

MAINE STATE LEGISLATURE

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JAMES E. TIERNEY
ATTORNEY GENERAL



STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

May 10, 1983

Honorable Patrick E. Paradis
House of Representatives
State House Station #2
Augusta, Maine 04333

Dear Representative Paradis:

This will respond to your opinion request in which you ask whether a person criminally convicted of operating a motor vehicle under the influence of intoxicating liquor or drugs, pursuant to 29 M.R.S.A. § 1312-B, and sentenced to a period of incarceration, may be placed in the Kennebec County Halfway House. For the reasons discussed below, it is the opinion of this Office that there is no legal prohibition against the placement of such individuals in the Kennebec County Halfway House by the County Sheriff.

The Kennebec County Halfway House is located at 14 Winthrop Court in Augusta, approximately two blocks from the county jail.^{1/} The Halfway House is a two-story dwelling purchased by the county several years ago with funds made available by the Law Enforcement Assistance Administration, an

^{1/} This information concerning the Halfway House was obtained from telephone conversations with you, Kennebec County Sheriff Leo Bazinet, and Kennebec County Commissioner Charles Moreshead, as well as from a visit to the facility by a member of this Office.

agency of the United States government.^{2/} The Halfway House is utilized by the Sheriff to place inmates who have a demonstrated record of trustworthiness and who are either trustees of the jail or who are participating in a work release program in a residential setting. Although members of the Sheriff's staff regularly visit the Halfway House, it has no cells and is not guarded on a 24-hour basis.

Inmates who are assigned to the Halfway House are subject to the same rules and regulations as are jail inmates, except that they enjoy somewhat greater freedom in that they sleep at the house rather than the jail. Residents of the Halfway House are required to report in at of the jail each morning and, unless lawfully absent therefrom, are required to spend the day there.

By enacting Chapter 468 of the Public Laws of 1981, the Legislature has established a comprehensive statutory scheme governing the offense of operating a motor vehicle while under the influence of intoxicating liquor or drugs. 29 M.R.S.A. § 1312-1312-D (1978 & Supp. 1982). A criminal conviction of operating under the influence is a Class D crime with a maximum sentence of imprisonment of 364 days. 29 M.R.S.A. § 1312-B(2) (Supp. 1982); 17-A M.R.S.A. § 1252(2)(D) (Supp. 1983). Moreover, 29 M.R.S.A. § 1312-B(2)(B) specifically provides that "[t]he sentence for any conviction shall include a period of incarceration of not less than 48 consecutive hours, which sentence shall not be suspended."

Your question calls for a determination of whether serving a sentence at the Kennebec County Halfway House constitutes "incarceration," within the meaning of this section. It is the opinion of this Office that it does. As noted earlier, inmates who have been assigned to the Halfway House are subject to the same rules and regulations as jail inmates and are confined to the jail during the day and the Halfway House during the evenings. Moreover, nothing in the operating under the influence statutes suggest that a person convicted of that offense is, for that reason alone, ineligible to participate in

^{2/} Prior to purchasing the property at 14 Winthrop Court, the county had apparently rented apartments in an area of Augusta close to the jail and used them as a halfway house type of facility.

a halfway house program.^{3/} In short, persons at the Halfway House are incarcerated, albeit in a facility which is less secure than a typical jail.

Having reached this conclusion, however, it is also necessary to point out that the decision of whether to place an inmate in the Kennebec County Halfway House rests solely with the County Sheriff. 34 M.R.S.A. § 901 (Supp. 1982) provides, in relevant part, that "[t]he sheriff has the custody and charge of the jail in his county and of all prisoners therein and shall keep it himself, or by his deputy as jailer, master or keeper." (emphasis supplied). In Sawyer v. County Commissioners of Androscoggin County, 115 Me. 408, 414-15, 102 A. 226 (1917), the Maine Law Court interpreted the forerunner of 34 M.R.S.A. § 901 and other related statutes and concluded that

" . . . these various statutes all point the same way and are consistent with the expressed intention of the legislature, that the sheriff or his deputy, as jailer, shall have absolute and exclusive custody and charge of all prisoners confined in the jail. These provisions impose so great a responsibility upon the sheriff or jailer, for the safe keeping of all prisoners, that their interpretation is inconsistent with any other theory than that which vests in the sheriff complete control of the key that unlocks the door that stands between the confinement of the prisoners and access to escape."

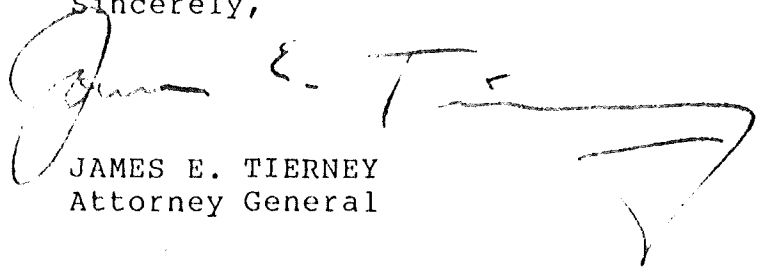
In view of the foregoing, and in the absence of legislation to the contrary, it is the County Sheriff who must make the determination as to which inmates are appropriate candidates

^{3/} 34 M.R.S.A. § 528 (1978), the statute authorizing the Department of Corrections to establish a halfway house program, provides that "[i]nmates, juveniles and prisoners at any of the correctional, penal or juvenile institutions or any county jail" may be paroled, furloughed, entrusted or transferred to a halfway house. Nothing in section 528 indicates that participation in the halfway house program is limited to persons convicted of certain types of crimes, or that the halfway house may not be owned and operated by a county.

for placement in the Halfway House.^{4/}

I hope this information is helpful to you, and please feel free to call upon me if I can be of further assistance.

Sincerely,



JAMES E. TIERNEY
Attorney General

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^{4/} Throughout this Opinion, it has been assumed that a county has the authority to establish and maintain a halfway house. We have made this assumption on the basis of your representation that the existence of the Kennebec County Halfway House is, and has been, well-known to the County Commissioners and the members of the county legislative delegation and that funds for the operation of the Halfway House have been approved by the Legislature as part of the annual county budget review process. Nevertheless, it should be pointed out that there is no statute specifically authorizing a county to establish a halfway house. The only statute dealing with halfway houses is 34 M.R.S.A. § 528 (see note 3 supra), which simply permits the Department of Corrections to create a Halfway House Program, but is silent as to the power of counties to do so. In order to avoid any uncertainty as to the authority of a county to establish and operate a halfway house, the Legislature may wish to specifically address the question.