

## ANALYSIS OF S.2080 & H.3818 "THREE STRIKES" PROVISIONS Skyrocketing Costs, Overcrowding, and Disproportionate Punishments

The amendments to Chapter 279, §25 in S.2080 and H.3818 will overwhelm the Massachusetts criminal justice system, which is already in a state of crisis by generating a dramatic increase in prison sentences and **additional costs of approximately \$75-125 million per year** once the provisions are in full effect. The end result of either of the proposed habitual offender, or "three strikes", laws will be dramatically increased costs for the Department of Correction, county correctional facilities, and the court system, exacerbation of existing overcrowding at state prisons and county correctional facilities, and imposition of disproportionate punishments. **Inevitably, incarcerating more prisoners for longer sentences will cost taxpayers more money.**

However, these detrimental effects can be mitigated to some extent if the Conference Committee:

- (1) **Adopts from S.2080 (Section 46) the language of Subsection (a) of Chapter 279, §25;**
- (2) **Adopts from H.3818 (Section 3) the language of Subsection (b) of Chapter 279, §25 with the added requirement that the person has served 3 years or more in state prison for each of the two prior "strikes";**
- (3) **Removes certain crimes from Subsection (b) of Chapter 279, §25** in light of the lack of seriousness of the actions required to be convicted of the offenses;
- (4) **Makes habitual offenders sentenced to life imprisonment pursuant to Subsection (b) eligible for parole after serving 25 years of said life sentence;** and
- (5) **Includes an exception to the application of the habitual offender provisions** that can be invoked by judges in limited circumstances for individuals who technically meet the prerequisites for conviction as a habitual offender, but do not fit within the intended focus of the provisions.

### Ø Increased Department of Correction Costs and State Prison Overcrowding

- The amendments to Chapter 279, §25 broadly expand the class of persons deemed habitual offenders who must serve maximum sentences and eliminate parole for a large subsection of those individuals. This will **inevitably and dramatically exacerbate overcrowding and, in turn, increase the Department of Correction's (DOC) annual operating budget.**
- Currently, overcrowding in the DOC averages 143% of design capacity, with the most overcrowded facility at 345%. *Absent any legislative changes*, the DOC has projected an annual growth of more than 2.5% per year through 2019.
- Additionally, because of the 56% reduction in parole releases in 2011 compared to 2010, *absent any legislative changes*, the DOC has projected that it will have 550 additional prisoners by the end of 2011. Therefore, *without any changes to the existing habitual offender law*, at a cost of \$46,000 per year for each of the 550 prisoners, the annual cost to taxpayers will be over \$25 million.
- Based on data compiled by the Sentencing Commission, approximately 150-250 people could be sentenced under Subsection (b) per year.<sup>1</sup> If each person serves a conservative average of 10 additional years as a result, **Subsection (b) alone could cost taxpayers \$75-125 million per year once the law has fully taken effect, not including the capital costs associated with building a new prison to house the additional 1,500-2,500 habitual offenders for which DOC will be responsible.**

### Increased Court and County Jail Costs, Court Delays, and County Jail Overcrowding

- **The amendments to Chapter 279, §25 will substantially increase costs of pre-trial jail time, case processing, and trials because defendants facing maximum terms of incarceration as habitual offenders will opt to go to trial rather than plead guilty.**
- Similar to DOC facilities, county facilities are already overcrowded, with an average of 142% of design capacity. Larger county facilities are at over 200% of design capacity with the most overcrowded at 378%.

<sup>1</sup> See Survey of Sentencing Practices Report, available at <http://www.mass.gov/courts/admin/sentcomm.html>, assuming that persons with a third strike would be in Category D or E, and that all of Levels 7-9 and 50% of Level 6 crimes would count as a strike.

∅ **Disproportionate Punishments**

- **Chapter 279, §25, as amended, is overly inclusive.** Failure to limit applicability of the habitual offender provisions to the most serious offenses makes it a certainty that many will be sentenced to lengthy terms of incarceration in state prison.
- **Subsection (a) encompasses all of the 688 felony crimes in Massachusetts. Subsection (b) includes 59 crimes in S.2080 and 55 crimes in H.3818.** Over 30 of the 688 felonies carry a maximum of life imprisonment; 24 are included in S.2080 and 22 in H.3818.
- **The facts of the crime, the nature of the offense, the history of the individual, and the sentence imposed must all be considered in identifying the worst offenders.** Both Subsections (a) and (b) fail to consider the lack of seriousness of the actions required to meet the elements of many offenses deemed “strikes” and prevent consideration of mitigating factors regarding the circumstances of the case and the individual defendant that is necessary for fair and appropriate sentencing.
- No research supports a link between longer prison terms and reduced recidivism. In fact the research is clear that the longer a person is incarcerated, the more difficult it becomes to adjust to the outside world. Coupled with very limited options for employment after a long incarceration, this population is more likely to return to crime. **Rehabilitative, training, and work release programs during incarceration, along with parole supervision are vital to prisoners’ stability and reducing recidivism. The DOC only spends 2.4% of its budget on programming. However, individuals sentenced pursuant to Subsection (b) are foreclosed from participation in what few programs exist.**

**Adopt from S.2080 (Section 46) the Language of Subsection (a) of Chapter 279, §25**

- ∅ **The three criminal convictions qualifying a person as a habitual offender under Subsection (a) can be for any of the 688 felonies in Massachusetts.**
- ∅ Both S.2080 and H.3818 provide the enhanced penalty of parole eligibility at 2/3 of the maximum sentence, in contrast to current law, which provides parole eligibility at 1/2 the maximum sentence. Delaying parole eligibility means that prisoners will have to remain in custody longer, increasing overcrowding and the costs of imprisonment.
- ∅ **H.3818 reduces the length and sentence of the prior offenses from not less than three years to *any length of incarceration in state prison.***
  - Expanding the habitual offender designation to the pool of people who receive state prison sentences of less than three years for two prior convictions substantially increases the number of individuals subject to maximum sentences and eligible for parole at 2/3 the sentence, rather than 1/2.
- ∅ **Subsection (a) of S. 2080 is more narrowly tailored and less costly than Subsection (a) of H.3818.**

**Adopt from H.3818 (Section 3) the Language of Subsection (b) of Chapter 279, §25**

- ∅ Subsection (b) of Chapter 279, §25 creates a new class of habitual offenders to target violent offenders convicted three times of certain listed crimes. Both S.2080 and H.3818 provide that all persons convicted as habitual offenders pursuant to Subsection (b) are ineligible for parole, work release, and deduction from their sentences for good conduct.
- ∅ S.2080 Subsection (b) provides a list of 59 qualifying crimes. **H.3818 Subsection (b) provides a more reasonable list of 55 crimes, 22 of which carry maximum life sentences.**
- ∅ **S. 2080 Subsection (b) sweeps in minor offenses by including the crimes removed by H.3818 and by allowing prior convictions with only a county jail or house of correction sentences to qualify as “strikes.”**
- ∅ Under S.2080, a person needs only to have served at least *one day of incarceration in any facility* (county or state) on each of the two prior convictions. Alternatively, H.3818 requires *one day or more in state prison*. **More rational still would be applying Subsection (a)’s requirement of sentences of 3 years or more in state prison for each of the two prior “strikes.”**
  - S. 2080’s language means that an individual who has served as little as two days in a county jail may be sentenced from five years to life in prison without parole, depending on the maximum sentence allowed for the third conviction.

- **Aside from a sentence of probation that is completed successfully, there is no lesser sentence than one day of incarceration.** Because of mental illness, mental disabilities, homelessness, and substance abuse, among other issues, some individuals are unable to successfully complete probation.
  - S.2080 ignores a reality faced by many low-income people who cannot post bail: although they are innocent, the prosecutor offers to let them go if they plead guilty to the time that they have already served awaiting trial and, in order to go home, they plead guilty. Because they cannot make a \$100 or even a \$50 bail, they accept a guilty plea that counts as a “strike.”
- ∅ **To avoid imposing mandatory maximum sentences on some of the lowest-level criminals with the best chances of reform, add the state prison requirement of H.3818, or better still, the added requirement of 3 years served in state prison on each prior “strike.”**

### **Remove Crimes from Subsection (b) of Chapter 279, §25**

- ∅ **Certain crimes in Subsection (b) are not suitable for inclusion based on the lack of seriousness of the actions required to meet the elements of the offenses.**
- ∅ **H.3818 appropriately eliminates the following from the list of qualifying crimes in Subsection (b): c.265, §13H and §13K; c.266, §17 and §18; and c.269, §12F(e).**
- ∅ **Chapter 265, §13A(b)(ii) and (iii) and c.265, §13F should be removed from subsection (b) because they allow for conviction based on the acts of assault and battery, absent any injury, and simple assault.**
- The only proof required to convict a person of **assault and battery** is that the assailant committed an intentional, unconsented touching, directly or indirectly. **There is no injury or intent to harm required.**
  - To be convicted for **simple assault**, there must only be an attempted or threatened battery (touching). **There is no physical contact involved, no intent to harm required, and no requirement that the individual assaulted was put in fear.**

### **Allow Parole Eligibility for Subsection (b) Habitual Offenders after Serving 25 Years of a Life Sentence**

- ∅ Subsection (b) calls for life without parole for persons convicted of over 20 crimes as their third offense. **The difference in cost for taxpayers between life without parole and release after 25 years is approximately \$900,000 per prisoner.<sup>2</sup>**
- ∅ With more prisoners serving life without parole and other lengthy mandatory sentences, the number of elderly prisoners in the DOC will increase significantly. **The National Institute of Corrections estimates that the cost of housing elderly prisoners is almost double that of younger prisoners due to their increased medical needs; annual medical expenses for elderly prisoners can reach over \$100,000.**
- ∅ It is a waste of taxpayer money to incarcerate prisoners for life if they have not committed murder and are no longer dangerous. Even the notorious California Three Strikes law permits parole after 25 years.

### **Include an Exception to the Application of Habitual Offender Provisions**

- ∅ **Both S.2080 and H.3818 fail to provide an exception to the application of the habitual offender provisions for those individuals who technically meet the prerequisites, but do not fit within the intended focus of the provisions.**
- As an example, California law permits judges to vacate one or more of the prior convictions from consideration as strikes “in furtherance of justice” if the judge determines that the nature and circumstances of the defendant’s present felonies and prior convictions, and the particulars of his background, character, and prospects, make the defendant outside of the spirit of the habitual offender scheme, in whole or in part.
- ∅ **Putting individuals not appropriately deemed habitual offenders in prison based on a uniformly applied rule is wasteful and not in the public interest.**

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<sup>2</sup> Based on a conservative estimate that prisoners serving mandatory life sentences, rather than 25 years, will serve an additional 20 years in prison and the DOC’s average cost per prisoner of \$46,000 per year.