

**CRIMES THAT SHOULD NOT BE INCLUDED IN SUBSECTION (b) OF M.G.L. C. 279, §25
AS PROPOSED BY S.2080 AND H.3818**

A number of the crimes listed in Subsection (b) of the proposed habitual offender provisions should be removed based on the lack of seriousness of the actions required to meet the elements of those offenses. Put more simply, a person can be convicted of those offenses without committing acts that are serious or violent. H.3818 eliminated some of the less serious offenses, as enumerated below. However, if the purpose of Subsection (b) is truly to target the most serious violent habitual defendants, more must be removed from the list. Failing to remove the crimes highlighted below, at a minimum, will ensure that some of the lowest-level criminals with the best chances of reform will be subject to mandatory maximum state prison sentences.

According to data provided by the Massachusetts Sentencing Commission, during fiscal year 2010, there were 2,236 people incarcerated after being convicted of the crimes listed in Subsection (b) of S.2080. Of those, 1,117 people were incarcerated for the crimes excluded from Subsection (b) in H.3818 and 539 people were incarcerated for the additional crimes highlighted below. Thus, removing these crimes would substantially narrow the scope of Subsection (b).

An alternate method of reducing the number of felonies in Subsection (b) would be to include only the 22 life felonies listed in both bills with a requirement that the victim was injured. A third alternative would be to limit the bills to those crimes that resulted in a death.

Crimes Appropriately Excluded from Subsection (b) in H.3818

- (1) M.G.L.c.265, §13H - Indecent assault and battery on a person 14 years or older
- (2) M.G.L.c.265, §13K(a½) and (d)-(f)¹ - Assault and battery upon an elderly or disabled person
- (3) M.G.L.c.266, §17 - Entering without breaking in the night, breaking and entering in the daytime
- (4) M.G.L.c.266, §18 - Entering in the nighttime a dwelling house or breaking and entering in the daytime
- (5) M.G.L.c.269, §12F(e) - Possession or placement of cutting device, prohibited weapon in airport secure areas

Additional Crimes that Should be Removed in Order to Appropriately Limit the Focus of Subsection (b)

- (1) M.G.L.c.269, §10(b) - Carrying dangerous weapons
 - **Basis for Removal:** Conviction can rest solely on possession of items like brass knuckles, nunchaku, or a switch-blade. Subsection (b) has nothing to do with firearms and does not entail any use of the “weapon.” The maximum sentence, which those convicted of this crime as habitual offenders will necessarily serve, is 5 years in state prison.
- (2) M.G.L.c.265, §13A(b)(ii) and (iii) - Assault and assault and battery
 - **Basis for Removal:** Subsections (b) (ii) and (iii) allow for conviction based on assault and assault and battery. Assault entails no physical contact, no intent to harm, and no requirement that the individual assaulted was even placed in fear by the defendant’s conduct. Assault and battery is an unconsented touching of any kind, requiring no injury and no intent to harm on the part of the defendant. The maximum sentence for said conduct, despite the absence of injury or injurious intent, is 5 years in state prison.
- (3) M.G.L.c.265, §15A(a) and (c)(ii)-(iv) - Assault and battery with dangerous weapon; victim 60 years or older
 - **Basis for Removal:** Subsections (a) and (c) (ii)-(iv) do not require any bodily injury or any intent to injure on the part of the defendant. All that is required is an unconsented touching with a “dangerous weapon” that can consist of any number of things, including a shoe on a foot and the ground.

¹ S. 2054 includes the entirety of Chapter 265, §13K, while H. 3818 appropriately limits inclusion to subsections (b) and (c), which require intentional infliction of injury by the defendant.

Nevertheless, under §15A (a), a person convicted as a habitual offender will get the maximum sentence of 10 years; under §15A (b), the sentence will be 15 years.

- (4) **M.G.L.c.265, §13F - Assault and battery and indecent assault and battery on a person with an intellectual disability**
 - **Basis for Removal:** Provisions of the statute allow for conviction based on assault and battery – an unconsented touching – absent any injury. Again, the maximum sentence is 5 years in state prison.
- (5) **M.G.L.c.265, §13J - Assault and battery on a child**
 - **Basis for Removal:** Provisions of the statute allow for conviction based on “wanton and reckless” conduct, as opposed to intentional actions, that somehow resulted in injury to a child. Despite the absence of intent to harm, such conduct carries a maximum sentence of 5 years in state prison.
- (6) **M.G.L.c.269, §102 - Possession of incendiary device or hoax device**
 - **Basis for Removal:** Incendiary devices and substances have been construed to include firecrackers or combinations of household cleaners; hoax devices, by definition, are not functionally dangerous. There is no reason to include this offense, as Chapter 269, §102A and §102B sufficiently target those who actually seek to cause damage or fear by throwing, launching, discharging and igniting incendiary devices. Including this offense unreasonably places people at risk of receiving mandatory maximum sentences ranging from 5 to 20 years in state prison for mere possession if they are sentenced as habitual offenders.
- (7) **M.G.L.c.265, §43(b) or (c) - Stalking**
 - **Basis for Removal:** Stalking is not a violent offense. There is no physical or even face-to-face interaction required. If, in fact, the conduct of a defendant charged with stalking involved inflicting serious bodily injury on another person, those actions would result in additional, separate charges against that defendant. Nevertheless, the act of stalking charged pursuant to subsections §43(b) and §43(c) would require those sentenced as habitual offenders to serve 5 years or 10 years in state prison, respectively.
- (8) **M.G.L.c.265, §17 - Armed robbery**
 - **Basis for Removal:** Conviction for armed robbery can be based on an assault that gives rise to a taking of property. This can be committed with no actual force, no physical contact, and no injury. The “dangerous weapon” need only have been possessed by the defendant, not used, and could be a fake weapon or an innocuous object. The victim need not have been aware of any weapon. With this in mind, conduct that could potentially give rise to a conviction does not warrant the maximum sentence of life in state prison
- (9) **M.G.L.c.265, §18 - Armed assault with intent to rob or murder**
 - **Basis for Removal:** A conviction for armed assault with intent to rob can be based on an assault with the inferred intent to rob, though no robbery was completed. This can be committed with no actual force, no physical contact, and no injury. The “dangerous weapon” need only have been possessed by the defendant, not used, and could be a fake weapon or a harmless object. The victim need not have been aware of any weapon. Still, the maximum sentence for the crime, which would necessarily be imposed on a person convicted as a habitual offender based on this crime, is 20 years in state prison.

Proposed Language for List of Offenses Included in Subsection (b)

“Whoever: (i) has been convicted 2 times previously of 1 or more of the following offenses: section 131M of chapter 140; section 1, 13 or 13½, subsection (b)(i) of section 13A, section 13B, 13B½, 13B¾, subsection (b) or (c) of section 13K, 14, 15, subsection (b) of section 15C, 15D, 16, 18A, 18B or 18C, section 21, 21A, 22, 22A, 22B, 22C, 23A, 23B, 24, 24B, 26, 26B, 26C or 28, or subsection (b) of section 39 of chapter 265; section 1, 14, 102A, 102B or 102C of chapter 266; subsection (a) and (c)-(o) of section 10, or 10E of chapter 269; or section 3, 4A, 13, 17, 29A, 29B, 29C, 35A or subsection (b) of section 53A of chapter 272....”

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