

## Chapter 17

# MASSACHUSETTS STATE SENTENCING ENHANCEMENTS

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### Scope Note

This chapter shows how state sentencing enhancement provisions can increase the punishment of a defendant convicted of certain crimes, and thereby greatly impact the consequences to the defendant. Statutory provisions are discussed, including those pertaining to habitual offenders, “common thieves”, receivers of stolen goods, convictions while on pretrial release from another offense; subsequent drug offenses; firearms possession and operating under the influence. The proposed Massachusetts Sentencing Guidelines are discussed, as is the issue of disposition after trial or plea and its effect on sentencing enhancement provisions.

### § 17.1 QUICK TIPS

- In Massachusetts, many criminal statutory provisions mandate enhanced sentences for repeat offenders. Additionally, the proposed Massachusetts State Sentencing Guidelines provide for sentence enhancement for repeat offenses.
- The court cannot designate a defendant a “habitual criminal” under G.L. c. 279, § 25 until the defendant receives a trial on the charge of being a habitual offender.
- Defendants with habitual offender status are sentenced to the maximum term provided by law for the felony for which he or she is to be sentenced.
- A conviction over 10 years old is not considered too stale for use under the Habitual Offender Statute.

- A defendant convicted of buying or receiving stolen goods three or more times will not only be adjudged a common receiver of stolen or embezzled goods, but may also receive a prison term of not more than 10 years.
- During an offer to plead guilty, a defendant must be made aware of the effect of receiving a third conviction under the Common Thief/Common Receiver of Stolen Goods statutes.
- Courts have held that one aggregated sentence (rather than three sentences to be served concurrently) should be imposed where three crimes are charged in the same indictment under the Common Thief/Common Receiver of Stolen Goods statutes.
- Sentences for crimes committed while the defendant was on pre-trial release run consecutive to the earlier sentence for the crime for which the defendant was on release.
- First-time and subsequent offense sentences for drug offenses differ based on the statutory classifications (Class A, Class B, etc.) given to the drugs.
- A second prosecution for drug distribution permits the first conviction to relate to distribution of drugs of *any* type and not simply the class of drugs involved in the second conviction.
- While the proposed Massachusetts Sentencing Guidelines are not mandatory unless and until adopted by the Legislature, the Guidelines are tools that judges may and often do use at their discretion.
- For certain offenses where a statute sets forth more severe penalties on second or subsequent convictions, the Guidelines elevate the seriousness level of the offense.
- Prior criminal offenses may influence a judge's decision to depart from the proposed Massachusetts Sentencing Guidelines.

## § 17.2 INTRODUCTION

Sentencing enhancement provisions have the effect of increasing the punishment of a defendant convicted of certain crimes because of either the nature of the crime or the defendant's prior criminal record. In Massachusetts, there are two

sources from which the trier of fact may impose an increased sentence for repeat criminal offenses. First, under the Massachusetts General Laws, a number of criminal statutory provisions mandate enhanced sentences for repeat offenders. Second, the State Sentencing Guidelines (“the Guidelines”) contain provisions for sentence enhancement for repeat criminal offenses; however, until the legislature enacts legislation giving the Guidelines the force of law, judges are not bound by them and may utilize them at their discretion. This chapter provides a synopsis of the mandatory sentencing enhancement statutes contained in the Massachusetts General Laws and the Massachusetts Sentencing Guideline provisions that provide for the imposition of an enhanced sentence for repeat offenses.

## **§ 17.3 MANDATORY SENTENCING ENHANCEMENT STATUTORY PROVISIONS**

### **§ 17.3.1 Habitual Criminal Statute: G.L. c. 279, § 25**

General Laws c. 279, § 25 governs the punishment of habitual criminals. The Habitual Criminal Statute applies to defendants who previously have been convicted of two crimes and have been committed to prison on each for terms of not less than three years. The prior two convictions can be in any state and can be either in state or federal court. Once the defendant has been convicted of the third felony, the defendant may be designated a habitual criminal and sentenced with the maximum punishment available for that particular felony.

Significantly, following a defendant’s third felony conviction, the court cannot designate a defendant a habitual criminal under G.L. c. 279, § 25 until the defendant receives a trial on the charge of being a habitual offender. The habitual offender proceeding, moreover, may be conducted in front of the same jury or judge that found the defendant guilty of the third felony. The Commonwealth has the burden of proving beyond a reasonable doubt that the defendant has two prior convictions for which the defendant received committed sentences of not less than three years each. The Commonwealth may meet this burden by introducing either certified copies of the defendant’s prior convictions or testimony that the defendant was the person involved in the proceedings regarding the prior convictions.

If a person is found to be a habitual offender, G.L. c. 279, § 25 mandates that the sentencing court sentence him or her to the maximum term provided by law as a penalty for the felony for which he or she is then to be sentenced. For example, a trial judge would be required to impose a life sentence on a defendant who had been convicted of armed robbery and who had been found to be a habitual of-

fender. *See Commonwealth v. Tuitt*, 393 Mass. 801, 473 N.E.2d 1103 (1985). Similarly, where a defendant was convicted of breaking and entering with intent to commit a felony and found to be a habitual offender, a trial judge would be required to impose a sentence of 20 years. *See Commonwealth v. Hall*, 397 Mass. 466, 492 N.E.2d 84 (1986) (*aff'g* 19 Mass.App.Ct. 1004, 475 N.E.2d 757 (1986)).

Courts interpreting the provisions of the Habitual Criminal Statute have held the following:

- The use of prior convictions to enhance penalties under G.L. c. 279, § 25 does not run afoul of the double jeopardy prohibitions of the Fifth Amendment of the United States Constitution or G.L. c. 263, § 7. *See Commonwealth v. Burston*, 35 Mass.App.Ct. 355, 619 N.E.2d 632 (1993) (*reh'g denied*, 416 Mass. 1107, 625 N.E.2d 1368 (1993)).
- To be found to be a habitual criminal, a defendant need not be incarcerated for a full three years on each of the two previous offenses. For purposes of G.L. c. 279, § 25, a defendant can be convicted under the statute if the executed sentences were at least three years. The defendant, however, must have actually been imprisoned for some time with respect to the offense. *See Commonwealth v. Youngworth*, 48 Mass.App.Ct. 249, 720 N.E.2d 30 (1999) (*reh'g denied*, 73 N.E.2d 1065 (2000)). Thus, a suspended sentence would not be considered as a qualifying prior conviction without incarceration.
- A defendant may be convicted under the Habitual Criminal Statute even where the defendant has two convictions arising out of *unrelated* incidents that were disposed of on the same date with identical concurrent sentences. *See Commonwealth v. Hall*, 19 Mass.App.Ct. 1004, 475 N.E.2d 757 (1985).
- There is no time limit on the use of the prior convictions. A conviction over 10 years old is not too stale for use under the Habitual Criminal Statute.

### § 17.3.2 Common Thief/Common Receiver of Stolen Goods Statute: G.L. c. 266, §§ 40 & 62

General Laws c. 266, § 40 governs a defendant's criminal status as a common or notorious thief. Under the provisions of this statute, a defendant convicted of

three distinct larcenies, as a principal or accessory before the fact, “shall be adjudged a common or notorious thief.” See G.L. c. 266, § 40. Larceny has been defined as the “criminal taking, obtaining, or converting of personal property, with intent to defraud or deprive the owner permanently of its use.” G.L. c. 277, § 39. The “omnibus larceny statute,” G.L. c. 266, § 30, encompasses stealing, obtaining property by false pretenses, embezzlement, and converting or secreting the property of another whether or not such property is in the victim’s possession at the time of such conversion or secreting. Nolan and Henry, 32 *Massachusetts Practice*, § 342. The third larceny conviction results in the imposition of an enhanced punishment under the statute.

Specifically, under the Common and Notorious Thief statutory provisions, a defendant convicted of a third larceny charge “shall be punished by imprisonment in the state prison for not more than 20 years or in jail for not more than two and one half years.” See G.L. c. 266, § 40. The sentence imposed on defendants under this statute is in stark contrast to the potential maximum one-year sentence imposed on first-time offenders convicted of larceny under G.L. c. 266, § 30. A trial judge may impose on a defendant convicted of stealing property valued less than \$250 for the first time either a jail sentence of not more than one year *or* a fine of not more than \$300. If a defendant is convicted for the first time of stealing property valued at more than \$250, a trial judge may sentence the defendant to either imprisonment in the state prison for not more than five years *or* a fine of not more than \$25,000 *and* imprisonment in jail for not more than two years. Thus, where a defendant cashes three separate checks in three separate towns on three separate dates, he or she could be subjected to a penalty of up to 20 years in jail and be sentenced to state prison rather than to a house of corrections. See *Commonwealth v. Crocker*, 384 Mass. 353, 424 N.E.2d 524 (1981).

Under G.L. c. 266, § 60, a defendant convicted for the first time of buying or receiving stolen goods faces a maximum incarceration sentence of two-and-one-half years in a jail or a house of correction. Under G.L. c. 266, § 60, a trial judge also has the discretion to require the defendant to pay a fine of not more than \$250 rather than impose a jail sentence. Under G.L. c. 266, § 62, however, a defendant convicted of buying or receiving stolen goods three or more times will not only be adjudged a common receiver of stolen or embezzled goods but may also receive a prison term of not more than 10 years.

Under both of these statutory provisions, there are a number of important factors to consider when defending an individual convicted of either of these two crimes.

- Under G.L. c. 266, §§ 40 and 62, the indictments need not provide the defendant with notice of the enhanced penalty for the third

conviction. During an offer to plead guilty, however, the defendant must be made aware of the effect of receiving a third conviction under these statutes.

- Unlike the Habitual Criminal statute, the Commonwealth does not need to prove any element beyond the three distinct crimes under either statute.
- Courts interpreting both statutory provisions have held that where the three crimes are charged in the same indictment, trial judges should not impose three sentences to be served concurrently, but rather should impose one aggregated sentence. *See, e.g., Haggett v. Commonwealth*, 44 Mass. 457 (1842) (interpreting Common and Notorious Thief statute provisions and holding that if a defendant has been convicted of three distinct larcenies during the same trial, there must be a consolidated judgment against the defendant); *Commonwealth v. Santucci*, 13 Mass.App.Ct. 933, 430 N.E.2d 1239 (1982) (holding that under G.L. c. 266, § 62 defendant should receive one aggregate sentence rather than three sentences to be served concurrently).

### § 17.3.3 Crime Committed While on Pretrial Release: G.L. c. 279, § 8B

If a defendant is convicted of a crime while on pretrial release from another offense, Massachusetts law imposes an enhanced sentence on that defendant. General Laws c. 279, § 8B provides in relevant part that “[i]f a defendant on release subject to the provisions [of this statute], commits a crime, the sentence imposed for such a crime shall run consecutively to the earlier sentence for the crime for which he was on release.” *See* G.L. c. 279, § 8B. Significantly, there is a presumption under the statute that the commitment for the second offense be charged “from and after” the first; however, this presumption is not mandatory and thus concurrent sentences are possible. Generally, concurrent sentences may be available in two circumstances. First, concurrent sentences may be available if the first sentencing judge took the pendency of the second case into consideration in determining the sentence for the first case. Second, G.L. c. 279, § 8B does not apply in circumstances where the second offense is tried first, and hence a concurrent sentence may be available.

### § 17.3.4 Subsequent Drug Offenses: G.L. c. 94C, §§ 32, 32A–32D

There are five different categories of drugs under Massachusetts law, each of which contains enhancements for second offenses. These five distinct categorizations impose sentence enhancements for subsequent drug offenses dependent entirely on the statutory classification given to the drugs at issue. Notably, a second prosecution for drug distribution permits the first conviction to relate to distribution of drugs of *any* type and not simply the class of drugs involved in the second conviction. *See generally Commonwealth v. Chavis*, 415 Mass. 703, 616 N.E.2d 423 (1993). The statutory enhancements, many of which contain **mandatory minimums**, are as follows:

#### **Class A (G.L. c. 94C, § 32):**

First time offense: No minimum sentence *but* a minimum fine of not less than \$1,000 nor more than \$10,000 will be imposed.

Subsequent offenses: The minimum sentence imposed for subsequent offenders of this statute is imprisonment for not less than five years *and* a fine of not less than \$2,500 nor more than \$25,000. Under this statute, the maximum sentence that may be imposed on a subsequent offender is 15 years.

#### **Class B (G.L. c. 94C, § 32A):**

First time offense: No minimum sentence *but* a minimum fine of not less than \$1,000 nor more than \$10,000 will be imposed.

Subsequent offenses: The minimum sentence for subsequent offenders is imprisonment for three years *and* a fine of not less than \$2,500 nor more than \$25,000. The maximum prison sentence for subsequent offenders is 10 years.

#### **Class C (G.L. c. 94C, § 32B):**

First offenses: No minimum sentence *but* a minimum fine of not less than \$500 nor more than \$5,000.

Subsequent offenses: For subsequent offenders, a trial judge may impose the following minimum sentence: a prison term of two years *and* a fine of not less than \$1,000 nor more than \$10,000. If a term of imprisonment alone is ordered,

a subsequent offender will be incarcerated in the state prison for not less than 2½ years nor more than 10 years *or* imprisoned in a jail or house of correction for not less than 2 years nor more than 2½ years.

**Class D (G.L. c. 94C, § 32C):**

First offenses: No minimum prison sentence; however, a fine will be imposed of no less than \$500 and no more than \$5,000.

Subsequent offenses: For subsequent offenders, a minimum incarceration sentence of 1 year but not more than 2½ years will be imposed *or* a fine of not less than \$1,000 nor more than \$10,000 *or* both fine and imprisonment.

**Class E (G.L. c. 94C, § 32D):**

First offenses: No minimum incarceration sentence will be imposed. However, the maximum sentence for a first time offender is imprisonment in a jail or house of correction for no more than nine months. In the alternative, a trial judge may also impose a fine of not less than \$250 nor more than \$2,500.

Subsequent offenses: Subsequent offenses of this statute merit either imprisonment in a jail or house of correction for not more than 1½ years *or* a fine of not less than \$500 nor more than \$5,000. Trial judges also have the discretion to impose both a fine and imprisonment.

**§ 17.3.5 Illegally Carrying A Firearm: G.L. c. 269, § 10**

Massachusetts imposes a mandatory one-year sentence for individuals convicted of a gun-related offense. Under G.L. c. 269, § 10, however, subsequent firearm offenses mandate enhanced prison sentences. A second conviction under G.L. c. 269, § 10(a) for illegally carrying a firearm carries an enhanced mandatory state prison sentence of five to seven years. Similarly, a third conviction for carrying a firearm carries a state prison sentence of seven to 10 years. A fourth offense carries a state prison sentence for not less than 10 years nor more than 15 years. The statutory provisions for illegally possessing a knife or dagger, G.L. c. 269, § 10(b), and illegally possessing a machine gun or sawed-off shotgun, G.L. c. 269, § 10(c), also impose the same enhanced sentences for subse-

quent convictions as G.L. c. 279, § 10. In addition, a defendant who receives a subsequent conviction under G.L. c. 269, § 10 is ineligible for probation and sentence reductions for good-time.

### **§ 17.3.6 Operating Under the Influence (OUI) Offenses: G.L. c. 90, § 24**

General Laws c. 90, § 24 governs the crime of driving under the influence of an intoxicating liquor and the effect of subsequent offenses. Under G.L. c. 90, § 24, a judge may impose an enhanced sentence for repeat OUI offenders. The following provides a synopsis of the enhanced sentencing provisions under the statute:

A defendant convicted for the *first time* under G.L. c. 90, § 24 may be punished by:

- Fine: not less than \$500 nor more than \$5,000; *or*
- Imprisonment: not more than 2½ years; *or*
- Fine and imprisonment.

A defendant convicted of a *subsequent OUI offense within 10 years* of the original OUI conviction shall be punished by:

- Fine: Not less than \$600 nor more than \$10,000 *and*
- Imprisonment: Not less than 60 days nor more than 2½ years.

A defendant convicted of violating G.L. c. 90, § 24 *three times within 10 years* shall be punished by:

- Fine: Not less than \$1,000 nor more than \$15,000 *and*
- Imprisonment: Not less than 180 days nor more than 5 years.

An individual convicted of operating under the influence *four times within 10 years* shall receiving the following punishment:

- Fine: Not less than \$1,500 nor more than \$25,000; *and*
- Imprisonment: Not less than 2 years nor more than 2½ years; *or*
- By a fine of not less than \$1,500 nor more than \$25,000 *and* by imprisonment in the state prison for not less than 2½ years nor more than 5 years.

Lastly, a defendant convicted of operating under the influence *five or more times within ten years* shall be punished by:

- Fine: Not less than \$2,000 nor more than \$50,000 *and*
- Imprisonment: Not less than 2½ years nor more than 5 years *and*
- Imprisonment in the state prison: Not less than 2½ years nor more than 5 years.

## § 17.4 RECOMMENDED SENTENCING ENHANCEMENT: G.L. c. 211E

### § 17.4.1 Massachusetts Sentencing Guidelines

Promulgated by the Sentencing Commission pursuant to G.L. c. 211E, the proposed Massachusetts Sentencing Guidelines provide another example of enhanced punishment for prior convictions. These Guidelines will not be mandatory until and unless adopted by the Legislature. *See* G.L. c. 211E, § 3 (“The commission shall . . . recommend sentencing guidelines, which shall take effect only if enacted into law”). However, the Guidelines are tools that judges may, and often do, use at their discretion, and as a practical matter, prosecutors, defense attorneys, and judges frequently refer to them for guidance in sentencing proceedings. *See Superior Court Handbook* (1999).

Criminal history is classified under the Guidelines by focusing on the number and seriousness of prior convictions. In considering criminal history, the Sentencing Commission stated that criminal history should include only convicted behavior and that neither prior sentencing nor charging patterns impact criminal history. Massachusetts Sentencing Commission, *Report to the General Court*, 62 (1996). Five criminal history groups have been created, ranging from “Serious Violent Record” (two or more prior convictions for offenses such as murder, manslaughter, or rape) to “No/Minor Record” (no prior convictions of any kind, or one to five prior convictions for crimes such as disorderly conduct or assault). The sentencing range is determined by cross-indexing on a sentencing grid the seriousness of the offense for which the defendant is convicted with the relevant criminal history group.

A rebuttable presumption exists that multiple convictions for offenses with the same arraignment date are counted as one prior conviction of the most serious offense. For certain offenses where a statute sets forth more severe penalties on second or subsequent convictions (*i.e.*, aggravated rape), the Guidelines elevate the

seriousness level of the offense. Finally, juvenile criminal history must be considered where certain serious crimes resulted in an adjudication of delinquency.

Prior criminal offenses may also factor into a judge's decision to depart from the Guidelines. A sentencing judge may impose a sentence below or above the guideline range if the reasons for such a departure are set forth in writing, based on one or more mitigating or aggravating factors from a "non-exclusive" list. Massachusetts Sentencing Commission, *Report to the General Court*, 18 (1996). The only specific mention of prior criminal history on this list pertains to repeated offenses against the same victim as an aggravating circumstance.

## **§ 17.5 DISPOSITIONS AFTER TRIAL OR PLEA: EFFECT ON SENTENCING ENHANCEMENT PROVISIONS**

A continuance without a finding of guilty (CWOFF) has obvious benefits for a defendant in that he or she may be able to avoid trial and "earn" a dismissal of the indictment or complaint, thereby avoiding the consequences of a criminal conviction on his or her record. *Commonwealth v. Duquette*, 386 Mass. 834, 843, 438 N.E.2d 334, 340 (1982). It is a decision by a judge to continue the case for a period of generally three months to two years rather than entering a guilty finding. Successful completion of this probationary period will generally lead to dismissal of the criminal case. In the event that the defendant fails to comply with the terms of the CWOFF, however, the trial judge may enter a guilty finding and accordingly sentence the defendant. Importantly, a defendant facing a revocation of a CWOFF is entitled to written notice and a hearing. See Eric D. Blumenson, et al., *Massachusetts Criminal Practice: Abridged Clinical Student Ed.* § 39.5C n.125 (1998) (citing *Commonwealth v. Rivera*, 424 Mass. 1007, 675 N.E.2d 768 (1996) (single justice grants relief pursuant to G.L. c. 211, § 3)).

However, certain limitations do apply. A CWOFF is most often used for first offenders or in situations where there are compelling mitigating circumstances, and while it is frequently used in district courts, it is almost never used in Superior Court. Some mandatory sentencing provisions prohibit the use of CWOFF, including G.L. c. 90, § 24(1)(a)(1) (operating under the influence), G.L. c. 94C, §§ 32 et. seq. (some serious drug offenses), and G.L. c. 269, § 10(a) (carrying a dangerous weapon). To the extent that a CWOFF can be obtained, it should be as, if the period of the CWOFF passes and the case is dismissed, it will not be counted as a conviction that gives rise to subsequent sentence enhancements.

