

# PLS NOTES

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Published by Prisoners' Legal Services  
Ten Winthrop Square, Boston, MA 02110  
Executive Director: Leslie Walker  
Editor: Peter Costanza  
Phone: 617.482.2773 WATS: 800.882.1413

County Prisoner Collect: 617.482.4124  
Massachusetts state prisoner calls: \*9004#  
Call in Mondays 1-4 PM, emergencies from segregation  
9-11 or 1-4 every day or write PLS at 10 Winthrop  
Square, Boston, MA 02110

## “Three Strikes” Enacted

Chapter 192 of the Acts of 2012, commonly referred to as “Three Strikes,” became law on August 2, 2012. In a disappointing move, the Governor chose to sign the Act after legislators rejected his proposed amendment that would have restored the “safety valve” provision that granted narrow discretion to judges to permit parole eligibility for certain habitual offenders in the interests of justice. The Act makes significant changes to the habitual offender other laws. Some of these changes are discussed below.

The final version of the Act has been touted by a number of government officials as “balanced” based on the notion that monetary savings created by the reforms to mandatory minimum sentences for drug offenses will counterbalance any increased costs created by the stiffening of the habitual offender law. Little or no evidence was presented to support that assertion. Despite repeated requests from the public, no independent analysis of available data was conducted to determine what the actual effects of the law will be on prison overcrowding, the court system, or the budget. After reviewing the Massachusetts Sentencing Commission’s data, it

appears to PLS that the law is inherently unbalanced and will have unjust and expensive consequences.

## Amendments to the Habitual Offender Law

The habitual offender law, G.L. c.279, §25, is what is known as a “sentencing enhancement.” Rather than setting out a separate crime, it requires that sentencing judges impose predetermined punishments for certain repeat defendants. This removes judges’ ability to determine just and appropriate punishments based on the circumstances of each case and the personal history of each defendant. This law is a serious expansion of mandatory sentencing in Massachusetts at a time when many other states are moving in the opposite direction.

Prosecutors alone decide whether to indict a qualifying defendant as a habitual offender. By choosing to indict, prosecutors determine the sentence that the defendant will receive if found guilty and gain the power to coerce a defendant to plead guilty in exchange for the dismissal of the habitual offender indictment. This mechanism transfers control of sentencing from the court to the district attorney, which is a subversion of the judicial function.

The Act did not fill any void in our criminal law. Massachusetts has had a habitual offender law since the late 1880s and it has been regularly used by prosecutors throughout the state. Under the old law, every person convicted as a habitual offender became parole eligible after serving ½ of the maximum sentence for their third qualifying offense.

The intent behind the amendments to the habitual offender law in the Act was to exact harsher punishments by delaying or eliminating parole eligibility for habitual offenders. Therefore, the approach of this supposed reform is to further

penalize only those convicted habitual offenders whose conduct and efforts to rehabilitate themselves would have warranted a grant of parole by the Parole Board.

The amendments create two categories of habitual offenders, as set out in Subsection (a) and Subsection (b) of the new law.

Under Subsection (a), a person convicted twice of any felony who was sentenced to three years or more in state prison for those offenses, must be sentenced for his or her third felony conviction to the maximum state prison term permitted for the third offense. Subsection (a) habitual offenders are eligible for parole after serving  $\frac{2}{3}$  of the maximum sentence. It is important to note that there are almost 700 felonies that exist in Massachusetts and all of them can count as “strikes” under Subsection (a), including nonviolent property and drug crimes.

Subsection (b) establishes a list of 41 felonies that qualify as “strikes,” 19 of which carry maximum sentences of life. The 41 crimes are identified in Table 1 below. A person convicted for a third time of any felony on the list, when the sentences for the two predicate felonies were at least three years in state prison, must be sentenced to the maximum state prison term permitted. Subsection (b) habitual offenders are completely ineligible for parole, work release, and good conduct deductions. Accordingly, enacting Subsection (b) alters Massachusetts law to allow sentences of life without parole for 19 crimes. Prior to the passage of the Act, only one crime – first degree murder – could result in a sentence of life without parole.

Moreover, the Act alters the language of G.L.c.278, §33E concerning appellate review of capital crimes. Specifically, it deems habitual offender convictions under Subsection (b) capital crimes, making them eligible for direct appellate review by the Supreme

Judicial Court. Though the scope of review of capital cases is broader than that of non-capital appellate review, as Chief Justice Roderick Ireland made clear in a letter to Governor Patrick dated July 26, 2012, it cannot substitute for judicial discretion at the trial level. Please inform PLS if you have been indicted or convicted as a habitual offender under the new “Three Strikes” law.

### **Mandatory Minimum Sentence Reductions and Parole Eligibility for Some Drug Offenses**

The Act included welcome reductions to mandatory minimum sentences for some drug offenses. The reductions range from 6 months to 3 years. Table 2 below details the particular offenses affected by the reductions.

The reductions do not change the sentence length of anyone currently serving a mandatory minimum drug sentence imposed prior to the passage of the Act. However, certain people currently serving mandatory minimum sentences for offenses identified in Table 2 will benefit from the changes in the law by being made eligible for parole, work release, and earned good time. Still, as is the case for all prisoners, grants of parole and opportunities to earn good time are not guaranteed. Those who are not paroled and do not earn good time will serve the entire sentence imposed by the judge.

The Department of Correction (DOC) reports that it has reviewed the sentence structures of prisoners potentially affected by the change in good time eligibility and has started administratively applying sentence deductions for work and program participation, where applicable. To date, 39 people have been released.

Similarly, the DOC and the Parole Board are identifying prisoners who have immediate parole eligibility dates and scheduling parole hearings. The Parole Board has reported that hundreds of prisoners serving mandatory minimum sentences

became immediately eligible for parole. According to the Parole Board, hearings for these prisoners were supposed to start in August and continue into the fall. Because of the administrative processes undertaken by the DOC and the Parole Board, the DOC indicates that it is not necessary for prisoners to approach the court to revise their mittimus in order to get released on parole.

Whether a person is eligible for parole depends both on whether the offense is listed in Table 2 and on the sentence originally imposed. The Parole Board has, unfortunately, taken the position that the new law does not change the parole eligibility date of people whose minimum sentence is greater than the old mandatory minimum sentence. This means that, according to the Parole Board, a person convicted of violating G.L. c.94C, §32(b) and sentenced to 5 years to 7 years will be eligible for parole after serving the new 3-year mandatory minimum. However, a person convicted of the same offense and sentenced to 6 years to 7 years will not be eligible for parole until he or she has served the 6-year minimum term imposed by the judge. That being said, the 6-year term can still be reduced with earned good time. [If you go before the Parole Board based on reductions to your mandatory minimum sentences, please let PLS know the outcome.](#)

Individuals with open cases involving offenses in Table 2 should speak with their criminal attorneys about the reductions. Others sentenced to the old mandatory minimum sentences for a Table 2 offense before or after August 2, 2012 may also wish to consult with their attorneys.

### **Increases to Drug Trafficking Weight Ranges for Certain Offenses**

The Act changed the weight ranges for the two lowest-level offenses for trafficking in Class A and Class B drugs. Table 3 below details the particular trafficking offenses affected. Significantly, for the

offenses in Table 3, a person can no longer be charged with trafficking if the amount of narcotics weighs less than 18 grams, as opposed to the previous threshold of 14 grams.

Individuals with open cases for any of the Table 3 offenses should speak with their criminal attorneys about the application of the new weight ranges.

The retroactivity language of the Act, as written, does apply to the provisions that increase the weight ranges. However, the DOC is not in a position to administratively apply the benefits of the weight changes to affected prisoners because it is unaware of the exact weight of the drug evidence in each trafficking case. Therefore, individuals who have been convicted under the old weight ranges may wish to consult with their attorneys about approaching the court for relief, depending on the circumstances of their case. Contact CPCS if you do not currently have an attorney.

### **Changes to the School Zone Law**

The Act changes the school zone statute, G.L. c.94C, §32J, which requires that judges impose mandatory minimum sentences of 2 years for committing certain drug offenses on or near school property. The new law reduces to the school zone radius from 1000 feet to 300 feet and excludes from punishment violations that occur after midnight and prior to 5:00am. It does not change the mandatory minimum sentence requirement.

The language of the Act does not change sentences imposed before August 2, 2012. Individuals who have open school zone cases should speak with their criminal attorneys about the effect of the changes. Others already sentenced for a school zone violation that took place over 300 feet away from school property or between the hours of 12:00am and 5:00am, may wish to contact their criminal attorneys.

**Table 1: Crimes**

<ul style="list-style-type: none"> <li>• G.L. c.265, §1 - Murder</li> <li>• G.L. c.265, §13 - Manslaughter</li> <li>• G.L. c.265, §13½ - Vehicular manslaughter</li> <li>• G.L. c.265, §13A(b)(i) - Assault; A&amp;B</li> <li>• G.L. c.265, §13B - Indecent A&amp;B on a child under 14</li> <li>• G.L. c.265, §13B½(a) - Indecent A&amp;B on a child under the age of 14 during commission of certain offenses</li> <li>• G.L. c.265, §13B¾ - Indecent A&amp;B on a child under 14 by certain previously convicted offenders</li> <li>• G.L. c.265, §13F - A&amp;B, indecent A&amp;B on a person with an intellectual disability</li> <li>• G.L. c.265, §13J(b) - A&amp;B on a child</li> <li>• G.L. c.265, §14 - Mayhem</li> <li>• G.L. c.265, §15 - Assault with intent to murder or maim</li> <li>• G.L. c.265, §15A(c)(i) - A&amp;B with dangerous weapon</li> <li>• G.L. c.265, §16 - Attempt to murder</li> <li>• G.L. c.265, §17 - Armed robbery</li> <li>• G.L. c.265, §18 - Armed assault with intent to rob or murder</li> <li>• G.L. c.265, §18A - Assault in dwelling with dangerous weapon</li> <li>• G.L. c.265, §18B - Use of firearm in committing a felony</li> <li>• G.L. c.265, §18C - Entry of a dwelling with dangerous weapon</li> <li>• G.L. c.265, §21 - Stealing by confining or putting in fear</li> <li>• G.L. c.265, §22 - Rape</li> <li>• G.L. c.265, §22A - Rape of child</li> <li>• G.L. c.265, §22B - Rape of child during commission of certain other offenses or by use of force</li> </ul>	<ul style="list-style-type: none"> <li>• G.L. c.265, §22C - Rape of a child through use of force by certain previously convicted offenders</li> <li>• G.L. c.265, §23A - Statutory rape aggravated by age difference or committed by mandatory reporter</li> <li>• G.L. c.265, §23B - Statutory rape by certain previously convicted offenders</li> <li>• G.L. c.265, §24 - Assault with intent to commit rape</li> <li>• G.L. c.265, §24B - Assault of child with intent to rape</li> <li>• G.L. c.265, §26 - Kidnapping</li> <li>• G.L. c.265, §26B - Drugging persons for kidnapping</li> <li>• G.L. c.265, §26C - Enticement of a child under 16 years</li> <li>• G.L. c.265, §28 - Use of poison with intent to injure</li> <li>• G.L. c.265, §39(b) - A&amp;B for intimidation</li> <li>• G.L. c.266, §14 - Armed burglary</li> <li>• G.L. c.266, §102C - Possession of a biological, chemical, or nuclear weapon or delivery system</li> <li>• G.L. c.272, §4A - Inducing minor into prostitution</li> <li>• G.L. c.272, §17 - Incest</li> <li>• G.L. c.272, §29A(b) - Posing or exhibiting child under 18 in state of nudity or sexual conduct</li> <li>• G.L. c.272, §29B(b) - Knowingly disseminating pornography depicting child under 18</li> <li>• G.L. c.272, §29C - Knowingly possessing pornography depicting child under 18</li> <li>• G.L. c.272, §35A - Unnatural, lascivious acts with child under 16</li> <li>• G.L. c.272, §53A(b) - Engaging in sexual conduct for a fee</li> </ul>
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**Table 2: Mandatory Minimum Drug Sentence Reductions**

G.L. c. 94C	Offense	Old Mandatory Minimum	New Mandatory Minimum or Parole Eligibility
§32(b)	Distribution Class A Subsequent Offense	5 years	3 years
§32A(b)	Distribution Class B Subsequent Offense	3 years	2 years
§32A(d)	Distribution PCP Subsequent Offense	5 years	3 ½ years
§32B(b)	Distribution Class C Subsequent Offense	2 years	18 months
§32E(a)(2)	Trafficking Class D 100 to 2,000 pounds	3 Years	2 years
§32E(a)(3)	Trafficking Class D 2,000 to 10,000 pounds	5 years	3 ½ years
§32E(a)(4)	Trafficking Class D Over 10,000 pounds	10 years	8 years
§32E(b)(1)	Trafficking Class B 14 to 28 grams	3 years	2 years
§32E(b)(2)	Trafficking Class B 28 to 100 grams	5 years	3 ½ years
§32E(b)(3)	Trafficking Class B 100 to 200 grams	10 years	8 years
§32E(b)(4)	Trafficking Class B Over 200 grams	15 years	12 years
§32E(c)(1)	Trafficking Class A 14 to 28 grams	5 years	3 ½ years
§32E(c)(2)	Trafficking Class A 28 to 100 grams	7 years	5 years
§32E(c)(3)	Trafficking Class A 100 to 200 grams	10 years	8 years
§32E(c)(4)	Trafficking Class A Over 200 grams	15 years	12 years

**Table 3: Increases in Drug Trafficking Weight Ranges**

G.L. c. 94C	Offense	Old Weight Range	New Weight Range
§32E(b)(1)	Trafficking Class B	14 to 28 grams	18 to 36 grams
§32E(b)(2)	Trafficking Class B	28 to 100 grams	36 to 100 grams
§32E(c)(1)	Trafficking Class A	14 to 28 grams	18 to 36 grams
§32E(b)(2)	Trafficking Class A	28 to 100 grams	36 to 100 grams

## Rules Regarding Work Release

The Act amended G.L.c.94C, §32H, which provides a list of things that prisoners can and cannot have access to while serving mandatory minimum sentences for the drug offenses listed in Table 4. Specifically, the amendment makes provision for the DOC and county correctional facilities to grant individuals convicted of the offenses in Table 4 permission to engage in employment under a work release program.

Table 4: Work Release Availability	
G.L. c. 94C	Offense
§32(b)	Distribution Class A Subsequent Offense
§32A(b)	Distribution Class B Subsequent Offense
§32A(c)	Distribution PCP
§32A(d)	Distribution PCP Subsequent Offense
§32B(b)	Distribution Class C Subsequent Offense
§32E(a)	Trafficking Class D (all subsections)
§32E(b)	Trafficking Class B (all subsections)
§32E(c)	Trafficking Class A (all subsections)
§32F	Distribution to a Minor (all subsections)
§32J	Distribution in School Zone

The DOC indicates that is in the process of identifying prisoners who may now be eligible for work release programs, notifying them, and, if necessary, holding classification board hearings so that the prisoner can be placed on the work release eligibility list. This means that mandatory minimum sentences for the offenses in Table 4 no longer categorically prevent prisoners from classification to pre-release facilities.

## Earned Good Time Increases

Based on changes in the Act, prisoners are able to earn 5 days per month for each program, job, or educational course and can earn a total of 10 days good time each month. The Act also allows prisoners to earn an extra 10 days for completing a program that takes six months or longer to finish, which the DOC refers to as a “boost” credit. In order to earn the “boost” credit, the Act

requires that prisoners satisfy the requirements of the program and demonstrate “competency in the material, as determined by the commissioner.” The DOC interprets this language as requiring that the prisoners pass a test before receiving the earned good time credit for long-term programs.

As was the case before the passage of the Act, the DOC decides how many credits each activity is worth and the opportunity to participate in activities is limited by availability and other factors within DOC control. The DOC indicates that it has formed a committee to review the increased good time provisions and has already approved several programs and educational courses for an increase in credit up to 5 days per month. The committee has recommended that some existing programs be considered for the “boost” credit as well.

Because thousands of prisoners are affected by these increases, it may take a while for the DOC to fully implement this part of the new law. The DOC takes the position that the good time increases will not be applied retroactively to August 2, 2012, but will be effective once the Inmate Management System is reprogrammed.

## Changes Related to Parole Votes and Parole Eligibility for Second Degree Lifers

The Act contains provisions that alter the position of people sentenced to second degree life with regard to parole. These changes apply to crimes committed after August 2, 2012.

First, the new law requires a two-thirds majority vote in order to grant parole to individuals serving second degree life sentences, rather than a majority vote. Second, individuals serving multiple second degree life sentences will no longer be eligible for parole if: (1) the life

sentences arise out of separate and distinct incidents that occurred at different times and (2) the second offense occurred after the first conviction.

### **Requirement of a Fixed Minimum Term for Second Degree Life Sentences**

The Act requires that sentencing judges set a fixed minimum term of not less than 15 years or more than 25 years for people sentenced to life with the possibility of parole, or second degree life. This requirement applies to crimes committed after the passage of the Act.

As a result, individuals sentenced to second degree life in the future for crimes committed after August 2, 2012 will not automatically be eligible for parole after serving 15 years; they will become parole eligible at the minimum term set by the judge. Additionally, those individuals with second degree life sentences that include the fixed minimum term will, arguably, be eligible to earn good time.

### **Criminal Penalties for Failure to Provide a Required DNA Sample**

People who fail to provide a required DNA sample within 1 year of conviction, adjudication, or release from custody after receiving a written notice to do so will be subject to criminal penalties. This amendment and the Act's other provisions related to DNA testing will take effect on January 1, 2013.

#### **DOC Facts**

- For the first time in history, the DOC population was over 12,000 this summer.
- The DOC went from 143% of design capacity in 12/12 to 149% in 6/12.
- The amount the DOC spent on treatment went from 2.2% of its annual budget in 2010 to 1.9% in 2011.

## **State Drug Lab Closed as Investigation into Chemist's Misconduct Continues**

Governor Deval Patrick closed the state crime laboratory in Jamaica Plain on August 30, 2012. An investigation into improper handling of drug evidence continues. Drug analysis duties have been transferred from the Department of Public Health to the State Police. Former chemist **Annie Dookhan's** practices, along with flawed oversight and quality control by lab management, are at the center of the crisis. As of September 17, 2012 the Commissioner of the Department of Public Health resigned, the lab director resigned, the director of the Analytical Chemistry Division was fired, and a third lab supervisor was facing "discharge proceedings."

The Attorney General's office, in conjunction with the State Police, is conducting a criminal investigation into Dookhan's actions. Governor Patrick announced on September 20<sup>th</sup> that the Attorney General agreed to conduct a separate review to determine if problems discovered at the lab may have affected the reliability of drug testing in cases handled by other chemists.

Determining the extent of the misconduct and creating a comprehensive list of individuals whose cases may have been affected by tainted drug evidence are massive undertakings. The latter requires broad cooperation amongst prosecutors, criminal defense attorneys, and other government officials. Former prosecutor David Meier has been appointed to lead the central office charged with identifying the cases. Representatives from the Committee for Public Counsel Services, the Massachusetts Association of Criminal Defense Lawyers, and the Federal Public Defenders met with Governor Patrick, Secretary of Health and Human Services Judy Ann

Bigby, and Secretary of Public Safety Mary Beth Heffernan to get a briefing on September 14<sup>th</sup>.

The first priority was to identify the individuals who are presently incarcerated for cases that involved drug evidence tested by Dookhan. On September 24, 2012, Mr. Meier produced a list of 1,140 such people – 690 in state prison and 450 in county correctional facilities. Each of these people will go before the court to address the issues created by Dookhan’s misconduct and to determine appropriate resolutions.

Dookhan worked at the Jamaica Plain lab from 2003 to 2012. She was suspended in mid-June, but she was removed from testing responsibilities and given administrative duties sometime prior to that. During Dookhan’s tenure, the lab tested drug samples from every county to the east of Worcester County. Middlesex County stopped sending samples to that lab in 2009.

Initially, it was only disclosed that Dookhan improperly logged 90 samples on one day in June 2011. However, it is now clear that the problems were much more widespread. State Police announced on September 13<sup>th</sup> that current and former chemists informed investigators that Dookhan “routinely violated” protocols in drug testing while handling evidence. Reports indicate that Dookhan tampered with evidence bags, did not calibrate instruments correctly, altered the weight of samples, and mixed samples to assure that they tested positive for narcotics. To make matters worse, Dookhan processed significantly more samples than her colleagues. She may have been involved in analysis of as many as 60,000 samples, affecting as many as 34,000 cases.

Dookhan also had access to the evidence samples of other chemists. Though, it is unclear whether and to what extent she took advantage of the unsupervised access she had to the evidence safe. Authorities do not know yet if other chemists were mishandling evidence as well or if testing conducted by other chemists was compromised. If investigators discover that more chemists are involved in the improprieties at the lab, then thousands more cases will likely be affected.

Based on these recent reports, it appears that retesting drug evidence would not eliminate the possibility of convictions based on contaminated, incorrectly weighed, or misidentified samples.

Defendants currently facing charges based on evidence tested in the Jamaica Plain lab should speak with their criminal attorneys about how the misconduct may impact their case. Individuals currently serving sentences for drug convictions out of Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth, or Suffolk Counties may have had their evidence tested by Dookhan and should seek advice. **If you were convicted of a drug offense in any of those counties and would like to have your case screened for assignment of counsel, call the Committee for Public Counsel Services at 617-482-6212 or 1-800-882-2095 and ask to be connected with the “drug lab intake” extension. DOC prisoners may also call CPCS at the following preauthorized speed dial: \*9009#.**

Please spread the word! Additional information about the scope of the misconduct will determine whether convictions relying on testing by other chemists at the lab must also be examined.

Prisoners' Legal Services  
Ten Winthrop Square, 3d Floor  
Boston, MA 02110

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