

PRISONERS' LEGAL SERVICES*
10 WINTHROP SQUARE, 3RD FLOOR, BOSTON, MA 02110
617-482-2773; WATS 800-882-1413
FAX 617-451-6383
State Prisoner Speed Dial *9004#
County Collect Calls 617-482-4124
www.plsma.org

“THREE STRIKES” LEGISLATION*

Chapter 192 of the Acts of 2012, commonly referred to as “Three Strikes,” became law on August 2, 2012. 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 law and others. Some of these changes are discussed below.

Amendments to the Habitual Offender Law

The changes to the habitual offender law included in the Act expand mandatory sentencing in Massachusetts at a time when many states are moving in the opposite direction. The habitual offender law, G.L. c.279, §25, is a “sentencing enhancement.” 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. Instead, the habitual offender law transfers control of sentencing from the court to the district attorneys. Prosecutors alone decide whether to indict a qualifying defendant as a habitual offender. By choosing to indict, a prosecutor controls the sentence that the defendant will receive if found guilty and gains additional power to pressure a defendant to plead guilty in exchange for the dismissal of the habitual offender indictment.

Massachusetts has had a habitual offender law since the late 1880s. 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 effect of this supposed reform is to further penalize only those habitual offenders whose conduct and efforts at rehabilitation 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:

- #1** 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) is similar to the old habitual offender statute except that habitual offenders must now serve $\frac{2}{3}$ of the maximum sentence instead of $\frac{1}{2}$ the sentence before becoming eligible for parole. 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.
- #2** 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 prior felonies were at least three years in state prison, must be sentenced to the maximum state prison term authorized for the third crime. Subsection (b) habitual offenders are 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, rather than one crime – first degree murder.

The Act also 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.

Please inform PLS if you have been indicted or convicted as a habitual offender under the new law and the outcome of those proceedings.

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

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 details which offenses are affected by the reductions.

The reductions do not change the sentence length of prisoners currently serving mandatory minimum drug sentences imposed prior to the passage of the Act. However, people serving mandatory minimum sentences for offenses identified in Table 2 will benefit from the changes in the law by becoming eligible for parole, work release, and earned good time. As is the case for all prisoners, grants of parole and opportunities to earn good time are not guaranteed.

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. As of November 27, 2012, it had released over 100 prisoners because of the shorter mandatory minimums.

Similarly, the Parole Board are identifying prisoners who have immediate parole eligibility dates and scheduling parole hearings. According to the Parole Board, it had conducted 123 hearings as of November 21st, with 91 prisoners receiving favorable votes. The remaining 200 or so hearings are supposed to be completed in the first few months of 2013. Because of these administrative processes, the DOC indicates that it is not necessary for prisoners to approach the court to revise their mittimus to get released on parole.

Every person currently serving a sentence for offenses listed in Table 2 becomes parole eligible upon serving the new mandatory minimum sentence. Originally, the Parole Board took 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. However, the Executive Office of Public Safety (EOPS) overruled this interpretation in a memorandum dated November 8, 2012. The memorandum only applies to prisoners sentenced before August 2, 2012.

If you go before the Parole Board based on reductions to your mandatory minimum sentences, please let PLS know the outcome.

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

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 details the particular trafficking offenses affected. Significantly, for Table 3 offenses, 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.

The retroactivity language of the Act, as written, applies to the provisions that increase the weight ranges, but the DOC is not in a position to administratively apply the benefits because it is unaware of the exact weight of the drug evidence in each trafficking case. Thus, individuals who have been convicted under

the old weight ranges may wish to consult with their criminal attorney or contact CPCS about approaching the court for relief, depending on the circumstances of their case.

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

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.

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 allows the DOC and county correctional facilities to place individuals convicted of the offenses in Table 4 in a work release program even before completing the mandatory minimum.

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 has indicated that it is identifying prisoners who may 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 prevent prisoners from classification to pre-release facilities.

Earned Good Time Increases

Based on changes in the Act, prisoners are able to earn up to 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.”

As was the case before the passage of the Act, the DOC has the discretion to determine how many credits each activity is worth. In addition, the opportunity to participate in activities is limited by availability and other factors within DOC control. The DOC released a memorandum dated November 2, 2012 concerning the application of good time increases. The memorandum lists all the activities that will now receive 5 days of earned good time per month. It also lists the programs eligible for the 10-day “boost” credit upon completion of six months in the program and a demonstration that the prisoner has achieved competency in the material. Programs not on the list will continue to receive good time according to the old rules. Still, the DOC has indicated that it is continuing to review its practices and may add to the list of programs eligible for 5 days per month.

Please be aware that the changes are not retroactive. The DOC has made the increases effective on November 1, 2012. This means the increased good time will be awarded for participation in programs during November 2012, but not for any month before November 2012. However, prisoners are eligible for the 10-day “boost” credit if they complete six months in the program as of the end of November.

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.

* This memorandum is based on information available to Prisoners’ Legal Services as of November 27, 2012.