when it will end.¹⁶⁴ In addition, the Parole Board may disseminate CORI to the public if needed for the apprehension of a fugitive.¹⁶⁵ In all other situations, the public may obtain CORI and evaluative information with a valid subpoena and a court order.¹⁶⁶

The Board enters all its decisions into the public record by way of a “record of decision.”¹⁶⁷ The *Record of Decision* contains a summary of the offense, which includes the court, the statute violated, date of sentence, length and effective date of

¹⁵⁵ G.L. c. 6, § 172; 803 C.M.R. 2.01–2.04(4), 2.04(5)–(11) .

¹⁵⁶ G.L. c. 6, § 167; *see* 803 C.M.R. 2.03 (evaluative information), 2.04(4).

¹⁵⁷ G.L. c. 6 § 167A, as amended by Acts 2010 c. 256, § 8.

¹⁵⁸ G.L. c. 6, § 175; 803 C.M.R. 6.02; 120 C.M.R. 500.03. *See* Antell v. Attorney General, 52 Mass. App. Ct. 244, 249 (2001).

¹⁵⁹ *See* 120 C.M.R. 500.04; 803 C.M.R. 6.06. To obtain information, the offender and the representative must complete and sign a Parole Board form.

¹⁶⁰ G.L. c. 6, § 172; 120 C.M.R. 500.06. These individuals are usually the victims of crimes or family members of crime victims.

¹⁶¹ For example, requests for evaluative information may be denied because of a threat to the safety of an individual (including the offender) or the security of a correctional facility.

¹⁶² 120 C.M.R. 500.06.

¹⁶³ The easiest way to find out where a Department of Correction prisoner is incarcerated is to check vinelink.com. If you telephone a county facility, you can find out whether a particular individual is incarcerated there.

¹⁶⁴ G.L. c. 6, § 172; 120 C.M.R. 500.02(1).

¹⁶⁵ 120 C.M.R. 500.02(2). *See, e.g.*, Bellin v. Kelley, 435 Mass. 261 (2001).

¹⁶⁶ 120 C.M.R. 500.02(3).

¹⁶⁷ G.L. c. 127, § 130.

sentence. The Record of Decision further describes the type of parole hearing and date of hearing; the date of decision; the names of the Board members voting; the vote of each member; and the decision. For prisoners serving life sentences, the Record of Decision is available to the public on the Parole Board's website.

In all stages of the parole hearing process — initial release, review, rescission, and revocation — representatives and prisoners should request information through the institutional parole officer. The officer will refer requests to other agency personnel when needed. Parolees should refer their questions to their field parole officer. An individual no longer on parole requests CORI from the legal unit.

§ 40.10B. PAROLE ELIGIBILITY

The parole eligibility date is the date on which a prisoner, serving single or multiple sentences of sixty days or more, becomes eligible for parole. Generally, the Board sets a single parole eligibility date for multiple sentences.¹⁶⁸ Counsel should not presume that parole release will be granted on the eligibility date, or that parole will be granted at all.¹⁶⁹

Parole Board regulations set parole eligibility for house of correction (and reformatory) sentences; for state prison sentences, parole eligibility is governed by statute.¹⁷⁰ Parole eligibility is established by adding to the effective date of sentence the required parole ineligibility period and subtracting one day.¹⁷¹ For a house of correction (and reformatory) sentence, earned (and statutory) good-time deductions do not affect the calculation of the parole eligibility date. However, earned good-time deductions are subtracted directly from the parole eligibility date of state prison sentences.¹⁷² Chart C, *infra*, summarizes parole eligibility pre- and post-Truth-in-Sentencing Act for all sentences.

1. House of Correction Sentence

The rules governing parole eligibility are the same for pre- and post-Truth-in-Sentencing sentences. A defendant sentenced to a house of correction will become eligible for parole after service of one-half the commitment term but not later than two years even where there are *consecutive house of correction sentences*.¹⁷³ However, if one or more the sentences carries a mandatory minimum term which together exceed

¹⁶⁸ G.L. c. 127 § 133; 120 C.M.R. 200.04; *Henschel v. Commissioner*, 368 Mass. 130 (1975); *Hamm v. Commissioner*, 29 Mass. App. Ct. 1011 (1991). *See also* *Hamm v. Superintendent*, 72 F.3d 947 (1st Cir. 1995).

¹⁶⁹ *See* discussion in note 23, *supra*.

¹⁷⁰ G.L. c. 127, § 133; 120 C.M.R. 200.02.

¹⁷¹ In measuring the period of ineligibility, the first day, the last day, and all of the days in-between are counted. *Commonwealth v. Keniston*, 5 Pick 420 (1927). Subtracting one day from the effective date of sentence accomplishes counting the first and last day of the parole ineligibility period. Time not spent in custody during the parole ineligibility period will delay parole eligibility by the number of days not served (i.e., escape). Although time on furlough is not considered an interruption in the sentence, an escape while on furlough or on work release program is considered an interruption. *Commonwealth v. Clark*, 20 Mass. App. Ct. 962 (1985).

¹⁷² *Connery v. Commissioner of Correction*, 414 Mass. 1009 (1993).

¹⁷³ 120 C.M.R. 200.022(1).

two years, parole eligibility occurs after service of the aggregate length of the mandatory terms.¹⁷⁴

Where a judge sentences a defendant to a *split house of correction sentence*, parole eligibility is based solely on the commitment term of that sentence.¹⁷⁵ When the offender completes the commitment term of the split sentence but is returned to custody as a *probation violator*, parole eligibility is determined by looking at the entire sentence, which usually makes a prisoner immediately eligible for parole.¹⁷⁶

Parole eligibility of prisoners serving *concurrent house of correction sentences* occurs after service of one-half the total time to be served, or after the completion of two years, whichever is less.¹⁷⁷ If the prisoner is serving one or more mandatory sentence of more than two years, then parole is based on the aggregate length of any mandatory terms.¹⁷⁸ In certain instances, parole eligibility is calculated separately for each concurrent house of correction sentence with the latest eligibility date becoming the single parole eligibility date. These are:

1. The concurrent sentence results from a crime committed while incarcerated and where the parole eligibility date of that concurrent sentence exceeds the parole eligibility of the sentence the prisoner was serving;¹⁷⁹
2. The concurrent sentence results from a crime committed on parole and the judge orders the house of correction sentence served concurrently with the pre-parole sentence;¹⁸⁰

¹⁷⁴ 120 C.M.R. 200.02(1).

¹⁷⁵ 120 C.M.R. 200.03(1).

¹⁷⁶ 120 C.M.R. 200.03(2). For example, a judge sentences a defendant to two years, suspended, one year to serve. The defendant is discharged from the one-year term after service of 11 months because of earned good-time deductions. Subsequently, the defendant is found guilty of violating probation and is returned to serve the balance of the sentence. Parole eligibility is one-half the two years and because the defendant has already served 11 months, parole eligibility is within one month of the return to custody.

¹⁷⁷ 120 C.M.R. 200.04(2)(a). The total time to be served begins at the earliest effective date and ends at the latest maximum date of the sentence series. For example, two concurrent sentences, same effective dates. One is a two-year house of correction sentence; the other a two-and-one-half-year house of correction sentence. The total length is two-and-one-half years. Parole eligibility is after service of 454 days (2 × 365 days + 180 days divided by 2, minus 1 day). However, if the first sentence began six months before the second, the total aggregate sentence would be three years, and parole eligibility would be after one and one-half years.

¹⁷⁸ 120 C.M.R. 200.04(2)(a).

¹⁷⁹ 120 C.M.R. 200.05(2). For example, a prisoner is serving the following concurrent sentences, the second of which is a crime while incarcerated:

<i>Sentence</i>	<i>Effective Date</i>	<i>Maximum Date</i>	<i>Parole Eligibility</i>
a. 2 years	8/20/10	8/19/12	8/19/11
b. 2 years	11/2/11	11/1/13	11/1/12

Single parole eligibility date: 11/1/12, the latest in time. The time between the parole eligibility date of sentence (a) and the effective date of sentence (b) is not considered in computing the single parole date. This “dead” time, however, is counted toward service of the concurrent sentences.

¹⁸⁰ 120 C.M.R. 200.06. Because the parole eligibility has passed on the pre-parole sentence and there is intervening time in the community, no total sentence of imprisonment may be readily calculated. For a judge to order any new sentence served concurrently with the pre-

3. The other concurrent sentences are state prison (or reformatory) sentences;¹⁸¹
4. The prisoner is serving a house of correction sentence concurrently with a civil commitment.

For a house of correction sentence *consecutive to another sentence type*, a single parole eligibility is determined by adding the parole ineligibility periods attendant to each consecutive sentence. The exceptions to aggregation occur where:

1. The house of correction sentence for a crime on parole is consecutive to a pre-parole sentence;¹⁸²
2. The house of correction sentence is consecutive to any life sentence if the offender committed the crime that resulted in the consecutive sentence on or after January 1, 1988;¹⁸³
3. Where one of the consecutive sentences is a split state prison sentence (pre-Truth-in-Sentencing) with an attendant parole ineligibility period exceeding the commitment term of that state prison sentence.¹⁸⁴

2. State Prison Sentences

a. Basic Cedar Junction Sentence

Parole eligibility for prisoners serving a state prison sentence with a minimum and maximum term is governed by G.L. c. 127, § 133. Parole eligibility occurs after completion of the minimum term of the sentence, minus any earned good-time deduction.¹⁸⁵ For a state prison sentence that is *concurrent* with other sentences, the parole eligibility date for each sentence is calculated, and the latest date becomes the single parole eligibility date for both sentences.¹⁸⁶ When the individual receives a state prison sentence concurrent with the pre-parole sentence or with a civil commitment, parole eligibility is based only on the new concurrent sentence.¹⁸⁷

For a state prison sentence *consecutive to another sentence type*, a single parole eligibility date is determined by adding the parole ineligibility periods attendant to each

parole sentence, the parole violation warrant must be served before the imposition of sentence. *See supra* § 40.6A.

¹⁸¹ 120 C.M.R. 200.04(1).

¹⁸² 120 C.M.R. 200.08(3)(a).

¹⁸³ 120 C.M.R. 200.08(3)(c).

¹⁸⁴ 120 C.M.R. 200.08(3)(b).

¹⁸⁵ Parole eligibility for pre-Truth-in-Sentencing *state sentences* is governed by G.L. c. 127, § 133, as amended through St. 1986, c. 486. Generally, parole eligibility is after service of one-third the minimum term or one year, whichever is greater. However, enumerated crimes and any crime committed while on parole from a Massachusetts sentence, require service of two-thirds the minimum term (or two years, whichever is greater) before parole eligibility. (Chart C, *infra*, lists the two-thirds eligibility crimes). Earned good-time deductions *are subtracted from the* parole eligibility date, but statutory good time is not. The rules governing parole eligibility for a state prison sentence *concurrent with or consecutive to* other sentences are the same as under Truth-in-Sentencing.

¹⁸⁶ 120 C.M.R. 200.04(2)(b).

¹⁸⁷ 120 C.M.R. 200.04(1), 200.04(2)(b); 120 C.M.R. 200.06 (pre-parole), 200.07 (civil commitment).

consecutive sentence. The exceptions to the aggregation of parole ineligibility periods involving state prison sentences are the same as for house of correction sentences.¹⁸⁸

When an individual receives a *forthwith state prison* sentence from a house of correction sentence, parole eligibility is based solely on the state prison sentence.¹⁸⁹

b. Life Sentence

On July 31, 2012, Governor Patrick declared that he would sign a bill approved by the Legislature that makes major changes to the statutes governing the parole eligibility of prisoners serving second degree life sentences. Since the bill contains an emergency preamble, it will go into effect immediately upon the Governor's signature, and will apply to defendants whose crimes were committed after that date. Prisoners serving a second degree life sentence imposed under prior law are still parole eligible for parole after fifteen years.¹⁹⁰ But in the future, judges will be required to fix a minimum term of between 15 and 25 years, which will determine the parole eligibility date.¹⁹¹ If the prisoner has multiple life sentences arising out of separate incidents where the second offense occurred after the first conviction, there is no parole eligibility at any time.

Under the prior law, lifers could not benefit from good time because there was no minimum sentence from which to subtract the deductions. Arguably, therefore prisoners sentenced to second degree life under the amended statute may be able to reduce their parole eligibility date by good conduct deductions. However, obtaining a parole may be more difficult because release now requires a vote of two-thirds of the Parole Board, instead of a simple majority.¹⁹²

c. Habitual Offender Sentence

On July 31, 2012, Governor Patrick declared that he would sign a bill approved by the Legislature that makes dramatic changes to the habitual offender statute. There will now be two categories of habitual offender. The first, set forth in G.L. c. 279, §25(a), retains most of the features of the present statute. An individual sentenced as a habitual criminal under § 25(a) will still be sentenced to the maximum sentence authorized for the crime underlying the conviction. However, the defendant will not become eligible for parole until completion of two-thirds of the maximum term, instead

¹⁸⁸ 120 C.M.R. 200.08 (2)-(3).

¹⁸⁹ 120 C.M.R. 200.09.

¹⁹⁰ G.L. c. 127, § 133A. The language in § 133A that prohibits the Board from conducting a parole hearing for a prisoner serving a life sentence and "confined to the hospital at the Massachusetts Correctional Institution, Bridgewater . . ." has been acknowledged as violating the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.). *Louraine v. Hubbard*, Suffolk Sup. Ct. Civ. No. 94-6896. (The settlement of this case resulted from the U.S. Supreme Court's decision in *Penn. Dept. of Corrections v. Yeskey*, 524 U.S. 206 (1998), holding that the Act covers prisoners in state prisons). The Board therefore now schedules hearings for Bridgewater hospital prisoners who are serving a life sentence. In addition, juveniles adjudicated delinquent for murder in the first degree under G.L. c. 119, § 72 (before amendment by St. 1996, c. 200, § 13), are parole eligible after 15 years pursuant to G.L. c. 127, § 133A.

¹⁹¹ See G.L. c. 279, § 24, and G.L. c. 127, § 133A

¹⁹² See G.L. c. 127, § 133A, as amended in 2012.

of one-half the maximum. . Both the parole eligibility and wrap-up dates can still be reduced by earned good-time deductions.¹⁹³

The statute is unclear as to what the sentence must be if the underlying crime authorizes a life sentence, The requirement of G.L. c. 127, § 133B, that the parole eligibility of habitual offenders be set at two-thirds of the maximum term makes no sense when the maximum term is life. Presumably, parole eligibility will be based on the minimum sentence that G.L. c. 279, § 24, now mandates be set for second degree life sentences. Although G. .L. c. 279, § 25(a), requires punishment by imprisonment "for the maximum term provided by law," it places no apparent restrictions on the length of the minimum sentence.. Arguably, a judge has discretion to impose any minimum sentence within the permitted range of 15 and 25 years.

The second category of habitual offender is set forth in G.L. c. 279, § 25(b), widely referred to as the "Three Strikes Law," It bars parole completely for habitual offenders convicted for a third time of one of the specified predicate offenses, where the two prior convictions resulted in a sentence of "at least 3 yers to be served," and where each offense occurred after the prior conviction.¹⁹⁴listed Prisoners convicted under §25(b) are also ineligible for probation, work release, furlough, or good time.¹⁹⁵

d. Split State Prison sentence

New split state prison sentences were abolished by the Truth-in-Sentencing Act. However, a prisoner still serving such a sentence is eligible for parole after completion of one-third or two-thirds the minimum term of sentence, not by reference to the commitment term.¹⁹⁶ If an individual completes the original commitment term of a split state prison sentence and is returned as a probation violator, a single new parole eligibility date is determined using the minimum term of the entire sentence and the prior commitment term is credited in the same manner as if it consisted of pretrial jail credits.¹⁹⁷ When a split state prison sentence with a parole eligibility exceeding the commitment term is part of a series of concurrent sentences, that parole ineligibility period is excluded from the calculation of a single parole eligibility date for that series of concurrent sentences.¹⁹⁸

3. Reformatory sentence

¹⁹³ G.L. c. 127, § 133B, as amended in 2012; 120 C.M.R. 200.04(2)(b).

¹⁹⁴ See G.L. c. 279, § 25(b), as emended in 2012.

¹⁹⁵ Although the Ex Post Facto clause clearly prohibits imposition of a no parole habitual offender sentence where the third strike occurred before the effective date of the statute, it is arguable that the prior predicate offenses must also have been committed before the new statute went into effect. G.L. c. 279, § 25(d), requires that a defendant found guilty of a qualifying § 25(b) crime be given actual notice by the court that subsequent crimes could result in a maximum sentence without the possibility of parole or good time. Although 25(d) also provides a conviction may not be "vacated based upon the failure to give such warnings," the failure might still prevent imposition of a 25(b) sentence because it thwarts the legislative intent to deter crime by making sure the offender has fair warning of the consequences.

¹⁹⁶ 120 C.M.R. 200.06(2)(b)(1997).

¹⁹⁷ 120 C.M.R. 200.06(3)(1997).

¹⁹⁸ 120 C.M.R. 200.08(3)(b).

The Truth-in-Sentencing Act abolished the reformatory sentence. For pre-Truth-in-Sentencing offenses, parole eligibility for reformatory sentence is based on Parole Board regulations.¹⁹⁹ Eligibility depends on the length of the commitment term and whether the prisoner has a prior incarceration period.

Parole eligibility for a *split reformatory sentence* is based on the commitment term only.²⁰⁰ If an individual completes the original commitment term, by parole or otherwise, and returns as a probation violator, parole eligibility is based on the entire sentence, which usually makes a prisoner immediately eligible for parole.²⁰¹ For *concurrent reformatory sentences*, parole eligibility is determined by the total sentence of imprisonment: from the earliest effective date to the latest maximum date of that series of concurrent sentences.²⁰² However, parole eligibility is calculated separately for each concurrent reformatory sentence in the same manner as it is for house of correction sentences.²⁰³

If a reformatory sentence is ordered served consecutive to another sentence, a single parole eligibility date is determined by adding the parole ineligibility periods attendant to each consecutive sentence.²⁰⁴

4. Administrative Advancement of Eligibility Date

The Parole Board regulations provide for the administrative advancement of parole eligibility for prisoners serving a house of correction sentence in situations defined by the Board as “compelling.” The hearing panel may release a prisoner up to sixty days earlier than the parole eligibility date and may recommend to the full Board release up to sixty days earlier.²⁰⁵ Administrative advancement of parole eligibility is also available for state prisoners serving sentences not governed by the Truth-in-Sentencing act, but only if the sentence carries a two-thirds parole eligibility²⁰⁶

By way of G.L. c. 127, § 142, the Board may also advance parole eligibility for a pregnant prisoner serving any sentence of sixty days or more on a showing by a physician's report that birth is imminent and that parole is in the best interest of either the mother or the unborn child.²⁰⁷ It is not clear whether this statutory provision allowing early parole for pregnant prisoners overrides the mandatory terms of incarceration that preclude parole consideration.

§ 40.10C. PAROLE HEARING PROCESS GENERALLY

¹⁹⁹ 120 C.M.R. 200.04(2) ; *see also* 120 C.M.R. 202.00 (1993).

²⁰⁰ 120 C.M.R. 200.04(2) (1997). For example, on a 15-year reformatory sentence with 10 years to serve, parole eligibility is after service of one year with no prior incarceration period, or after service of one year, six months with a prior incarceration period.

²⁰¹ 120 C.M.R. 200.06(1) (1997).

²⁰² 120 C.M.R. 200.04(1); 120 C.M.R. 200.07(2)(b) (1997).

²⁰³ 120 C.M.R. 200.04(1).

²⁰⁴ *See Crooker v. Superintendent*, 19 Mass. App. Ct. 315 (1985).

²⁰⁵ 120 C.M.R. 200.10(1).

²⁰⁶ 120 C.M.R. 200.10(2). Individuals sentenced before July 1, 1994, to a sentence with two-thirds parole eligibility can request consideration after serving one-third of their sentences.

²⁰⁷ 120 C.M.R. 200.11.

1. Representation

Counsel may represent offenders serving life sentences at initial and review hearings, and may represent any prisoner at rescission and revocation hearings. Further, counsel, or staff assistance, is required at any hearing if the prisoner is not capable of representing himself because of a disability. Counsel may also assist in administrative appeals and reconsideration petitions. Counsel is required by G.L. c. 127, § 167, to register with the Secretary of State before commencing representation.

2. Scheduling of Hearings

a. Timing

The Parole Board affords a prisoner serving a sentence with parole eligibility a hearing approximately sixty days before the eligibility date.²⁰⁸ Although correctional authorities initially calculate the parole eligibility date, there are sometimes disagreements between the Department of Correction and the Parole Board about sentence calculation. Since the Parole Board is ultimately responsible for determining parole eligibility, the institutional parole officer will schedule a timely hearing regardless of the DOC calculation.

If the Board denies parole, the Board gives a prisoner a review hearing annually thereafter except prisoners sentenced to life, as a habitual criminal, or to a concurrent civil commitment as a sexually dangerous person. Unless the Board votes a shorter review period, it reviews a prisoner serving a life sentence every five years²⁰⁹ and a prisoner serving a concurrent civil commitment as a sexually dangerous person every three years.²¹⁰ The Board reviews a prisoner sentenced as a habitual criminal every two years.²¹¹

A *rescission hearing* is scheduled on the next available docket after the Board has voted to rescind provisionally its release vote.²¹² Generally, if not held in the community, a *preliminary revocation hearing* is held within fifteen days of the issuance of a warrant for temporary custody²¹³ and a *final revocation hearing* is held within sixty days from the service of a parole violation warrant.²¹⁴ For people on parole from a life sentence, in practice this final hearing is split into two stages, one before a panel and one before the full Board. At the hearing before the full board the decision is whether to return the prisoner to parole. If there is an intervening sentence, the Board conducts a final revocation hearing at the time of initial eligibility on the intervening

²⁰⁸ G.L. c. 127, § 136.

²⁰⁹ G.L. c. 127, § 133A; 120 C.M.R. 301.01 (5). Section 133A was amended by St. 1996, c. 43, to increase the possible review period from three to five years if parole was denied. The Board applies the five-year review period to all life sentences, no matter when the prisoner committed the crime. The changes in parole procedures do not violate the *ex post facto* doctrine when applied to individuals convicted before the changes were implemented. *Garner v. Jones*, 529 U.S. 244 (2000); *Stewart v. Chairman of Mass. Parole Bd.*, 35 Mass. App. Ct. 843 (1994).

²¹⁰ 120 C.M.R. 301.01(4).

²¹¹ G.L. c. 127, § 133B; 120 C.M.R. 301.01(3).

²¹² 120 C.M.R. 302.02(2).

²¹³ 120 C.M.R. 303.06(1).

²¹⁴ 120 C.M.R. 303.18(1).

sentence.²¹⁵ If the Board denies release on parole after rescinding a parole date or revoking parole, the Board will hold a review hearing after one year (except as noted above).²¹⁶

b. Postponing

The prisoner may postpone any initial, review, rescission, or revocation parole hearing, and postponement occurs automatically when the prisoner is unavailable.²¹⁷ The prisoner should request postponement of any parole hearing (except preliminary revocation) when there is a pending criminal case because the Board usually will not consider release under such circumstances.²¹⁸ Postponement requests are made through the institutional parole officer. However, when the hearing is a preliminary revocation hearing for a parolee not returned to custody, postponement is through the field parole officer or the assigned hearing examiner.

c. Waiving

An offender may waive any parole hearing. All waivers must be in writing and witnessed by parole staff.²¹⁹ In the case of an initial release hearing or review hearing, this waiver results in the Board not considering parole.²²⁰ If a prisoner waives a rescission hearing, the Board will retract its previous decision to release.²²¹ If a parolee waives a preliminary revocation hearing, the waiver results in the issuance of a parole violation warrant.²²² Waiver of a final revocation hearing results in revocation of parole and denial of re-release.²²³

²¹⁵ 120 C.M.R. 303.18(2). The U.S. Supreme Court considers delaying a revocation hearing until after service of an intervening sentence to comport with due process requirements, *Moody v. Daggett*, 429 U.S. 78, 87 (1976), and the Massachusetts Appeals Court has agreed, *Commonwealth v. Collins*, 31 Mass. App. Ct. 679 (1991).

²¹⁶ 120 C.M.R. 301.01.

²¹⁷ 120 C.M.R. 301.02 (initial review), 302.04 (rescission), 303.08 (preliminary revocation), 303.20 (final revocation). The Board considers a prisoner unavailable only where the absence is caused by extrinsic factors and not by the willful conduct of the prisoner. For example, a move to the Treatment Center at Bridgewater for evaluation renders the prisoner “unavailable”; watching television and refusing to attend a hearing does not. Postponements are automatic where the correctional authority suddenly transfers a prisoner to another institution, to a medical facility, or to court. In these situations, institutional parole staff will reschedule the hearing to the next available date. However, the Board is considering limiting the reasons for postponement and counsel should expect that the Board will not liberally grant postponements in the future.

²¹⁸ Further, statements made at the hearing might be admissible at the criminal proceedings. Conversely, if the offender remains silent, the hearing panel will make its decision only on available information. 120 C.M.R. 302.04(7) (rescission), 303.11(3) (preliminary revocation), 303.23(4) (final revocation).

²¹⁹ 120 C.M.R. 301.03 (initial review), 302.05 (rescission), 303.09 (preliminary revocation), 303.21 (final revocation).

²²⁰ 120 C.M.R. 301.03.

²²¹ 120 C.M.R. 302.05(2).

²²² 120 C.M.R. 303.09(2). Where the warrant is also served, a final revocation hearing will be scheduled. 120 C.M.R. 303.18(1).

²²³ 120 C.M.R. 303.21 (2).

3. Parole Hearing Panel

Any parole hearing panel may be comprised of the full available membership of the Board. However, if a prisoner is serving a state prison sentence, two Board members usually comprise the parole hearing panel, and any subsequent parole hearing — review, rescission, or revocation — will be conducted by two or three Board members.²²⁴ The full Board will always make the release decision in cases involving a prisoner serving a life sentence, even where a hearing panel made the rescission or revocation decision.²²⁵ For house of correction sentences, a single Board member conducts all parole hearings.²²⁶ A member of the hearing panel may refer any case to the full Board for action; however, subsequent review need not be by the full Board.²²⁷

4. Voting Requirements

Hearings conducted by the full Board require a majority vote of the Board's membership.²²⁸ For hearings conducted by a parole-hearing panel, two members must concur on the vote. Hearing examiners make only findings of fact and a recommended decision, and a Board member must adopt this recommendation for it to become the final decision. Where the first reviewing Board member disagrees with the hearing examiners, another Board member will review the case. The decision becomes final when there are two agreeing Board members.

5. Administrative Appeal and Reconsideration

Each release, rescission, and revocation decision of the Board may be appealed but the issues that the prisoner may raise are limited.²²⁹ The first appeal is to the

²²⁴ G.L. c. 127, § 134(a), provides that in the case of state prison sentences “no parole permit shall be granted by the parole board until the inmate has been seen by at least three members of said board, except when the chairman has designated three members to act as the parole board under the provisions of [section five of chapter twenty-seven](#), no parole permit shall be granted by the board until the inmate has been seen by at least two of said members.”

²²⁵ 120 CMR 303.17(2); *see generally* G.L. c. 127, § 133A, which requires that the “full membership” of the Board conduct the initial parole hearing for a prisoner serving a life sentence. Where a Board member is disqualified, the Board membership is temporarily reduced. Where a Board member is not available, the prisoner may elect to be heard by the available membership. *Cantell v. Hubbard*, Suffolk Sup. Ct. Civ. No. 93-4516 (Aug. 18, 1994). By way of St. 2000, c. 159 §230, the Legislature amended G.L. c. 127, §133A, to reflect consistent and long-standing practice of the Parole Board that the full Board does not include members that are disqualified or otherwise unavailable. *See also* 120 C.M.R. 301.06.

²²⁶ G.L. c. 127, § 134(b). Hearing examiners are full-time Parole Board employees who conduct are authorized by statute to conduct parole hearings for prisoners serving a house of correction sentence but no longer do so in practice. Hearing examiners now only conduct preliminary revocation hearings, no matter what sentence the parolee is serving.

²²⁷ 120 C.M.R. 301.07.

²²⁸ 120 C.M.R. 100.01.

²²⁹ 120 C.M.R. 304.01(1). Appeals are limited to the following grounds: (1) the decision was not supported by the reasons or facts stated; (2) the decision was based on erroneous information, and the actual facts justify a different decision; (3) the hearing panel did not follow correct procedure in deciding the case, and a different decision would have resulted if the error had not occurred; (4) there was significant information in existence but not known at

hearing panel and the prisoner must deliver the appeal to the institutional parole officer within thirty days of receipt of the decision.²³⁰ There is no particular form; appeals range from handwritten letters to formal legal briefs. There is no time limit for the hearing panel's response, which the institutional staff will transmit to the prisoner.²³¹ Within thirty days of receiving notice of a denial by the hearing panel, a prisoner may appeal to the full Board through the institutional parole officer.²³² The Board's regulations set no time limit for this final administrative decision.

No sooner than ninety days after receiving a decision, a prisoner may also ask that a hearing panel *reconsider* its vote to deny, rescind, revoke, or grant parole with special conditions.²³³ A plea for reconsideration is in addition to the appeal process and is limited to certain enumerated grounds.²³⁴ A prisoner may only request reconsideration once in each calendar year, and may not base a request on grounds previously rejected.²³⁵

§ 40.10D. INITIAL AND REVIEW PAROLE HEARING

1. Prehearing Process

a. Preparation of Case for Hearing by Parole Board Staff

Prior to an initial parole hearing (or subsequent review hearing), institutional parole staff explain the hearing process and interviews the prisoner. At this interview, parole institutional staff ask the prisoner questions regarding social, medical, and criminal histories; facts of the offense; institutional adjustment and accomplishments; and plans if granted release on parole. The prisoner records this information on a questionnaire form. As of July 1, 2012, the Board was training its staff in the use of a new risk-assessment instrument to assist the Board in making parole decisions. If applicable, the individual should request an interpreter for the hearing. Any fraudulent information provided by a prisoner or on a prisoner's behalf may be grounds for revocation of parole if the Board grants parole.²³⁶ This questionnaire and information gleaned from the correctional authorities, district attorney, and victims are included in a parole packet used by the hearing panel.²³⁷ In addition, the institutional parole officer makes a release recommendation to the Board.²³⁸

the time of the hearing; and (5) the special conditions of parole are unfair and cannot be obeyed under the circumstances and should be amended by the Board. 120 C.M.R. 304.02(3).

²³⁰ 120 C.M.R. 304.01(1); 120 C.M.R. 304.02(1).

²³¹ 120 C.M.R. 304.02(5).

²³² 120 C.M.R. 304.02(2).

²³³ 120 C.M.R. 304.03.

²³⁴ 120 C.M.R. 304.03(1). Requests for reconsideration are limited to the following reasons: “(a) There is a material change in personal or other circumstances which requires a different decision. (b) The tasks mandated by the parole hearing panel have been accomplished. (c) Especially mitigating circumstances justify a different decision. (d) There are compelling reasons why a more lenient decision should be rendered.”

²³⁵ 120 C.M.R. 304.01(4); 120 C.M.R. 304.03(2).

²³⁶ 120 C.M.R. 303.01(1).

²³⁷ *See generally* G.L. 127, § 135.

²³⁸ This recommendation is part of the prehearing conference between the hearing panel and institutional staff. 120 C.M.R. 301.05(2)(a).

b. Prehearing discovery

Although a prisoner has no due process discovery rights before the initial release and review hearings, a prisoner should request to see the information contained in the parole master and institutional files.²³⁹ A prisoner should also ask to review the correction files. Institutional parole officers will facilitate review of parole files; a prisoner should contact appropriate correctional staff to review the correction file. Further, nothing contained in Board regulations, policies, and procedures precludes a prisoner from requesting a list of the documents that are in the hearing panel's file at the beginning of any parole hearing.

2. Procedure at Hearing

Unless the prisoner is serving a life sentence, the Board holds the *initial release hearing* at the institution where the prisoner is housed and a hearing panel conducts the hearing. This hearing is not open to the public.²⁴⁰ The hearing is informal, and the Board does not permit testimony of witnesses or representation in most circumstances.²⁴¹ However, the Board will accept written documentation and may grant an interview to attorneys, victims, and other interested parties. If parole is denied, the Board conducts another hearing in a year, except in three clearly defined situations.²⁴² The *review hearing process* is similar to the initial parole release hearing, but should include emphasis on institutional accomplishments during the past year and efforts at rehabilitation.

For prisoners serving life sentences, the initial release and subsequent review hearings are public hearings conducted by the full available Board membership.²⁴³ The Board permits representation by an attorney and appearance of witnesses. The Parole Board gives notice of the hearing to the Attorney General, the Executive Office of Public Safety, the district attorney, the police department involved in the original case, and to the victims. The Board gives each individual an opportunity to appear and offer evidence.²⁴⁴ If the Board denies parole, review occurs after five years, unless by majority vote the Board establishes an earlier date for review.²⁴⁵

For crimes that result in the death of an individual and where the prisoner is not serving a life sentence, the Parole Board conducts *victim access hearings* at which

²³⁹ A prisoner must request disclosure in writing at least 30 days before any scheduled hearing. 120 C.M.R. 301.04. For initial release hearings, the Board probably will not have developed a parole file prior to 30 days before the hearing.

²⁴⁰ 120 C.M.R. 300.02(2).

²⁴¹ 102 C.M.R. 300.08(2). A prisoners who need interpreter should request one from an institutional parole officer. Other prisoners are not permitted to act as interpreters.

²⁴² The Board reviews prisoners serving a life sentence every five years unless an earlier time is set by the Board; the Board reviews prisoners sentenced as habitual criminals every two years; those serving a concurrent civil commitment as a sexually dangerous person every three years. *See supra* § 40.10C(2)(a) (scheduling of parole hearings).

²⁴³ G.L. c. 127, § 133A; 120 C.M.R. 301.06 (2001).

²⁴⁴ If the victim is deceased at the time of the parole hearing, relatives or friends may represent the deceased victim.

²⁴⁵ Prisoners serving a life sentence may appeal or ask for reconsideration of any adverse decision.

victims may attend and give testimony.²⁴⁶ Alternatively, victims may submit testimony in writing or in person to an individual Board member.²⁴⁷ Victims (and parents or legal guardians of minor victims) of a violent crime or a sex offense, who have been certified by the Criminal History Systems Board, may testify at the parole hearing of the offender or submit written testimony.²⁴⁸

3. Possible Decisions

The Board may grant or deny parole release. There is *no liberty interest in release on parole*.²⁴⁹ Release is totally within the discretion of the Board, which must not base its decision exclusively on institutional behavior but also on the risk of recidivism and the welfare of the community.²⁵⁰ On July 31, 2012, Governor Patrick indicated that he would sign a bill approved by the Legislature that clarifies and expands the criteria that the Board must use when deciding whether or not to release a prisoner.²⁵¹ These include a requirement that the Board consider a “risk and needs assessment;” that the risk of recidivism be evaluated based on the assumption that the prisoner “is released with appropriate conditions and community supervision;” and whether “risk reduction programs” made available through collaboration with other agencies would minimize the probability of the prisoner re-offending.²⁵² The Board may consider any reliable information in making its decision and, in judging the severity of the offense, is not limited to the offense charged or the actual crime to which the prisoner pled.²⁵³ In general, the hearing panel makes its decision based on multiple factors. These include whether the prisoner acknowledges participation in the crime, understands the reasons for commission of the offense and has taken measures to address his or her criminal behavior,²⁵⁴ and the impact and consequences of the crime

²⁴⁶ 120 C.M.R. 401.00 *et seq.* See also *Foley v. Commonwealth*, 429 Mass. 496 (1999) (describing what constitutes public hearing accommodations in the context of arraignment sessions in prisons).

²⁴⁷ G.L. c. 127, § 133C (St. 1997, c. 217, § 2); see generally 120 C.M.R. 401.00 *et seq.* The Parole Board maintains a proactive victim advocate unit. See 120 C.M.R. 400.00. In *Stewart v. Chairman, Mass. Parole Bd.*, 35 Mass. App. Ct. 843 (1994), the court ruled that Parole Board regulations that gave the public and crime victims greater access and input to parole hearings do not violate the *ex post facto* clause.

²⁴⁸ G.L. c. 127, §133E, as amended by St. 2010 c. 256 §83 and St. 2010 c. 256 §§ 40-42..

²⁴⁹ *Jimenez v. Conrad*, 678 F.3d 1 (1st Cir. 2012).

²⁵⁰ G.L. c. 127, §§ 130; 120 C.M.R. 300.04(1); *Commonwealth v. Hogan*, 17 Mass. App. Ct. 186, 191–92 (1983); accord *Lanier v. Massachusetts Parole Board*, 396 Mass. 1018 (1986); *Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384, 388–389 n.3 (1989) (“[t]he individual characteristics of the Massachusetts parole scheme do not give rise to a liberty interest under Federal law”); *Quegan v. Massachusetts Parole Board*, 423 Mass. 834 (1996). See also *Commonwealth v. Thurston*, 53 Mass. App. Ct. 548, 554 (2002).

²⁵¹ See G.L. c. 127, § 130, as amended in 2012.

²⁵² *Id.*

²⁵³ *Greenman v. Massachusetts Parole Bd.*, 405 Mass. 384 (1989) ; *Lynch v. Hubbard*, 47 F. Supp. 2d 125 (1999) (Board may permit victims to testify at its hearings without affording prisoner’s supporters equal hearing participation, as there is no due process implicated in parole release in Massachusetts).

²⁵⁴ For example, participation in available drug and alcohol treatment programs; participation in available sex treatment programs; and attending mental health counseling.

to the victim and family members. The primary concern of the Board is whether a parole officer can supervise the prisoner in the community compatible with public safety.²⁵⁵ Consistent with the foregoing, the Board also considers the prisoner's need for supervised release instead of a direct discharge from prison into the community with no support mechanisms.²⁵⁶

Detainers, including orders of the Immigration and Naturalization Service, and pending criminal cases will not absolutely bar release, but the Board seldom releases an offender on parole if there are pending criminal cases. If there is an outstanding warrant, release will be to that warrant.²⁵⁷

Release on a date specified will only occur if there is an approved home and work plan,²⁵⁸ except that home may be verified after release for a prisoner serving a sentence of less than six months.²⁵⁹ Where the Board sets a condition precedent to parole release — such as “reserve after six months in prerelease” — and the prisoner does not meet this condition by the annual review hearing, a rescission hearing will be scheduled. However, the prisoner may also ask the Board to reconsider the need for the condition. Parole release also may be a “reserve parole” to another state or legal process.²⁶⁰ If granting release, the Board also sets any needed parole conditions. The Board may delay its vote pending receipt of additional information²⁶¹ or clarification of legal issues. This “action pending” vote may be resolved by an office vote²⁶² or after another hearing.

²⁵⁵ As of July 1, 2012, the Board was training its staff in the use of a risk-assessment instrument to assist in making parole decisions.

²⁵⁶ A parolee serves the sentence until the maximum date. G.L. c. 127, § 133. If not paroled, a prisoner's sentence terminates at the good-time discharge date.

²⁵⁷ 120 C.M.R. 300.06(1).

²⁵⁸ Instead of work, the Board may accept a training, treatment, or education program. In addition, the Board may waive this requirement until after a time on supervision. For example, the Board may vote to waive the work requirement for two weeks from date of release on parole.

²⁵⁹ 120 C.M.R. 300.06(3).

²⁶⁰ If parole is to another state, parole does not occur until that state agrees to accept the prisoner for supervision under the Interstate Compact for Adult Offender Supervision, G.L. c. 127, §§ 151A–151N and the parolee is released to the receiving state. 120 C.M.R. 300.06(2)(b). If parole is to a consecutive or concurrent sentence, the prisoner will be on parole supervision when serving that sentence. This creates a situation where institutional misbehavior may result in the revocation of that parole. If parole is to a warrant, parole does not occur until the jurisdiction that issued the warrant assumes custody. 120 C.M.R. 300.06(1). If parole is to a residential program parole does not occur until the program accepts the prisoner and a space is available. 120 C.M.R. 300.06(2).

²⁶¹ This information may include probation reports, police reports, and results of a mental health evaluation. The Board takes an “action pending” vote if the prisoner is a “sexually dangerous person” under G.L. c. 123A, § 1, if the Board decides to grant parole release. Notice of this vote is sent to the appropriate District Attorney who notifies the Board if a civil commitment as a sexually dangerous person will be sought. If the District Attorney does not pursue civil commitment, release on parole follows. If the District Attorney seeks a civil commitment, the Board's action pending vote continues in effect until resolution of the petition for civil commitment or until the review parole hearing, whichever occurs first.

²⁶² An office vote is the process of voting on a case outside the hearing context. The Board may render an office vote in executive session or by circulation to individual Board members.

§ 40.10E. PAROLE RESCISSION HEARING

1. Prehearing Process

a. Provisional Rescission

Release on the reserve parole date is conditioned on continued satisfactory conduct by the prisoner and on the Board receiving no new adverse information. If the prisoner does not meet either of these conditions, the Board may provisionally rescind the parole date and schedule a hearing.²⁶³ Because Parole Board regulations create a liberty interest once a parole release date is given, due process is required.²⁶⁴

b. Prehearing Notice and Discovery

Where the Board contemplates rescission, the prisoner is provided with a written notice of the time and place of the hearing and the grounds for rescission.²⁶⁵ The prisoner is entitled to discovery of all information that may be used by the Board in making its decision.²⁶⁶

2. Procedure at Hearing

A rescission hearing is administrative but adversarial in nature and the Board details the hearing procedure in its regulations.²⁶⁷ The prisoner may be represented by an attorney,²⁶⁸ and has the right to present evidence and witnesses as well as request the presence of adverse witnesses and cross-examine these witnesses.²⁶⁹ The hearing panel may use any reliable information, and bases its decision on a *substantial evidence* standard of proof.²⁷⁰

²⁶³ 120 C.M.R. 302.02(2). The mechanism for “provisionally rescinding” a reserve parole release date is as follows: An institutional parole officer forwards a report of the new adverse information with a recommended action to a deputy chief of institutional service. If the deputy chief recommends a rescission hearing, a Board member must concur with the recommendation for a rescission hearing to occur.

²⁶⁴ Lanier v. Fair, 876 F.2d 243 (1st Cir. 1989).

²⁶⁵ 120 C.M.R. 302.02(2). Institutional parole staff delivers the written notice at least 72 hours before the scheduled hearing. These 72 hours are not limited to working days.

²⁶⁶ 120 C.M.R. 302.06.

²⁶⁷ 120 C.M.R. 302.08.

²⁶⁸ 120 C.M.R. 302.07(7). The prisoner may retain counsel, but is not eligible for Board-provided counsel at a rescission hearing as he might be in a revocation hearing. *See infra* § 40.10G(1)(a) and (2)(a) (preliminary and final revocation hearings).

²⁶⁹ The Board works under the constraints of the Department of Correction. The Board will not call adverse prisoner witnesses at a rescission hearing; the Board will not request the correctional authority to transport “friendly” prisoner witnesses from one institution to another. However, witnesses may present written statements to the Board, and, when deemed necessary, the Board will ask staff to interview the witnesses.

²⁷⁰ 120 C.M.R. 302.07(4); G.L. c. 30A, § 1(6)(“Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion.”)

3. Possible Decisions

At a rescission hearing, the hearing panel makes two decisions: (1) whether to rescind the previously granted parole date, and (2) whether to grant the prisoner a new parole release date or to review the case at the appropriate review hearing date.²⁷¹ The Board provides a written notice of its decision,²⁷² which the prisoner may appeal to the hearing panel and ask the panel to reconsider the conditions imposed.²⁷³

§ 40.10F. PAROLE SUPERVISION

The Parole Board supervises an inmate released to serve the remainder of his or her sentence in the community on parole. The following is a brief overview of the field services unit of the Parole Board and the supervision afforded parolees and their rights under this system.

1. Parole Release

On release from actual custody, each parolee signs an agreement to observe standard conditions of parole²⁷⁴ and any special conditions imposed by the Board,²⁷⁵ all

²⁷¹ 120 C.M.R. 302.09; *see supra* § 40.10C.

²⁷² 120 C.M.R. 302.10.

²⁷³ *See supra* § 40.10C(5) (administrative appeal and reconsideration).

²⁷⁴ The standard parole conditions are as follows: (1) obeying local, state, and federal laws; and conducting oneself in the manner of a responsible citizen; (2) notifying the parole officer in writing within 24 hours of any changes in employment or residence, informing the parole office within 24 hours if arrested, and notifying the parole officer before applying for a license to marry; (3) making earnest efforts to find and maintain legitimate employment, unless engaged in some other program approved by the parole officer; (4) not engaging in a continuous pattern of association with persons known to have a criminal record, or who are known to be engaged in violation of law (this prohibition does not apply where such association is incidental to the place of residence or employment, or connected with activities of a bona fide political or social organization; however, the Parole Board retains authority to impose limits on these latter activities as a special condition of parole where such association is inconsistent with the approved parole plan); (5) not leaving the state of Massachusetts for periods in excess of 24 hours without securing a travel permit from the parole officer; and (6) not serving as an informant or special agent for any law enforcement agency without specific permission from the Board. 120 CMR 300.07(1). General Laws Chapter 127, §130, also requires that conditions of parole include payment of child support due under a support order, including payment toward arrearage that has accrued. If deemed necessary by the Parole Board, conditions of parole can be eliminated. 120 CMR 300.07(3).

If an inmate refuses to sign the parole permit, release from incarceration does not occur since accepting the conditions of parole is a condition precedent to parole. *See Commonwealth v. Christian*, 46 Mass. App. Ct. 477, *aff'd* 429 Mass. 1022 (1999) (probation revocation due to probationer's refusal to sign document outlining probation conditions affirmed).

²⁷⁵ For example, the Parole Board has broad discretion to impose in writing special conditions related to a parolee's housing, work, and travel, the identity of persons a parolee may not contact, counseling, treatment, and supervision for drugs and alcohol. *See* 120 CMR 300.07(2)-(3); *But see Commonwealth v. Pike*, 428 Mass. 393 (1998) (judge cannot set a condition of probation that prohibits defendant from entering Massachusetts as such violates his constitutional right to interstate travel).

of which must be listed on the Certificate of Parole.²⁷⁶ Noncompliance with any condition may result in the revocation of parole and return to prison.²⁷⁷ Once the offender signs the Certificate of Parole, the Board may not add or amend a condition unless there has been a change in circumstances.²⁷⁸ Only a vote by the Board may change or add a condition of parole, and this may be done without input from the parolee.²⁷⁹

2. Supervision

a. Supervision Levels

Regular supervision may range from maximum supervision, which entails at least two contacts (one personal, one collateral) per month with the parole officer, to a minimum level of supervision, which involves two personal contacts per year, supplemented by collateral contacts such as telephone calls. Supervision of parolees serving a life sentence entails at least four personal contacts per month for maximum supervision to a minimum level of one personal contacts per month, supplemented by collateral contacts. The Board may assign high-risk offenders who need very structured supervision to more intensive supervision. Currently, the Parole Board has an intensive Intensive Supervision Programs for Sex Offenders (IPSO).²⁸⁰ Although G.L. c. 127, § 133D ½, requires all parolees convicted of certain sex offenses to wear a GPS device, ex post facto considerations require that it only apply to offenses committed after the effective date of the statute, December 20, 2006.²⁸¹ Notwithstanding official levels of supervision, each parole officer determines the amount of supervision necessary in any

An inmate may, in writing, petition for reconsideration of and appeal a hearing panel's decision to grant parole subject to special conditions, in keeping with the requirements of 120 CMR 304.02 and 120 CMR 304.03.

²⁷⁶ G.L. c.127 § 133A; 120 CMR 101.03(3)(a).

²⁷⁷ A grant of parole is a grant of conditional liberty, subject to compliance with the terms of parole release. *See Morrissey v. Brewer*, 408 U.S. 471, 480 (1972); *Rizzo v. Terenzi*, 619 F. Supp. 1186, 1190 (E.D.N.Y. 1985) (“The parolee released from confinement has been granted but a conditional liberty and his liberty is defined by the terms of his release.”). The parolee may violate the first condition of parole — being a responsible citizen — by new criminal conduct or by conduct that, although not criminal, is substantially at variance with actions of a responsible citizen. This includes not paying court-ordered child support, G.L. c.127, §130; refusing to give a DNA sample in violation of G.L. c.22E; and registering as a sex offender under G.L. c.6, §§178A–178L.

²⁷⁸ *See Commonwealth v. Goodwin*, 458 Mass. 11, 18 (2010), citing *Buckley v. Quincy Div. of Dist. Court Dep't*, 395 Mass. 815, 820 (1985).

²⁷⁹ G.L. c. 27 § 5; 120 CMR 101.03(3)(b). However, as noted above, a parolee can request that the Parole Board to remove or modify any condition.

²⁸⁰ Currently, the Parole Board has an Intensive Supervision Program for Sex Offenders (IPSO). The requirements of the program are depend on the classification level established for the parolee by Sex Offender Registry Board. Special conditions of parole for IPSO parolees include GPS monitoring, approved treatment programs, strict curfews, routine polygraph examinations, and submission to computer examinations and searches. See <http://www.mass.gov/eopss/law-enforce-and-cj/parole/field-svcs-unit/intensive-parole-for-sex-offenders.html>.

²⁸¹ *Doe v. Chairperson Of Massachusetts Parole Bd.*, 454 Mass. 1018 (2009).

given situation, but never allows supervision below the official level.²⁸² However, any request made of a parolee by a parole officer must be reasonably related to parole supervision.²⁸³

b. Field Parole Officer: Duties and Police Powers

Each parolee is assigned to a field parole officer in a regional office. The Board has delegated its authority to supervise parolees and investigate possible parole violations to these officers,²⁸⁴ who have special state police powers enumerated in G.L. c.127, §127, and may carry weapons.

Parole officers have broad authority to conduct warrantless searches if a parole officer has “reasonable grounds” or “reasonable suspicion” for such search and an exception to the warrant requirement appears to exist.²⁸⁵ This authority is in addition to the officer's statutory authority to perform police duties on the premises of Parole Board facilities; to apply directly to court for search warrants involving parolees; and to apply for a warrant on a “reasonable belief,” rather than a probable cause standard, to search a parolee’s person or residence for evidence of a parole violation.²⁸⁶

In addition, a parole officer may issue, with the concurrence of a superior parole officer, a warrant for temporary custody, authorizing the arrest and

²⁸² See G.L. c.127, §158; G.L. c.27, §5. Before 1993, a victim could maintain an action against the Commonwealth for harm done by an offender on parole or probation under the theory of negligent supervision. See, e.g., *A.L. v. Commonwealth*, 402 Mass. 234 (1988) (victims of sexual abuse by probationer could sue probation officer for his failure to enforce condition that probationer not have access to children). In 1993, the Legislature amended the Mass. Tort Claim Act, G.L. c.258, to severely restrict such claims, thus limiting them to tortious acts or omissions directly attributable to the actions of the public employee. See *Kent v. Commonwealth*, 437 Mass. 312, 318-19 (2002) (holding that a Parole Board decision to release a convicted murderer was not the “original cause” of the “condition or situation” of the victims injuries years later and the Commonwealth was immune from suit); *Brum v. Dartmouth*, 428 Mass. 684, 695 (1999); *Serrell v. Franklin County*, 47 Mass. App. Ct. 400 (1999) (holding that affirmative actions of officers may create a situation where harm to plaintiff increased and therefore no immunity under Tort Claim Act, G.L. c. 258); *Bonnie W. v. Commonwealth*, 419 Mass. 122, 125-26 (1994) (barring a claim based on the parole officer’s negligent failure to supervise, but allowing claim alleging the parole officer's negligence in recommending the assailant for employment at the trailer park to proceed).

²⁸³ 120 CMR 300.07(2); see *Bagley v. Harvey*, 718 F.2d 921 (9th Cir. 1983). For example, a parolee might be officially on “administrative supervision” but because of an incident, the parole officer demands six office visits during a two-week period. The parolee must comply or risk revocation.

²⁸⁴ See generally G.L. c.27, §5(b).

²⁸⁵ See *Commonwealth v. LaFrance*, 402 Mass. 789, 795 (1988) (certain warrantless searches, based on reasonable suspicion, will be proper if they are conducted in circumstances in which search warrants traditionally are not required and the agency's regulations are reasonable and are followed by the probation officer conducting the search). See also *Cooker v. Metallo*, 5 F.3d 583 (1st Cir. 1993) (where the court did not reach the issue of whether a parolee had a diminished expectation of privacy having found the warrantless search lawful).

²⁸⁶ G.L.c.127, §127. Full probable cause continues to be required, however, to obtain a warrant to search the premises of a third party for a parole violator or for property that is unlawfully kept or concealed by a parolee, which includes the search of any parolee or areas under the parolee’s control for evidence or instruments of a crime.

imprisonment of the parolee for fifteen days.²⁸⁷ In addition, under G.L. c.127, §149, a parole officer may arrest a parolee under a Board-issued parole violation warrant.

Counsel should thoroughly review the statutes and case law when devising a challenge to a search or arrest of a defendant by his parole officer or by police who may accompany a parole officer.

3. Early Termination of Supervision and Sentence

A parolee may petition his supervising parole officer for termination of parole supervision after a period of one year of satisfactory conduct on parole, unless he has completed the boot camp program, in which case only four months of satisfactory parole is required.²⁸⁸ A person subject to community parole supervision for life may petition for termination of supervision after 15 years.²⁸⁹ Early termination occurs only after a majority vote of all the members of the Board. Early termination is rarely granted because it does not merely end supervision, it ends the sentence for all purposes so that the Board no longer has jurisdiction over it.²⁹⁰

4. Mechanisms for Returning Parolee to Custody

On receipt of information indicating noncompliance with a parole condition, a parole officer may address the problem without Board involvement or may prepare a Parole Violation Report, outlining the facts of each alleged violation, the rules violated, and the parole officer's recommended disposition.²⁹¹ The officer's supervisor, who also makes a recommendation as to disposition, reviews this parole violation report, which is then submitted to a member of the Board for final action. The Board may impose a variety of sanctions that do not include returning the parolee to custody.²⁹² In 2006, the Board put into place a graduated sanctions program that is designed to match the parolee's action with the appropriate treatment, intervention, or sanction based upon the parolee's risk level in order to reduce the number of parolees returned to custody for technical violations.²⁹³ Moreover, if a Board member votes to proceed with the revocation process, the parolee may be ordered to appear for a preliminary parole revocation hearing without being brought back to custody.

a. Warrant for Temporary Custody (Fifteen-Day Detainer)

The primary mechanism for returning a parolee to custody is a warrant for temporary custody, referred to as a "fifteen-day detainer." Under G.L. c.127, §149A, a

²⁸⁷ G.L. c.127, §149A; *see* *Com. v. Hinterleitner*, 57 Mass.App.Ct. 1103 (2003).

²⁸⁸ G.L. c. 127, § 130A. However, the boot camp program no longer exists.

²⁸⁹ G.L. c. 127, § 133D.

²⁹⁰ G.L. c.127, §130-130A. In ending the sentence, the Board must send notice to the sentencing court. However, the Board makes its decision without judicial review.

²⁹¹ The possible recommendations are numerous, but the most common recommendations are "proceed with revocation process" ("provisionally revoke"), "await action of court," "issue warning," and "impose special condition of parole."

²⁹² For example, the Parole Board may impose a curfew, more frequent drug testing, mental health counseling, restrict travel, and a change in residence.

²⁹³ See <http://www.mass.gov/eopss/law-enforce-and-cj/parole/field-svcs-unit/graduated-sanctions-overview.html>

parole officer, with the concurrence of a superior parole officer, may issue and serve a warrant for temporary custody that authorizes imprisonment for fifteen days. In order to issue such a warrant, the parole officer must have “reasonable cause to believe” that the parolee “has lapsed or is about to lapse into criminal ways or has associated or is about to associate with criminal company or that he has violated the conditions of his parole.”²⁹⁴ Once a warrant for temporary custody issues, the officer must submit a complete report for final decision by the Parole Board.²⁹⁵ This fifteen-day detainer does not interrupt the service of the sentence.²⁹⁶ Only the Chair of the Board may authorize a second fifteen-day detainer for compelling reasons; a third detainer may not be authorized.²⁹⁷

With this warrant, a parole officer may act quickly to return a parolee to prison.²⁹⁸ If the sentence being served on parole is a state prison (or reformatory) sentence, the parolee is generally returned to MCI Cedar Junction (males) or Framingham (females). A parolee serving a house of correction sentence is returned to the county institution of the original sentence.

b. Parole Violation Warrant (Warrant for Permanent Custody)

A parole violation warrant issues only when authorized by a member of the Parole Board on a finding that (1) a reasonable basis exists that one or more conditions of parole have been violated and (2) there exists probable cause to believe that the parolee constitutes a risk to the community or to himself.²⁹⁹ A Board member makes such finding only after a preliminary parole revocation hearing or a valid substitute.

The issuance of a parole violation warrant interrupts the service of the sentence; when the warrant is served, the sentence commences again. If a judge sentences a parolee for a new criminal offense after the warrant issues, G.L. c. 127, §149, precludes the Board from serving its warrant until expiration of the intervening sentence.³⁰⁰ However, this statute permits the Board to withdraw its warrant at any time. When that happens, the sentence begins to run again even if the person is serving an intervening sentence; however, the time between the issuance of the warrant and its

²⁹⁴ G.L. c. 127, § 149A; 120 CMR 303.04(1). The Parole Board has the authority to withdraw the warrant. G.L. c. 127, § 149A;

²⁹⁵ G.L. c.127, §149A.

²⁹⁶ 120 CMR. 303.04(2).

²⁹⁷ 120 CMR. 303.04(3). The postponements of a preliminary revocation hearing by the hearing examiner for the reasons specified in 120 C.M.R. 303.08(2) or a parolee’s request for postponement.

²⁹⁸ The Board conducts a preliminary parole revocation hearing within 15 days from the lodging of this warrant as a detainer. If a Board member finds probable cause after the hearing, a parole violation warrant issues and replaces the warrant for temporary custody as a detainer.

²⁹⁹ G.L. c.127, §149; 120 CMR 303.15. For a parolee serving a life sentence, a parole violation warrant issues only by vote of the Chair or four concurring Board members.

³⁰⁰ G.L. c. 127, § 149. The Board interprets the word *convicted* in the statute as the point in time after sentencing occurs. *see also*, *Goetzendanner v. Superintendent, Massachusetts Correctional Inst., Norfolk*, 71 Mass.App.Ct. 533 (2008); *Smith v. State Parole Bd.*, 17 Mass. App. Ct. 145 (1983) (Parole Board is authorized under G.L. c. 127, § 149, to delay service of the parole violation warrant until parolee discharged from the “SDP” commitment). Further, there are ways for a defendant to force the Board to serve the warrant before the imposition of the new sentence. *See* § 40.7(a)(3), *infra*.

withdrawal does not count against the original sentence.³⁰¹ If an alleged parole violator is located in another state and refuses to waive rendition, the Parole Board obtains a Governor's Warrant for the parolee's return to Massachusetts.³⁰² In cases where the parolee has absconded from supervision, the Board must exercise reasonable diligence in locating the parolee and serving the parole violation warrant or risk a court holding that the Board waived jurisdiction over the parolee.³⁰³

c. Interstate Compact Parole Violation Detainer

Return to custody of a parolee being supervised by the Massachusetts Parole Board for another state is controlled by the Interstate Compact for Adult Offender Supervision, which was signed by Massachusetts in 2005.³⁰⁴ The Compact provides a framework for the supervision of parolees whose supervision has been transferred to another state. It also established the Interstate Commission for Adult Offender Supervision, which has promulgated detailed rules that govern the revocation process.³⁰⁵ Under these rules, Massachusetts must notify the sending state of significant violations of conditions of supervision within thirty calendar days of discovery of the violation.³⁰⁶ Once the sending state is notified of a violation, it is required to respond to the violation report within ten business days.³⁰⁷ The sending state is required to inform the Massachusetts Board of what action they want it to take.³⁰⁸ While this process takes place, the Rules allow the Board to detain the parolee.³⁰⁹ Following the notification process, if a parolee is subject to retaking for violations of parole conditions, the parolee is generally entitled to a preliminary hearing to determine whether there is probable cause to find a violation of parole.³¹⁰ The Board must report its findings to the sending state, which must then decide within 15 days whether or not to retake the parolee.³¹¹ Only when all criminal processes in Massachusetts are complete can the

³⁰¹ G.L. c. 127, § 149.

³⁰² See G.L. c.276, §20K. Obtaining a Governor's Warrant entails providing the Massachusetts Governor with a variety of documents verifying that the parolee was convicted and sentenced in Massachusetts, that the individual was subsequently paroled, that one or more conditions of parole were violated, and that the Board wants the parolee only as a parole violator and not for some other purpose. Additionally, copies of certified court documents, photographs, and fingerprints must accompany the Board's request to the Governor.

³⁰³ In *Zullo, Petitioner*, 420 Mass. 872 (1995), the court held that the Parole Board waives jurisdiction if it does not exercise reasonable diligence in serving a parole violation warrant on a parolee who becomes "whereabouts unknown." In addition, the Board may be deemed to have waived jurisdiction if the parolee reasonably relied on the Board's inaction, or if the parolee was prejudiced by the delay.

³⁰⁴ G.L. c. 127, § 151A-N, added by St.2005, c. 121, § 3. *See also*, G.L. c. 276, § 12.

³⁰⁵ The Rules are available at [http:// www.interstatecompact.org](http://www.interstatecompact.org).

³⁰⁶ Rule 4.109(a).

³⁰⁷ Rule 4 .109(c)(1).

³⁰⁸ Rule 4.109(c)(2)

³⁰⁹ Rule 4.109–1. Although the old version of G.L. c. 127, § 151J authorized the Board to hold the parolee for 60days pending a decision by the sending state, that statute was repealed and superceded by the Compact and the Rules. Nonetheless, Board regulations still permit it to hold the parolee for 60 days. 120 CMR 303.05 (2012).

³¹⁰ Rule 5.108

³¹¹ Rule

sending state retake its parolee to face parole violation charges, unless the Governor of Massachusetts grants specific permission for an earlier return.³¹² A parolee may not challenge rendition since that right was waived under the Compact when the parolee agreed to be supervised in another state.

If the sending state decides to retake custody of the parole violator, it must do so within 30 days.³¹³ In *Zullo*, Petitioner, 420 Mass. 872 (1995), the court held that the Parole Board waives jurisdiction if it does not exercise reasonable diligence in serving a parole violation warrant on a parolee who becomes “whereabouts unknown.” In addition, the Board may be deemed to have waived jurisdiction if the parolee reasonably relied on the Board's inaction, or if the parolee was prejudiced by the delay.

§ 40.10G. PAROLE REVOCATION HEARINGS

The Parole Board may revoke a parole permit if the parolee violates any parole condition or if the Board based its release decision on fraudulent information provided by or on behalf of the parolee.³¹⁴ However, as a general policy the Board is supposed to consider less severe sanctions before revoking parole status and returning a parolee to custody.³¹⁵ In the situation where counsel learns of supervision problems before the scheduling of a preliminary revocation hearing, counsel should try to negotiate a sanction that does not include a return to custody. In this situation, counsel, upon consultation with the parolee client, should be prepared to acknowledge the problem and offer an available program that will address the circumstances as effectively as incarceration. While dealing with a parole officer, counsel should remember that a parolee is not entitled to due process before he is taken into custody because of a possible parole violation.³¹⁶ Further, a parolee does not ordinarily have the right to have counsel present at meetings with a parole officer.³¹⁷

Because a parolee has a protected liberty interest in remaining on parole as long as he or she does not breach the conditions of parole, due process requires certain safeguards after he or she is reincarcerated for a suspected parole violation.³¹⁸ The Supreme Court has held that parole revocation is a two stage process.³¹⁹ First, there must be a preliminary hearing to determine whether there is probable cause to believe that parolee committed acts which would constitute violation of parole conditions; in Massachusetts this hearing must be held within 15 days. The parolee is then entitled to a second hearing within 60 days of his arrest at which the Board must definitively answer two questions: did the parolee violate one or more condition of parole, and, if so, was the violation serious enough to warrant recommitting him to prison, or should other steps be taken to protect society and improve chances of rehabilitation?³²⁰

³¹² See G.L. c.276, §20G.

³¹³ Rule 5.105

³¹⁴ 120 CMR. 303.01(1).

³¹⁵ 120 CMR. 303.01(2).

³¹⁶ *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972).

³¹⁷ *Commonwealth v. Woods*, 427 Mass. 169, 174–75 (1998) (where the court regarded as “doubtful” the assertion that the defendant had a right to an attorney at a psychological evaluation that was a condition of probation).

³¹⁸ *Morrissey*, *supra*, 408 U.S. at 480; *see generally* 120 CMR 303.09.

³¹⁹ *Morrissey*, *supra*, 408 U.S. at 480.

³²⁰ *Id.*

1. Preliminary Revocation Hearing

The first of the two-hearing process, the preliminary parole revocation hearing, is conducted by a hearing examiner.³²¹ This hearing may be held in the community or after the parolee is returned to custody.³²² Preliminary hearings are required to take place within fifteen days of the service or lodging of a warrant for temporary custody, unless the hearing has been temporarily postponed³²³ or waived.³²⁴ However, the Board may issue a parole violation warrant without a preliminary hearing under the following circumstances: if a parolee was convicted of a crime committed while on parole; if there was a finding of sufficient facts by a court to enter a guilty finding against the parolee; if a court found probable cause in a bind-over proceeding, pursuant to G.L. c. 278, § 1; if a grand jury indicted the parolee; if the parolee was found in violation of probation in a preliminary or final violation hearing; or if reliable evidence exists that the parolee absconded from supervision.³²⁵ These proceedings serve as an adequate substitute for the probable cause finding that the Board would have to make at a preliminary hearing.

a. Prehearing Process

Prior to the preliminary revocation hearing, the Parole Board gives the parolee written notice of the following: the alleged violations of parole; the time and place of the hearing; the name of the hearing examiner scheduled to conduct the hearing; and that the parolee may have an attorney present, may present witnesses, and may cross-examine adverse witnesses.³²⁶ If the parolee requests the presence of adverse witnesses, the Board produces them unless the Board finds “good cause” to deny the request, the parolee has admitted to a violation of any condition, or the parolee has been convicted of a new offense while on parole.³²⁷

³²¹ 120 CMR 303.11(1).

³²² 120 CMR. 303.03; 120 CMR 303.06(2)-(3)

³²³ 120 CMR 303.08. Both the parolee and the hearing examiner may postpone the preliminary revocation hearing. Postponements upon the request of the parolee are permitted in order for the parolee to secure counsel or arrange for the attendance of witnesses. The hearing examiner may postpone the hearing due to lack of proper notice to the parolee; insufficient information to proceed with the hearing, the need for an interpreter; illness of the parolee that places the hearing examiner or the parolee at risk; or the parolee is committed to Bridgewater State Hospital or The Addiction Center for detoxification. The fifteen-day period is tolled in the event of the parolee’s commitment for detoxification. *Id.*

³²⁴ 120 CMR 303.09. A parolee may waive the preliminary revocation hearing in writing only after receiving notice of the hearing, the grounds for violation alleged, the due process rights afforded at the hearing, and the possible dispositions. Waiver results in the issuance of a parole violation warrant. *Id.*

³²⁵ 120 CMR 303.10; *see* *Stefanik v. State Bd. of Parole*, 372 Mass. 726 (1977).

³²⁶ 120 CMR. 303.07. The parolee must receive this written notice at least 48 hours before the hearing. *Id.*

³²⁷ 120 CMR 303.11(6). Requests for adverse witnesses should be made to the hearing examiner at least several days in advance of the preliminary hearing. As contrasted to the final revocation hearing, the preliminary hearing is “an informal inquiry” and the hearing examiner may readily find “good cause” to deny the adverse witness request.

Although counsel is not required at all revocation hearings, the Supreme Court has held that Board should presumptively provide an attorney where a parolee makes a request for counsel based on a timely and colorable claim that: (1) he has not committed the alleged violation; or (2) there are substantial reasons that justify or mitigate the violation and make revocation inappropriate and said reasons are complex or difficult to develop or present.³²⁸ The Board should also consider whether the parolee appears to be capable of speaking effectively for himself.³²⁹ There is no distinction between the right to counsel for preliminary or final revocation hearings.

If the parolee requests that the Board provide him with an attorney, the parolee completes an indigency report and the hearing examiner will conduct an evaluation before the preliminary hearing.³³⁰ If the hearing examiner determines that the Parole Board should provide counsel, then the preliminary hearing is postponed. If the hearing examiner determines that counsel should not be provided and the parolee does not intend to secure his or her own counsel, the preliminary hearing proceeds, unless another reason for postponement is approved.³³¹

b. Procedure at Hearing

Procedure at the hearing is set out in 120 CMR 303.12. At the outset, the hearing examiner ascertains whether the parolee received sufficient notice and has had sufficient time to prepare and obtain representation and witnesses.³³² In addition, the hearing examiner discloses in some fashion all documents and information that the Board will consider.³³³ The parolee, or representative, may present relevant information and question adverse witnesses, except in instances where the examiner finds good cause to disallow cross-examination.³³⁴ This preliminary hearing is very informal, and the parolee has great leeway in answering the allegations.³³⁵ Representatives and parolees should ascertain the exact allegations of parole violations from the hearing examiner. Counsel should be aware that any admission of additional parole violations will result in supplementary charges.

c. Possible Decisions

After the hearing, the hearing examiner prepares a written summary of the preliminary hearing and a recommended decision addressing whether the parolee violated each charge and, if so, whether the parolee should be incarcerated pending a

³²⁸ *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

³²⁹ *Id.*

³³⁰ *See* PAROLE BOARD POLICY 500.03 (May 2006). The criteria used by the Board to decide whether to appoint counsel appear to be somewhat more stringent than those established by the Supreme Court in *Gagnon*.

³³¹ *See* 120 CMR 303.08 ().

³³² 120 CMR 303.12(1)-(2). The hearing examiner may grant a postponement to allow the parolee time to prepare adequately for the preliminary hearing. If the parolee is in custody under the Board's warrant for temporary custody ("F-day detainer") and the hearing examiner grants a postponement, the Chair will authorize a second detainer.

³³³ 120 CMR 303.12(3). The hearing examiner determines the form of discovery, from providing actual copies of the documents to a fair oral summary. *Id.*

³³⁴ 120 CMR 303.12(4).

³³⁵ 120 CMR 303.11..

final revocation hearing.³³⁶ This report, together with a copy of the Parole Violation Report, “running records,”³³⁷ other investigation materials, and any written documents presented by the parolee, is given to a Board member for final decision about whether parole should be preliminarily revoked.³³⁸ If the final decision is to proceed with the revocation process, a parole violation warrant will issue; if the decision is that no probable cause exists, the parolee will “resume supervision in the community without unnecessary delay.”³³⁹ Because the final decision is made on a paper review, counsel should submit a short written memorandum, with relevant exhibits attached, at the hearing. The parolee must be provided with a written notice of the final hearing decision.³⁴⁰

2. Final Revocation Hearing

a. Prehearing Process

Before a final revocation hearing, a parolee is entitled to discovery of information that is relevant to revocation and in the possession of the Board.³⁴¹ Requests for documentation should be made through the institutional parole officer. The staff usually requires considerable advance notice to respond to discovery requests.³⁴² Because the Parole Board is required to conduct a final revocation hearing within approximately sixty days after the parolee’s return to custody, counsel should take advantage of discovery before a final revocation hearing, even if discovery occurred during the preliminary revocation hearing process.

The Board must give written notice of the claimed violations of parole and procedural due process rights at least seventy-two hours before the final revocation hearing.³⁴³ All charges alleged in the notice of the preliminary hearing and any others discovered at or since the preliminary hearing are included.

The parolee may request the Board to furnish counsel for this hearing even if the Board declined to provide counsel during the preliminary hearing process.³⁴⁴ Where counsel was previously denied, the parolee must demonstrate a substantial change in circumstances. Requests for provided counsel are made to the institutional parole staff

³³⁶ 120 CMR 303.13(1)-(2).

³³⁷ The log kept by parole staff noting all interactions relating to the parolee.

³³⁸ 120 CMR 303.13(1). If the Board member disagrees with any of the hearing examiner's recommendations, a second Board member will review the case to break the impasse. If the two Board members disagree, the case is referred to a third member. Two agreeing Board members decide the case. 120 CMR 303.13(5).

³³⁹ 120 CMR 303.12(3).

³⁴⁰ 120 CMR 303.14.

³⁴¹ 120 CMR 303.22(1).

³⁴² The Board will not give copies of any “sensitive” documents that came from a source other than the Board without specific written approval from that other entity for such disclosure. Additionally, the Board may classify certain documents as “confidential,” and the Board will not completely disclose these documents. In these situations, the Board may give the parolee or representative a fair oral or written summary of the document's contents. *See generally* 120 CMR 303.23(6).

³⁴³ 120 CMR 303.19.

³⁴⁴ *See* PAROLE BOARD POLICY 500.03 (May 2006).

who will schedule an evaluation with a hearing examiner.³⁴⁵ The Parole Board schedules a final revocation hearing within approximately sixty days from the date of service of the parole warrant.³⁴⁶ The Board may extend the time period if the hearing is postponed³⁴⁷ or the parolee's actions otherwise delay the proceedings.³⁴⁸ In instances where the parolee is serving an intervening sentence, the hearing is generally scheduled to coincide with the initial parole release hearing for that sentence.³⁴⁹ A parolee may choose to waive a final hearing as well.³⁵⁰

b. Procedure at Hearing

The parolee's due process rights at a final revocation hearing include an opportunity to be heard in person, the right to present witnesses and documentary evidence, and the right to confront and cross-examine adverse witnesses, and a "neutral and detached" hearing body.³⁵¹ It is important for counsel to be aware that the strict rules of evidence do not apply during final revocation hearings.³⁵²

³⁴⁵ Parole Board Policy 500.03 (May 2006)

³⁴⁶ 120 CMR 303.18(1).

³⁴⁷ 120 CMR 303.18(3). As with preliminary revocation hearings, the parolee or the hearing panel may seek to postpone the final revocation hearing. The parolee may request postponement in order to obtain counsel, to secure the attendance of witnesses, to prepare for the hearing, or to resolve pending criminal or disciplinary charges up to one year from the service of the parole violation warrant. 120 CMR 303.20(1). The hearing panel may postpone the hearing until the next available docket if: the parolee did not receive proper notice; the panel lacks sufficient information to proceed; to obtain an interpreter; the parolee is suffering from an infectious disease placing the panel or the parolee at risk; to decide on a request for discovery or for the presence of adverse witnesses; or the parolee is absent or unavailable. 120 CMR 303.20(2).

³⁴⁸ 120 CMR 303.18(3).

³⁴⁹ 120 CMR 303.18(2).

³⁵⁰ 120 CMR 303.21. A parolee may waive the final revocation hearing in writing only after receiving notice of the hearing, the grounds for violation alleged, the due process rights afforded at the hearing, and the possible dispositions. Waiver results in a decision of revocation affirmed and parole denied, with a review hearing scheduled to take place within one year of the waiver. *Id.*

³⁵¹ *Morrissey*, 408 U.S. at 489; *see also* *Commonwealth v. Harrison*, 429 Mass. 866,868 (1999) (probation surrender hearing held without defendant violates constitutional right to be heard); *Commonwealth v. Maggio*, 414 Mass. 193 (1993) (revocation of probation did not comply with due process where the probationer did not receive adequate prior notice of the charges and therefore could not have had an adequate opportunity to present any meaningful defense, and where the only information available to the judge was an indictment); *Commonwealth v. Durling*, 407 Mass. 108, 113 (1990).

³⁵² 120 CMR 303.23(2); *Gagnon*, 411 U.S. at 789; *Pennsylvania Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 365-66 (1998); *see* *Commonwealth v. Thissell*, 457 Mass. 191, 195-99 (2010); *Commonwealth v. Vincente*, 405 Mass. 278 (1989). Evidence admissible in a criminal proceeding is presumptively reliable; for evidence that would not be admissible, the Board makes an independent finding of its relevance and reliability. *See, e.g., Durling*, 402 Mass. at 117-20.

The regulations of the Parole Board set out the evidentiary process and the procedure that should be followed at the final revocation hearing.³⁵³ The hearing panel must disclose all evidence upon which it may base a finding of violation in the form of documents or verbal summarization of documents.³⁵⁴ In general, all relevant and reliable evidence presented by the parolee is admissible, but the presenting member of the hearing panel may exclude evidence that is irrelevant and repetitious.³⁵⁵ The Board uses the preponderance of evidence standard of proof in making its decisions, which may be based solely on reliable documentary evidence.³⁵⁶ If the facts leading to a violation of parole are also the subject of a criminal charge that the judge dismissed or resulted in acquittal, the Board may still consider whether they are grounds for revocation.³⁵⁷ The exclusionary rule is not applicable to Parole Board proceedings.³⁵⁸ If a judge excluded the evidence, the Board will consider the reason for exclusion by the court and make an independent finding of its relevance and reliability.³⁵⁹

The composition of the final revocation hearing panel depends on the nature of the parolee's sentence. If it is a term of years in the state prison, the hearing is conducted by a panel of Board members.³⁶⁰ If the hearing concerns a parolee with a life sentence, it is conducted by a panel of at Board members, but the case must then be referred to the full Board for a final vote.³⁶¹ For sentences to county houses of correction, the final hearing is conducted by a panel of hearing examiners.³⁶²

c. Possible Decisions

The decision of the parole hearing panel at a final revocation hearing has two components: (1) whether one or more conditions of parole were violated, and (2) if so,

³⁵³ 120 CMR 303.23; 120 CMR 303.24. The final revocation hearing is recorded and a copy of the audiotape may be obtained on written request to the institutional parole staff.

³⁵⁴ 120 CMR 303.23(6).

³⁵⁵ 120 CMR 303.23(3)-(4).

³⁵⁶ 120 CMR. 303.25; *Commonwealth v. Holmgren*, 421 Mass. 224, 226 (1995); *see Commonwealth v. Wilson*, 47 Mass. App. Ct. 924, 925 (1999) (finding that a police report based on another person's statement, with no corroboration or investigation, was unreliable hearsay upon which probation revocation could not be based); *Commonwealth v. Calvo*, 41 Mass. App. Ct. 903, 904 (1996) (upholding probation revocation based on a police report without a showing the unavailability of percipient witnesses whose statements were contained in the report).

³⁵⁷ 120 CMR 303.25(4). The Board, because of the great difference in standards of proof between a criminal trial and a parole revocation hearing, may find a violation of parole conditions even after an acquittal or dismissal of the criminal charges. *See Holmgren*, 421 Mass. at 225-26; *Commonwealth v. Mejias*, 44 Mass. App. Ct. 948, 949 (1998). Additionally, a parole revocation may be based on a criminal conviction that is under appeal. *Argro v. United States*, 505 F.2d 1374 (2d Cir. 1974). Conversely, a finding of no revocation at a parole revocation hearing does not preclude prosecution on the criminal charges due to the differences in burden of proof. *See Commonwealth v. Reddix*, 429 Mass. 1015 (1999).

³⁵⁸ *Pennsylvania Bd. of Probation and Parole v. Scott*, 118 S. Ct. 2014 (1998); *Commonwealth v. Vincente*, 405 Mass. 278 (1989).

³⁵⁹ *See Commonwealth v. Olsen*, 405 Mass. 491 (1989).

³⁶⁰ 120 CMR 303.17(3).

³⁶¹ 120 CMR 303.17(2).

³⁶² 120 CMR 303.17(4).

whether re-parole is appropriate.³⁶³ Although the Board has sometimes taken the position that an offender is not entitled to the same due process protections in the release decision phase of the hearing, it permits representatives to remain and to speak. After private deliberations on the day of the hearing, the presenting member of the hearing panel will inform the parolee of the panel's decision as to whether a violation occurred, whether parole status should be revoked, and whether re-parole is warranted.³⁶⁴ If the panel does not find a violation, the parolee must be restored to supervision within twenty-four hours, unless additional time is necessary to make housing or comply with CORI notifications.³⁶⁵ After the decision, the presenting member advises the parolee of the availability of administrative appeal and reconsideration.³⁶⁶

A parolee is entitled to a written statement by the fact finders as to the evidence on which they relied and the reasons for revoking parole.³⁶⁷ The Board provides such to the inmate within twenty-one days after the decision to revoke parole is made.³⁶⁸

d. Second-Degree Lifer Revocation Proceedings

Although arguably not authorized by its regulations or by the Due Process Clause, the Board has adopted a three hearing procedure for parole revocations of offenders serving life sentences. If revocation is affirmed at the final revocation hearing held before a panel of the Board, it schedules a third hearing before the full Board to determine if, and under what conditions, reparole is appropriate. Because this hearing is conducted by the full membership of the Board, it generally does not take place until several months after the final revocation hearing.

§ 40.10H. JUDICIAL REVIEW OF PAROLE BOARD DECISIONS

After exhaustion of the administrative appeal process, an inmate may file an action for a declaratory judgment,³⁶⁹ or for certiorari,³⁷⁰ in the superior court to challenge the decision of the Board. If the prisoner asserts that the Board should have voted to release him, the court cannot second-guess the Board, but can only grant relief if the decision was not supported by reliable evidence or was an abuse of discretion.³⁷¹

³⁶³ 120 CMR 303.25(2).

³⁶⁴ 120 CMR 303.24(j).

³⁶⁵ 120 CMR 303.25(1). Even when no violation has been found, Parole Board members can modify previous conditions of release. *Id.*

³⁶⁶ 120 CMR 303.24(k).

³⁶⁷ *Morrissey*, 408 U.S. at 489.

³⁶⁸ 120 CMR 303.26. The exact vote of the hearing panel may be acquired by requesting the public record of decision.

³⁶⁹ G.L. c. 231A, § 4; *see also* *Henderson v. Commissions of Barnstable County*, 49 Mass. App. Ct. 455, 458 (2000) (declaratory action appropriate to challenge agency's interpretation of statute, the agency's practice of acting under that interpretation, and agency's construction of its regulations and handbook);

³⁷⁰ G.L. c. 249, § 4.

³⁷¹ *Committee for Public Counsel Services v. Lookner*, 47 Mass. App. Ct. 833, 835 (1999) ("Actions in the nature of certiorari under [G.L. c. 249, § 4](#), must be commenced within sixty days after the conclusion of the proceeding being challenged."), *citing* *Pidge v. Superintendent, Mass. Correctional Inst., Cedar Junction*, 32 Mass.App.Ct. 14, 17-18 (1992);

Because Massachusetts prisoners do not have a constitutionally protected liberty interest in being granted parole, the decision cannot be challenged on due process grounds.³⁷² But due process is required before the Board can rescind or revoke parole.³⁷³ Therefore, the offender may challenge parole rescission and revocation by alleging deprivation of due process as well as by alleging arbitrary and capricious actions and abuse of discretion.³⁷⁴ However, unless the prisoner is entitled to immediate unrestrained release, as opposed to release back to parole supervision, an application for a writ of habeas corpus is not appropriate.³⁷⁵ Again, exhaustion of administrative remedies appears to be required and should always be done in an abundance of caution.³⁷⁶

Nercessian v. Board of Appeal on Motor Vehicle Liability Policies and Bonds, 46 Mass.App.Ct. 766, 772-773 (1999) (finding that review on certiorari can extend to determinations of whether the decision being challenged was arbitrary, capricious, or an abuse of discretion, whether the decision was supported solely by inadequate evidence, and whether it was supported by “substantial evidence.”). *See also* *In the Matter of Robert B. Antonelli*, 429 Mass. 644 (1999) (challenges to hearing officer’s conclusions concerning the credibility of witnesses must fail as they are questions for the trier of fact to resolve).

³⁷² *Jiminez v. Conrad*, 678 F.3d 44 (1st Cir. 2012)(prisoner who alleged parole denied because he had killed a police officer stated no federal constitutional claim); *see also*, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979). Massachusetts parole statutes have no mandatory language indicating that parole must be granted if certain criteria are met. The language is purely discretionary. G.L. c. 127, §§ 130, 133B; *Greenman v. Massachusetts Parole Bd.* 405 Mass. 384, 389 (1989); *Commonwealth v. Hogan*, 17 Mass. App. Ct. 186, 191–92 (1983).

³⁷³ *Morrissey*, 408 U.S. at 480; *Lanier v. Fair*, 876 F.2d 243, 248 (1st Cir. 1989). Ordinarily, due process claims are brought under 42 U.S.C. § 1983. However, the Supreme Court has suggested that § 1983 cannot be used to challenge a parole revocation without a prior showing that the revocation has been “expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus” Such a showing must also be made where the plaintiff is only asking for declaratory judgment and not seeking damages. *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *but see Lynch v. Hubbard*, 47 F. Supp.2d 125 (D. Mass. 1999) (in parole cases, *Heck* would only bar allegations of constitutional impropriety in revocation proceedings, and not § 1983 suits that challenge the procedures and standards pertaining to the grant or the denial of parole release are not barred); *see also Puleio v. Commissioner of Correction*, 52 Mass. App. Ct. 302, 308-310 (2001), *citing Spencer v. Kemna*, 523 U.S. 1, 3-6, 18 (1998).

³⁷⁴ This suggested standard of review is garnered from federal cases involving the highly structured decision making process of the U.S. Parole Commission. *See generally Billiteri v. United States Bd. of Parole*, 541 F.2d 938, 944 (2d Cir. 1976); *Zannino v. Arnold*, 531 F.2d 687, 690 (3d Cir. 1976); *Cerullo v. Gunnell*, 586 F. Supp. 211, 213 (D. Conn. 1983). Under 18 U.S.C. § 4206, expectation of parole is a liberty interest. *Solomon v. Elsea*, 676 F.2d 282, 284–85 (7th Cir. 1982); *Stroud v. United States Parole Comm’n*, 668 F.2d 843, 846 (5th Cir. 1982); *Evans v. Dillahunty*, 662 F.2d 522 (8th Cir. 1981).

³⁷⁵ G.L. c. 248, §1; *Massachusetts Parole Bd. v. Brusgulis*, 403 Mass. 1010, 1011 (1989) (“[S]ince parole constitutes a variation on imprisonment...and not an unrestrained release from confinement, a grant of declaratory relief rather than a writ of habeas corpus is appropriate remedy”); *Pina v. Superintendent*, 376 Mass. 659, 664–65 (1978); *See also* *Petition of Stewart*, 411 Mass. 566, 568–69 (1992); *Love v. Massachusetts Parole Bd.*, 413 Mass. 766, 767 (1999).

³⁷⁶ *See* *Washington v. Massachusetts Parole Bd.*, 54 Mass.App.Ct. 1114, 2002 WL 807207 (2002)(unpublished). Other jurisdictions hold that the doctrine may only be circumvented in very limited situations: where exhaustion is futile and where a clear right of the

§ 40.11 EXECUTIVE CLEMENCY

Anyone convicted in a Massachusetts court may petition the Governor for a commutation or pardon.³⁷⁷ The Governor's executive clemency powers are discretionary and generally, the Governor reserves this power only for petitioners he deems the most deserving. The executive clemency power is comprehensive, extending to all Massachusetts offenses except senate impeachment convictions and limited only by the provision that pardons or commutations will not be granted before conviction.³⁷⁸

The General Laws authorize the Massachusetts Parole Board to act as the Advisory Board of Pardons, screening all petitions for pardons and commutations and making nonbinding recommendations to the Governor.³⁷⁹ If the Governor desires to grant a commutation or pardon, the petition is referred to the Governor's Executive Council for a final decision. Through each stage in the process, a petitioner may be represented by counsel who has registered with the Secretary of State.³⁸⁰

§ 40.11A. COMMUTATION OF SENTENCE

“The Governor's power to commute sentences is derived from the Governor's pardoning power.³⁸¹ A commutation substitutes a lighter for a more severe punishment but leaves the conviction undisturbed,³⁸² and any sentence may be commuted to any lesser term.³⁸³ There is no specific time that a prisoner must serve before commutation,

plaintiff is affected. *See* *United States v. Snooks*, 493 F. Supp. 1364, 1375 (W.D. Mo. 1980); *Rosati v. Haran*, 459 F. Supp. 1148 (E.D.N.Y. 1977).

³⁷⁷ Mass. Const. pt. 2, c. 2, § 1, art. 8. Statutory directives are found at G.L. c. 127, §§ 152–169. In addition to statutory directives, each governor publishes “guidelines” specifying the minimum criteria that must be met before consideration for executive clemency. The current guidelines were promulgated by Governor Patrick on May 21, 2007 and are available at <http://www.mass.gov/eopss/docs/pb/patrick-clemency-guidelines.pdf>.

³⁷⁸ *Juggins v. Executive Council*, 257 Mass. 386, 388 (1962); *In re Kennedy's Case*, 135 Mass. 48, 51 (1883); *Commonwealth v. Lockwood*, 109 Mass. 323 (1872); *Perkins v. Stevens*, 24 Pick. 277 (1833). *But see* *Ex parte Garland*, 4 Wall 333, 280 (1866) (President of the United States could pardon a person before conviction).

³⁷⁹ G.L. c. 127, § 153. As in parole matters, any member of the Advisory Board may be disqualified from voting because of a conflict of interest. 120 C.M.R. 900.01(3).

³⁸⁰ G.L. c. 127, § 167. The Advisory Board must approve nonlicensed attorneys who represent commutation petitioners. 120 C.M.R. 901.09(3). There is no similar provision for pardon petitions.

³⁸¹ Although the Mass. Const. and statutes speak only of the *pardoning power* of the Governor, that term applies equally to commutation of sentence. Opinion of the Supreme Court (November 1787); Opinion of the Justices, 190 Mass. 616, 621 (1906); Opinion of the Justices, 210 Mass. 609, 610–11 (1912); 4 Op. Atty. Gen. 119, 120–21 (1914); 8 Op. Atty. Gen. 6 (1926).

³⁸² *Commonwealth v. Arsenault*, 361 Mass. 287, 292–93 (1972); Opinion of Justices, 210 Mass. 609, 610–11 (1912); 7 Op. Atty. Gen. 73 (Sept. 15, 1966); Kinney, Petitioner, 5 Mass. App. Ct. 457 (1977).

³⁸³ Commutation is not limited to a sentence of imprisonment, therefore, commutation of probation or a fine is possible.

which overrides even a mandatory term of incarceration.³⁸⁴ Practitioners should keep in mind, however, that commutations are extremely rare. In 2010, the Advisory Board of Pardons received 39 commutation petitions and held two commutation hearings. None of these commutation hearings resulted in a favorable recommendations to the Governor.³⁸⁵ In fact, no Massachusetts prisoner has had a sentence commuted since 1997.

The Advisory Board of Pardons expects a petitioner to exhaust available administrative remedies prior to applying for a commutation, and to meet the minimum criteria under the Governor's Commutation Guidelines, but not doing so will not absolutely bar the processing of the petition.³⁸⁶ Additionally, a petitioner must demonstrate the following by clear and convincing evidence: exceptional strides in self-development since the commission of the offense; a terminal illness or severe and chronic disability that would be mitigated by release from custody; or that further incarceration constitutes gross unfairness; and that commutation of sentence is consistent with the ends of justice.³⁸⁷

The processing of petitions for commutation involves three levels: the Advisory Board of Pardons, the Governor's Executive Council, and the Governor. Although the General Laws³⁸⁸ set deadlines in terms of weeks on the Advisory Board, a petitioner may expect a case to take six months for review by the Advisory Board; there are no time constraints for action by the Executive Council or on the final decision by the Governor.³⁸⁹

Applications for a commutation of sentence may be obtained from either the Governor's Executive Council or the Advisory Board of Pardons. A completed application is submitted to the Executive Secretary of the Governor's Executive Council, who transmits it to the Advisory Board of Pardons for processing.³⁹⁰ Any documents submitted by a petitioner must comply with the Massachusetts laws of evidence governing the authentication of documents. If the Advisory Board recommends denial of the application for failure to comply with the General Laws,

³⁸⁴ For example, in 1987 Governor Dukakis granted commutation of Silvester Lindsley's sentence under the Bartley-Fox gun law (G.L. c. 269, § 10(a)) before the service of the one-year mandatory term of incarceration. However, nothing precludes the Governor from developing guidelines that set minimum incarceration lengths before which commutation is unavailable.

³⁸⁵ See Mass. Parole Board, *2010 Annual Statistical Report*.

³⁸⁶ 120 C.M.R. 901.01(2). If an administrative (or judicial) remedy is no longer available to a petitioner, the Advisory Board considers it exhausted.

³⁸⁷ 120 C.M.R. 901.01(1). The 2007 Commutation Guidelines of Governor Patrick give examples of what constitutes "gross unfairness" in the petitioner's further incarceration: "(i) the severity of the sentence received in relation to sentences received by co-defendants; (ii) the extent of petitioner's participation in the offense; or (iii) a history of abuse suffered by the petitioner at the hands of the victim which significantly contributed to or brought about the offense."

³⁸⁸ G.L. c. 127, § 154.

³⁸⁹ Where the recommendation is denial, the petitioner must wait one year from this recommendation to submit another application. If the recommendation is favorable but the Governor denies commutation, the petitioner must wait one year from the denial to refile. 120 C.M.R. 901.13. The Advisory Board may waive this latter restriction if the petitioner demonstrates a material and compelling change in circumstances. An example of such change would be the diagnosis of a terminal illness.

³⁹⁰ 120 C.M.R. 901.02.

Governor's Commutation Guidelines, or Advisory Board's regulations, the Advisory Board gives the petitioner a chance to correct the deficiencies.³⁹¹ If the application substantially complies with all requirements, the Advisory Board conducts an investigation into the petitioner's criminal, social, and institutional histories, as well as any other factor deemed relevant.³⁹² Advisory Board staff prepare a summary of the case, which is then provided to each Advisory Board member. The Advisory Board, by majority vote, may recommend the denial of the application or approve the scheduling of a hearing. The Advisory Board may also recommend commutation without a hearing if the petitioner is in deteriorating physical or mental condition, or other exigent circumstances apply, and where the delay due to a hearing would subject the petitioner to irreparable harm.³⁹³

If the Advisory Board votes to grant a *commutation hearing*, the General Laws require written notice of the hearing to numerous parties.³⁹⁴ If the petitioner was convicted of a homicide, the Advisory Board publishes notice of the commutation hearing in a newspaper of general circulation in the county in which the crime occurred.³⁹⁵

The petitioner or representative may request access to all materials and exhibits the Advisory Board will use at the hearing, except those which the Board deems confidential.³⁹⁶

The full available membership of the Advisory Board conduct commutation hearings: These hearings are public and recorded.³⁹⁷ The burden is on the petitioner to establish by clear and convincing evidence that he or she is deserving of commutation relief.³⁹⁸ The Board does not follow strict rules of evidence and may exclude evidence considered immaterial, irrelevant, repetitive, or extraneous. Additionally, the Advisory Board may receive evidence in camera or off the record if public presentation would put someone at risk. The Advisory Board may summon witnesses and may provide an interpreter.³⁹⁹

³⁹¹ 120 C.M.R. 901.03. If the petitioner does not correct the inadequacies, the Advisory Board will recommend denial to the Governor as the petition did not meet the minimum requirements. A denial on these grounds does not bar resubmission of the application at any time after the petitioner removes the deficiency.

³⁹² 120 C.M.R. 901.04.

³⁹³ 120 C.M.R. 901.05.

³⁹⁴ See G.L. c. 127, § 152; 120 C.M.R. 901.07.

³⁹⁵ 120 C.M.R. 901.07(3) (failure to publish does not delay the commutation process).

³⁹⁶ 120 C.M.R. 901.08. All requests for discovery must be made in writing to the director of pardons at the Advisory Board. Any challenge to the non-availability of material deemed confidential by the Advisory Board is addressed to the General Counsel of the Advisory Board. Although the petition and accompanying documentation are public records upon filing with the Executive Council, G.L. c. 127, § 152, para. 3, the materials gathered and developed by the Advisory Board during its investigation are considered exempt from the public records law under G.L. c. 4, § 7(f) and c. 6, §§ 172 *et seq.* The Advisory Board's submissions to the Governor are public when received by the Governor, and the Board must send under separate cover those materials it deems confidential. G.L. c. 127, § 154, para. 5. See 120 CMR 900.02.

³⁹⁷ 120 C.M.R. 901.09. All members of the Advisory Board may not be in actual attendance, but will review the audio or video recording of the hearing and all documentation prior to voting.

³⁹⁸ 120 C.M.R. 901.01(1).

³⁹⁹ 120 C.M.R. 901.09; G.L. c. 127, § 154, para. 6.

At a hearing the Chair administers oaths to the petitioner and each witness. The process of the hearing is outlined by the Advisory Board's regulations.⁴⁰⁰ For good cause the Advisory Board may, at the close of the hearing, allow a request by any party to submit supplemental memoranda or other documentation.⁴⁰¹

Within a reasonable time after the commutation hearing, the full Advisory Board votes a nonbinding *recommendation to the Governor*. The Board will not disclose to anyone its recommendation until the Governor receives its opinion⁴⁰² and recommendation.⁴⁰³ The Advisory Board will not disclose to the public information it considers confidential and will send this information to the Governor under seal.⁴⁰⁴ The Advisory Board retains a copy of its opinion, related exhibits, and a certified copy of the application for a period of ten years from the date the Board received the application.⁴⁰⁵ Requests to obtain this information should be made to the public information officer of the Advisory Board.

*The Massachusetts Constitution and the General Laws authorize commutation with conditions and revocation of both conditional and unconditional commutations where any condition of commutation is violated or where there was "a misstatement of a material fact knowingly made at the time of the filing of the written petition by the petitioner, or that such [commutation] was procured by fraud, concealment or misrepresentation or that any provision of the [statute] has not been complied with."*⁴⁰⁶ If the Governor issues a warrant for a commutation petitioner, the petitioner is returned

⁴⁰⁰ 120 C.M.R. 901.10. The hearing proceeds in the following manner: (1) The petitioner or representative may make a brief opening statement. (2) The Advisory Board members inquire of the petitioner concerning any matter. (3) The Advisory Board permits testimony from any individual who may wish to provide information regarding the petitioner's institutional progress or fitness for release. (4) The Advisory Board elicits available evidence and/or testimony regarding the impact of petitioner's crime on the victim(s) or victim's family, and any recommendations by the victim or family regarding the issue of commutation of the petitioner's sentence. (5) The Advisory Board elicits testimony from officials of the Commonwealth. (6) The Chair may permit a closing statement by the petitioner or representative. 120 CMR 901.10(2). This is the same procedure used at parole hearings for prisoners serving second degree life sentences.

⁴⁰¹ 120 C.M.R. 901.10(3). However, the Advisory Board will use any relevant information received prior to its vote, and where such information is received after the Board transmits its recommendation to the Governor, the Board will send the new information to the Governor and may also recall its recommendation for the Board's reconsideration.

⁴⁰² The Advisory Board's opinion contains a description of the offense as summarized by an appellate court; a summary of the evidence presented at the public hearing, including the support petitioner accrued both in the institution and in the community, and the nature and extent of opposition to the petition; an institutional progress report concerning responsible use of available rehabilitative programs; where applicable, a description of realistic community correctional and parole programs available to continue the petitioner's rehabilitation; and where applicable, a plan for reintegrating the petitioner into normal community life. 120 C.M.R. 901.12(1).

⁴⁰³ 120 C.M.R. 901.11(2); *see also* 120 C.M.R. 900.02(2).

⁴⁰⁴ 120 C.M.R. 900.02(3).

⁴⁰⁵ G.L. c. 127, § 154, para. 5.

⁴⁰⁶ G.L. c. 152, para. 6; Mass. Const. pt. 2, c. 2, § 1, art. 8, as annulled and superseded by amendments, art. LXXIII.

to the institution on the original terms of the commuted sentence. When the Governor revokes a commutation, the petitioner receives no “jail credit” for the street time.⁴⁰⁷

§ 40.11B. PARDON OF OFFENSES

Under the Advisory Board regulations, pardon relief will in general only be granted to petitioners who establish by clear and convincing evidence a substantial period of good citizenship subsequent to a criminal offense of which they have been convicted in a Massachusetts court and who have a specific compelling need for such relief. In addition, a petitioner must demonstrate that the ends of justice will be served by the granting of pardon relief.⁴⁰⁸ However, a petitioner must also pass the threshold criteria established in the Governor's Clemency Guidelines.⁴⁰⁹

The effect of a full and complete pardon is to cancel the *fact of conviction*⁴¹⁰ except for sentencing purposes in a subsequent criminal proceeding or in any court proceeding⁴¹¹ where the defendant is accused of violating certain enumerated crimes.⁴¹² Uncertainty exists, however, as to whether a licensing or other authority may utilize the specific acts of misconduct that led to the conviction if the pardon was granted prior to 1983.⁴¹³

The Governor may grant restricted pardons in addition to full and complete pardons. The General Laws do not limit the restrictions that may be attached, and if the petitioner violates any restriction, the pardon may be revoked.⁴¹⁴ Additionally, all pardons granted before February 1988 that did not contain affirmative language permitting the petitioner to carry a firearm should be considered restricted as to firearm

⁴⁰⁷ G.L. c. 127, §§ 155–156; 4 Op. Atty. Gen. 6 (Jan. 7, 1926).

⁴⁰⁸ 120 C.M.R. 902.01(1).

⁴⁰⁹ 120 CMR. 902.01(2).. Governor Patrick’s guidelines state that serious consideration will be given to only where the individual as neither been convicted or under sentence for 15 years in the case of a felony and 10 years in the case of misdemeanors.

⁴¹⁰ 8 Op. Atty. Gen. 125 (May 4, 1961); 9 Op. Atty. Gen. 217 (April 3, 1964); 9 Op. Atty. Gen. 134 (Jan. 21, 1964); Ex parte Garland, 4 Wall 333, 380 (1866); *see also* Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647 (1915); Note, *The Effect of a Pardon*, 26 HARV. L. REV. 644 (1913).

⁴¹¹ The legislature made this effect clear by amending G.L. c. 127, § 152, to require the sealing of the records of the pardoned offenses. St. 1983, c. 120.

⁴¹² The crimes are G.L. c. 265, §§ 1 (murder), 13 (manslaughter), 13B (indecent assault and battery of child under 14), 13C (assault and battery in order to collect loan), 13F (indecent assault and battery on mentally retarded person), 13G (commission of felony for hire), 13H (indecent assault and battery on child of 14), 14 (mayhem), 15 (assault, intent to murder or maim), 15A (assault and battery with dangerous weapon), 15B (assault with dangerous weapon), 16 (attempt to murder), 18 (assault with intent to rob or murder; dangerous weapon), 18A (dangerous weapon; assault in dwelling house), 18B (use of firearm while committing a felony), 22 (rape), 22A (rape of child; use of force), 23 (rape and abuse of child), 24 (assault with intent to commit rape), 24B (assault of child with intent to commit rape), 26 (kidnapping). G.L. c. 127, § 152.

⁴¹³ In *DeLuca v. Chief of Police*, 415 Mass. 155 (1993), the court held that the sealing provision of G.L. c. 127, § 152, did not apply retroactively to persons who were pardoned prior to the 1983 effective date of the legislation. However, the court did not reach the question of the effect of a “full and complete” pardon because the Governor's guidelines restricted the availability of such pardons.

⁴¹⁴ G.L. c. 127, §§ 152, 156.

acquisition. Those pardons granted after February 1988 are not restricted as to firearm acquisition unless the restrictive language is on the pardon.⁴¹⁵

The processing of pardon applications is identical to that of commutation applications except that notice of the scheduled hearing is not published⁴¹⁶ and hearings are conducted by two members of the Advisory Board who present a summary of the pardon hearing and make recommendations to the full Board for final vote.

⁴¹⁵ An unrestricted pardon removes the fact of conviction for obtaining a license to carry a firearm under Massachusetts laws. *See generally* G.L. c. 140, §§ 131(d)(i), 131F(i)(a)–(e).

⁴¹⁶ *See* 120 C.M.R. 902.06. Like the commutation process, the Advisory Board of Pardons investigates each application. A sealed criminal record (G.L. c. 276, § 100A) offers no protection from the Advisory Board's scrutiny; the Advisory Board requires the petitioner to give the Board access to the sealed records.

CHART A: CRIMES CARRYING MANDATORY TERMS OF INCARCERATION

(This is not necessarily a comprehensive list and may not remain accurate as laws change)

I. Driving

A. Operating of motor vehicle after suspension or revocation of license⁴¹⁷

G.L. c. 90, § 23 (prohibits probation, parole, furlough, good-time deductions, but work release and other temporary releases permitted).

First and subsequent offenses — 60 days

B. Driving under influence of intoxicating liquor or controlled substances

G.L. c. 90, § 24(1)(a)(1) (prohibits probation, parole, furloughs and good-time deductions, but work release and other temporary releases permitted).

Second offense — 14 days (before 5/26/94)

30 days (5/27/94 to present)

Third offense — 90 days (before 5/26/94)

150 days (5/27/94 to present)

Fourth offense — 6 months (before 5/26/94)

12 months (5/27/94 to present)

Fifth offense — 6 months (before 5/26/94)

24 months (5/27/94 to present)

C. Leaving scene of accident resulting in death

G.L. c. 90, § 24(2)(A½)(2) (prohibits probation, parole, furloughs, good-time deductions, but work release and other temporary releases permitted).

First and subsequent offenses — one year

D. Vehicular homicide

G.L. c. 90, § 24G(a) (prohibits probation, parole, furloughs, good-time deductions, but work release and other temporary releases permitted).

First and subsequent offenses — one year

E. Manslaughter while operating a motor vehicle

G.L. c. 265, § 13 ½ (prohibits probation, parole, furloughs, goodtime deductions, but work release & other temporary releases permitted).

First and subsequent offenses – five years

F. Serious bodily injury by motor vehicle while under the influence of intoxicating substance

G.L. c. 90, § 24L(1) (prohibits probation, parole, furlough, good-time deductions, but work release and other temporary releases permitted).

First and subsequent offenses — 6 months

G. Operation of motor vehicle in violation of ignition interlock device license restriction

⁴¹⁷ The license may have been suspended as part of a disposition under the following: G.L. c. 90, §§ 24(a)(1), 24D, 24E, 24G, 24L, or 24N, or under G.L. c. 90B, §§ 8(a), 8A, or 8B.

G.L. c. 90, §24S (prohibits probation, furlough, good-time deduction, but allows work release and other temporary releases).

First and subsequent offenses – 150 days

H. Child endangerment while operating a motor vehicle or vessel under the influence

G.L. c. 90, §24V (prohibits probation, furlough, good-time deductions, but allows work release and other temporary releases).

First and subsequent offenses – 6 months

I. Operation of motor boat or other vessel while under the influence

G.L. c. 90B § 8(a)(1)(A) (prohibits probation, furlough, good-time deduction, but allows work release and other temporary releases).

First Offense – 14 days

Second Offense – 6 months

Third Offense – 1 year

Fourth Offense – 2 years

J. Reckless operation of motorboat, OUI, Serious bodily injury

G.L. c. 90B, §8A(1) (prohibits probation, furlough, good-time deduction, but allows work release and other temporary releases).

First and subsequent offenses – 6 months

K. Reckless operation of motor boat resulting in death

G.L. c. 90B, § 8B(1) (prohibits probation, furlough, good-time deduction, but allows work release and other temporary releases).

First and subsequent offenses - 1 year

L. Failure to attend residential alcohol treatment program

G.L. c. 90B, § 8(3)(A) (prohibits furlough and good-time deductions, but allows work release and other temporary releases).

First offense - 2 days.

Second and subsequent offenses – 14 days

II. Crimes against mentally retarded persons

Indecent assault and battery (prohibits probation and parole)

G.L. c. 265, § 13F, para. 1

Second and subsequent offenses — 10 years

III. Offenses against an elderly person

(prohibits probation, parole, furloughs, work release, good-time deductions, but temporary release permitted)

A. Assault and battery with dangerous weapon of person 60 years or older

G.L. c. 265, § 15A(a)

Second and subsequent offenses — 2 years

B. Assault with dangerous weapon of person 60 years or older

G.L. c. 265, § 15B(a)

*Second and subsequent offenses*⁴¹⁸ — one year

C. Armed assault, intent to rob or murder a person 60 years or older

⁴¹⁸ A conviction under G.L. c. 265, §§ 15A(a), 15B(a), or 18 is a prior offense.

G.L. c. 265, § 18(a)

Second and subsequent offenses — 2 years

D. Robbery by unarmed person; victim 60 years or older

G.L. c. 265, § 19(a)

Second and subsequent offenses — 2 years

E. Larceny by stealing; victim 65 years or older

G.L. c. 266, § 25(a)

Second and subsequent offenses — one year

IV. Offenses related to prostitution

A. Enticement of child under age 18 to engage in prostitution, human trafficking or commercial sexual activity

G.L. 265, § 26D (prohibits probation, parole, work release, furloughs, good-time deductions).

Second and subsequent offenses – 5 years

B. Trafficking in persons for sexual servitude (prohibits probation, parole, work release, furloughs, good-time deductions).

G.L. c. 265, § 50, 52

First offense – 5 years

Second offense and subsequent offenses – 10 years

C. Trafficking of persons for forced service; victims under 18 years (prohibits probation, parole, work release, furloughs, good-time deductions)

G.L. c. 265, § 51, 52

First and subsequent offenses – 5 years

Second offense and subsequent offenses – 10 years

D. Inducing a minor to prostitution

G.L. c. 272, § 4A (prohibits probation, parole, furloughs, good-time deductions).

First and subsequent offenses — 3 years

E. Living off or sharing earnings of minor prostitute

G.L. c. 272, § 4B (prohibits probation, parole, furloughs, good-time deductions).

First and subsequent offenses — 5 years

F. One controlling a place, inducing or suffering a person to reside there for sexual intercourse

G.L. c. 272, § 6 (prohibits probation, parole, furloughs, good-time deductions).

First and subsequent offenses — 2 years

G. Support from, or sharing, earnings of prostitute

G.L. c. 272, § 7 (prohibits probation, parole, furloughs, good-time deductions).

First and subsequent offenses — 2 years⁴¹⁹

V. Killing of a human being

⁴¹⁹ Commonwealth v. Lightfoot, 391 Mass. 718, 721 (1984).

A. First-degree murder

G.L. c. 265, § 1 (prohibits parole and furloughs prohibited by G.L. c. 127, § 90A).

First and subsequent offenses — life

B. Second-degree murder

G.L. c. 265, § 2 (G.L. c. 127, § 133A, prohibits parole)

First and subsequent offenses — 15 years

VI. Crimes against children

A. G.L. c. 276, § 87, provides that no person convicted of any of the offenses listed below, if previously convicted under said sections, and the offender was at least 18 at the time of the first offense, shall be released on probation or parole prohibits prior to completion of 5 years:

1. G.L. c. 265, § 22A - Rape of child; use of force
2. G.L. c. 265, § 22B - Rape of child during commission of certain offenses or by use of force
3. G.L. c. 265, § 22C – Rape of child under 16
4. G.L. c. 265, § 24B - Assault of child; intent to commit rape
5. G.L. c. 265, §50(b) – Human trafficking, victim under 18
6. G.L. c. 272, § 35A - Unnatural and lascivious acts with child

B. Indecent assault and battery on a child under the age of 14 during commission of certain offenses by mandated reporters

G.L. c. 265, § 13B 1/2 (prohibits probation, parole, furloughs, work release, good-time deductions)

First and subsequent offenses – 10 years

C. Indecent assault and battery on a child under the age of 14 by certain previously convicted offenders

G.L. c. 265, § 13B 3/4 .

First and subsequent offenses – 10 years

D. Organ trafficking on person under 18 (prohibits probation, parole, work release, furlough, and good time deductions)

G.L. c. 265, § 53

First and subsequent offenses – 5 years

VII. Assault and battery connected with “loan sharking” and house invasion

A. Assault and battery to collect a loan

G.L. c. 265, § 13C (prohibits probation and parole)

Second and subsequent offenses — 5 years

B. Dangerous weapon; assault in dwelling house

G.L. c. 265, § 18A (prohibits parole)

First and subsequent offenses — 5 years

All offenses where dangerous weapon defined as firearm, shotgun, rifle, assault weapon — 10 years

C. Home invasion committed while armed with firearm, shotgun, rifle, machine gun, assault weapon.

G.L. c. 265, § 18C

First and subsequent offenses — Not less than 10 years (10/21/98 to 9-13-04)⁴²⁰

D. Armed burglary

G.L. c. 266, § 14 (prohibits probation)

Second and subsequent offenses — 10 years

VIII. Other crimes against the person

A. Stalking in violation of court order

G.L. c. 265, § 43(b) and (c) (prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary releases).

First offense (§ 43(b)) — one year

Second offense (§ 43(c)) — 2 years

IX. Motor vehicle theft or fraud

(prohibits: probation, parole, furloughs, work release, but permits temporary releases).

A. Car theft for insurance fraud

G.L. c. 266, § 27A

Second and subsequent offense — one year

B. Receipt of stolen vehicle or theft of car or parts

G.L. c. 266, § 28(a)

Second or subsequent offense — one year

C. False report of motor vehicle theft

G.L. c. 268, § 39

Second and subsequent offense — one year

X. Gun-related offenses

A. Use of firearms while committing a felony; second or subsequent offenses⁴²¹ (prohibits probation, parole, furloughs, work release, good-time deductions, but allows temporary release).

G.L. c. 265, § 18B

Second and subsequent offenses(including attempted) if the first felony offense involved the possession or control of a firearm, rifle, shotgun, including but not limited to a large capacity weapon or machine gun and second offense involved the possession or control of a firearm, rifle, shotgun — 20 years

⁴²⁰ St.2004, c. 150, § 17, approved July 1, 2004, effective Sept. 13, 2004 increased the minimum sentence to 20 years but eliminated the prior mandatory prohibitions against probation, parole, furlough, work release, and good time. Commonwealth v. Brown, 431 Mass. 772, 779–780 (2000) (G.L. c. 265, § 18C, as amended by St. 1998, c. 180, § 57, requires a 20-year minimum term and a 10-year mandatory term of incarceration).

⁴²¹ When an individual commits a felony and uses a firearm, rifle, shotgun or machine gun, a judge must sentence that person to the additional minimum penalty as noted above, which is also the mandatory term of incarceration. However, G.L. c. 265, § 18B does not require imposition of the additional penalty if an element of the felony is using a dangerous weapon. See Commonwealth v. Hawkins, 21 Mass. App. Ct. 766 (1986).

Second and subsequent offenses (including attempted) if the first felony offense involved the possession or control of a firearm, rifle, shotgun, including but not limited to a large capacity weapon or machine gun and second offense involved the possession or control of a large capacity semi-automatic weapon or machine gun — 25 years

B. Illegal carrying of a firearm⁴²²

G.L. c. 269, § 10(a) (prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary release)

First offense — 18 months (3/6/06 to present)

Subsequent offenses - G.L. c. 269, § 10(d) (prohibits probation and good-time deductions for entire sentence)

Second offense – 5 years

Third offense – 7 years

Fourth offense – 10 years

All offenses — G.L. c. 269, § 10G(d) prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary release, if:

Previously convicted of a violent crime or drug offense — 3 years

Previously convicted of two violent crimes or two drug offenses — 10 years

Previously convicted of three violent crimes or three drug offenses — 15 years

C. Illegal possession of knife, dagger, etc.

G.L. c. 269, § 10(b)

Subsequent offenses — G.L. c. 269, § 10(d) (prohibits probation and good-time deductions for entire sentence)

Second offense – 5 years

Third offense – 7 years

Fourth offense – 10 years

D. Possession of machine gun or sawed-off shotgun

G.L. c. 269, § 10(c) (prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary release).

First offense — 18 months

Subsequent offenses — G.L. c. 269, § 10(d) (prohibits: probation and good-time deductions for entire sentence).

Second offense – 5 years

Third offense – 7 years

Fourth offense – 10 years

All offenses — G.L. c. 269, § 10G(d) prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary release, if:

⁴²² The mandatory provision in § 10(a) does not violate the Eighth Amendment ban on cruel and unusual punishment (*Commonwealth v. Jackson*, 369 Mass. 904 (1976)), or an unlawful exercise of executive powers. *Commonwealth v. McQuoid*, 369 Mass. 925 (1977), *aff'd*, *McQuoid v. Smith*, 556 F. 2d 595 (1st Cir. 1977).

Previously convicted of a violent crime or drug offense — 3 years

Previously convicted of two violent crimes or two drug offenses — 10 years

Previously convicted of three violent crimes or three drug offenses — 15 years

E. Owning, possessing, or transferring the possession of firearm without compliance with license requirements

G.L. c. 269, § 10(h) (G.L. c. 269, § 10G(d) (prohibits probation, parole, furloughs, good-time deductions but permits temporary release).
All offenses if previously convicted of a violent crime or drug offense — 3 years

Previously convicted of 2 violent crimes or 2 drug offenses — 10 years
Previously convicted of three violent crimes or three drug offenses — 15 years

F. In a vehicle, knowingly possessing or controlling a large capacity weapon or large feeding device without valid license

G.L. c. 269, § 10(m) (prohibits probation, parole, furloughs, good-time deductions but permits temporary releases).
All offenses where FIC card not possessed — one year

G. Trafficking in firearms

G.L. c. 269, § 10E (prohibits probation, parole, work release, furloughs, good-time deductions but temporary release permitted).
3–9 firearms — 3 years
10–19 firearms — 5 years
20 or more firearms — 10 years

H. Selling large capacity weapon or large capacity feeding device to person 18+ yrs.

G.L. c. 269, § 10F(a) (prohibits probation, parole, work release, furloughs, good-time deductions, but temporary release permitted).
First offense — two and one half years
Second and subsequent offenses — 5 years

I. Selling large capacity weapon or large capacity feeding device to person under 18 yrs.

G.L. c. 269, § 10F(b) (prohibits probation, parole, work release, furloughs, good-time deductions, but permits temporary releases).
First and subsequent offenses — 5 years

XI. Rape and other Sex Offenses

A. Forcible rape with injury

G.L. c. 265, § 22(a) (prohibits furloughs, work release)

B. Rape of a child where victim could contract sexually transmitted disease

G.L. c. 265, § 22B (prohibits probation, parole, furloughs, work release, and good time)
First and subsequent offenses — 15 years

C. Rape of a child through use of force by certain previously convicted

offenders

G.L. c. 265, § 22C (prohibits probation, parole, furloughs, work release, and good time)

First and subsequent offenses – 20 years

- D. Rape and abuse of child aggravated by age difference between defendant and victim or by when committed by mandated reporters

G.L. c. 265, § 23A (prohibits probation, parole, furloughs, work release, and good time deductions)

First and subsequent offenses - 10 years

- E. Rape of a child by certain previously convicted offenders

G.L. c. 265, § 23B (prohibits probation, parole, furloughs, work release, and good time deductions)

First and subsequent offenses - 15 years

- F. Sex offender living in nursing home or other prohibited residence

G.L. c. 6 § 178K(e) (prohibits probation, parole, furloughs, work release, and good time)

Third offense – 5 years

XII. Drug Offenses: Chapter 94C

The following lists the current mandatory terms for the listed offenses. On July 31, 2012, Governor Patrick stated that he would sign a bill approved by the Legislature that makes significant reductions in many mandatory minimum drug sentences, as well as in the amounts of drug that trigger application of the mandatory. These changes are retroactive and apply to existing sentences as well to sentences for crimes committed after the effective date of the amendments. The Governor and members of the Legislature have declared that further amendments may be forthcoming. Practitioners should, therefore, be sure to check the relevant statutes to determine the controlling law.

Furthermore, significant changes to mandatory drug sentences were enacted by the Legislature in 2010 to ameliorate their harshness. Specifically, G.L. c. 94C, §§ 32, 32A, 32B, , 32E, and 32J now permit a person sentenced to a house of correction for violations of any these sections to become parole eligible after serving half the maximum term, except upon a finding of one of three specified aggravating circumstances.⁴²³ State prisoners, however, are still ineligible for parole until completion of the mandatory term.

In addition, the 2012 legislation amended G.L. c. 94C, § 32H to permit both state and county prisoners to participate in work release during the mandatory term. Section 32H had already been amended by St. 2010, c. 256, § 71, to permit prisoners to be temporarily released to: (1) to attend the funeral of a relative, to visit a critically ill relative, to obtain emergency medical or psychiatric services unavailable at said institution; (2) to participate in education, training, or employment programs established under G.L. c. 127, § 48 ; or (3) to participate in a program to provide services under G.L. c. 127, §§ 49B or 49C.

⁴²³ See, G.L. c.94C, § 32(c); § 32A(e); § 32B(c); § 32D(e); § 32J, as amended by St. 2010 c. 256, §§ 67-71

A. Unlawful manufacture, distribution, dispensing, or possession with intent to manufacture, distribute, or dispense a controlled substance⁴²⁴

1. Class A Controlled Substances

G.L. c. 94C, § 32(b)

Second and subsequent offenses — 3.5 years⁴²⁵

2. Class B Controlled Substances

G.L. c. 94C, § 32A(b)

Second and subsequent offenses — 2 years⁴²⁶

3. Class B Controlled Substance (PCP, cocaine, or methamphetamine)

G.L. c. 94C, § 32A(c)⁴²⁷

First offense – 1 year

Second and subsequent offenses– 3.5 years

4. Class C Controlled Substances

G.L. c. 94C, § 32B(b)

Second and subsequent offenses — 18 months⁴²⁸

B. Trafficking in controlled substances⁴²⁹

1. Marijuana (all offenses)

a. 50 pounds up to 100 pounds

G.L. c. 94C, § 32E(a)(1) — 1 year

b. 100 pounds up to 2,000 pounds

G.L. c. 94C, § 32E(a)(2) — 2 years

c. 2,000 pounds up to 10,000 pounds

G.L. c. 94C, § 32E(a)(3) — 3.5 years

d. 10,000 pounds or more

G.L. c. 94C, § 32E(a)(4) — 8 years

2. Cocaine⁴³⁰ (all offenses)

⁴²⁴ Second and subsequent offenses include a violation of this statute or any similar prior drug law of Massachusetts, and a violation of federal, territorial, or other states offenses that have the same or include elements of this statute.

⁴²⁵ If sentenced to the house of correction, parole eligibility may be after service of half the maximum term. G.L. c.94C, § 32(c).

⁴²⁶ If sentenced to the house of correction, parole eligibility may be after service of half the maximum term. G.L. c. 94C, § 32A(e).

⁴²⁷ If sentenced to the house of correction parole eligibility may be after service of half the maximum term. G.L. c. 94C, § 32A(e).

⁴²⁸ If sentenced to the house of correction, parole eligibility may be after half the maximum term. G.L. c. 94C, § 32B(c).

⁴²⁹ If sentenced to the house of correction, parole eligibility may be after service of half the maximum term. G.L. c. 94C, § 32E(d).

⁴³⁰ When the cocaine trafficking statutes were amended in 1988, the lower quantity of 14 grams was added and became subsection (1). Previously, the 28 grams quantity was published as subsection (1). Therefore, in calculating mandatory terms of incarceration look to the date the offense was committed and the quantity of cocaine involved.

- a. 18 grams up to 36 grams⁴³¹
G.L. c. 94C, § 32E(b)(1) — 2 years
 - b. 36 grams up to 100 grams⁴³²
G.L. c. 94C, § 32E(b)(2) – 3.5 years
 - c. 100 grams up to 200 grams
G.L. c. 94C, § 32E(b)(3) - 8 years
 - d. 200 grams or more
G.L. c. 94C, § 32E(b)(4) - 12 years
3. Heroin (all offenses)
- a. 14 grams up to 28 grams
G.L. c. 94C, § 32E(c)(1) — 5 years
 - b. 28 grams up to 100 grams
G.L. c. 94C, § 32E(c)(2) — 7 years
 - c. 100 grams up to 200 grams
G.L. c. 94C, § 32E(c)(3) — 10 years
 - d. 200 grams or more
G.L. c 94C, § 32E(c)(4) — 15 years
- C. Distribution of controlled substances to minors (under age 18)
- 1. Class A controlled substances (all offenses)
G.L. c. 94C, § 32F(a) — 5 years
 - 2. Class B controlled substances (all offenses)
G.L. c. 94C, § 32F(b) — 3 years
 - 3. Class C controlled substances (all offenses)
G.L. c. 94C, § 32F(c) — 2 years
 - 4. Cocaine (all offenses)
G.L. c. 94C, § 32F(d) — 5 years
- D. Controlled substances; violation in, on, or near school property⁴³³
(all offenses⁴³⁴)

⁴³¹ Prior to the 2012 amendments that the Governor has stated he will sign , the amounts were 14 grams up to 28 grams. The change is retroactive.

⁴³² Prior to the 2012 amendments that the Governor has stated he will sign , the amounts were 28 grams up to 100 grams. The change is retroactive.

⁴³³ Although the 2012 amendments that the Governor has stated he will sign decrease the size of the school zone from 1000 to 300 feet, the change is not retroactive.

⁴³⁴ There have been instances where judges had to resentence defendants because the judge did not impose some length of sentence (even a day) for the predicate offense, yet imposed a sentence for violation of G.L. c. 94C, § 32J. *See, e.g., Commonwealth v. McFadden*, 49 Mass. App. Ct. 441 (2000) (prosecutor recommended a one-day sentence for distribution and a two-year from-and-after sentence for distribution of cocaine in a school zone). Moreover, there are cases where one predicate offense can generate two convictions under § 32J as the defendant can be dealing drugs in an area that is within the zone of two schools (playgrounds). Because of the complexity often present in cases where there is a conviction under § 32J and other drug offenses, counsel should find out how the Department of Correction is calculating the length and parole eligibility of the sentences once the defendant is incarcerated and classified. *See* § 40.4 *supra*.

G.L. c. 94C, § 32J — 2 years (must be consecutive)⁴³⁵

E. Inducing or abetting minor to distribute or sell controlled substances

G.L. c. 94C, § 32K — 5 years⁴³⁶

⁴³⁵ If sentenced to the house of correction, parole eligibility may be after half the maximum term. G.L. c.94C, § 32J.

⁴³⁶ Although the statute states that the five years is a “mandatory minimum term of imprisonment,” it does not prohibit probation, parole, work release, furloughs, or good conduct deductions, and therefore allows for early release.

CHART B: MASSACHUSETTS DEPARTMENT OF CORRECTION OBJECTIVE CLASSIFICATION SCORING SHEETS

OBJECTIVE CLASSIFICATION -- INITIAL FORM – MALE

Name: _____ Number: _____ Date: _____

Inst: _____ Current Housing Unit: _____ CPO: _____

1. Severity of Current Offense **SCORE**

Low	1
Moderate	3
High	5
Highest	7

OFFENSE SCORED:

2. Severity of Convictions within the last 7 years

None	0
Low	1
Moderate	3
High	5
Highest	7

OFFENSE SCORED:

ARRAIGNMENT DATE:

3. History of Escape or Attempts to Escape

No escapes or attempts to escape	0
Escape or attempt from non secure custody over 1 year ago	1
Escape or attempt from non secure custody within the past year	3
Escape or attempt from secure custody OR any escape with actual or threatened violence:	
Over 10 years ago	5
Within the past 10 years	7

ESCAPE DATE:

FROM:

4. History of Prior Institutional Violence within the last 7 years

None	0
Documented behavior for any offense listed as Category 2	4
Documented behavior for offense listed as Cat. 1	7

DATE OF INCIDENT/ D-REPORT:

WHERE REC'D:

5. Age

24 or younger	1
25 to 38	0
39 or older	-2

Education

None	0
High school diploma GED or higher	-1

Employment

Not applicable	0
Employed or student full or pt. time for at least 1 yr	-1

TOTAL INITIAL SCORE

12 or more points – Maximum	Updated 11-08: 6 to 11 points – Medium	Updated 11-08: 5 or fewer points - Minimum or below
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Page Two - Initial

Name: _____ Number: _____ Date: _____

Preliminary Custody Level: Maximum _____ Medium _____ Minimum or below _____

Check (✓) all applicable Non-Discretionary restrictions for purposes of overriding scored custody level:

Non-Discretionary Minimum Custody Restrictions

- ____ Code A: Length of time to serve- Inmates with more than four (4) years to their earliest release date are not to be considered for minimum or below.
- ____ Code B: Outstanding Legal – Inmates whose data critical to decision making is outstanding and inmates with unresolved / non-permissible legal issues are to remain in medium or above until the legal issue is resolved. Inmates may be placed in minimum security with permissible legal issues, as noted in Table D.
- ____ Code C: Sex Offender Status- Inmates who are subject to civil commitment post release are not to be considered for minimum or below.
- ____ Code D: Pending immigration status – Inmates whose immigration status is pending or those with an immigration detainer or Deportation Order are not to be considered for minimum or below.
- ____ Code E: 1st degree lifer- 1st degree lifers are not to be considered for minimum or below.
- ____ Code F: Inmates currently convicted of murder of a public official, a crime while incarcerated or a crime involving loss of life are not to be considered for minimum unless a positive parole decision has been granted or are within two years of a defined release date.
- ____ Code G: Health coverage necessary – Health Status Report reflects medical/mental health restrictions preventing lower security.

Non-Discretionary Medium Custody Restrictions

- ____ Code J: 1st degree lifer initially – 1st degree lifers beginning their sentences are initially restricted to maximum security for the first two years of incarceration following commitment.
- ____ Code K: 2nd degree lifer initially – 2nd degree lifers beginning their sentences are initially restricted to maximum security for the first year of incarceration following commitment.
- ____ Code L: Those who commit the act of murder while incarcerated are not to be considered for medium custody.
- ____ Code M: Outstanding Legal- Inmates with serious outstanding legal issues that, if convicted, could significantly impact their sentence structure.

Check (✓) all applicable Discretionary Overrides, ONLY if Non-Discretionary restrictions do not apply, for purposes of overriding scored custody level.

Discretionary Over-Ride – Higher Custody

- ____ Code P: Pending Disciplinary Report- Inmates who have pending disciplinary report(s).
- ____ Code Q: Investigative Hold- Those inmates who are currently under investigation or awaiting action and a transfer to lower security may jeopardize the investigation.
- ____ Code R: Nature of Offense/ High Notoriety- The facts or notoriety of the offense presents a seriousness that cannot be captured in the score.
- ____ Code S: Prior Criminal History- The criminal history presents a seriousness that cannot be captured in the score.
- ____ Code T: Institutional Negative Adjustment - institutional adjustment presents a seriousness that cannot be captured in the score.
- ____ Code U: Relates to the Safe Orderly Operation of the Facility-Those inmates whose behavior, while not always negative enough to warrant disciplinary action, may serve to threaten security or undermine the exercise of proper control and maintenance of order within the institution or other correctional facility.
- ____ Code V: STG Issues-Those inmates who should remain in higher custody based on their STG involvement.

Discretionary Over-Ride – Lower Custody

- ____ Code 1: Institutional Positive Adjustment- Those inmates whose institutional adjustment on previous or current incarceration is not as severe as the score indicates.
- ____ Code 2: Nature of Offense- Those inmates whose offense is not as severe as the score indicates.
- ____ Code 3: Positive Parole Vote- Those inmates who receive a positive parole vote, and to facilitate compliance with that vote.

Provide rationale for any discretionary overrides: _____

Final Custody Level Recommended: Maximum _____ Medium _____ Minimum or below _____

OBJECTIVE CLASSIFICATION – RECLASSIFICATION FORM- MALES

Name: _____ Number: _____ Date: _____

Inst: _____ Custody Level _____

Current Housing Unit _____ CPO: _____

1. Severity of Current Offense	Score
Low	1
Moderate	2
High	4
Highest	6

OFFENSE SCORED:

2. Severity of Convictions within the last 7 years	
None	0
Low	1
Moderate	2
High	4
Highest	6

OFFENSE SCORED:

ARRAIGNMENT DATE:

3. History of Escape or Attempts to Escape	
No escapes or attempts to escape	0
Escape or attempt from non secure custody over 1 year ago	1
Escape or attempt from non secure custody within the past year	3
Escape or attempt from secure custody OR any escape with actual or threatened violence:	
Over 10 years ago	5
Within the past 10 years	7

ESCAPE DATE:

FROM:

4. History of Prior Institutional Violence within the last 7 years	
None	0
Documented behavior for any offense listed as Category 2.	3
Documented behavior for any offense listed as Category 1.	5

DATE OF INCIDENT / D-REPORT:

WHERE REC'D:

5. Number of Disciplinary Reports within the last 12 months	
None or One	0
Two	2
Three or more	4

6. Most Severe Disciplinary within the last 18 months	
None	0
Category 4	1
Category 3	3
Category 2	5
Category 1	7

D-REPORT NUMBER & DATE:

7. Age	
24 or younger	1
25 to 38	0
39 or older	-2

8. Program Participation or Work Assignment	
No participation	0
Currently on a program or work wait list or actively involved in a program or work assignment	-1
Satisfied all program requirements	-2

TOTAL RECLASSIFICATION SCORE

12 or more points – Maximum	Updated 11-08: 6 to 11 points – Medium	Updated 11-08: 5 or fewer points – Minimum or below
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Page Two - Reclassification

Name: _____ Number: _____ Date: _____

Preliminary Custody Level:

Maximum _____ **Medium** _____ **Minimum or below** _____

Check (✓) all applicable Non-Discretionary restrictions for purposes of overriding scored custody level:

Non-Discretionary Minimum Custody Restrictions

- ____ Code A: Length of time to serve- Inmates with more than four (4) years to their earliest release date are not to be considered for minimum or below.
- ____ Code B: Outstanding Legal – Inmates whose data critical to decision making is outstanding and inmates with unresolved / non-permissible legal issues are to remain in medium or above until the legal issue is resolved. Inmates may be placed in minimum security with permissible legal issues, as noted in Table D.
- ____ Code C: Sex Offender Status- Inmates who are subject to civil commitment post release are not to be considered for minimum or below.
- ____ Code D: Pending immigration status – Inmates whose immigration status is pending or those with an immigration detainer or Deportation Order are not to be considered for minimum or below.
- ____ Code E: 1st degree lifer- 1st degree lifers are not to be considered for minimum or below.
- ____ Code F: Inmates currently convicted of murder of a public official, a crime while incarcerated or a crime involving loss of life are not to be considered for minimum unless a positive parole decision has been granted or are within two years of a defined release date.
- ____ Code G: Health coverage necessary – Health Status Report reflects medical / mental health restrictions preventing lower security.

Non-Discretionary Medium Custody Restrictions

- ____ Code J: 1st degree lifer initially – 1st degree lifers beginning their sentences are initially restricted to maximum security for the first two years of incarceration following commitment.
- ____ Code K: 2nd degree lifer initially – 2nd degree lifers beginning their sentences are initially restricted to maximum security for the first year of incarceration following commitment.
- ____ Code L: Those who commit the act of murder while incarcerated are not to be considered for medium custody.
- ____ Code M: Outstanding Legal- Inmates with serious outstanding legal issues that, if convicted, could significantly impact their sentence structure.

Check (✓) all applicable Discretionary Overrides, ONLY if Non-Discretionary restrictions do not apply, for purposes of overriding scored custody level.

Discretionary Over-Ride – Higher Custody

- ____ Code P: Pending Disciplinary Report- Inmates who have pending disciplinary report(s).
- ____ Code Q: Investigative Hold- Those inmates who are currently under investigation or awaiting action and a transfer to lower security may jeopardize the investigation.
- ____ Code R: Nature of Offense/ High Notoriety- The facts or notoriety of the offense presents a seriousness that cannot be captured in the score.
- ____ Code S: Prior Criminal History- The criminal history presents a seriousness that cannot be captured in the score.
- ____ Code T: Institutional Negative Adjustment- The institutional adjustment presents a seriousness that cannot be captured in the score.
- ____ Code U: Relates to the Safe Orderly Operation of the Facility-Those inmates whose behavior, while not always negative enough to warrant disciplinary action, may serve to threaten security or undermine the exercise of proper control and maintenance of order within the institution or other correctional facility.
- ____ Code V: STG Issues-Those inmates who should remain in higher custody based on their STG involvement.

Discretionary Over-Ride – Lower Custody

- ____ Code 1: Institutional Positive Adjustment- Those inmates whose institutional adjustment on previous or current incarceration is not as severe as the score indicates.
- ____ Code 2: Nature of Offense- Those inmates whose offense is not as severe as the score indicates.
- ____ Code 3: Positive Parole Vote- Those inmates who receive a positive parole vote, and to facilitate compliance with that vote.

Provide rationale for any discretionary overrides:

Final Custody Level Recommended: Maximum _____ **Medium** _____ **Minimum or below** _____

CHART C: PAROLE ELIGIBILITY RULES

1. HOUSE OF CORRECTION SENTENCE

(parole eligibility (PE) determined by Parole Board regulations)

- a. *Basic and Split*: One-half the commitment term. 120 C.M.R. 200.02(1), 200.03(1).
- b. *Return after Probation Violation*: One-half the total sentence. 120 C.M.R. 200.03(2).
- c. *Concurrent House of Correction Sentences*: One-half of total commitment term but no more than two years. 120 C.M.R. 200.04(2).
- d. *Concurrent for Crime Committed While Incarcerated or While on Escape or Furlough/Work Release*: Latest parole eligibility applies. 120 C.M.R. 200.05(2).
- e. *Concurrent with Pre-parole Sentence*: One-half commitment term of new house of correction sentence. 120 C.M.R. 200.06.
- f. *Concurrent with State Prison Sentence (or Reformatory Sentence or Both)*: Latest eligibility forms single PE. 120 C.M.R. 200.04(1).
- g. *Consecutive*: Add parole ineligibility periods of all sentences. If all sentences are house of correction, PE cannot exceed two years unless mandatory terms exceed two years 120 C.M.R. 200.04(2)(a).⁴³⁷
- h. *Mandatory Term of Incarceration That Precludes Parole*: At end of mandatory term or at PE if eligibility exceeds the mandatory term. 120 C.M.R. 200.02(2).
- i. *Special*: One-half of the commitment term. *See generally* 120 C.M.R. 200.02.
- j. *Concurrent with Civil Commitment as SDP*: Use regular PE rules for criminal commitment. 120 C.M.R. 200.07. If parole granted, will only be to civil commitment; if denied, review after three years, unless Board decides otherwise. 120 C.M.R. 301.01.

2. STATE PRISON SENTENCES —

- a. *Basic*: The minimum term of sentence minus earned good-time deductions. G.L. c. 127, § 133; 120 C.M.R. 120.200.02(2).
- b. *Concurrent State Prison Sentences or Concurrent with House of Correction (or Reformatory)*: Latest PE forms single PE. 120 C.M.R. 200.04(1), 200.04(2)(b).
- c. *Concurrent with Pre-parole Sentence*: Apply rule in 2(a). 120 C.M.R. 200.06.
- d. *Consecutive*: Add parole ineligibility periods of all sentences to form a single PE date. 120 C.M.R. 200.08(2).⁴³⁸
- e. *Mandatory Term of Incarceration Which Precludes Parole*: At end of mandatory term or at PE if eligibility exceeds mandatory term. 120 C.M.R. 200.02(2).
- f. *Forthwith State Prison Sentence*: Sentence extinguishes any house of correction sentence a defendant is then serving. Apply rule in 2(a). G.L. c. 279, § 27; 120 C.M.R. 200.09.
- g. *Life Sentence*: After 15 years. If parole denied, review after five years unless Board decides to review earlier. G.L. c. 127, § 133A; 120 C.M.R. 200.02(2).

⁴³⁷ The exceptions to establishing a single PE for a series of consecutive sentences are: crimes committed while on parole; where a life sentence is first in the series and crime that resulted in consecutive sentences committed on or after Jan. 1, 1988; and where a component sentence is a split state prison sentence where PE exceeds commitment term. 120 C.M.R. 200.08(3).

⁴³⁸ The exceptions to establishing a single PE for a series of consecutive sentences are: crimes committed while on parole; where a life sentence is first in the series and crime that resulted in consecutive sentences committed on or after Jan. 1, 1988; and where a component sentence is a split state prison sentence where PE exceeds commitment term. 120 C.M.R. 200.08(3).

h. *Habitual Criminal*: One-half the maximum term (earned good time reduces the parole eligibility as well as the maximum term); if parole is denied, review is after two years. G.L. c. 127, § 133B; 120 C.M.R. 200.12. Where maximum term is life, PE is fifteen years

i. *Concurrent with Civil Commitment as SDP*: Use regular PE rules for criminal commitment. If parole granted, will only be to civil commitment; if denied, review after three years, unless Board decides otherwise. 120 C.M.R. 301.01.

3. STATE PRISON SENTENCES — Pre-Truth-in-Sentencing

a. *Basic*: One-third or two-thirds the minimum term of sentence minus earned good-time deductions (G.L. c. 127, § 133),⁴³⁹ one-year and two-year mandatory parole ineligibility period respectively. 120 C.M.R. 203.01, 203.02 (1993); 120 C.M.R. 200.04(3) (1997).

b. *Other Sentencing Schemes*: Same rules as Truth-in-Sentencing state prison parole eligibility, 2(b)–(i) above.

4. REFORMATORY SENTENCES (“Concord,” “Framingham”) (PE determined by Parole Board regulations). 120 C.M.R. 200.04, 200.06 120 C.M.R. 200.04(2)(b)(6) (1997).

b. *Return After Probation Violation*: C.M.R. 200.03 (1997).

c. *Concurrent Reformatory Sentences*: parole based on total commitment term. 120 C.M.R. 202.04 (1993), 120 C.M.R. 200.07(2)(G) (1997).

d. *Concurrent for Crime Committed While Incarcerated or While on Escape or Furlough/Work Release*: Latest parole eligibility applies. 120 C.M.R. 202.05 (1993); 120 C.M.R. 200.08 (1997).

e. *Concurrent with Pre-parole Sentence*: After parole warrant served, apply chart to new reformatory sentence. Pre-parole sentence counts as prior incarceration period. 120 C.M.R. 202.06 (1993); 120 C.M.R. 200.09 (1997).

f. *Concurrent with House of Correction or State Prison Sentence or Both*: Latest PE forms single PE date (in calculation do not use PE of split state prison sentence where the PE exceeds commitment term). 120 C.M.R. 202.07 (1993); 120 C.M.R. 200.04 (1) (2012).

g. *Consecutive*: Add parole ineligibility periods of all sentences to form single PE date. 120 C.M.R. 202.08 (1993); 120 C.M.R. 200.10 (1997).²

h. *Mandatory Term of Incarceration Which Precludes Parole*: At end of mandatory term or at PE if PE exceeds mandatory term. 120 C.M.R. 202.09 (1993); 120 C.M.R. 200.12 (1997).

i. *Concurrent with Civil Commitment as SDP*: Use regular PE rules for criminal commitment. If parole granted would only be to civil commitment; if denied, review after three years, unless Board decides otherwise. 120 C.M.R. 202.10 (1993); 120 C.M.R. 200.13 (1997).

⁴³⁹ The following crimes carry a two-thirds eligibility: G.L. c. 265 (Crimes Against The Person), §§ 13 (manslaughter), 13B (indecent assault/battery on child under fourteen), 13J (assault/battery of a child; liability of person having custody), 14 (mayhem), 15 (assault with intent to murder), 15A (assault/battery with dangerous weapon), 15B (assault with dangerous weapon), 16 (attempt to murder), 17 (armed robbery), 18A (dangerous weapon; assault in dwelling house), 19 (unarmed robbery), 20 (simple assault; intent to rob or steal), 21 (stealing by confining or putting in fear), 22 (rape), 22A (rape of child; use of force), 23 (rape and abuse of child), 24 (assault with intent to commit rape), 24B (assault of child with intent to commit rape), 25 (attempted extortion), 26 (kidnapping); G.L. c. 266 (Crimes Against Property), §§ 1 (burning of a dwelling house; aiding), 2 (burning of meeting house; aiding), 10 (burning insured property; intent to defraud); G.L. c. 268 (Crimes Against Public Justice), §16 (escape); G.L. c. 272 (Crimes Against Morality), §§ 17 (incest), 35 (unnatural or lascivious acts), 35A (unnatural acts with child under 16), or any attempt to commit any of these crimes; or for any crime committed while on a Massachusetts parole.