



WASHTENAW COUNTY

OFFICE OF THE PROSECUTING ATTORNEY

ELI SAVIT
PROSECUTING ATTORNEY

VICTORIA BURTON-HARRIS
CHIEF ASSISTANT PROSECUTING ATTORNEY

MEMORANDUM

To: Washtenaw County Apportionment Commission
From: Eli Savit, Prosecuting Attorney
Date: October 24, 2021
Re: Prison Populations and County Apportionment

At the County Apportionment Commission's October 18 meeting, a question was raised as to whether residents of certain correctional facilities within Washtenaw County should be counted as "residents" for apportionment purposes.

The relevant portion of the County Apportionment statute provides:

MCL 46.404(g): "Residents *of state institutions* who cannot by law register in the county as electors shall be excluded from any consideration of representation."

The phrase "state institutions" is not defined in the statute.

At issue, therefore, are three particular types of correctional institutions that could potentially qualify as "state institutions": (1) a county jail (i.e., the Washtenaw County jail); (2) a federal prison (i.e., the Milan Correctional Institution in York Township); and (3) a state prison (i.e., the Huron Valley Correctional Facility in Pittsfield Township).

I believe we should **count** for apportionment purposes (1) all residents of the County Jail, and (2) all residents of federal institutions. We should **not count** for apportionment purposes (3) residents of state institutions who are not Washtenaw County residents.

If feasible, however, we should **count** for apportionment purposes (4) residents of state institutions who are Washtenaw County residents (e.g., women who lived in Washtenaw County, were convicted of a crime, and were sent to live the Huron Valley Correctional Facility).

I discuss each type of facility in turn below.

I. The Washtenaw County Jail

I do not believe that any residents of the Washtenaw County jail should be excluded from the apportionment county under MCL 46.404(g). As promised at our October 18

200 NORTH MAIN STREET • P.O. BOX 8645 • ANN ARBOR, MICHIGAN 48107-8645
TEL. (734) 222-6620 • FAX (734) 222-6610
www.washtenaw.org

Justice, Justice, Shall You Pursue

meeting, I asked other prosecutors across the state whether they counted jail residents who have been convicted of crimes for apportionment purposes. The feedback I received from other counties indicates that other counties *are* counting residents of their county jail for apportionment purposes.

From my own independent research, that is consistent with the law. It should be noted here that jail populations include both (1) those who are being held pretrial; and (2) those who have been sentenced to jail as a result of a criminal conviction. Both populations are discussed in turn.

A. Pretrial Detention Population of the Jail

Under Michigan law, law *permits* people who are held in jail pretrial to vote—but prohibits those who have “been legally convicted and sentenced of a crime . . . to vote at an election while confined.” MCL 168.758b. The full relevant statute is as follows:

MCL 168.758b: “A person who, in a court of this or another state or in a federal court, *has been legally convicted and sentenced* for a crime for which the penalty imposed is confinement in jail or prison shall not vote, offer to vote, attempt to vote, or be permitted to vote at an election while confined.”

Because MCL 168.758b provides only that those who have “been legally convicted and sentenced” cannot vote “while confined,” it plainly does not cover individuals who have not yet been convicted, but are being held in jail pretrial. And indeed, pretrial detainees can and do vote from jail in Michigan.

Given that (1) MCL 46.404(g) requires the exclusion only of “[r]esidents of state institutions *who cannot by law register in the county as electors*”;¹ and (2) those held pretrial can not only register but can *vote*, MCL 168.758b, there is no colorable argument that people being held in jail pretrial should be excluded from apportionment consideration.

B. Post-Conviction Population of the Jail

The more difficult question is whether the population of the jail that is being held pursuant to a *conviction* should be counted for apportionment purposes. There are two separate questions here: (1) whether a county jail qualifies as a “state institution” under MCL 46.404(g), and (2) if so, whether the population being held in the jail, post-conviction, is a population who “cannot by law register in the county as electors” under MCL 46.404(g).

With respect to the jail, I do not believe it is necessary to answer the second question, because a county jail does not qualify as a “state institution” under MCL 46.404(g). Again, the term “state institution” is not defined in the statute. However, it bears emphasis that when the Legislature means to include both the “state” and “a political subdivision of the state,” it knows how to do so. By way of example, MCL 28.421(h) defines a “peace officer” to mean law enforcement officers employed “by this state or another state, *a political subdivision of this state*”

¹ Emphasis added.

or another state, or the United States.” That implies the term “state” does not include, by implication, a county or another “political subdivision” of the state.

Perhaps more persuasively, there is caselaw from the Michigan Supreme Court—dating back over 100 years—which provides that the phrase “state institution” does *not* include a county jail. In *People v. Bodjack*, 210 Mich. 443 (1920), the Supreme Court endorsed the position that:

A penitentiary erected by a county, the management of which is vested in local and county officers, the money belonging to which is required to be deposited in the county treasury, and subject to the control of the board of county supervisors, *is not a state institution*.

Id. at 452, 453 (emphasis added).²

Given this caselaw from the Michigan Supreme Court, I believe the best reading of MCL 46.404(g) is that the phrase “state institution” excludes the County jail, and thus all persons residing in the Washtenaw County Jail should be included for apportionment purposes.

II. Federal Prison

For similar reasons, **I do not believe that a federal prison qualifies as a “state institution” within the meaning of MCL 46.404(g)**. Again—as outlined above—the Legislature knows how to define “state” and “federal” separately, *see* MCL 28.421(h), indicating that the term “state” means “state,” not the federal government.

Further, the logic of the Michigan Supreme Court’s decision in *Bodiack* suggests that a federal prison should not qualify as “a state institution.” *Bodiack*’s reasoning was that a county facility does not qualify as a “state” facility because it is controlled and funded by the county, not the State. The same logic should apply when the federal government is controlling and funding the facility.

Indeed, the logic is even stronger with respect to the federal government. Unlike a county, the federal government is not a local subdivision of the State—so if a county institution does not count as a “state institution,” it seems even clearer that a federal institution should not qualify as a “state institution.”

To be sure, it seems odd that a federal prison (which houses individuals who may not even be Michigan residents) would be included for apportionment purposes, while a state prison (which houses primarily Michiganders) is excluded. But there is little in the statute to imply that it would be appropriate to depart from what the United States Supreme Court has called “the most natural reading” of the term “state.” *King v. Burwell*, 567 U.S. 473, 497 (2015).³

² It should be noted that the statute that the Michigan Supreme Court was interpreting in *Bodjack* included the language “a penal institution of this state,” not “state institution.” The latter phrasing was used by the Attorney General, and adopted by the Court. I do not believe, however, that this minor difference in phrasing makes a difference, given that the clear import of *Bodjack* is that a county jail does not qualify as a “state” institution.

³ In *King*, the Supreme Court held that a phrase referencing a healthcare exchange “established by the

Accordingly, I believe that the phrase “state” has its “most natural reading” here—that is, that “state” means “state.” *Id.*

I will note that I received little guidance on this question from my prosecutor colleagues. That is unsurprising, because the Milan prison is the only federal prison in the State of Michigan that typically houses U.S. citizens.⁴

III. State Prison

Moving on to state prisons: It is clear (and presumably does not require any further discussion) that a state prison qualifies as a “state institution” within the meaning of MCL 46.404(g). And it is therefore clear that any non-residents of Washtenaw County who is serving time in a state prison should be excluded from the population for apportionment purposes, as they are “[r]esidents of state institutions *who cannot by law register in the county as electors.*” MCL 46.404(g).

The more difficult question is whether residents of Washtenaw County who are serving time in a state prison should be excluded. Technically, as outlined above, the relevant statute denying incarcerated people the right to vote provides only that incarcerated people “shall not vote, offer to vote, attempt to vote, or be permitted to vote at an election while confined.” MCL 168.758b. As Clerk Kestenbaum pointed out at our last meeting, nothing in that statute precludes incarcerated persons from *registering* to vote while confined. And because the Apportionment Statute requires exclusion only of “residents of state institutions who cannot by law *register* in the county,” it suggests that (1) Washtenaw residents of (2) state prisons that are (3) in Washtenaw County *should* be included in the population total.

I am not as certain in my conclusion on this point than on my previous conclusions regarding county and federal facilities. I will note, however, that counting Washtenaw residents of state prisons does have a certain amount of logical appeal. As an initial matter, it would have been very easy for the Legislature to write a statute which excluded “prisoners who by law cannot vote,” if that was what the Legislature wished to do. But it didn’t. Instead, it adopted a scheme which hinged on one’s ability to *register* as a *county elector*. That suggests that the Legislature didn’t want to remove incarcerated people from the apportionment total entirely. Rather, it suggests the Legislature wished to exclude residents of *other* Michigan counties who are only temporarily living in the county as a result of their incarceration.

Relatedly, it bears emphasis that this Commission’s task is to draw boundaries for the next ten years. Many, if not most, of the Washtenaw residents of state prisons in Washtenaw County will be coming home in the next ten years—and will therefore be eligible to vote in Washtenaw County. It makes some sense, then, to include that population in our apportionment consideration.

State” in the Affordable Care Act also included exchanges established by the federal government. Along the way, however, the Court noted that “the most natural reading of the pertinent statutory phrase” was that “state” means “state”—and that only the “context and structure of the Act compel[led]” a different result. *King*, 567 U.S. at 497. There are no “context” or “structural” clues in the County Apportionment Act that would “compel” the conclusion that the term “state” encompasses “federal” as well.

⁴ See <https://prisonerresource.com/federal-bureau-prisons/michigan/>.

All of this being said, I am not even sure as to whether it is possible—given the data we have—to separate Washtenaw and non-Washtenaw residents of state correctional institutions. I will also note that this question is likely somewhat academic. The only major state prison in Washtenaw County is the Huron Valley Women’s Correctional Facility. That is the *only* state correctional facility in Michigan that houses females (and thus houses women convicted in all 83 Michigan counties). The proportion of Washtenaw residents in Huron Valley is therefore likely very small. With most maps, the question whether we count or do not count its Washtenaw residents is unlikely to be dispositive for the question of equal representation.

For the foregoing reasons, my recommendation to the Commission is as follows: We should **count** for apportionment purposes (1) all residents of the County Jail, and (2) all residents of federal institutions. We should **not count** for apportionment purposes (3) temporary residents of state institutions who are not Washtenaw County residents.

If feasible, we should **count** for apportionment purposes (4) residents of state institutions who are Washtenaw County residents (e.g., women who lived in Washtenaw County, were convicted of a crime, and were sent to live the Huron Valley Correctional Facility). If it is not feasible to count that population, we should simply keep an eye on our population distribution to ensure that the district in which the Huron Valley Correctional Facility is located does not skew our population distribution beyond the 11.9% deviation allowable by law.