COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FRANKLIN, ss. **No. SJC-12412**

COMMONWEALTH of MASSACHUSETTS,
Appellee,

v.

JEFFREY WIMER,
Appellant.

On Appeal from a Judgment of the District Court

BRIEF FOR THE COMMONWEALTH

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REGULATIONS

STATUTES

Issue Presented

Whether the Defendant's Motion to Correct Sentence, Which Sentence Included an Order to Register as a Sex Offender, Was Correctly Denied Where the Defendant, Having Pleaded Guilty to Two Separate Charges of Open and Gross Lewdness and Lascivious Conduct that Took Place on Different Dates, Met the Definition of a Sex Offender.

Statement of the Case

On July 17, 2012, the defendant was arraigned on two counts of Open and Gross Lewdness, G.L. c. 272, §16 (Defendant's Appendix "Def. App."/1, 7). On April 2, 2013, the defendant pleaded guilty on both counts and was found guilty by the Honorable, Mazanec, J. (Def. App./2). On Count One, he was sentenced to one year to the House of Correction, six months direct, with the balance suspended for two years with conditions of sex offender counseling, provide DNA sample, no contact/stay away from the victim, and have a GPS upon release (Def. App./2, 10-11, 41). On Count Two, he was sentenced to two years' probation (Def. App./11, 41). On this count, he was advised that he would have to register as a sex offender (Def. App./11, 41, 47).

On February 23, 2016, after having been found in violation of probation two times, the defendant filed a Motion for New Trial (Def. App./4-5). After an April 5, 2016 hearing, the motion was denied (Def. App./6).

On December 19, 2016, the defendant filed a Motion to Correct Illegal Sentence and the Commonwealth filed its Opposition on February 22, 2017 (Def. App./52-59; Commonwealth's Appendix "Comm. App."/7). On February 23, 2017, after a hearing, the motion was denied (Def. App./74; Comm. App./7). On March 16, 2017, a Notice of Appeal was filed regarding the denial of the motion to correct sentence (Comm. App./7). On March 27, 2017, the case was entered in the Appeals Court (Comm. App./8).

Statement of Facts

The facts were found by the plea judge in ruling on the defendant's Motion to Correct Illegal Sentence:

> The defendant was arraigned on July 17, 2012 on a complaint charging him with two counts of Open and Gross Lewdness. Ultimately, the facts supporting these two charges stem from two separate incidents in which the defendant entered a nine year old's bedroom at night and openly masturbated in front of the nine year old. Both incidents were also

observed by the nine year old's mother. On April 2, 2013, the defendant, while represented by counsel, tendered a guilty plea to both counts with an agreed upon condition of probation that the defendant register as a sex offender with the SORB. The court accepted the guilty plea and adopted the agreed upon conditions. (Def. App./7).

ARGUMENT

I. The Defendant's Motion to Correct Illegal Sentence Was Properly Denied Where the Plea Judge Applied the Statutory Definition of the Term "Sex Offender" and Properly Concluded that the Defendant Was Required to Register.

Because the defendant committed a sex offense, as defined in G.L. c. 6, §178C, the judge correctly ordered him to register as a sex offender as a condition of his probation. Pursuant to G.L. c. 6, §178C, a person convicted of an enumerated sex offense meets the definition of a sex offender. *Roe v. Attorney General*, 434 Mass. 418, 423-424 (2001). Under the statutory scheme, G.L. c. 6, §178C-178P, the person then has an obligation to register with the Sex Offender Registry Board (SORB). *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. 152, 159 (2012).

In ruling on the defendant's motion, the question before the judge was whether the defendant was

required to register as the result of having two convictions for open and gross lewdness and lascivious conduct, G.L. c. 272, §16 (Open and Gross) and, more particularly, whether he was required to register when the second conviction was for conduct that was not charged as a second and subsequent offense and was committed before his conviction on the first charge (Def. App./73). In fact, in this particular case, the offenses took place on different dates but the conviction took place on the same date. The judge correctly determined that the defendant was required to register.

The legislature has defined a sex offense to include a "second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under [G.L. c. 272, §16] but excluding a first or single adjudication as a delinquent juvenile before August 1, 1992." G.L. c. 6, §178C. G.L. c. 272, §16, does not call for more severe punishment upon conviction for a second and subsequent offense. Contrast G.L. c. 90, §24 (calling for greater punishment for conviction of a second or subsequent offense of Operating under the Influence); G.L. c. 269, §10G(c)(requiring enhanced punishment for

persons, "having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences" receives enhanced penalty); *Commonwealth v. Daley*, 70 Mass. 209, 212 (1855)(holding that, where second offense calls for enhanced penalty, prior offense must be a prior conviction).

The statutory language does not require that a prior offense end in conviction before the second offense is committed. This language can be contrasted with that of G.L. c. 90, §24(1)(a)(1), which specifically states that a subsequent offense requires that the defendant have "been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program … because of a like violation preceding the date of the commission of the offense for which he has been convicted…" (emphasis added). Therefore, G.L. c. 278, §11A (requiring bifurcated trial when second or subsequent conviction calls for more severe punishment) does not apply to the defendant's second charge of Open and Gross.

That a defendant is required to register as the result of two convictions for Open and Gross does not constitute more severe punishment. The requirement to register as a sex offender has been considered a collateral consequence of conviction. *Commonwealth v. Shindell*, 63 Mass. App. Ct. 503, 506 (2005). Since 2016 and the decision in *Commonwealth v. Sylvester*, whether it is collateral remains an open question. *Commonwealth v. Sylvester*, 476 Mass. 1, 14 (2016). Contrast *Padilla v. Kentucky*, 559 U.S. 356, 364-366 (2010)(holding that deportation is so closely connected to criminal conviction that it may not be treated as a collateral consequence for Sixth Amendment purposes); *Commonwealth v. Clarke*, 460 Mass. 30, 31 (2011)(same).

When the sex offender registration statutes, G.L. c. 6, § 178C through 178P, were written, just one conviction for open and gross lewdness and lascivious conduct resulted in a person being designated a sex offender who was required to register. G.L. c. 6, §178C (as inserted by St. 1996, c. 239, §1); *Commonwealth v. Guy G.*, 53 Mass. App. Ct. 271, 275 (2001). However, the defendant received the benefit of the 1999 amendment to the statute, which now

requires that a defendant be convicted a second and subsequent time to meet the definition of a sex offender. St. 1999, c. 74, §2; *Guy G., supra*. See *Doe v. Sex Offender Registry Bd.*, 452 Mass. 764, 765 (2008)(Doe was classified as level two sex offender based on convictions for Open and Gross in 1992 and 2003). And there are several examples in unpublished decisions where a defendant has been required to register as the result of a second and subsequent conviction or adjudication for Open and Gross. See *Doe, SORB No. 327216 v. Sex Offender Registry Bd.*, 88 Mass. App. Ct. 1102, 2015 Mass. App. Unpub. LEXIS 866, review denied 473 Mass. 1109 (2015) (defendant had duty to register as sex offender after pleading to one count of Open and Gross under G.L. c. 272, §16 when he had prior similar conviction from another state, even though he had not been charged or prosecuted as second and subsequent offender). See *Loe v. Sex Offender Reg. Bd.*, 79 Mass. App. Ct. 1104, 2011 Mass. App. Unpub. Lexis 343 *1 (2011) (same). See also *Doe v. Sex Offender Registry Bd.*, 83 Mass. App. Ct. 1124, 2013 Mass. App. Unpub. LEXIS 433, *1 (2013)(same).

As to an interpretation of just what constitutes a second and subsequent conviction or adjudication for

Open and Gross, SORB has the authority to promulgate rules and regulations to carry out legislative intent and its applicable rules and regulations are clear. G.L. c. 6, §178D; *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. at 158, citing *Commonwealth v. Maker*, 459 Mass. 46, 48 (2011). These regulations are entitled to a presumption of validity. *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. at 160, citing *Maker, supra* at 49-50.[1]

SORB has specifically defined the term in its regulations and the defendant's offenses fall squarely within the definition, to wit:

> Second and Subsequent Adjudication of Conviction for Open and Gross Lewdness and Lascivious Behavior. The later of two or more separate convictions pursuant to M.G.L. c. 272, §16. Multiple convictions resulting from a single act shall be treated as a single conviction, but arraignments occurring on the same date and resulting in multiple convictions shall be presumed to be the result of separate acts and treated as separate convictions.

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[1]The statute does not provide for an opportunity for the Legislature to review and approve the regulations from which this court might then "infer legislative confirmation that they are within the board's delegated rule-making authority." *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. at 161.

803 CMR 1.03. The charges against the defendant arose from discrete acts of the defendant and he was properly convicted of two separate charges of Open and Gross.

In defining a second and subsequent conviction or adjudication for Open and Gross, a term set out by the Legislature, SORB has not gone beyond its rule-making power. Contrast *Doe v. Sex Offender Registry Bd.*, 82 Mass. App. Ct. 152, 161 (2012)(SORB exceeded its authority where nothing in statutory scheme authorized it to modify upward an offender's final classification determination). The regulation has merely placed a definition on the legislature's language.

It has been noted that a second and subsequent conviction for Open and Gross "supports a finding of 'repetitive and compulsive behavior.'" *Loe, supra* at *1, quoting G.L. c. 6, §178K(1)(a)(ii). "The Legislature has determined that … repetitive and compulsive sexual misconduct … indicate[s] a 'high risk of re-offense and degree of dangerousness posed to the public.'" *Doe v. Sex Offender Registry Bd.*, 447 Mass. 750, 763 (2006), quoting G.L. c. 6, §178K(1)(a)(ii).

The definition of a second and subsequent Open and Gross, which requires that multiple convictions not arise from the same act, addresses the legislature's concern with repetitive and compulsive behavior. "The general court hereby finds that: (1) the danger of recidivism posed by sex offenders, especially sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior, to be grave and that the protection of the public from these sex offenders is of paramount interest to the government." Emergency preamble to St. 1999, c. 74. "As evidenced by [grouping offenders with a second and subsequent open and gross conviction with offenders who commit hand-on offenses such as rape of a child] the Legislature determined that noncontact offenders may indeed pose a danger to the public." *Doe, Sorb No. 2197120 v. Sex Offender Registry Board*, 2017 Mass. App. Unpub. LEXIS 43, *10-11 (2015). See *id.* (rejecting defendant's argument that commission of non-contact offenses does not warrant classification as a level three offender).

Further examination of SORB regulations help to illuminate SORB's mandate to address repetitive and compulsive offending conduct. 803 CMR §1.40(2), which

focuses on determining an offender's level of risk of re-offense, in effect at the time of Wimer's sentencing but replaced by 803 CMR §1.33 in January, 2016, stated in part

> certain offenders manifest their compulsive behavior by engaging in a continuing course of sexual misconduct involving separate incidents with either the same victim or others. The Board considers these offenders as presenting a greater risk to reoffend and as posing an increased degree of dangerousness. (For [a]dult [o]ffenders: *Hanson & Thornton 1999; Hanson & Bussiere, 1998; Epperson, Kaul & Huot, 1995; McGovern & Peters, 1988*).

803 Code Mass. Regs. § 1.40(2)(2002); *Doe v. Sex Offender Registry Board*, 447 Mass. 750, 763-764 (2006). The regulation went on to state:

> The SORB has decided that, for the purpose of [the Repetitive and Compulsive Behavior] Factor, an offender exhibits repetitive sexual offending behavior if he has a history of two or more separate incidents of sexual misconduct. Similarly, the SORB has decided that an offender's repetitive sexual misconduct is compulsive if the information regarding his separate incidents of sexual misconduct indicates: (a) a repetition of the manner and method of committing the offenses; (b) a pattern of ritualistic, bizarre, or distinctive acts; (c) that in the interval between acts of sexual misconduct, the offender had sufficient opportunity to reflect on the wrongfulness of his conduct and take remedial measures by avoidance, counseling or otherwise, to stop himself

> from committing subsequent acts of sexual misconduct; (d) adult family members, adult friends, adult co-workers, employers, law enforcement, the court, or social services had sanctioned the offender for sexual misconduct and the offender, nonetheless, committed a subsequent act of sexual misconduct; or (e) the offender committed his acts of sexual misconduct as a result of sudden uncontrollable urges or desires to commit the acts.

803 Code Mass. Regs. § 1.40(2)(2002). As to Wimer, his conduct met (a) and probably (c). See *Doe, SORB No. 332487 v. Sex Offender Registry Board*, 2014 Mass. App. Unpub. LEXIS 1033, *6 and n.6 (2014)(on issue of leveling of Doe's risk of re-offense, repetitive and compulsive conduct refers to dates of offenses, not dates of sentencing, which could all be on the same date). For purposes of defining a sex offender who will be required to register with SORB, there was no requirement that the defendant's first Open and Gross conviction occur before the commission of his second offense. The defendant could be found to have a second and subsequent offense for Open and Gross in accordance with the statue and the applicable SORB regulations.

CONCLUSION

For the above-stated reasons, the Commonwealth respectfully requests this Court affirm the judge's denial of defendant's Motion to Correct Illegal Sentence on Greenfield District Court Complaint Number 1241CR01056.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify, as required by Mass.R.A.P. 16(k), that this brief complies with the rules of court that pertain to the filing of briefs including, but not limited to, the following: Mass.R.A.P. 16(a)(6); Mass.R.A.P. 16(e); Mass.R.A.P. 16(f); Mass.R.A.P. 16(h); Mass.R.A.P. 18; and Mass.R.A.P. 20.

Cynthia M. Von Flatern

Date: 10/30/17

Statutory Addendum

ALM GL ch. 6, § 178C

§ 178C. Definitions.

- As used in sections 178C to 178P, inclusive, the following words shall have the following meanings:—
  - "Agency", an agency, department, board, commission or entity within the executive or judicial branch, excluding the committee for public counsel services, which has custody of, supervision of or responsibility for a sex offender as defined in accordance with this chapter, including an individual participating in a program of any such agency, whether such program is conducted under a contract with a private entity or otherwise. Each agency shall be responsible for the identification of such individuals within its custody, supervision or responsibility. Notwithstanding any general or special law to the contrary, each such agency shall be certified to receive criminal offender record information maintained by the department for the purpose of identifying such individuals.
  - "Employment", includes employment that is full-time or part-time for a period of time exceeding 14 days or for an aggregate period of time exceeding 30 days during any calendar year, whether compensated or uncompensated.
  - "Institution of higher learning", a post secondary institution.
  - "Mental abnormality", a congenital or acquired condition of a person that affects the emotional or volitional capacity of such person in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes such person a

menace to the health and safety of other persons.

- "Predatory", an act directed at a stranger or person with whom a relationship has been established, promoted or utilized for the primary purpose of victimization.
- "Secondary addresses", the addresses of all places where a sex offender lives, abides, lodges, or resides for a period of 14 or more days in the aggregate during any calendar year and which is not a sex offender's primary address; or a place where a sex offender routinely lives, abides, lodges, or resides for a period of 4 or more consecutive or nonconsecutive days in any month and which is not a sex offender's permanent address, including any out-of-state address.
- "Sentencing court", the court that sentenced a sex offender for the most recent sexually violent offense or sex offense or the superior court if such sentencing occurred in another jurisdiction or the sex offender registry board to the extent permitted by federal law and established by the board's regulations.
- "Sex offender", a person who resides, has secondary addresses, works or attends an institution of higher learning in the commonwealth and who has been convicted of a sex offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense or a person released from incarceration or parole or probation supervision or custody with the department of youth services for such a conviction or adjudication or a person who has been adjudicated a sexually dangerous person under section 14 of chapter 123A, as in force at the time of adjudication, or a person released from civil commitment pursuant to section 9 of said chapter 123A, whichever last occurs, on or after August 1, 1981.
- "Sex offender registry", the collected information and data that is received by the department pursuant to sections 178C to

178P, inclusive, as such information and data is modified or amended by the sex offender registry board or a court of competent jurisdiction pursuant to said sections 178C to 178P, inclusive.

- "Sex offense", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B½ of said chapter 265; a repeat offense under section 13B¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; indecent assault and battery on a person age 14 or over under section 13H of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault with intent to commit rape under section 24 of said chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; kidnapping of a child under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of said chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; enticing away a person for prostitution or sexual intercourse under section 2 of chapter 272; drugging persons for sexual intercourse under section 3 of said chapter

272; inducing a minor into prostitution under section 4A of said chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior under section 16 of said chapter 272, but excluding a first or single adjudication as a delinquent juvenile before August 1, 1992; incestuous marriage or intercourse under section 17 of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; possession of child pornography under section 29C of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

- "Sex offense involving a child", an indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B½ of said chapter 265; a repeat offense under section 13B¾ of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said chapter 265; rape and abuse of a child under section 23 of said chapter 265; aggravated rape and abuse of a child under section 23A of said chapter 265; a repeat offense under section 23B of said chapter 265; assault of a child with intent to commit rape under section 24B of said

chapter 265; kidnapping of a child under the age of 16 under section 26 of said chapter 265; enticing a child under the age of 16 for the purposes of committing a crime under section 26C of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude upon a person under 18 years of age under subsection (b) of section 50 of said chapter 265; inducing a minor into prostitution under section 4A of chapter 272; living off or sharing earnings of a minor prostitute under section 4B of said chapter 272; disseminating to a minor matter harmful to a minor under section 28 of said chapter 272; posing or exhibiting a child in a state of nudity under section 29A of said chapter 272; dissemination of visual material of a child in a state of nudity or sexual conduct under section 29B of said chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority.

- "Sexually violent offense", indecent assault and battery on a child under 14 under section 13B of chapter 265; aggravated indecent assault and battery on a child under the age of 14 under section 13B½ of said chapter 265; a repeat offense under section 13B¾ of said chapter 265; indecent assault and battery on a mentally retarded person under section 13F of said chapter 265; rape under section 22 of said chapter 265; rape of a child under 16 with force under section 22A of said chapter 265; aggravated rape of a child under 16 with force under section 22B of said chapter 265; a repeat offense under section 22C of said

chapter 265; assault with intent to commit rape under section 24 of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; assault of a child with intent to commit rape under section 24B of said chapter 265; enticing a child under 18 via electronic communication to engage in prostitution, human trafficking or commercial sexual activity under section 26D of said chapter 265; trafficking of persons for sexual servitude under section 50 of chapter 265; a second or subsequent violation of human trafficking for sexual servitude under section 52 of chapter 265; drugging persons for sexual intercourse under section 3 of chapter 272; unnatural and lascivious acts with a child under 16 under section 35A of said chapter 272; aggravated rape under section 39 of chapter 277; and any attempt to commit a violation of any of the aforementioned sections pursuant to section 6 of chapter 274 or a like violation of the law of another state, the United States or a military, territorial or Indian tribal authority, or any other offense that the sex offender registry board determines to be a sexually violent offense pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071.

- "Sexually violent predator", a person who has been convicted of a sexually violent offense or who has been adjudicated as a youthful offender or as a delinquent juvenile by reason of a sexually violent offense, or a person released from incarceration, parole, probation supervision or commitment under chapter 123A or custody with the department of youth services for

such a conviction or adjudication, whichever last occurs, on or after August 1, 1981, and who suffers from a mental abnormality or personality disorder that makes such person likely to engage in predatory sexually violent offenses.

ALM GL ch. 6, § 178D

§ 178D. Establishment and Maintenance of Sex Offender Registry.

- The sex offender registry board, known as the board, in cooperation with the department, shall establish and maintain a central computerized registry of all sex offenders required to register pursuant to sections 178C to 178P, inclusive, known as the sex offender registry. The sex offender registry shall be updated based on information made available to the board, including information acquired pursuant to the registration provisions of said sections 178C to 178P, inclusive. The file on each sex offender required to register pursuant to said sections 178C to 178P, inclusive, shall include the following information, hereinafter referred to as registration data:
  - **(a)** the sex offender's name, aliases used, date and place of birth, sex, race, height, weight, eye and hair color, social security number, home address, any secondary addresses and work address and, if the sex offender works at or attends an institution of higher learning, the name and address of the institution;
  - **(b)** a photograph and set of fingerprints;
  - **(c)** a description of the offense for which the sex offender was convicted or adjudicated, the city or town where the offense occurred, the date of conviction or adjudication and the sentence imposed;

- **(d)** any other information which may be useful in assessing the risk of the sex offender to reoffend; and
- **(e)** any other information which may be useful in identifying the sex offender.

- Notwithstanding sections 178C to 178P, inclusive, or any other general or special law to the contrary and in addition to any responsibility otherwise imposed upon the board, the board shall make the sex offender information contained in the sex offender registry, delineated below in subsections (i) to (viii), inclusive, available for inspection by the general public in the form of a comprehensive database published on the internet, known as the "sex offender internet database"; provided, however, that no registration data relating to a sex offender given a level 1 designation by the board under section 178K shall be published in the sex offender internet database but may be disseminated by the board as otherwise permitted by said sections 178C to 178P, inclusive; and provided further, that the board shall keep confidential and shall not publish in the sex offender internet database any information relating to requests for registration data under sections 178I and 178J:
  - **(i)** the name of the sex offender;
  - **(ii)** the offender's home address, and any secondary addresses;
  - **(iii)** the offender's work address;
  - **(iv)** the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;
  - **(v)** the sex offender's age, sex, race, height, weight, eye and hair color;
  - **(vi)** a photograph of the sex offender, if available;
  - **(vii)** whether the sex offender has been designated a sexually violent predator; and
  - **(viii)** whether the offender is in compliance with the registration obligations of sections 178C to 178P, inclusive.

- All information provided to the general public through the sex offender internet database shall

include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275. The sex offender internet database shall be updated regularly, based on information available to the board and shall be open to searches by the public at any time without charge or subscription. The board shall promulgate rules and regulations to implement, update and maintain such a sex offender internet database, to ensure the accuracy, integrity and security of information contained therein, to ensure the prompt and complete removal of registration data for persons whose duty to register has terminated or expired under section 178G, 178L or 178M or any other law and to protect against the inaccurate, improper or inadvertent publication of registration data on the internet.

- The board shall develop standardized registration and verification forms, which shall include registration data as required pursuant to sections 178C to 178P. The board shall make blank copies of such forms available to all agencies having custody of sex offenders and all city and town police departments; provided, however, that the board shall determine the format for the collection and dissemination of registration data, which may include the electronic transmission of data. Records maintained in the sex offender registry shall be open to any law enforcement agency in the commonwealth, the United States or any other state. The board shall promulgate rules and regulations to implement the provisions of sections 178C to 178P, inclusive. Such rules and regulations shall include provisions which may permit police departments located in a city or town that is divided into more than one zip code to disseminate information pursuant to the provisions of section 178J categorized by zip code and to disseminate such information limited to one or more zip codes if the request for such dissemination is so qualified provided, however, that for the city of

Boston dissemination of information may be limited to one or more police districts.

- The board may promulgate regulations further defining in a manner consistent with maintaining or establishing eligibility for federal funding pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, the eligibility of sex offenders to be relieved of the obligation to register, including but not limited to, regulations limiting motions under subsection (e) of section 178E, section 178G and relief from registration pursuant to paragraph (d) of subsection (2) of section 178K.

ALM GL ch. 6, § 178D

ALM GL ch. 6, § 178K

§ 178K. Sex Offender Registry Board.

- **(1)** There shall be, in the executive office of public safety and security, a sex offender registry board which shall consist of seven members who shall be appointed by the governor for terms of six years, with the exception of the chairman, and who shall devote their full time during business hours to their official duties. The board shall include one person with experience and knowledge in the field of criminal justice who shall act as chairman; at least two licensed psychologists or psychiatrists with special expertise in the assessment and evaluation of sex offenders and who have knowledge of the forensic mental health system; at least one licensed psychologist or psychiatrist with special expertise in the assessment and evaluation of sex offenders, including juvenile sex offenders and who has knowledge of the forensic mental health system; at least two persons who have at least five years of training and experience in probation, parole or corrections; and at least one person who has

expertise or experience with victims of sexual abuse. Members shall be compensated at a reasonable rate subject to approval of the secretary of administration and finance.

- The chairman shall be appointed by and serve at the pleasure of the governor and shall be the executive and administrative head of the sex offender registry board, shall have the authority and responsibility for directing assignments of members of said board and shall be the appointing and removing authority for members of said board's staff. In the case of the absence or disability of the chairman, the governor may designate one of the members to act as chairman during such absence or disability. The chairman shall, subject to appropriation, establish such staff positions and employ such administrative, research, technical, legal, clerical and other personnel and consultants as may be necessary to perform the duties of said board. Such staff positions shall not be subject to section 9A of chapter 30 or chapter 31.

- The governor shall fill any vacancy for the unexpired term. As long as there are four sitting members, a vacancy shall not impair the right of the remaining members to exercise the powers of the board.

- The sex offender registry board shall promulgate guidelines for determining the level of risk of reoffense and the degree of dangerousness posed to the public or for relief from the obligation to register and shall provide for three levels of notification depending on such risk of reoffense and the degree of dangerousness posed to the public; apply the guidelines to assess the risk level of particular offenders; develop guidelines for use by city and town police departments in disseminating sex offender registry information; devise a plan, in cooperation with state and local law enforcement authorities and other appropriate agencies, to locate and verify the current addresses of sex offenders including, subject to appropriation, entering into contracts or interagency agreements for such purposes; and

conduct hearings as provided in section 178L. The attorney general and the chief counsel of the committee for public counsel services, or their designees, shall assist in the development of such guidelines. Factors relevant to the risk of reoffense shall include, but not be limited to, the following:

- **(a)** criminal history factors indicative of a high risk of reoffense and degree of dangerousness posed to the public, including:
  - **(i)** whether the sex offender has a mental abnormality;
  - **(ii)** whether the sex offender's conduct is characterized by repetitive and compulsive behavior;
  - **(iii)** whether the sex offender was an adult who committed a sex offense on a child;
  - **(iv)** the age of the sex offender at the time of the commission of the first sex offense;
  - **(v)** whether the sex offender has been adjudicated to be a sexually dangerous person pursuant to section 14 of chapter 123A or is a person released from civil commitment pursuant to section 9 of said chapter 123A; and
  - **(vi)** whether the sex offender served the maximum term of incarceration;
- **(b)** other criminal history factors to be considered in determining risk and degree of dangerousness, including:
  - **(i)** the relationship between the sex offender and the victim;
  - **(ii)** whether the offense involved the use of a weapon, violence or infliction of bodily injury;
  - **(iii)** the number, date and nature of prior offenses;
- **(c)** conditions of release that minimize risk of reoffense and degree of dangerousness posed to the public, including whether the sex offender is under probation or parole supervision, whether such sex offender is receiving counseling, therapy or treatment and whether such sex offender is

residing in a home situation that provides guidance and supervision, including sex offender-specific treatment in a community-based residential program;

- **(d)** physical conditions that minimize risk of reoffense including, but not limited to, debilitating illness;
- **(e)** whether the sex offender was a juvenile when he committed the offense, his response to treatment and subsequent criminal history;
- **(f)** whether psychological or psychiatric profiles indicate a risk of recidivism;
- **(g)** the sex offender's history of alcohol or substance abuse;
- **(h)** the sex offender's participation in sex offender treatment and counseling while incarcerated or while on probation or parole and his response to such treatment or counseling;
- **(i)** recent behavior, including behavior while incarcerated or while supervised on probation or parole;
- **(j)** recent threats against persons or expressions of intent to commit additional offenses;
- **(k)** review of any victim impact statement; and
- ***(l)*** review of any materials submitted by the sex offender, his attorney or others on behalf of such offender.

- **(2)** The guidelines shall provide for three levels of notification depending on the degree of risk of reoffense and the degree of dangerousness posed to the public by the sex offender or for relief from the obligation to register:
  - **(a)** Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level 1 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where such sex offender lives and works and

attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. The police shall not disseminate information to the general public identifying the sex offender where the board has classified the individual as a level 1 sex offender. The police and the board may, however, release such information identifying such sex offender to the department of correction, any county correctional facility, the department of youth services, the department of children and families, the parole board, the department of probation and the department of mental health, all city and town police departments and the Federal Bureau of Investigation.

- **(b)** Where the board determines that the risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information, it shall give a level 2 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives, has a secondary address and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. The public shall have access to the information regarding a level 2 offender in accordance with the provisions of sections 178D, 178I and 178J. The sex offender shall be required to register and to verify registration information pursuant to section 178F½.
- **(c)** Where the board determines that the risk of reoffense is high and the degree of dangerousness posed to the public is such

that a substantial public safety interest is served by active dissemination, it shall give a level 3 designation to the sex offender. In such case, the board shall transmit the registration data and designation to the police departments in the municipalities where the sex offender lives, has a secondary address and works and attends an institution of higher learning or, if in custody, intends to live and work and attend an institution of higher learning upon release and where the offense was committed and to the Federal Bureau of Investigation. A level 3 community notification plan shall require the police department to notify organizations in the community which are likely to encounter such sex offender and individual members of the public who are likely to encounter such sex offender. The sex offender shall be required to register and to verify registration information pursuant to sections 178F½. Neighboring police districts shall share sex offender registration information of level 3 offenders and may inform the residents of their municipality of a sex offender they are likely to encounter who resides in an adjacent city or town. The police or the board shall actively disseminate in such time and manner as such police department or board deems reasonably necessary the following information:

- **(i)** the name of the sex offender;
- **(ii)** the offender's home address and any secondary addresses;
- **(iii)** the offender's work address;
- **(iv)** the offense for which the offender was convicted or adjudicated and the date of the conviction or adjudication;
- **(v)** the sex offender's age, sex, race, height, weight, eye and hair color; and
- **(vi)** a photograph of the sex offender, if available; provided, that such active dissemination may include publication of such information on the internet by the police department at

such time and in such manner as the police or the board deem reasonably necessary; and provided further, that the police or the board shall not release information identifying the victim by name, address or relation to the sex offender. All notices to the community shall include a warning regarding the criminal penalties for use of sex offender registry information to commit a crime or to engage in illegal discrimination or harassment of an offender and the punishment for threatening to commit a crime under section 4 of chapter 275.

- **(vii)** the name and address of the institution of higher learning that the sex offender is attending.

- The public shall have access to the information regarding a level 3 offender in accordance with sections 178D, 178I and 178J.
- If the board, in finally giving an offender a level 3 classification, also concludes that such sex offender should be designated a sexually violent predator, the board shall transmit a report to the sentencing court explaining the board's reasons for so recommending, including specific identification of the sexually violent offense committed by such sex offender and the mental abnormality from which he suffers. The report shall not be subject to judicial review under section 178M. Upon receipt from the board of a report recommending that a sex offender be designated a sexually violent predator; the sentencing court, after giving such sex offender an opportunity to be heard and informing the sex offender of his right to have counsel appointed, if he is deemed to be indigent in accordance with section 2 of chapter 211D, shall determine, by a preponderance of the evidence, whether such sex offender is a sexually violent predator. An attorney employed or retained by the board may make an appearance, subject to

section 3 of chapter 12, to defend the board's recommendation. The board shall be notified of the determination. A determination that a sex offender should not be designated a sexually violent predator shall not invalidate such sex offender's classification. Where the sentencing court determines that such sex offender is a sexually violent predator, dissemination of the sexually violent predator's registration data shall be in accordance with a level 3 community notification plan; provided, however, that such dissemination shall include such sex offender's designation as a sexually violent predator.

- **(d)** The board may, upon making specific written findings that the circumstances of the offense in conjunction with the offender's criminal history do not indicate a risk of reoffense or a danger to the public and the reasons therefor, relieve such sex offender of any further obligation to register, shall remove such sex offender's registration information from the registry and shall so notify the police departments where said sex offender lives and works or if in custody intends to live and work upon release, and where the offense was committed and the Federal Bureau of Investigation. In making such determination the board shall consider factors, including but not limited to, the presence or absence of any physical harm caused by the offense and whether the offense involved consensual conduct between adults. The burden of proof shall be on the offender to prove he comes within the provisions of this subsection. The provisions of this subsection shall not apply if a sex offender has been determined to be a sexually violent predator; has been convicted of two or more sex offenses defined as sex offenses pursuant to the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. section 14071, committed on different occasions; or has been convicted of a sexually violent offense. The

provisions of this subsection shall also not apply if a sex offender has been convicted of a sex offense involving a child or a sexually violent offense, and such offender has not already registered pursuant to this chapter for at least ten years, or if the sex offender is otherwise subject to lifetime or minimum registration requirements as determined by the board pursuant to section 178D.

- **(e)** No sex offender classified as a level 3 offender shall knowingly and willingly establish living conditions within, move to, or transfer to any convalescent or nursing home, infirmary maintained in a town, rest home, charitable home for the aged or intermediate care facility for the mentally retarded which meets the requirements of the department of public health under section 71 of chapter 111. Any sex offender who violates this paragraph shall, for a first conviction, be punished by imprisonment for not more than 30 days in a jail or house of correction; for a second conviction, be punished by imprisonment for not more than 2½ years in a jail or house of correction nor more than 5 years in a state prison or by a fine of not more than $1,000, or by both such fine and imprisonment; and for a third and subsequent conviction, be punished by imprisonment in a state prison for not less than 5 years; provided, however, that the sentence imposed for such third or subsequent conviction shall not be reduced to less than 5 years, nor suspended, nor shall any person sentenced herein be eligible for probation, parole, work release or furlough, or receive any deduction from his sentence for good conduct until he shall have served 5 years. Prosecutions commenced hereunder shall neither be continued without a finding nor placed on file.

- **(3)** The sex offender registry board shall make a determination regarding the level of risk of reoffense and the degree of dangerousness posed to the public of each sex offender listed in said

sex offender registry and shall give immediate priority to those offenders who have been convicted of a sex offense involving a child or convicted or adjudicated as a delinquent juvenile or as a youthful offender by reason of a sexually violent offense or of a sex offense of indecent assault and battery upon a mentally retarded person pursuant to section 13F of chapter 265, and who have not been sentenced to incarceration for at least 90 days, followed, in order of priority, by those sex offenders who (1) have been released from incarceration within the past 12 months, (2) are currently on parole or probation supervision, and (3) are scheduled to be released from incarceration within six months. All agencies shall cooperate in providing files to the sex offender registry board and any information the sex offender registry board deems useful in providing notice under sections 178C to 178P, inclusive, and in assessing the risk of reoffense and the degree of dangerousness posed to the public by the sex offender. All agencies from which registration data, including data within the control of providers under contract to such agencies, is requested by the sex offender registry board shall make such data available to said board immediately upon request. Failure to comply in good faith with such a request within 30 days shall be punishable by a fine of not more than $1,000 per day.

- **(4)** The sex offender registry board, in cooperation with the executive office of public safety and security, and with the consultation of the offices of the district attorneys, the department of probation, the department of children and families and the Massachusetts Chiefs of Police Association Incorporated, shall establish and maintain a system of procedures for the ongoing sharing of information that may be relevant to the board's determination or reevaluation of a sex offender's level designation among the board, the offices of the district attorneys and any department, agency or office of the commonwealth that reports, investigates or otherwise has access to potentially relevant information, including, but

not limited to, the department of youth services, the department of children and families, the department of mental health, the department of developmental services, the department of correction, the department of probation, the department of early education and care, the department of public health and the office of the child advocate.

- The board shall promulgate any rules or regulations necessary to establish, update and maintain this system including, but not limited to, the frequency of updates, measures to ensure the comprehensiveness, clarity and effectiveness of information, and metrics to determine what information may be relevant. When sharing information through this system, all members shall have discretion to delay sharing information where it is reasonably believed that disclosure would compromise or impede an investigation or prosecution or would cause harm to a victim.

- **(5)** The sex offender registry board shall have access to any information that is determined to be relevant to the board's determination or reevaluation of a sex offender's level designation, as defined in subsection (4), through the system of procedures established in said subsection (4).

ALM GL ch. 6, § 178K

G.L. c. 90, §24(1)(a)(1)

24. Driving Under the Influence of Intoxicating Liquor or Controlled Substance.

- **(1)**
  - **(a)**
    - **(1)** Whoever, upon any way or in any place to which the public has a right of access, or upon any way or in any

place to which members of the public have access as invitees or licensees, operates a motor vehicle with a percentage, by weight, of alcohol in their blood of eight one-hundredths or greater, or while under the influence of intoxicating liquor, or of marijuana, narcotic drugs, depressants or stimulant substances, all as defined in section one of chapter ninety-four C, or the vapors of glue shall be punished by a fine of not less than five hundred nor more than five thousand dollars or by imprisonment for not more than two and one-half years, or both such fine and imprisonment.

- There shall be an assessment of $250 against a person who is convicted of, is placed on probation for, or is granted a continuance without a finding for or otherwise pleads guilty to or admits to a finding of sufficient facts of operating a motor vehicle while under the influence of intoxicating liquor, marijuana, narcotic drugs, depressants or stimulant substances under this section; provided, however, that but $187.50 of the amount collected under this assessment shall be deposited monthly by the court with the state treasurer for who shall deposit it into the Head Injury Treatment Services Trust Fund, and the remaining amount of the assessment shall be credited to the General Fund. The assessment shall not be subject to reduction or waiver by the court for any reason.
- There shall be an assessment of $50 against a person who is convicted, placed on probation or granted a continuance without a finding or who otherwise pleads guilty to or admits to a finding of sufficient facts for operating a motor vehicle while under the influence of intoxicating liquor or under the influence of marihuana,

narcotic drugs, depressants or stimulant substances, all as defined by section 1 of chapter 94C, pursuant to this section or section 24D or 24E or subsection (a) or (b) of section 24G or section 24L. The assessment shall not be subject to waiver by the court for any reason. If a person against whom a fine is assessed is sentenced to a correctional facility and the assessment has not been paid, the court shall note the assessment on the mittimus. The monies collected pursuant to the fees established by this paragraph shall be transmitted monthly by the courts to the state treasurer who shall then deposit, invest and transfer the monies, from time to time, into the Victims of Drunk Driving Trust Fund established in section 66 of chapter 10. The monies shall then be administered, pursuant to said section 66 of said chapter 10, by the victim and witness assistance board for the purposes set forth in said section 66. Fees paid by an individual into the Victims of Drunk Driving Trust Fund pursuant to this section shall be in addition to, and not in lieu of, any other fee imposed by the court pursuant to this chapter or any other chapter. The administrative office of the trial court shall file a report detailing the amount of funds imposed and collected pursuant to this section to the house and senate committees on ways and means and to the victim and witness assistance board not later than August 15 of each calendar year.

- If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like violation preceding the date of the commission of the offense for which he

has been convicted, the defendant shall be punished by a fine of not less than six hundred nor more than ten thousand dollars and by imprisonment for not less than sixty days nor more than two and one-half years; provided, however, that the sentence imposed upon such person shall not be reduced to less than thirty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served thirty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such thirty day sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

- If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth, or any other jurisdiction because of a like offense two times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment for not less than one hundred and eighty days nor more than two and one-half years or by a fine of not less than one thousand nor more than fifteen thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than one hundred and fifty days, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served one hundred and fifty days of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative, to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support

the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such one hundred and fifty days sentence to the extent such resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

- If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment, or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense three times preceding the date of the commission of the offense for which he has been convicted the defendant shall be punished by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment for not less than two years nor more than two and one-half years, or by a fine of not less than one thousand five hundred nor more than twenty-five thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence imposed upon such person shall not be reduced to less than twelve months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until such person has served twelve months of such sentence; provided, further, that the commission of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution,

or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twelve months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

- If the defendant has been previously convicted or assigned to an alcohol or controlled substance education, treatment or rehabilitation program by a court of the commonwealth or any other jurisdiction because of a like offense four or more times preceding the date of the commission of the offense for which he has been convicted, the defendant shall be punished by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment for not less than two and one-half years or by a fine of not less than two thousand nor more than fifty thousand dollars and by imprisonment in the state prison for not less than two and one-half years nor more than five years; provided, however, that the sentence

imposed upon such person shall not be reduced to less than twenty-four months, nor suspended, nor shall any such person be eligible for probation, parole, or furlough or receive any deduction from his sentence for good conduct until he shall have served twenty-four months of such sentence; provided, further, that the commissioner of correction may, on the recommendation of the warden, superintendent, or other person in charge of a correctional institution, or the administrator of a county correctional institution, grant to an offender committed under this subdivision a temporary release in the custody of an officer of such institution for the following purposes only: to attend the funeral of a relative; to visit a critically ill relative; to obtain emergency medical or psychiatric services unavailable at said institution; to engage in employment pursuant to a work release program; or for the purposes of an aftercare program designed to support the recovery of an offender who has completed an alcohol or controlled substance education, treatment or rehabilitation program operated by the department of correction; and provided, further, that the defendant may serve all or part of such twenty-four months sentence to the extent that resources are available in a correctional facility specifically designated by the department of correction for the incarceration and rehabilitation of drinking drivers.

- A prosecution commenced under the provisions of this subparagraph shall not be placed on file or continued without a finding except for dispositions under section twenty-four D. No trial shall be commenced on a complaint alleging a violation of this

subparagraph, nor shall any plea be accepted on such complaint, nor shall the prosecution on such complaint be transferred to another division of the district court or to a jury-of-six session, until the court receives a report from the commissioner of probation pertaining to the defendant's record, if any, of prior convictions of such violations or of assignment to an alcohol or controlled substance education, treatment, or rehabilitation program because of a like offense; provided, however, that the provisions of this paragraph shall not justify the postponement of any such trial or of the acceptance of any such plea for more than five working days after the date of the defendant's arraignment. The commissioner of probation shall give priority to requests for such records.

- At any time before the commencement of a trial or acceptance of a plea on a complaint alleging a violation of this subparagraph, the prosecutor may apply for the issuance of a new complaint pursuant to section thirty-five A of chapter two hundred and eighteen alleging a violation of this subparagraph and one or more prior like violations. If such application is made, upon motion of the prosecutor, the court shall stay further proceedings on the original complaint pending the determination of the application for the new complaint. If a new complaint is issued, the court shall dismiss the original complaint and order that further proceedings on the new complaint be postponed until the defendant has had sufficient time to prepare a defense.
- If a defendant waives right to a jury trial pursuant to section twenty-six A of chapter two hundred and eighteen on a complaint under this subdivision he

shall be deemed to have waived his right to a jury trial on all elements of said complaint.

ALM GL ch. 90, § 24

ALM GL ch. 269, § 10G

§ 10G. Weapons — Multiple Violations — Penalties.

- **(a)** Whoever, having been previously convicted of a violent crime or of a serious drug offense, both as defined herein, violates the provisions of paragraph (a), (c) or (h) of section 10 shall be punished by imprisonment in the state prison for not less than three years nor more than 15 years.

- **(b)** Whoever, having been previously convicted of two violent crimes, or two serious drug offenses or one violent crime and one serious drug offense, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than ten years nor more than 15 years.

- **(c)** Whoever, having been previously convicted of three violent crimes or three serious drug offenses, or any combination thereof totaling three, arising from separate incidences, violates the provisions of said paragraph (a), (c) or (h) of said section 10 shall be punished by imprisonment in the state prison for not less than 15 years nor more than 20 years.

- **(d)** The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such

person shall have served the minimum number of years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on probation shall not apply to any person 18 years of age or over charged with a violation of this section.

- **(e)** For the purposes of this section, "violent crime" shall have the meaning set forth in section 121 of chapter 140. For the purposes of this section, "serious drug offense" shall mean an offense under the federal Controlled Substances Act, 21 U.S.C. 801, et seq., the federal Controlled Substances Import and Export Act, 21 U.S.C. 951, et seq. or the federal Maritime Drug Law Enforcement Act, 46 U.S.C. App. 1901, et seq. for which a maximum term of imprisonment for ten years or more is prescribed by law, or an offense under chapter 94C involving the manufacture, distribution or possession with intent to manufacture or distribute a controlled substance, as defined in section 1 of said chapter 94C, for which a maximum term of ten years or more is prescribed by law.

ALM GL ch. 269, § 10G

ALM GL ch. 278, § 11A

§ 11A. Prior Offenses — Separate Trial.

- If a defendant is charged with a crime for which more severe punishment is provided for **second and subsequent** offenses, and the complaint or indictment alleges that the offense charged is a second or subsequent offense, the defendant on arraignment shall be inquired of only for a plea of guilty or not guilty to the crime charged, and that portion of the indictment or complaint that charges, or refers to a charge that, said crime is a second or subsequent offense shall not be read in open court. If such defendant pleads not guilty and is tried before a jury, no part of the complaint or indictment which alleges that the crime charged is a second or subsequent offense shall be read or shown to the jury or referred to in any manner during the trial; provided, however, that if a defendant takes the witness stand to testify, nothing herein contained shall prevent the impeachment of his credibility by evidence of any prior conviction, subject to the provisions of section twenty-one of chapter two hundred and thirty-three. If a defendant pleads guilty or if there is a verdict or finding of guilty after trial, then before sentence is imposed, the defendant shall be further inquired of for a plea of guilty or not guilty to that portion of the complaint or indictment alleging that the crime charged is a second or subsequent offense. If he pleads guilty thereto, sentence shall be imposed; if he pleads not guilty thereto, he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials. A defendant may waive trial by jury. The court may, in its discretion, either hold the jury which returned the verdict of guilty of the crime, the trial of which was just completed, or it may order the impanelling of a new jury to try the issue of conviction of one or more prior offenses. Upon the return of a verdict, after the separate trial of the issue of conviction of one or more prior offenses, the court shall impose the sentence appropriate to said verdict.

803 CMR 1.33

This document reflects all regulations in effect as of 5/19/2017

Code of Massachusetts Regulations

TITLE 803: DEPARTMENT OF CRIMINAL JUSTICE INFORMATION SERVICES

CHAPTER 1.00: SEX OFFENDER REGISTRY BOARD, REGISTRATION, CLASSIFICATION AND DISSEMINATION

1.33: Risk Factors

Pursuant to M.G.L. c. 6, §§ 178K(1)(a) through (l) and 178L, the Board shall use the following factors to determine each sex offender's level of risk of reoffense and degree of dangerousness posed to the public in reaching a final classification decision.

Research supports that the strongest predictors of sexual recidivism for all sex offenders are variables related to antisocial orientation and sexual deviance. (Cortoni, 2010; Hanson and Morton-Bourgon, 2004; Prescott 2006)

These factors may be present to varying degrees in any individual case. The final classification level is not based on a cumulative analysis of the applicable factors, but rather a qualitative analysis of the individual sex offender's history and personal circumstances. Factors that are not specifically referenced in a final classification decision are deemed inapplicable.

Some factors apply to adult male offenders, adult female offenders and juvenile offenders in different ways. These differences are reflected in each factor. Juvenile females are classified using juvenile factors. (Frey, 2010; Hunter et al., 2006; Kubick et al. 2002; Matthews et al., 1997; Van deer Put, 2013)

The Board recognizes that adult female sex offenders generally have lower recidivism rates than adult male sex offenders. (Cortoni et al., 2010). The Board shall apply mitigating weight to this lower recidivism rate, along with the other relevant regulatory factors, in determining the final classification level.

HIGH-RISK FACTORS:

Pursuant to M.G. L. c. 6, §178K(1)(a)(i) through (vi), the presence of Factors 1 through 6, is indicative of a high risk of reoffense and degree of dangerousness. The absence of Factors 1 through 6 does not reduce an offender's risk of reoffense or lower his degree of dangerousness.

(1) Factor 1: Mental Abnormality.

(a) Adult Male. The presence of a statutorily defined mental abnormality specifically related to sexual deviance is significantly associated with an increased risk of reoffense.

The Board shall consider documentation from a licensed mental health professional that indicates that the offender has been diagnosed with a paraphilic disorder related to sexual fantasies, urges, and behaviors.

In the case of pedophilic disorder, this would only be applicable to offenders who are 16 years of age or older at the time of diagnosis. (Doren, 2002; Hanson and Morton-Bourgon, 2004; Hanson and Morton-Bourgon, 2005; and Mann et al. 2010)

(b) Adult Female. Factor 1 applies in the same manner to female offenders. (Ford and Cortoni, 2008; Hart et al., 2003; Rousseau and Cortoni, 2010)

(c) Juvenile. Factor 1 applies in the same manner to juvenile offenders. (Prescott, 2006; Worling and Curwen, 2001; Worling and Langstrom, 2006)

(2) Factor 2: Repetitive and Compulsive Behavior.

(a) Adult Male. Repetitive and compulsive behavior is associated with a high risk of reoffense. Factor 2 is applied when a sex offender engages in two or more separate episodes of sexual misconduct. To be considered separate episodes there must be time or opportunity, between the episodes, for the offender to reflect on the wrongfulness of his conduct.

The Board may give increased weight to offenders who have been discovered and confronted (by someone other than the victim) or investigated by an authority for sexual misconduct and, nonetheless, commit a subsequent act of sexual misconduct. The most weight shall be given to an offender who engages in sexual misconduct after having been charged with or convicted of a sex offense. (Harris et al., 2003; Harris and Hanson, 2004)

(b) Adult Female. Factor 2 applies in the same manner to female offenders. (Cortoni, et al., 2010; Vandiver and Kercher, 2004)

(c) Juvenile. Factor 2 applies only to juvenile offenders who continue to commit sex offenses after they have been detected for prior sexual misconduct. Detection includes: being cautioned, warned, disciplined, criminally charged, or otherwise sanctioned by an adult authority (e.g. police, parent, or teacher).

An offender who engages in sexual misconduct after having been charged with or convicted of a prior sex offense presents an even higher risk to reoffend.

803 CMR 1.33(2)(c) includes adults whose only sex offense(s) were committed as a juvenile. (ATSA, 2012; Curwen and Costin, 2007; Epperson et al., 2009; Nisbet, et al., 2004; Powers-Sawyer and Miner, 2009;

Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2003 and 2006)

(3) Factor 3: Adult Offender with a Child Victim.

(a) Adult Male. Adult offenders who target children pose a heightened risk to public safety because children normally lack the physical and mental strength to resist an offender. In addition, children can be lured into dangerous situations more easily than most adults. For purposes of factor 3, the Board shall consider any victim younger than 16 years old as a "child victim".

Offenders who target prepubescent children, generally younger than 13 years old, are more likely to have a deviant sexual interest and, therefore, pose an even higher risk of reoffense and degree of dangerousness and are given greater weight.

If the difference in age between the offender and the victim is five years or less and there is evidence of a consensual, although statutorily criminal, sexual act, the Board shall give limited weight to factor 3. (Hanson & Bourgon, 2005; Hanson et al. 2007, Levinson et al., 2008; Mann et al., 2010)

(b) Adult Female. Factor 3 will apply in the same manner to adult female offenders.

(c) Juvenile. Factor 3 does not apply to juvenile offenders. Factor 27 addresses juvenile offenders who target child victims, including adults whose only sex offense(s) were committed as a juvenile.

(4) Factor 4: Age at First Offense.

(a) Adult Male. Age at first offense is an important variable related to risk of reoffense and degree of sexual deviance. Offenders who manifest an early onset and persistence of deviant sexual interests or behaviors are at a higher risk to reoffend sexually.

Factor 4 applies to offenders convicted as adults who committed their first detected sexual misconduct as a juvenile and continued to engage in sexual misconduct after the age of 21. (Hanson and Harris, 2000; Skelton and Vess, 2008)

(b) Adult Female. Factor 4 will apply in the same manner to adult female offenders.

(c) Juvenile. Factor 4 applies to juvenile offenders who committed their first act of sexual misconduct when they were younger than 13 years old, were detected, and then continued to engage in sexual misconduct after 14 years of age or older.

803 CMR 1.33(4)(c) includes adults whose only sex offense(s) were committed as juveniles. (Prentky, et al., 2010; Prescott, 2006)

(5) Factor 5: Adjudicated Sexually Dangerous Person or Released from Civil Commitment.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(a)(v), the Board views any offender who has been adjudicated as a sexually dangerous person, pursuant to M.G.L. c. 123A or the equivalent in another state, whether he has been released or not, to present a substantial risk to reoffend and degree of dangerousness.

Because of the statutory differences between the criteria and legal process for civilly committing sexually dangerous persons and classifying sex offenders living in the community, the Board uses criteria to determine an offender's risk of reoffending and degree of dangerousness that are different from those used by the courts in a sexually dangerous person proceeding.

(b) Adult Female. Factor 5 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 5 applies in the same manner to juvenile offenders.

(6) Factor 6: Maximum Term of Incarceration.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(a)(vi), the Board considers the offender who declines early release, specifically to avoid community supervision or due to his own concerns of reoffending, to present an increased risk of reoffense and degree of dangerousness.

803 CMR 1.33(6)(a) includes adults whose only sex offense(s) were committed as a juvenile, but who were incarcerated for other offenses as an adult.

(b) Adult Female. Factor 6 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 6 does not apply to juvenile offenders.

RISK-ELEVATING FACTORS:

(7) Factor 7: Relationship between Offender and Victim. The relationship between an offender and the victim is an important variable in determining risk of reoffense and degree of dangerousness.

(a) Adult Male. For purposes of Factor 7, the following relationship categories are relevant:

1. Intrafamilial Victim includes the following:

a. Any persons whose marriage to the offender would be prohibited pursuant to M.G.L., c. 207, §§ 1 through 3;

b. Legally married spouses;

c. Adoptive children, first cousins, brothers- and sisters-in-law; and

d. Any persons who are family member substitutes (e.g., foster, step-relatives, or any other type of familial household "live-in" relationship) who lived in the same household with the offender for two or more years prior to the offending behavior.

Offenders who only target intrafamilial victims may be at a lower risk to reoffend as compared to offenders who target unrelated victims. However, having an intrafamilial victim is not a risk mitigating, nor a risk elevating, factor. It is included for definitional purposes only.

2. Extrafamilial Victim includes the following:

a. Any person who has a recognizable non-intrafamilial relationship with the offender, such as a friend, co-worker, or acquaintance; and

b. Any persons who are family member substitutes (e.g. foster, step-relatives, or any other type of familial household "live-in" relationship) who lived in the same household with the offender for less than two years prior to the offending behavior.

Having victims outside the family relationship is empirically related to an increased risk of reoffense. The number of potential victims substantially increases when offenders choose to sexually offend against extrafamilial victims.

Position of Trust. The Board gives special consideration to offenders who commit a sex offense while in a position of trust as established by their profession or role with the victim. These offenders present an increased degree of dangerousness because they violate the victim's and the public's sense of trust, safety, and security.

3. Stranger Victim includes the following:

a. Any person who has known the offender for less than 24 hours prior to the offense;

b. Any person who has had no memorable interaction with the offender prior to the offense;

c. There are cases where the offender and victim relationship is established via electronic communications. To consider an adult victim a

stranger, the contact sex offense would have to occur within 24 hours of the initial contact. To consider a child victim a stranger, the offender would have to transmit sexually explicit materials or make sexually explicit comments within 24 hours of first electronic contact.

Sex offenders who have sexually offended against a stranger victim have a higher risk of reoffense then offenders who target victims known to them. (Hanson and Bussiere, 1998; Hanson and Harris, 2000; Harris et al., 2003; Knight and Thornton, 2007)

(b) Adult Female. Factor 7 applies in the same manner to adult female offenders. (Poels, 2007; Williams and Nicholaichuk, 2001)

(c) Juvenile. Factor 7 applies in the following manner for juvenile offenders:

1. Intrafamilial Victim includes the following:

a. Any persons whose marriage to the offender would be prohibited pursuant to M.G.L., c. 207, §§ 1 through 3;

b. Any other siblings or cousins, whether biological, step or adoptive; and

c. Any persons who are family member substitutes (e.g., foster, or any other type of familial household "live-in" relationship) and who lived in the same household with the offender for more than one year prior to the offending behavior.

Offenders who only target intrafamilial victims may be at a lower risk to reoffend as compared to offenders who target unrelated victims. However, having an intrafamilial victim is not a risk mitigating, nor a risk elevating, factor. It is included for definitional purposes only.

2. Extrafamilial Victim includes the following:

a. Any person who has a relationship with the offender, but is not related, such as: friends, schoolmates, co-workers, neighbors, family friends; and

b. Any persons who are family member substitutes (e.g. foster or any other type of familial household "live-in" relationship) and who lived in the same household with the offender for less than one year prior to the offending behavior.

Juvenile offenders who target extrafamilial victims pose an increased danger to the community.

Position of Trust: The Board gives special consideration to offenders who commit a sex offense while in a position of trust as established by their jobs. These offenders may present an increased level of dangerousness because they violate the victim's and the public's sense of trust, safety, and security.

3. Stranger Victim includes the following:

a. Any person who has known the offender for less than 24 hours prior to the offense;

b. Any person who has had no memorable interaction with the offender prior to the offense;

c. There are cases where the offender and victim relationship is established within electronic communications. If the offender transmits sexually explicit materials or makes sexually explicit communication within 24 hours of first electronic contact, this counts as a stranger relationship, even if the actual offense occurred on a later date.

Juvenile offenders who have sexually offended against a stranger victim have an increased risk of reoffense and present a greater degree of dangerousness to the safety and welfare of the public than offenders who target victims known to them.

803 CMR 1.33(7)(c) includes adults whose only sex offense(s) were committed as a juvenile. (Gerhold, et al., 2007; Heilbrun, et al., 2005; Hendriks and Bijlevild, 2008; McCann and Lussier, 2008; Miccio-Fonseca and Rasmusen, 2009; Powers-Sawyer and Miner, 2009; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006)

(8) Factor 8: Weapon, Violence or Infliction of Bodily Injury.

(a) Adult Male. All sex offenses are inherently violent, but not necessarily in a physical sense. Offenders who use or threaten to use violence or weapons or cause bodily injury during the commission of a sexual assault are more likely to reoffend and present an increased degree of dangerousness. These behaviors may be indicative of sexual arousal to violence or an antisocial orientation.

Any force or threat of force beyond that necessary to commit the sexual offense shall constitute violence. Any object used to injure, incapacitate, penetrate, force, or threaten the victim during the course of the sexual assault shall be considered a weapon. Any injury, including but not limited to bruises, abrasions, and cuts, or any injury requiring medical attention other than for investigative purposes that is sustained by the victim during a sexual offense shall be deemed bodily injury. (Boer et al., 1997; Epperson et al., 1998; Harris et al., 2003; Knight and Thornton, 2007; Mann et al., 2010; Mokres et al., 2012)

(b) Adult Female. Factor 8 applies in the same manner to adult female offenders. (Poels, 2007)

(c) Juvenile. Factor 8 applies in the same manner to juvenile offenders. (ATSA, 2012; Curwen and Costin, 2007; McCann and Lussier, 2008; Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006)

(9) Factor 9: Alcohol and Substance Abuse.

(a) Adult Male. Drugs and alcohol are behavioral disinhibitors. Substance abuse may increase an offender's risk of reoffense. Factor 9 applies when the sex offender has a history of substance abuse, demonstrates active substance abuse, or when the offender's substance use was a contributing factor in the sexual misconduct. An offender's history of drug and alcohol use and history of treatment, abstinence and relapse should be considered in determining the weight given to factor 9.

803 CMR 1.33(9)(a) includes adults whose only sex offense(s) were committed as a juvenile, unless the substance misuse was time-limited experimentation during adolescence. (Bonta and Andrews, 2007; Douglas and Skeem, 2005; Hanson and Harris, 2000; Hanson et al., 2007)

(b) Adult Female. Factor 9 applies in the same manner to adult female offenders. (Cortoni, 2010; Ford, 2010; Giguere and Bumby, 2007; Hanson et al., 2007; Hart et al., 2003; Rousseau and Cortoni, 2010; Sandler and Freeman, 2009; Vandiver and Kercher, 2004).

(c) Juvenile. Factor 9 applies in the same manner to juvenile offenders. (Heilbrun, et al., 2005; Stetson School, 2012)

(10) Factor 10: Contact with Criminal Justice System.

(a) Adult Male. Individuals are expected to comply with the law. Lawlessness and antisocial behavior correlate with risk of reoffense and degree of dangerousness. For the purposes of factor 10, the Board shall consider evidence of a persistent disregard for rules, laws, and the violation of the rights of others.

Ongoing criminal behavior weighs heavily in the application of factor 10. Analysis under factor 10 shall include the consideration of the number and type of criminal charges, dispositions on the charges,

dates of the criminal conduct, and number of abuse prevention or harassment prevention orders.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider their entire criminal history. (Duwe and Freske, 2012; Hanson and Bussiere, 1998; Hanson and Bourgon, 2005; and Harris et al., 2003)

(b) Adult Female. Factor 10 applies in the same manner to adult female offenders. (Cortoni, 2010; Hanson et al., 2007; Hart et al., 2003; Sandler and Freeman, 2007, 2009; Vandiver and Kercher, 2004; Vandiver, 2006)

(c) Juvenile. Juveniles with a history of multiple charges or adjudications, including non-sexual crimes, are at increased risk of reoffense. Analysis under factor 10 shall include consideration of the number and severity of criminal charges, abuse prevention orders, harassment prevention orders, and Child Requiring Assistance proceedings, dispositions on the charges, and dates of the criminal conduct. (Carpentier et al., 2011; Epperson et al., 2009; Gerhold et al. 2007; McCann & Lussier, 2008; Nisbet et al,. 2004; Prentky and Righthand, 2003; Zimring et al., 2007; Zimring et al., 2009).

(11) Factor 11: Violence Unrelated to Sexual Assaults.

(a) Adult Male. An offender is more likely to reoffend and present a greater danger if he has previously demonstrated that he can act violently and with no regard to the safety of others. Analysis under factor 11 shall include the consideration of the severity and frequency of violence towards other persons or animals. (Harris et al., 2003; Hanson & Bourgon, 2005)

(b) Adult Female. Factor 11 applies in the same manner to adult female offenders. (Hanson and Cortoni, 2005; Poels, 2007)

(c) Juvenile. Factor 11 applies in the same manner to juvenile offenders. (Curwen and Costin, 2007; Knight et al., 2009; Prentky and Righthand, 2003; Stetson School, 2012; Worling and Curwen, 2001; and Worling et al., 2012)

(12) Factor 12: Behavior While Incarcerated or Civilly Committed.

(a) Adult Male. Offenders are expected to comply with the rules of the institutional setting. Poor behavior while incarcerated or civilly committed is an indicator of antisocial behavior. An offender who unsatisfactorily adjusts to the rigors of confinement by violating rules in a highly structured environment presents an increased degree of dangerousness. Unsatisfactory adjustment is evidenced by violations of the rules. In determining the potential risk of reoffense and dangerousness of an offender, the Board may consider such elements as:

1. the number of poor behavioral reports or disciplinary reports the offender received while confined;

2. the seriousness of the violation; and

3. the length of time that has elapsed between the offender's last report and his release.

803 CMR 1.33(12)(a) includes adults whose only sex offense(s) were committed as a juvenile and who also have a history of adult incarcerations or commitment. (Doren, 2002; and Epperson et al., 2003)

(b) Adult Female. Factor 12 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 12 does not apply to juvenile offenders. Factor 13 addresses juvenile offenders in custody.

(13) Factor 13: Non-compliance with Community Supervision.

(a) Adult Male. Offenders are expected to comply with the terms of community supervision. Non-compliance with the rules of community supervision is an indicator of antisocial behavior. An offender who unsatisfactorily adjusts to the external controls inherent to community supervision poses a significant risk when those controls are removed. Unsatisfactory adjustment is evidenced by violations of the rules of the supervising agency or the conditions of release. In determining the potential risk and dangerousness of an offender, the Board may consider such elements as:

1. the number of violations the offender received during his period of supervision;

2. the seriousness of the violation reported in the violation notice or report; and

3. the length of time that has elapsed between the offender's last violation notice or report and his release from supervision.

The Board shall consider the offender who engages in sexual misconduct while on community supervision to pose a greater risk of reoffense and a greater degree of danger to the public.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider the offender's entire history of community supervision. (Hanson and Harris, 2000; Knight and Thornton, 2007; Mann et al., 2010).

(b) Adult Female. Factor 13 applies in the same manner to adult female offenders. (Hanson et al., 2007; Hart et al., 2003; Stuart and Brice-Baker, 2004)

(c) Juvenile. For purposes of factor 13, juvenile offenders are considered to be under "community supervision" when they are supervised in the community by probation or the Department of Youth Services (DYS), or when they are in a residential treatment program or a DYS detention center or program.

A juvenile who unsatisfactorily adjusts to the external controls inherent to supervision may pose a significant risk when those controls are removed. Unsatisfactory adjustment is evidenced by a pattern of violations of rules and regulations of the supervising agency or program. In determining the potential risk and dangerousness of an offender, the Board may consider such elements as:

1. the number of disciplinary issues or rule violations;

2. their seriousness; and

3. the length of time that has elapsed since the offender's last disciplinary issue or violation.

While not sufficient by itself to invoke factor 13, a juvenile's history of suspension and expulsion from school may be considered in assessing a pattern of behavior while in a supervised setting.

The Board shall consider juvenile offenders who engage in sexual misconduct while under community supervision to pose a heightened risk of reoffense and a greater degree of danger to the public. (Epperson et al., 2009; Prentky and Righthand, 2003)

(14) Factor 14: Recent Threats.

(a) Adult Male. The Board shall consider the offender who expresses threats or intent to sexually assault another person to be at an increased risk of reoffense and degree of dangerousness.

803 CMR 1.33(14)(a) includes adults whose only sex offense(s) were committed as a juvenile. (Hanson and Harris, 2000; Hanson et al., 2007; Harris et al., 2003)

(b) Adult Female. Factor 14 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 14 applies in the same manner to juvenile offenders.

(15) Factor 15: Hostility Towards Women.

(a) Adult Male. Hostile attitudes and behavior towards women are predictive of sexual reoffense and increased dangerousness. Factor 15 is applied when an offender has a pervasive pattern of conflicts with women, physical aggression toward women, and using derogatory and demeaning language towards women, or has multiple abuse prevention orders or harassment prevention orders taken out by different women at different times.

803 CMR 1.33(15)(a) includes adults whose only sex offense(s) were committed as a juvenile and who evidence a recent pattern of hostility toward women. (Allan et al. 2000; Hanson et al., 2007; Mann et al., 2010)

(b) Adult Female. Factor 15 does not apply to adult female offenders.

(c) Juvenile. Factor 15 does not apply to juvenile offenders.

(16) Factor 16: Public Place.

(a) Adult Male. The commission of a sex offense or engaging in sexual misconduct in a place where detection is likely reflects the offender's lack of impulse control. The Board may apply less weight to factor 16 if there is evidence that the offender made a clear and concerted effort to conceal his offending behavior from others. For purposes of factor 16, a "public place" includes any area maintained for or used by the public and any place that is open to the scrutiny of others or where there is no expectation of privacy. (Epperson et al., 2000)

(b) Adult Female. Factor 16 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 16 applies in the same manner to juvenile offenders. (Langstrom, 2001)

(17) Factor 17: Male Offender against Male Victim.

(a) Adult Male. Male offenders who have engaged in sexual misconduct against a male victim reoffend at a higher rate. Factor 17 applies when a male offender commits any sexual misconduct against a non-consenting male or a male child younger than 16 years old. (Hanson et al., 2003; Harris et al., 2003; Harris and Hanson, 2004; Knight and Thornton, 2007)

(b) Adult Female. Factor 17 does not apply to adult female offenders.

(c) Juvenile. Factor 17 applies only to juvenile offenders who were 13 years of age or older at the time of the sexual misconduct.

There are two circumstances when juvenile sex offenders who have male victims are at a higher risk to reoffend. Factor 17 only applies:

1. when the male victim is younger than 13 years old and is at least five years younger than the offender at the time of the sexual misconduct; or

2. if there is penetration and physical force in the sexual assault, regardless of the age of the victim.

803 CMR 1.33(17)(c) includes adults whose only sex offense(s) were committed as a juvenile. (McCann and Lussier, 2008; Prescott, 2006; Prentky and Righthand, 2003; Worling and Curwen, 2001).

(18) Factor 18: Extravulnerable Victim.

(a) Adult Male. Offenders who engage in sexual misconduct against an extravulnerable victim pose a greater danger to public safety. For purposes of factor 18 "extravulnerable" includes any condition or circumstance that:

1. renders a victim more susceptible to sexual assault or unable to effectively defend himself or herself; or

2. compromises his or her ability to effectively report the abuse or provide testimony in court.

The Board considers victims who are younger than eight years old or 60 years of age or older to be extravulnerable by virtue of their age. (Levinson, et al., 2001; McGrath, 1991)

(b) Adult Female. Factor 18 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 18 applies in the same manner to juvenile offenders.

(19) Factor 19: Level of Physical Contact.

(a) Adult Male. Sexual assault involving penetration has been shown to cause increased psychological harm to the victim. The offender who engages in penetration, especially penile penetration, as part of the sexual assault poses an increased degree of dangerousness. In the case of an adult with a child victim, if the difference in age between the offender and the victim is five years or less and there is evidence of a consensual, although statutorily criminal sexual act, the Board shall give limited weight to factor 19. (Lesserman et al., 1997)

(b) Adult Female. Factor 19 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 19 applies in the same manner to juvenile offenders. However, when determining the weight to apply to factor 19, the Board should consider: age difference between offender and victim; whether there is evidence of an ongoing dating type relationship; whether the victim consented; and whether there was force or coercion.

803 CMR 1.33(19)(c) includes adults whose only sex offense(s) were committed as a juvenile. (Stetson School, 2012)

(20) Factor 20: Diverse Sexual Behavior.

(a) Adult Male. Diverse sexual behavior may reflect sexual preoccupation, elevated sex drive, or sexual deviance. Offenders who have a history of engaging in different types of inappropriate sexual behaviors, in separate episodes, are at an increased risk to reoffend. Diverse sexual behaviors include, but are not limited to: voyeurism, exhibitionism, possession of pornography, contact sexual assaults, stealing of a person's belongings for sexual arousal, frottage, stalking, photographing or videotaping a partially nude or nude person or the intimate parts of a person without their consent, and engaging in sexual harassment. In determining the weight applied to factor 20, the Board shall consider the number, types, and frequency of the diverse sexual behaviors. (Hanson and Harris, 2000; Hanson et al., 2007; Harris et al., 2003; and Mann et al., 2010)

(b) Adult Female. Factor 20 applies in the same manner to adult female offenders. (Hart et al., 2003)

(c) Juvenile. Factor 20 applies in the same manner to juvenile offenders. (Curwen and Costin, 2007; Prentky and Righthand, 2003; Worling and Curwen, 2001)

(21) Factor 21: Diverse Victim Type.

(a) Adult Male. Offenders whose acts of sexual misconduct traverse victim types, such as multiple ages, gender, or relationship categories, present a greater risk of reoffense and danger to public safety because they have a broader victim pool. (Hanson and Harris 2000; Heil et al., 2003; Kleban et al., 2012)

(b) Adult Female. Factor 21 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 21 applies in the same manner to juvenile offenders. (Curwen and Costin, 2007; Epperson et al., 2009; Stetson School, 2012; Worling and Curwen, 2001; Parks and Bard, 2006)

(22) Factor 22: Number of Victims.

(a) Adult Male. Offenders who have committed acts of sexual misconduct against two or more victims present an increased risk of reoffense and degree of dangerousness.

(b) Adult Female. Factor 22 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 22 applies in the same manner to juvenile offenders. (Epperson et al., 2009; Gerhold et al., 2007; Miccio-Fonseca, 2009; Prentky and Righthand, 2003; Powers-Sawyer and Miner, 2009; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006)

(23) Factor 23: Victim Access.

(a) Adult Male. An offender's risk of reoffense increases when he has frequent and easy access to potential victims from his preferred victim pool.

The Board may consider such things as:

1. whether the offender has regular and ongoing opportunities for interaction with potential victims through such things as coaching, teaching, or volunteering, or through his living, employment, or relationship settings; or

2. whether the offender appears to be intentionally seeking circumstances that put him in contact with his preferred victims.

For offenders who target stranger victims, factor 23 applies when the offender's conduct suggests an intentional seeking out of circumstances similar to his prior offending behavior.

803 CMR 1.33(23)(a) includes adults whose only sex offense(s) were committed as juveniles. (Hanson and Harris, 2000; Hanson et al., 2007)

(b) Adult Female. Factor 23 applies in the same manner to adult female offenders.

(c) Juvenile. The risk of reoffense increases when juveniles have frequent, unsupervised access to potential victims from their preferred victim pool or appear to be intentionally seeking circumstances that allow such access. (Carpentier and Proulx, 2011; Spice, et al., 2013; Worling and Langstrom, 2006)

(24) Factor 24: Less than Satisfactory Participation in Sex Offender Treatment.

(a) Adult Male. Offenders who refuse to participate in, dropped out of, or are terminated by their treatment provider from sex offender treatment present an increased risk of reoffense.

The Board shall consider the offender who, during his most recent opportunity to participate in treatment while in custody or when required by community supervision, refused to participate in a sex offender treatment program or dropped out or was involuntarily terminated to be at an increased risk of reoffense and degree of dangerousness. (Hanson and Harris, 2000; Hanson et al., 2002; Losel and Schmucker, 2005)

(b) Adult Female. Factor 24 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 24 applies in the same manner to juvenile offenders. (Curwen and Costin, 2007; Epperson et al., 2009; Gerhold, et al., 2007; Powers-Sawyer and Miner, 2009; Vitacco et al., 2009; Worling and Curwen, 2001; Worling and Langstrom, 2006)

(25) Factor 25: Prostitution of Children.

(a) Adult Male. Factor 25 does not apply to male offenders.

(b) Adult Female. Female offenders convicted of offenses related to either promoting or patronizing prostitution of a child have an increased risk of reoffense. (Sandler and Freeman, 2009)

(c) Juvenile. Factor 25 does not apply to juvenile offenders.

(26) Factor 26: History of Abusing Children.

(a) Adult Male. Factor 26 does not apply to male offenders.

(b) Adult Female. Female offenders with a history of engaging in any type of non-sexual child abuse have an increased risk of reoffense. The Board shall consider evidence of prior child abuse, including charges, investigations, and convictions. (Cortoni and Gannon, 2011; Sandler and Freeman, 2009; Wijkman and Bijleveld, 2013)

(c) Juvenile. Factor 26 does not apply to juvenile offenders.

(27) Factor 27: Age of Victim.

(a) Adult Male. Factor 27 does not apply to male offenders.

(b) Adult Female. Factor 27 does not apply to female offenders.

(c) Juvenile. Factor 27 only applies to juvenile offenders who were 13 years of age or older at the time of the sex offense.

1. Child Victims. Juvenile offenders who target younger child victims outside of their peer age group present an increased risk of reoffense and degree of dangerousness. For purposes of factor 27, the Board shall consider "child victim" as younger than 13 years old and at least five years younger than the offender at the time of the offense.

2. Adult Victims. Juvenile offenders who target adult victims present an increased risk of reoffense and degree of dangerousness. For purposes of factor 27, the Board shall consider "adult victim" as 18 years of age or older and at least five years older than the offender at the time of offense.

803 CMR 1.33(27)(c) includes adults whose only sex offense(s) were committed as a juvenile. (ATSA, 2012; McCann and Lussier, 2008; Nisbet, et al, 2004; Stetson School, 2012; Worling and Curwen, 2001; Worling and Langstrom, 2006)

RISK-MITIGATING FACTORS:

(28) Factor 28: Supervision by Probation or Parole.

(a) Adult Male. Supervision of sex offenders released into the community increases public safety. An offender's risk of reoffense and degree of dangerousness are reduced while he is serving a term of community supervision. Factor 28 also applies to offenders who are incarcerated at the time of the classification hearing and will be under community supervision upon release. Factor 28 may be given less weight if there is a history of probation violations.

803 CMR 1.33(28)(a) includes adults whose only sex offense(s) were committed as a juvenile. (English et al., 1995; Vries Robbe and Vogel, 2013)

(b) Adult Female. Factor 28 applies in the same manner to female offenders.

(c) Juvenile. Community supervision reduces a juvenile sex offender's risk of reoffense and degree of dangerousness. For purposes of factor 28, juvenile offenders are under "community supervision" when they are serving a probation sentence or are being monitored by DYS while in the community. (Stetson School, 2012)

(29) Factor 29: Offense-Free Time in the Community.

(a) Adult Male. The likelihood of sexual recidivism decreases the longer the sex offender has had access to the community without committing any new sex offense or non-sexual violent offense. The risk of reoffense decreases for most offenders after living in the community offense-free for five to ten years. The

risk of reoffense lowers substantially after ten years of offense-free time in the community.

For purposes of factor 29, the offense-free time begins on the date of an offender's most recent release from custody for a sex offense or non-sexual violent offense. In the case of an offender who was not committed, the offense-free time begins on the most recent date of conviction or adjudication of a sex offense or non-sexual violent offense.

803 CMR 1.33(29)(a) includes adults whose only sex offense(s) were committed as a juvenile. (Hanson et al., 2013; Harris & Hanson, 2004)

(b) Adult Female. Factor 29 applies in the same manner to female offenders.

(c) Juvenile. Adolescence is a time of rapid social, sexual, physical, cognitive, and emotional developmental changes. The likelihood of recidivism decreases for most juvenile sexual offenders after living in the community offense-free for three years. The risk of re-offense continues to lower over time and by ten years of offense-free time the risk of reoffense has substantially decreased.

For purposes of factor 29, the offense-free time begins on the most recent date the juvenile offender is released from DYS detention for a sex offense or non-sexual violent offense. In the case of an offender who is not in detention, the offense-free time begins on the most recent date of adjudication in the juvenile court for a sex offense or non-sexual violent offense. (Prentky et al., 2010; Worling and Langstrom, 2006; Worling, et al., 2010)

(30) Factor 30: Advanced Age.

(a) Adult Male. Recidivism rates incrementally decline as sex offenders get older, especially as offenders move into their later years. While advanced age alone does not outweigh other risk-elevating

factors present in an individual offender, advancing age has a mitigating effect on risk of reoffense.

Factor 30 does not apply uniformly to all sex offenders. Although risk of reoffense gradually declines when an offender is in his forties, the Board considers advanced age to have a significant mitigating effect when the offender is 50 years of age or older or, for those with child victims, when the offender is 60 years of age or older. For purposes of factor 30, the Board will consider the offender's age at the time of the classification hearing.

Factor 30 should be given less weight when an offender continues to demonstrate an active sex drive or general criminality.

803 CMR 1.33(30)(a) includes adults whose only sex offense(s) were committed as a juvenile. (Barbaree and Blanchard, 2008; Hanson, 2002; Hanson, 2006; Fazel et al., 2006; Lussier and Healy, 2009; Nicholaichuk et al., 2014; Prentky and Lee, 2007; Skelton and Vess, 2008; Thornton, 2006)

(b) Adult Female. Factor 30 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 30 does not apply to juvenile offenders.

(31) Factor 31: Physical Condition.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(d), the Board shall give consideration to the offender who has a physical condition that is documented by a treating medical provider. Factor 31 seeks to identify those offenders who have a decreased risk of reoffense or degree of dangerousness due to a physical condition, including a debilitating illness. At minimum, the medical documentation must:

1. Identify the physical condition;

2. Indicate the onset or date of diagnosis of the physical condition;

3. Provide a detailed description of the offender's limitations connected to the physical condition; and

4. Provide a summary of the offender's treatment and prognosis relative to the physical condition.

(b) Adult Female. Factor 31 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 31 applies in the same manner to juvenile offenders.

(32) Factor 32: Sex Offender Treatment. In order for factor 32 to apply, it shall be the responsibility of the offender to provide documentation from a treatment provider verifying his treatment participation or completion. This documentation must, at minimum, include: the name and license number of the offender's treatment provider; the treatment provider's description of the treatment program's milieu, methodology, goals, and objectives; and a record of the offender's attendance, level of participation, and degree of progress.

(a) Adult Male. The Board has determined that participation in or successful completion of sex offense-specific treatment, specifically in a program utilizing a cognitive-behavioral modality, such as Relapse Prevention, Risk-Needs-Responsivity, or Good Lives, is a risk-reducing factor. The Board may also consider pharmacological treatment for paraphilic disorders as risk reducing.

The risk-mitigating weight applied to factor 32 varies in degrees based on the following:

1. Completion of Treatment. In general, offenders who have successfully completed a treatment program have lower rates of reoffense than those who have not. Participation in treatment through the end of a term of incarceration or community supervision is not

considered "completion of treatment" unless there is documentation that the offender met all the goals of the program.

2. Currently Participating in Treatment. The Legislature has identified current participation in treatment as a risk mitigating factor. Offenders who voluntarily participate in treatment in the community, not solely as a condition of supervised release, and offenders who continue to participate in treatment after their treatment providers have determined that they have completed the program, may receive more weight under factor 32.

3. Past Participation in Treatment. The Board shall consider an offender's past participation in treatment. Offenders who participated in treatment while incarcerated or under community supervision, but did not complete the sex offender treatment program, may receive less weight under factor 32.

4. Denial. One of the primary goals of successful sex offender treatment is accepting responsibility for engaging in harmful sexual offending behavior. While some individuals who deny committing their sex offense can benefit from treatment, their lack of responsibility or degree of minimization for their behaviors may diminish the weight assigned to factor 32.

When classifying adults whose only sex offense(s) were committed as a juvenile, the Board shall consider their past participation in treatment as a juvenile and participation in sex offender treatment as an adult. (Hanson et al., 2009; Levenson, 2011; Losel and Schmucker, 2005; Marques, 2005; Olver et al., 2013; Saleh and Guidry, 2003)

(b) Adult Female. Many female sex offenders have treatment needs that may not be addressed in traditional treatment programs created for male sex offenders. The Board shall give mitigating weight to participation in or successful completion in a program

utilizing a cognitive-behavioral modality such as Relapse Prevention, Risk-Needs-Responsivity, and Good Lives or general psychological therapy. The Board shall consider the degree of participation in treatment and denial in the same manner as adult males. (Blanchette and Brown, 2006; Blanchette and Taylor, 2010; Ford, 2010)

(c) Juvenile. Juvenile offenders may have broader treatment needs than their adult counterparts. Because juveniles are still maturing and developing, they may be more amenable to treatment.

The Board has determined that participation in any psychological therapy that addresses various areas of the offender's life, including family, school, emotional, and social domains, or sex offense specific treatment is a risk-reducing factor. The amount of weight assigned to factor 32 increases with the offender's progress and level of participation, family involvement, level of accountability, amount of focus on sex offending behavior, or whether the offender completed a treatment program. (ATSA, 2012; Borduin et al., 2009; Reitzel and Carbonell, 2006; Worling et al., 2010)

(33) Factor 33: Home Situation and Support Systems.

(a) Adult Male. Factor 33 is applied to an offender who is currently residing in a positive and supportive environment. The likelihood of reoffense is reduced when an offender is supported by family, friends, and acquaintances.

The Board shall give greater mitigating consideration to evidence of a support network that is aware of the offender's sex offense history and provides guidance, supervision, and support of rehabilitation.

803 CMR 1.33(33)(a) includes adults whose only sex offense(s) were committed as a juvenile. (Tabachnick and Klein, 2011; de Vries Robbe and Vogel, 2013; de Vries Robbe et al., 2014)

(b) Adult Female. Factor 33 applies in the same manner to adult female offenders. (Gannon and Rose, 2008)

(c) Juvenile. A juvenile who is currently residing in a positive and supportive environment is less likely to reoffend. Factor 33 is applied when there is evidence of stable relationships with family, stable and therapeutically supportive family, pro-social friends and acquaintances, or positive engagement with social services, teachers or other adults.

The Board shall give greater mitigating consideration to evidence of a positive support network that is aware of the offender's sex offense history and provides guidance, supervision, and support of rehabilitation. (Bremer, 2006; Prentky and Righthand, 2003; Prentky et al., 2010; Worling and Curwen, 2001)

(34) Factor 34: Materials Submitted by the Sex Offender Regarding Stability in the Community.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178K(1)(l), the Board shall give mitigating consideration to materials submitted by the offender that demonstrate stability in the community. The Board shall consider evidence that directly addresses the offender's recent behavior and lifestyle including, but not limited to: his residential stability, sustained sobriety, education or employment stability, type of employment, and non-work related activities. (Tabachnick and Klein, 2011; de Vries Robbe and Vogel, 2013; de Vries Robbe et al., 2014)

(b) Adult Female. Factor 34 applies in the same manner to adult female offenders. (Gannon and Rose, 2008)

(c) Juvenile. Factor 34 applies in the same manner to juvenile offenders. (Bremer, 2006; Prentky et al., 2010)

ADDITIONAL FACTORS:

(35) Factor 35: Psychological or Psychiatric Profiles Indicating Risk to Reoffend.

(a) Adult Male. The Board shall consider evaluative reports, empirically-based risk assessment instruments, or testimony from a licensed mental health professional that discuss psychological and psychiatric issues, including major mental illness, as they relate to the offender's risk of reoffense.

The Board may give appropriate evidentiary weight to documentary reports and risk assessment, but the ultimate risk opinion, if any, will be excluded from consideration unless the mental health professional testifies as an expert witness at the classification hearing. (Abracen and Looman, 2012; Fazel et. al. 2007; Hanson and Bussiere, 1998; Hanson and Harris, 2000; Kafka, 2012)

(b) Adult Female. Factor 35 applies in the same manner to adult female offenders. (Cortoni, 2010; Gannon, et al., 2014; Hart et al., 2003; Rousseau and Cortoni, 2010; Vandiver and Kercher, 2004)

(c) Juvenile. Factor 35 applies in the same manner to juvenile offenders. (Kafka, 2012).

(36) Factor 36: Online Offending Behavior.

(a) Adult Male. The presence of other regulatory factors must also be considered in assessing the risk of reoffense and degree of dangerousness posed by online offenders. The Board categorizes online offending behavior in the following ways:

1. Child Pornography. Sex offenders who limit their offending to possessing child pornography, in the absence of other factors, generally pose a lower risk of reoffense and degree of dangerousness than sex offenders who commit contact offenses.

Evidence of sexual deviance may demonstrate an increase in risk to commit contact sex offenses. Useful indicators of sexual deviance include, but are

not limited to: evidence of actively searching for images of prepubescent children; collecting larger amounts of prepubescent pornography relative to adolescent or adult pornography; collecting larger amounts of child pornography relative to adult pornography; sorting and organizing files versus random downloading; and primarily focusing on child pornography depicting boys or a higher boy to girl ratio in a collection. (Kim, 2004; Seto et al., 2011; Seto & Eke, 2015)

2. Online Communicating. Sex offenders who engage in sexually explicit communications or exchange pornographic photos with minors or persons they believe to be minors by any electronic means present a danger to the public.

These offenders generally pose a higher degree of dangerousness than those who limit their offending behavior to child pornography as described in 803 CMR 1.33(36)(a)1.

3. Solicitation Offending. Sex offenders who communicate with minors or persons they believe to be minors by any electronic means for the purpose of enticing or meeting in-person to engage in sexual misconduct present the greatest danger among online offenders. (Seto & Eke, 2005; Babchishin et al., 2011; Briggs et al, 2011; Seto et al., 2011; Eke et al., 2011)

(b) Adult Female. Factor 36 applies in the same manner to adult female offenders.

(c) Juvenile. The categories of online offending apply to juveniles in the same manner as adults.

Juveniles whose online offending targets similarly aged peers may present a lower degree of risk and dangerousness than adults who target juveniles. (Saleh et al., 2014)

(37) Factor 37: Other Information Related to the Nature of the Sexual Behavior.

(a) Adult Male. Pursuant to M.G.L. c. 6, § 178L(1), the Board shall consider any information that it deems useful in 178K(1)), 6, determining risk of reoffense and degree of dangerousness posed by any offender.

(b) Adult Female. Factor 37 applies in the same manner to adult female offenders.

(c) Juvenile. Factor 37 applies in the same manner to juvenile offenders.

(38) Factor 38: Victim Impact Statement.

(a) Adult Male. The Board recognizes the substantial impact sex offenses have on victims. Pursuant to M.G.L. c. 6, § 178K(1)(k), the Board shall consider any written statement authored by the victim, the parent or guardian of a minor victim or a deceased victim, or the guardian of an adult victim of a sex offense that resulted in a conviction or adjudication.

(b) Adult Female. Factor 38 applies in the same manner to adult female offenders.

(c) Juveniles. Factor 38 applies in the same manner to juvenile offenders.

803 CMR 1.33

803 CMR 1.40 (2004)

1.40 Specific Guidelines for Each Factor

Pursuant to its authority to promulgate Guidelines for determining each sex offender's level of risk of re-offense and degree of dangerousness posted to the public (M.G.L. c. 6, sec 178K(1), the Board reviewed the statutory factors enumerated in M.G.L. c. 178K(1)(a) through (l) as well as the available literature regarding these statutory factors and developed the Guidelines, definitions,

explanations, and principles contained in 803 CMR 1.40. The Board shall use the following Factors to develop the policies, procedures, protocols, and objective standards it will apply in its Recommendation Process. Similarly, at a hearing conducted pursuant to 803 CMR 1.07 through 1.26, the definitions, explanations, principles, and authorities contained in these Factors shall guide the Hearing Examiner in reaching a Final Classification decision.

(2) Factor 2: Repetitive and Compulsive Behavior [M.G.L. c. 6, §178K(1)(a)(ii)]. This Factor reflects the fact that certain offenders manifest their compulsive behavior by engaging in a continuing course of sexual misconduct involving separate incidents with either the same victim or others. The Board considers these offenders as presenting a greater risk to reoffend and posing an increased degree of dangerousness (For Adult Offenders: Hanson & Thornton 1999; Hanson & Bussiere, 1998; Epperson, Kaul & Huot, 1995; McGovern & Peters, 1988). (For Juvenile Offenders: Worling & Curwen, 2001). This Factor shall be applied to both Adult and Juvenile Offenders.

The SORB has decided that, for the purpose of this Factor, an offender exhibits repetitive sexual offending behavior if he has a history of two or more separate incidents of sexual misconduct. Similarly, the SORB has decided that an offender's repetitive sexual misconduct is compulsive if the information regarding his separate incidents of sexual misconduct indicates:

(a) a repetition of the manner and method of committing the offenses;
(b) a pattern of ritualistic, bizarre, or distinctive acts;
(c) that in the interval between acts of sexual misconduct, the offender had sufficient opportunity to reflect on the wrongfulness of his conduct and take remedial measures by avoidance, counseling

or otherwise, to stop himself from committing subsequent acts of sexual misconduct;

(d) adult family members, adult friends, adult co-workers, employers, law enforcement, the court, or social services had sanctioned the offender for sexual misconduct and the offender, nonetheless, committed a subsequent act of sexual misconduct; or

(e) the offender committed his acts of sexual misconduct as a result of sudden uncontrollable urges or desires to commit the acts.

Doe, SORB No. 327216 v. Sex Offender Registry Bd.,

2015 Mass. App. Unpub. LEXIS 866

Reporter

2015 Mass. App. Unpub. LEXIS 866 * | 88 Mass. App. Ct. 1102 | 36 N.E.3d 78

JOHN DOE, SEX OFFENDER REGISTRY BOARD No. 327216 *vs.* SEX OFFENDER REGISTRY BOARD.

Notice:

SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28 ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR

ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT. SEE *CHACE* V. *CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by Doe v. Sex Offender Registry Bd., 2016 Mass. LEXIS 37 (Mass., Jan. 27, 2016)

Disposition:
Judgment affirmed.

Core Terms

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lewdness, sex offender, indecent exposure, register

Judges: Cypher, Hanlon & Agnes, JJ. **[*1]**

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The petitioner, John Doe, appeals from a Superior Court judgment affirming a decision of the Sex Offender Registry Board (board) requiring him to register as a level two sex offender. Doe argues that his prior New Hampshire conviction of indecent

exposure is not sufficiently similar to the Massachusetts crime of open and gross lewdness to constitute a "like offense." He also contends that the board violated art. 30 of the Massachusetts Declaration of Rights when it deemed the offense a second and subsequent conviction because, during the criminal prosecution of the index offense, a judge had allowed the prosecutor's motion to remove the second and subsequent offense portion of the complaint. In Doe's view, that action was binding on the board. We affirm, essentially for the reasons well explained in the judge's thoughtful memorandum of decision.

Doe pleaded nolo contendere in New Hampshire in 1990 of the misdemeanor offense of indecent exposure and lewdness, in violation of N.H. Rev. Stat. Ann. § 645:1 (1971).[1] The charge arose from an incident where women workers at a laundromat saw him standing naked and masturbating in front of an unshaded window in his **[*2]** mobile home across the street. In 2011, Doe was found guilty in the Cambridge Division of the District Court Department of one count of open and gross lewdness and one count of breaking and entering, after he entered an adult female neighbor's apartment and exposed his buttocks to her.[2] He initially had been charged with a violation of open and gross lewdness as a second and subsequent offense on the basis of the New Hampshire conviction. The Commonwealth, however, deciding that the New Hampshire conviction was not a "like violation," chose not to proceed with the second and subsequent offense portion of the complaint; the judge struck that charge from the docket.

In November, 2011, Doe was notified **[*3]** that the board initially had classified him as a level two sex offender. He made a timely request for an administrative hearing to challenge the board's recommendation. After an evidentiary hearing on April 17, 2012, the hearing examiner made a final determination, requiring Doe to register as a level

two offender. Doe then filed a complaint in the Superior Court for judicial review of the board's final determination; the judge upheld the board's decision. Doe timely appealed and now makes essentially the same arguments he did below.

Discussion. "Like violation." Doe argues first that his New Hampshire conviction of indecent exposure and lewdness was not of a "like violation" to a Massachusetts offense that would require him to register with the board.[3] "A 'like violation' is a conviction in another jurisdiction of an offense of which the elements are the same or nearly the same as an offense requiring registration in Massachusetts." *Doe, Sex Offender Registry Bd. No. 151564* v. *Sex Offender Registry Bd.*, 456 Mass. 612, 615, 925 N.E.2d 533 (2010). Comparing the definition of the New Hampshire offense with the Massachusetts offense, "the essence of the two crimes [must be] the same." *Ibid.*

In the State of New Hampshire, a person is guilty of the misdemeanor offense of indecent exposure and lewdness if he or she "fornicates, exposes his or her genitals, or performs any other act of gross lewdness under circumstances which he or she should know will likely cause affront or alarm." N.H. Rev. Stat. Ann. § 645:1 (1971). In Massachusetts, the crime of open and gross lewdness and lascivious behavior (G. L. c. 272, § 16) "requires proof of five elements to support a conviction, i.e., that the defendant (1) exposed genitals, breasts, or buttocks; (2) intentionally; (3) openly or with reckless disregard of public exposure; (4) in a manner so 'as to produce alarm or shock'; (5) thereby actually shocking or alarming one or more persons." *Commonwealth* v. *Swan*, 73 Mass. App. Ct. 258, 260-261, 897 N.E.2d 1015 (2008), quoting from *Commonwealth* v. *Kessler*, 442 Mass. 770, 773, 817 N.E.2d 711 & n.4 (2004).

Here, the essence of the two crimes is the same because both the New Hampshire and the Massachusetts

statutes prohibit the intentional exhibition of a person's private parts to cause shock or alarm. See *Doe, Sex Offender Registry Bd. No. 151564, supra*; *Commonwealth* v. *Becker*, 71 Mass. App. Ct. 81, 87, 879 N.E.2d 691 (2008). Any differences in the statutes are "inconsequential because both statutory formulations 'prohibit essentially the same conduct.'" *Commonwealth* v. *Bell*, 83 Mass. App. Ct. 82, 87, 981 N.E.2d 220 (2013), quoting from *Doe, Sex Offender Registry Bd. No. 151564, supra* at 617. **[*5]**

The fact that the Massachusetts crime requires proof of the victim's reaction does not undermine its similarity to the New Hampshire offense for purposes of G. L. c. 6, § 178C. "The elements of the offense in another jurisdiction need not be precisely the same as the elements of a Massachusetts sex offense in order for it to constitute a 'like violation.'. . . [T]he Legislature chose the word 'like' rather than the word 'identical' to describe the required relationship between an offense from another jurisdiction and a Massachusetts sex offense." *Doe, Sex Offender Registry Bd. No. 151564, supra* at 615-616. Because the offenses here are sufficiently similar, we are satisfied that Doe's indecent exposure conviction in New Hampshire is a "like violation" of the Massachusetts offense of open and gross lewdness and lascivious behavior.[4]

Board's authority. Doe also argues that the board's decision that Doe's Massachusetts conviction was a second and subsequent conviction violated art. 30 of the Massachusetts Declaration of Rights because the District Court judge earlier had removed the second and subsequent allegation from the complaint on the index offense. **[*6]** [5]

First, as the hearing officer noted, neither the statute nor the board's regulations require that, in order to require Doe to register, he must be convicted of a second and subsequent offense. Whether the Commonwealth chose to prosecute Doe as a first time

offender, prompting the judge to strike the second and subsequent portion of the offense from the docket, is therefore immaterial. The prosecutor's executive powers afford a wide discretion in deciding whether and how to prosecute a particular defendant. The board, in contrast, is duty-bound, by statute and its own regulations, to make a separate determination of whether a person is required to register with the board based on a second and subsequent conviction. See *Commonwealth* v. *Borders*, 73 Mass. App. Ct. 911, 912-913, 900 N.E.2d 117 (2009). See also G. L. c. 6, § 178C; 803 Code Mass. Regs. § 1.03 (2004).

In addition, contrary to Doe's argument, the Massachusetts conviction did not address whether the New Hampshire conviction was a "like violation"; instead, it established simply that Doe was convicted of breaking and entering and open and gross lewdness. In light of that fact, the board's determination that the Massachusetts conviction **[*7]** and the New Hampshire conviction were like violations in no way interfered with the judgment of the District Court.

Judgment affirmed.

By the Court (Cypher, Hanlon & Agnes, JJ.[6]),

Entered: August 25, 2015.

Footnotes

- [1]

  As in effect at the time of the offense.

- [2]

  In addition to these incidents, which together constituted the index offense, Doe committed several other similar offenses: a 1987 charge of open and gross lewdness for exposing himself at a shopping plaza; a 1989 guilty plea to one count of indecent exposure in violation of G. L. c.

272, § 53; and a 2001 charge of open and gross lewdness for "flashing" a woman sitting in a parked car. The 1987 and 2001 charges for open and gross lewdness were continued without findings.

- 3

A person convicted of a second and subsequent adjudication or conviction for open and gross lewdness and lascivious **[*4]** behavior under G. L. c. 272, § 16, a sex offense, must register with the board. G. L. c. 6, § 178C.

- 4

Doe agrees that his rule of lenity argument was not raised below. It is therefore waived.

- 5

Article 30 "enumerates the constitutional principles of separation of powers among the three branches of government." *Commonwealth* v. *Borders*, 73 Mass. App. Ct. 911, 912, 900 N.E.2d 117 (2009).

- 6

The panelists are listed in order of seniority.

Doe, SORB No. 297120 v. Sex Offender Registry Board,

2015 Mass. App. Unpub. LEXIS 43

Appeals Court of Massachusetts

January 20, 2015, Entered

13-P-547

Reporter

2015 Mass. App. Unpub. LEXIS 43 * | 87 Mass. App. Ct. 1102 | 23 N.E.3d 152

JOHN DOE, SEX OFFENDER REGISTRY BOARD No. 297120 *vs.* SEX OFFENDER REGISTRY BOARD.

Notice:

DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by Doe v. Sex Offender Registry Bd., 471 Mass. 1103, 2015 Mass. LEXIS 182 (Mass., Apr. 17, 2015)

Disposition: [*1]
Judgment affirmed.

Core Terms

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sex offender, offenders, noncontact, factors, reoffense, offenses, sex offense, escalate, classification, recidivism, sexual, sexual misconduct, supervision, compulsive, articles, commit, funds, sex

Judges: Graham, Brown & Sullivan, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

At issue is the propriety of a Superior Court judgment affirming a decision of the Sex Offender Registry Board (SORB) reclassifying the plaintiff as a level three offender. We affirm.

Our review of the administrative record established that substantial evidence supported the reclassification decision. See *Doe, Sex Offender Registry Bd. No. 27914* v. *Sex Offender Registry Bd.*, 81 Mass. App. Ct. 610, 618-619, 966 N.E.2d 235 (2012). The hearing examiner carefully considered all the relevant statutory and regulatory factors. See G. L. c. 6, § 178K(1), and 803 Code Mass. Regs. § 1.40 (2004) (guidelines). Based upon the totality of the evidence before him, the examiner found the presence of a multitude of aggravating factors that increased the plaintiff's risk of reoffense and degree of dangerousness. The Legislature expressly deemed one of these factors as indicative of a high risk of reoffense and a high degree of dangerousness to the public. See G. L. c. 6, § 178K(1)(*a*)(ii) (sexual misconduct characterized by repetitive and compulsive behavior). The examiner, in his discretion, reasonably gave only marginal weight [*2] to the few risk-reducing factors that were potentially applicable. See *Doe, Sex Offender Registry Bd. No. 10800* v. *Sex Offender Registry Bd.*, 459 Mass. 603, 633, 947 N.E.2d 9 (2011), citing *Smith* v. *Sex Offender Registry Bd.*, 65 Mass. App. Ct. 803, 812-813, 844 N.E.2d 680 (2006) (it is the province of the hearing examiner to determine how much weight to give each factor).

In ordering the reclassification, the examiner considered the evidence relating to the sexual offenses, finding that the plaintiff "committed sexual misconduct in three towns against multiple victims and on multiple occasions;" and that the second index sex offense occurred just three months after the first incident while the plaintiff was under community supervision. As the examiner found, consistent with the guidelines, an offender like the plaintiff who unsatisfactorily adjusts to the external controls inherent in community supervision poses a significant risk to public safety when those controls are removed. See 803 Code Mass. Regs. § 1.40(20). The examiner also weighed in the plaintiff's propensity for lawlessness and antisocial behavior as demonstrated by his several adjudications and convictions of property crimes, as a juvenile and as an adult. See 803 Code Mass. Regs. § 1.40(9)(b). The examiner found particularly significant that the Templeton incident involved a higher degree of sexual deviance than the plaintiff's other sexual [*5] misconduct based on which he had received a level two classification. As the examiner noted, by engaging in a continuing course of sexual misconduct against the same victim, the plaintiff manifested a different type of compulsive behavior that increased both his risk of reoffense and degree of dangerousness. See 803 Code Mass. Regs. § 1.40(2). Finally, the examiner noted that upon his release from the WHC, the plaintiff would fall into the highest recidivism risk category, consisting of those living in the community offense-free for less than five years. See 803 Code Mass. Regs. § 1.40(9)(a). In sum, the examiner's analysis of the required factors supported his ultimate findings that the plaintiff posed a high risk of reoffense and presented a high degree of dangerousness to the public warranting his reclassification. See *Doe, Sex Offender Registry Bd. No. 6904* v. *Sex Offender Registry Bd.*, 82 Mass. App. Ct. 67, 70, 970 N.E.2d 345 (2012) (level three classification is appropriate "[w]here the board determines that the risk of reoffense is high and the

degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination," quoting from G. L. c. 6, § 178K[2][*c*], [*6] as amended by St. 1999, c. 74, § 2).

Contrary to the plaintiff's assertions, the examiner did adequately consider the dangerousness prong of the statute, finding, based upon substantial evidence, the presence of significant risk factors (repetitive and compulsive behavior, stranger victim, nature of recent prior offense) that increased the plaintiff's degree of dangerousness to the public. See G. L. c. 6, § 178K(1). See also *Doe, Sex Offender Registry Bd. No. 68549* v. *Sex Offender Registry Bd.*, 470 Mass. 102, 110, 18 N.E.3d 1081 (2014) (ruling requiring plaintiff to register as level one offender supported by multiple factors that tended to indicate risk of reoffense and [*9] dangerousness, including repetitive, protracted, escalating, and "high contact" nature of offenses). The strategy pursued by the plaintiff's former attorney at the hearing was to show that the plaintiff belonged in the level two category. Where the plaintiff had conceded that he posed a moderate degree of danger, the examiner was justified based upon the additional facts indicating an increase in his dangerousness level — in particular, the escalating nature of his behavior and the offense, see note 6, *supra* — in moving him into the high risk category.

We reject the plaintiff's argument that, as matter of law, a noncontact exhibitionist may not be classified as a level three offender. First, there is no provision in the sex offender registration law, G. L. c. 6, §§ 178C-178Q, or SORB's regulations specifically prohibiting a level three classification for this type of sexual offender. Second, this bright-line rule would be contrary to the statutory scheme that calls for an individualized risk assessment in each case. Most importantly, the Legislature built leniency for these offenders into the statute. Individuals who

engage in open and gross lewdness and lascivious behavior are exempted from the reach of the statute for their first offense. Upon any **second and subsequent** adjudication or conviction, these individuals become sex offenders who are grouped together in the same category as those who commit hands-on sex offenses such as rape of a child under [*11] sixteen with force. See G. L. c. 6, § 178C (defining "sex offense"). As evidenced by this grouping and the mandatory registration requirement, the Legislature determined that noncontact offenders may indeed pose a danger to the public. See 803 Code Mass. Regs. § 1.04(1)&(2).

We disagree with the notion that in order to find a high degree of dangerousness under the statute, the examiner was required to find that the sexual offender was likely to cause physical harm. The decisions of the Supreme Judicial Court construing the element of mental abnormality under the involuntary civil commitment statute do not govern in this context. See *Commonwealth* v. *Suave*, 460 Mass. 582, 588, 953 N.E.2d 178 (2011) (for a defendant to be found a sexually dangerous person under G. L. c. 123A, the Commonwealth must prove that "the defendant's predicted sexual offenses will instill in his victims a reasonable apprehension of being subjected to a contact sex crime"); *Commonwealth* v. *Fay*, 467 Mass. 574, 580-582, 5 N.E.3d 1216 (2014) (holding that under G. L. c. 123A a defendant may be a menace to the health and safety of others notwithstanding that he is likely to commit only noncontact sexual offenses in the future; determination turns [*12] on whether defendant's predicted offenses "will instill in his victims a reasonable apprehension of being subjected to a contact sex crime").

We discern no abuse of discretion in the circumstances of this case in the examiner's ruling excluding from evidence several scholarly articles and graphs. First, this evidence was submitted for a purpose that was

irrelevant here (i.e., to show that noncontact offenders do not normally progress into contact offenders). The question presented for the examiner was the level of recidivism risk and the degree of dangerousness posed by the plaintiff. In the circumstances here, the examiner was not required to predict whether noncontact exhibitionists will escalate their behavior toward more serious sexual assaults. The articles, moreover, do not support the inference urged by the plaintiff's former attorney (i.e., that the plaintiff posed only a moderate risk). They also do not support successor counsel's assertion that noncontact offenders do not "escalate in terms of dangerousness to commit contact offenses," nor do the articles constitute "compelling scientific evidence," as successor counsel argues, that noncontact offenders "do not pose a high [*13] degree of danger to the community." Contrast *Doe, Sex Offender Registry Bd. No. 205614* v. *Sex Offender Registry Bd.*, 466 Mass. 594, 597, 604-609, 999 N.E.2d 478 (2013) (arbitrary and capricious to ignore validated studies demonstrating that female sex offenders pose a much lower recidivism risk). In fact, as is also stated in the plaintiff's brief, the articles show that noncontact offenders do not "necessarily escalate in terms of severity of offense or recidivate with contact offenses" but also that 38.8% of noncontact offenders who recidivated did so with contact offenses, according to one study. In any case, the relative risk of escalation to a contact offense was not necessary to the determination here, as the plaintiff, while a noncontact offender, has escalated his behavior notably, in other ways. See note 6, *supra*.

The plaintiff failed to demonstrate any abuse of discretion in the denial of his motion for expert witness funds. A sex offender seeking to obtain expert witness funds bears the burden "to identify and articulate the reason or reasons, connected to a condition or circumstance special to him, that he

needs to retain a particular type of expert." *Doe, Sex Offender Registry Bd. No. 89230* v. *Sex Offender Registry Bd.*, 452 Mass. 764, 775, 897 N.E.2d 1001 (2008) (*Doe No. 89230*).

As the hearing examiner could properly have found here, none of the factors focusing on the offender's mental and physical condition was implicated in the hearing examiner's findings. See 803 Code Mass. Regs. § 1.40(1),(13)&(15); *Doe No. 89230*, 452 Mass. at 772-773 & n.15. In fact, the only medical evidence of record was that "[i]ndications of serious psychopathology" were lacking in the plaintiff. Moreover, the medical aspect of the motion for funds was supported solely by hearsay. Not only was Dr. Bard's diagnostic [*15] opinion as recounted by the plaintiff's attorney a mere possibility, it did not demonstrate a connection to the plaintiff's potential risk of recidivism and degree of dangerousness. The examiner could properly have deemed the requested funds unnecessary in light of the particulars of the plaintiff's case. See *Doe, Sex Offender Registry Bd. No. 151564* v. *Sex Offender Registry Bd.*, 456 Mass. 612, 624, 925 N.E.2d 533 (2010).

In conducting this review, we have not considered any arguments that were raised for the first time in this appeal or that were based upon extra-record evidence. See *Knott* v. *Racicot*, 442 Mass. 314, 323 n.12, 812 N.E.2d 1207 (2004); *Doe, Sex Offender* [*16] Registry Bd. No. 68549 v. *Sex Offender Registry Bd.*, 470 Mass. at 113.

Judgment affirmed.

By the Court (Graham, Brown & Sullivan, JJ.),

Entered: January 20, 2015.

Footnotes

- The de novo administrative hearing before the SORB hearing examiner was held at the Worcester County house of correction (WHC) where the plaintiff was incarcerated. No witnesses testified.
- See G. L. c. 6, § 178K(1)(*a*)(ii), and 803 Code Mass. Regs. § 1.40(2) (repetitive and compulsive behavior); G. L. c. 6, § 178K(1)(*b*)(i), and 803 Code Mass. Regs. § 1.40(7) (targeting stranger victims); G. L. c. 6, § 178K(1)(*b*)(iii), and 803 Code Mass. Regs. § 1.40(9) (number, dates, and nature of prior offenses); 803 Code Mass. Regs. § 1.40(9)(c)(1) (offense committed in public places); 803 Code Mass. Regs. § 1.40(9)(c)(5) (offense committed while on community supervision); 803 Code Mass. Regs. § 1.40(9)(b)&(c)(9) (criminal history and number of persons victimized); 803 Code Mass. Regs. § 1.40(9)(c)(11) (male and female victims); G. L. c. 6, § 178K(1)(*g*), and [*3] 803 Code Mass. Regs. § 1.40(16) (substance abuse problem); and G. L. c. 6, § 178K(1)(*i*), and 803 Code Mass. Regs. § 1.40(20) (recent behavior while on probation).
- Under the guidelines, current probation supervision, current participation in sex offender treatment, and a stable living environment are considered factors that reduce the risk of reoffense and the degree of dangerousness. See G. L. c. 6, § 178K(1)(*c*), and 803 Code Mass. Regs. §§ 1.40(10)-(12). Here, the examiner gave the plaintiff some credit for his *future* mandatory supervision and participation in treatment upon his release from the WHC. The examiner could properly have deemed the plaintiff's future living circumstances too speculative to be given any weight. To the extent the plaintiff's attorney argued that his client did not pose an increased level of dangerousness as evidenced by his placement in the general inmate population, the examiner found that there was no evidence presented about how the plaintiff had adjusted to incarceration. See 803 Code Mass. Regs. § 1.40(19). The examiner noted in the plaintiff's favor that although the plaintiff admitted to substance abuse problems, a licensed psychologist, Dr. Theodore [*4] M. Jasnos of

North Central Human Services, found no evidence of substance dependence during a psychiatric assessment of the plaintiff on May 19, 2010.

- The plaintiff perpetrated the first sexual misconduct in the town of Templeton (Templeton incident). However, because these crimes were prosecuted last in time, they were unknown to the board at the time of the board's final level two classification decision, which issued on or about September 16, 2010, and became final on November 8, 2010. The plaintiff did not challenge that classification. He committed another probation violation weeks after that classification.
- The plaintiff's notable past criminal record included juvenile adjudications, for use without authority and vandalizing gravestones, and convictions of trespassing and of operating to endanger and leaving the scene of a property-damage accident in February, 2010. As the examiner noted, the plaintiff's past criminal history of sex offenses and nonsex offenses was relevant to both the issues of risk of reoffense and degree of dangerousness. See G. L. c. 6, § 178K(1)(*b*)(iii). The plaintiff also admitted to sufficient facts of attempting to commit a crime (carjacking) while fleeing from police after an incident of open and gross lewdness.
- In Templeton, the plaintiff targeted a fifty-two year [*7] old neighbor of his long-term girlfriend. On May 13, 2009, the plaintiff banged on the victim's front door and, after gaining her attention, masturbated to ejaculation by her garage door as she watched. The victim remained on the phone with 911 until the police arrived. This was not the plaintiff's first trespass on her property. The victim informed the police that, prior to that incident, she had periodically cleaned off an unknown white substance from her front door sidelights. Shortly after the incident, a note stating in pink letters that she was "a sexy woman" was left for the victim on her back porch. Samples taken from two areas of the victim's property (driveway and door) subsequently matched the plaintiff's DNA. The victim obtained a restraining order against the plaintiff. SORB has determined that "the presence of deviant sexual interests *dramatically*

increases the risk of reoffending . . ." (emphasis added). 803 Code Mass. Regs. § 1.40(9)(c). See also 803 Code Mass. Regs. § 1.40(9)(c)(1) (the commission of an offense in a public place where detection is more likely speaks to the offender's lack of impulse control and/or the strength of sexual deviance).

- The plaintiff has [*8] provided no support for his contention that the examiner was not permitted to apply several of the aggravating factors to adult, noncontact offenders like himself. The relevant authority is to the contrary. See 803 Code Mass. Regs. § 1.39(3) & (4); *Doe, Sex Offender Registry Bd. No. 89230* v. *Sex Offender Registry Bd.*, 452 Mass. 764, 777-778, 897 N.E.2d 1001 (2008) (using conduct underlying a continuation without a finding — open and gross lewdness and lascivious behavior — as supporting finding that plaintiff exhibited compulsive and impulsive choices of "multiple stranger victims."
- The examiner expressly concluded that the plaintiff "may be seen as a danger to the public." Many factors found applicable to the plaintiff's situation were relevant to both the risk of reoffense *and* the degree of dangerousness. See, e.g., 803 Code Mass. Regs. § 1.40(7) (studies show that adult sex offenders who choose stranger victims not only have increased risks of reoffense, they "certainly present a greater degree of dangerousness to the safety and welfare of the public"). In evaluating the dangerousness prong of the statute, the examiner was entitled to rely upon the explanations, principles, and authorities contained in SORB's [*10] guidelines. See 803 Code Mass. Regs. § 1.40. See also *Doe, Sex Offender Registry Bd. No. 205614* v. *Sex Offender Registry Bd.*, 466 Mass. 594, 604, 999 N.E.2d 478 (2013). In his decision, the examiner referenced ample evidence that tended to indicate an increased level of dangerousness to the public.
- We have confined our analysis to the only two articles addressed in the plaintiff's brief on appeal: Exhs. F and H.
- For example, summing up their noteworthy findings, the researchers who conducted the long-

term study of exhibitionists (Exh. F) stated: "Perhaps the most important finding is that exhibitionism is not a benign act and should be dealt with seriously. Men who exhibit [*14] may be at high risk for more serious offensive behavior. It is apparent that approximately 39 percent of our sample went on to commit other offenses, with approximately 31 percent committing a sexual or violent offense."

- In his affidavit, the plaintiff's attorney stated that the proposed expert, Dr. Leonard A. Bard, a clinical and forensic psychologist, said, based on the attorney's presentation, "that there is a possibility that the Petitioner is suffering from an undiagnosed anxiety disorder coupled with impulse control issues that are treatable with medication." The plaintiff's alleged anxiety disorder is not mentioned in the argument on appeal. Exhibitionism was not identified as a condition or circumstance special to the plaintiff justifying the need for the funds.

Doe, SORB No. 297120 v. Sex Offender Registry Board, 2015 Mass. App. Unpub. LEXIS 43, 87 Mass. App. Ct. 1102, 23 N.E.3d 152 (Mass. App. Ct. Jan. 20, 2015)

Doe, SORB No. 332487 v. Sex Offender Registry Board, 2014 Mass. App. Unpub. LEXIS 1033

Appeals Court of Massachusetts

October 2, 2014, Entered

13-P-1324

Reporter

2014 Mass. App. Unpub. LEXIS 1033 * | 86 Mass. App. Ct. 1114 | 17 N.E.3d 1119

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 332487 *vs.* SEX OFFENDER REGISTRY BOARD.

Notice:

DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Subsequent History: Appeal denied by John Doe Sex Offender Registry Bd. No. 332497 v. Sex Offender Registry Bd., 470 Mass. 1104, 2014 Mass. LEXIS 935, 23 N.E.3d 106 (Mass., Nov. 26, 2014)

Disposition: [*1]
Judgment affirmed.

Core Terms

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sex offender, hearing examiner, Registry, convictions, sex offense, sentence, factors, nolo contendere plea, police report, classification, recidivism, offenses, raped, rates

Judges: Cohen, Meade & Milkey, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, John Doe, appeals from a judgment affirming the decision of the Sex Offender Registry Board (board) which classified him as a level three sex offender. On appeal, Doe claims that the hearing examiner erred in determining the board had jurisdiction over him, that the evidence relied on by the hearing examiner was unreliable and insubstantial hearsay, and that the decision was against the weight of the evidence. We affirm.

1. *The board's jurisdiction.* Relying on Mass.R.Crim.P. 12(f), as appearing in 442 Mass. 1511 (2004), *Commonwealth* v. *Ingersoll*, 145 Mass. 381, 382, 14 N.E. 449 (1888), and *White* v. *Creamer*, 175 Mass. 567, 568, 56 N.E. 832 (1900), for the proposition that in Massachusetts a plea of nolo contendere cannot be used against a person in a civil proceeding, Doe claims that the hearing examiner erred [*2] in denying his motion to dismiss for lack of jurisdiction. We disagree. The above-cited authorities on which Doe relies are not applicable here because they address civil proceedings, not adjudicative administrative proceedings such as the proceedings here. See *Doe, Sex Offender Registry Bd. No. 10800* v. *Sex Offender Registry Bd.*, 459 Mass. 603, 625, 947 N.E.2d 9 (2011) (*Doe No. 10800*) ("[T]he [classification] hearing is not a criminal or civil trial . . . [it] is an adjudicative administrative proceeding").

In any event, in *Nardone* v. *Mullen*, 113 R.I. 415, 418, 322 A.2d 27 (1974), the Rhode Island Supreme Court held "that the entry of defendant's plea of nolo [contendere] was as much a conviction as would have

been a jury's verdict of guilty." See R.I. Gen. Laws § 12-18-3 (2002). See also *United States* v. *Patrone*, 948 F.2d 813, 816-817 (1st Cir. 1991). Thus, consideration of Doe's convictions following pleas of nolo contendere is as appropriate as consideration of a conviction based on a guilty plea was in *Doe, Sex Offender Registry Bd. No. 151564* v. *Sex Offender Registry Bd.*, 456 Mass. 612, 625-626, 925 N.E.2d 533 (2010). As such, we reject Doe's request that we should ignore Rhode Island law and that his convictions following [*3] his nolo contendere pleas are not convictions. Indeed, in Massachusetts, "[a] sex offender is defined as a person who has been convicted of any violation of Massachusetts law enumerated as a sex offense in the sex offender registry law, as well as any 'like violation of the laws of another [jurisdiction].' G. L. c. 6, § 178C." *Id.* at 615. Doe does not challenge the hearing examiner's determination that the Rhode Island crime of first degree sexual assault was a like offense to the Massachusetts crime of rape or that the Rhode Island crime of first degree child molestation was a like offense to the Massachusetts crime of rape and abuse of a child.

2. *Police reports.* Doe also claims the hearing examiner improperly relied on hearsay evidence in the police reports because the reports "were the only evidence of Mr. [D]oe's sex offenses." We disagree.

The board is not bound by the rules of evidence and may "consider evidence of a kind 'on which reasonable people are accustomed to rely in the conduct of serious affairs,' 803 Code Mass. Regs. § 119(1). . . . [P]articular narratives [in police reports] . . . may be admissible in board hearings depending on the general plausibility and consistency of the victim's or witness's story, the circumstances under which it is related, the degree of detail, the motives of the narrator, the presence or absence of corroboration and the like." *Doe, Sex Offender Registry Bd. No. 10304* v.

Sex Offender Registry Bd., 70 Mass. App. Ct. 309, 312-313, 873 N.E.2d 1194 (2007) (*Doe No. 10304*). Where, as here, the victims' statements were "plausible, consistent and highly detailed," they had sufficient indicia of reliability to constitute admissible and substantial evidence. *Id.* at 313. See *Doe No. 10800*, 459 Mass. at 638 ("In the context of administrative proceedings, hearsay evidence bearing indicia of reliability constitutes admissible and substantial evidence"). Also, the statements were not the only evidence of Doe's sex offenses. See *Doe No. 10304, supra* [*5] (statements in police reports are reliable where they are corroborated by defendant's admissions).

3. *Sufficiency of the evidence.* Finally, Doe claims the board's [*6] decision was against the weight of the evidence, and not supported by a preponderance of the evidence. We disagree. In reaching a decision, the hearing examiner considered the factors indicating an increased risk of reoffense and those indicating a lowered risk. See 803 Code Mass. Regs. § 1.40 (2002); G. L. c. 6, § 178K.

With respect to the former, the hearing examiner considered the following: Doe, twenty-four years old in 2002, committed sex offenses against three different teenaged victims over a period of eight months. One of the victims was a stranger, and the level of physical contact with her was high and caused her to bleed. The relationship between Doe and the second victim was an extrafamilial one, with Doe drinking prior to the commission of multiple sex acts on her. The relationship between the third victim, who was thirteen years old, and Doe was also an extrafamilial one and the sexual acts occurred outdoors in a public place.

Having considered all of the applicable factors, the hearing examiner found that aggravating factors outnumbered and outweighed [*8] the mitigating ones,

concluding that the risk that Doe would reoffend was high. Doe challenges this determination, arguing that the mitigating factors militate against the level three classification. However, it is up to the board, not a reviewing court, to weigh the mitigating and aggravating factors. See *Doe, Sex Offender Registry Bd. No. 10216* v. *Sex Offender Registry Bd.*, 447 Mass. 779, 787-788, 857 N.E.2d 492 (2006).

Based on all of the above, we conclude that there was more than sufficient evidence to support the board's requirement that Doe register as a level three sex offender.

Judgment affirmed.

By the Court (Cohen, Meade & Milkey, JJ.),

Entered: October 2, 2014.

Footnotes

- The crimes underlying Doe's classification were his convictions in Rhode Island, following his nolo contendere pleas, of two counts of first degree sexual assault and one count of first degree child molestation. Doe was sentenced to thirty years in prison, twelve years to serve, with the balance suspended.
- The record includes statements of the three victims: a statement by the sixteen year old victim who was raped by Doe in January, 2002, in the bathroom of a friend's house; a statement by the thirteen year old victim who was raped by Doe in August, 2002, in the bushes near the church yard; and a statement of the fifteen year old victim who was [*4] raped by Doe in May, 2002, in the basement of the house where he was staying.
- While Doe complains that some of the materials were not signed, there is nothing to indicate that he raised this issue below, and it is therefore waived.
- The record also includes Doe's statement admitting to intercourse with the thirteen year

old victim in the bushes; his statement, recounted in the police reports, admitting to intercourse with the fifteen year old victim; and his March 19, 2012, affidavit submitted to the board, where he wrote, in part: "I know I messed up in the past. I hurt three young ladies and [their] famil[ies]." The record also contains evidence of Doe's nolo contendere pleas, his convictions, and his sentences.

- Doe also claims that the hearing examiner improperly relied on the victim impact statement written by the mother of one of the victims. However, there is nothing in the record to indicate that Doe objected to this statement. In any event, 803 Code Mass. Regs. § 1.40(23) (2002) provides that the board can consider a written statement submitted by the parent of a child victim.
- Doe's suggestion that the board should not have considered the three offenses as repetitive and compulsive behavior because he was sentenced for all three on the same date is based on misinterpretation of the language of 803 Code Mass. Regs. § 1.40(2)(c) [*7] (2002), which refers to intervals between sex offenses, not the dates of sentencing on these offenses. Here, the offenses occurred in January, May, and August, 2002, months apart from each other.
- The hearing examiner also considered Doe's previous Massachusetts and Rhode Island convictions, which included convictions of violent offenses; Doe's three instances of violation of probation on offenses he committed prior to the sex offenses in question; the victim impact statement; the fact that he was released from prison after serving eight years of a thirty-year sentence; and the fact that he had been living in the community for only one year at the time of the hearing. Furthermore, the hearing examiner considered the mitigating factors, such as Doe's participation in various programs while in prison; his expression of remorse for his sex offenses; his supportive home life, family, and friends; his participation in sex offender treatment; his success in remaining drug and alcohol free; and his compliance, as of the time of the hearing, with the terms of his probation.

- Contrary to Doe's claim that the board failed to address the articles submitted by him, the hearing examiner admitted them in evidence and referred to them in the decision. Doe also points to a State of Connecticut Office of Policy and Management report applicable to offenders released from Connecticut prisons in 2005 for the proposition that sex offender recidivism rates are much lower than what many in the public have been led to believe. The full sentence relied on by Doe reads: "The sexual recidivism rates for the 746 sex offenders released in 2005 are much lower than what many in the public have been led to expect or believe." This statement is inapplicable to Doe's case for the reason, if no other, that in Massachusetts a hearing examiner does not rely on what the public has [*9] been led to expect or believe with respect to recidivism rates in making the classification decision. Doe cites two other studies for the proposition that "recidivism rates of treated sex offenders were lower than the recidivism rates of untreated sex offenders." However, the hearing examiner considered Doe's previous and on-going sex offender treatment in the classification decision.
- In his reply brief, Doe asserts that the hearing examiner should have granted him funds for an expert. Because Doe did not raise this issue in his main brief, we need not address it. See *Alliance to Protect Nantucket Sound, Inc.* v. *Energy Facilities Siting Bd.*, 457 Mass. 663, 688, 932 N.E.2d 787 (2010) (claim deemed waived when raised for first time in reply brief).

Doe, SORB No. 332487 v. Sex Offender Registry Board, 2014 Mass. App. Unpub. LEXIS 1033, 86 Mass. App. Ct. 1114, 17 N.E.3d 1119 (Mass. App. Ct. Oct. 2, 2014)

Doe v. Sex Offender Registry Bd., 2013 Mass. App. Unpub. LEXIS 433

Appeals Court of Massachusetts

April 12, 2013, Entered

11-P-1008

Reporter

2013 Mass. App. Unpub. LEXIS 433 * | 83 Mass. App. Ct. 1124 | 985 N.E.2d 413 | 2013 WL 1482860

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 69202 vs. SEX OFFENDER REGISTRY BOARD.

Notice:

DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28 ARE PRIMARILY ADDRESSED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, RULE 1:28 DECISIONS ARE NOT CIRCULATED TO THE ENTIRE COURT AND, THEREFORE, REPRESENT ONLY THE VIEWS OF THE PANEL THAT DECIDED THE CASE. A SUMMARY DECISION PURSUANT TO RULE 1:28, ISSUED AFTER FEBRUARY 25, 2008, MAY BE CITED FOR ITS PERSUASIVE VALUE BUT, BECAUSE OF THE LIMITATIONS NOTED ABOVE, NOT AS BINDING PRECEDENT.

PUBLISHED IN TABLE FORMAT IN THE MASSACHUSETTS APPEALS COURT REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NORTH EASTERN REPORTER.

Disposition: [*1]

Judgment affirmed.

Core Terms

lascivious, lewdness, alarm, indecent exposure, sex offender, shock

Judges: Trainor, Vuono & Sullivan, JJ.[3]

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, John Doe No. 69202, appeals from a Superior Court order that affirms the final decision of the Sex Offender Registry Board requiring him to register as a level 3 sex offender. The only issue on appeal is whether the Washington crime of indecent exposure, Wash. Rev. Code. § 9A.88.010, is a "like violation" -- for purposes of G. L. c. 6, § 178C -- of the Massachusetts offense of open and gross lewdness and lascivious behavior, G. L. c. 272, § 16.

In 2003, the plaintiff pleaded guilty in Cambridge District Court to one count of open and gross lewdness and lascivious behavior. Prior to that, the plaintiff was convicted several times of indecent exposure in Washington State. The definition of "sex offense," within the meaning of the statute, includes "second and subsequent adjudication or conviction for open and gross lewdness and lascivious behavior." G. L. c. 6, § 178C, as amended by **[*2]** St. 1999, c. 74, § 2. So, if the prior Washington offenses are not deemed "like violations," the plaintiff's lone Massachusetts offense would not constitute a "sex offense," and he would not be required to register as a sex offender. See G. L. c. 6, § 178C. "Because the registration requirement is defined in terms of offenses, the determination whether an offense from another jurisdiction is a 'like violation' is defined also in

terms of offenses and not conduct." John Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 619, 925 N.E.2d 533 (2010). Accordingly, we compare the elements of the crimes to determine if an out-of-State violation is a "like violation."

In the State of Washington, "[a] person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm." Wash. Rev. Code § 9A.88.010. "The essence of the crime is the lascivious exhibition of those private parts of the person which instinctive modesty, human decency, or common propriety require shall be customarily kept covered in the presence of others." State v. Eisenshank, 10 Wash. App. 921, 924, 521 P.2d 239 (1974), **[*3]** citing State v. Galbreath, 69 Wash.2d 664, 419 P.2d 800 (1966).

In Massachusetts, the crime of open and gross lewdness and lascivious behavior, G. L. c. 272, § 16,1 requires proof of five elements: "that the defendant (1) exposed genitals, breasts, or buttocks; (2) intentionally; (3) openly or with reckless disregard of public exposure; (4) in a manner so 'as to produce alarm or shock'; (5) thereby actually shocking or alarming one or more persons." Commonwealth v. Swan, 73 Mass. App. Ct. 258, 260-261, 897 N.E.2d 1015 (2008).

The Washington statute does not explicitly require proof of the victim being shocked or alarmed.2 From this, the plaintiff argues that the proof required for a Washington conviction would not necessarily lead to a conviction of the Massachusetts crime of open and gross lewdness and lascivious behavior. In other words, the State of Washington does **[*4]** not need to prove any reaction whatsoever in the victim to convict the defendant of indecent exposure. For the crime of

open and gross lewdness and lascivious behavior, however, the Commonwealth must prove shock or alarm in the victim to support a conviction. Therefore, the plaintiff reasons, the Washington crime of indecent exposure is not a "like violation" to the Massachusetts crime of open and gross lewdness and lascivious behavior. We disagree.

The plaintiff's argument hinges on the Supreme Judicial Court's statement that the "'like violation' requirement [is] satisfied where it is shown that proof necessary for the out-of-State conviction would also warrant a conviction of a Massachusetts offense for which registration is required." Doe No. 151564, supra at 616. The plaintiff reads this language too narrowly. "[T]he Supreme Judicial Court did not hold that this was the only way the 'like violation' requirement could be satisfied." Commonwealth v. Bell, 83 Mass. App. Ct. 82, 87, 981 N.E.2d 220 (2013). **[*5]** Rather, the Supreme Judicial Court affirmed the analysis in Commonwealth v. Becker, 71 Mass. App. Ct. 81, 87, 879 N.E.2d 691 (2008), cert. denied, 555 U.S. 933, 129 S. Ct. 320, 172 L. Ed. 2d 231 (2008), quoting from Commonwealth v. Boucher, 438 Mass. 274, 276, 780 N.E.2d 47 (2002), that "a 'like violation' . . . means 'the same or nearly the same.'" See Doe No. 151564, supra at 614. "The elements of the offense in another jurisdiction need not be precisely the same as the elements of a Massachusetts sex offense in order for it to constitute a 'like violation.'" Id. at 615-616. General Laws c. 6, § 178C, only requires that the essence of the two crimes be similar. See Becker, supra at 81; Doe No. 151564, supra at 615.

Here, the essence of the two crimes is similar because the conduct prohibited by the Washington statute is essentially the same as the conduct prohibited by the Massachusetts statute. See id. at 617. Both statutes prohibit the intentional exhibition of a person's private parts to cause shock or alarm. See G. L. c.

272, § 16; Eisenshank, 10 Wash. App. at 924. That the Massachusetts crime requires proof of the victim's reaction does not necessarily invalidate its similarity to the out-of-State crime for purposes of G. L. c. 6, § 178C. **[*6]** See Bell, supra. "[T]he legislature chose the word 'like' rather than the word 'identical' to describe the required relationship between an offense from another jurisdiction and a Massachusetts sex offense." Doe No. 151564, supra at 616. Because the offenses in question are sufficiently similar, we conclude that the plaintiff's indecent exposure convictions in Washington are "like violations" of the Massachusetts offense of open and gross lewdness and lascivious behavior.

Judgment affirmed.

By the Court (Trainor, Vuono & Sullivan, JJ.[3])

Entered: April 12, 2013.

Footnotes

- [3]

  This case was originally heard by a panel comprised of Justices Trainor, Smith, and Sullivan. Following the death of Justice Smith, Justice Vuono was added to the panel to participate in this decision.

- [1]

  The text of the G. L. c. 272, § 16, as amended by St. 1987, c. 43, reads: "A man or woman, married or unmarried, who is guilty of open and gross lewdness and lascivious behavior, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two years or by a fine of not more than three hundred dollars."

- [2]

But a victim is implicitly required. "A targeted victim is implicit in the statutory language [of § 9A.88.010] because only a victim could be affronted or alarmed by the obscene conduct." State v. Snedden, 149 Wash.2d 914, 919, 73 P.3d 995 (2003).

- 3

This case was originally heard by a panel comprised of Justices Trainor, Smith, and Sullivan. Following the death of Justice Smith, Justice Vuono was added to the panel to participate in this decision.

Loe v. Sex Offender Registry Bd., 2011 Mass. App. Unpub. LEXIS 343

Appeals Court of Massachusetts

March 18, 2011, Entered

08-P-1477

Reporter
2011 Mass. App. Unpub. LEXIS 343 *

RICHARD LOE, 1 SEX OFFENDER REGISTRY BOARD NO. 109862 vs. SEX OFFENDER REGISTRY BOARD.

Notice:

Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

Prior History: Loe v. Sex Offender Registry Bd., 79 Mass. App. Ct. 1104, 943 N.E.2d 507, 2011 Mass. App. LEXIS 397 (Mass. App. Ct., Mar. 18, 2011)

Disposition: [*1]

Judgment affirmed.

Core Terms

sex offender, exposure, requires, inserted, alarm, shock, lewd, hearing examiner, set forth, assertions, examiner's, equated

Judges: Berry, Katzmann & Grainger, JJ.

Opinion

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This appeal of a decision by the Sex Offender Registry Board (board) to classify the plaintiff as a level two sex offender requires us again to address the meaning of a "like violation of the laws of another state" within the meaning of G. L. c. 6, § 178C, inserted by St. 1999, c. 74, § 2. The practical import, as is generally the case, concerns the hearing examiner's ability fairly to characterize a later Massachusetts conviction as a "second or subsequent" conviction, G. L. c. 6, § 178C, inserted by St. 1996, c. 74, § 2, which in turn supports a finding of "repetitive and compulsive behavior." G. L. c. 6, § 178K(1)(a)(ii), inserted by St. 1996, c. 239, § 1.

The hearing examiner determined that the Connecticut offense of public indecency, of which the plaintiff was convicted in 2003, is a "like violation" to the Massachusetts crime of open and gross lewdness to which he pleaded guilty in 2005. She therefore determined that the Massachusetts adjudication was a second or subsequent conviction under the statute and that the plaintiff had a duty to register as a level two sex offender. The plaintiff asserts **[*2]** that the Connecticut statute, which requires "lewd exposure," lacks an essential element of the Massachusetts offense, namely that the exposure be performed in a manner which is intended to, and does, produce shock and alarm.

A judge of the Superior Court made a careful analysis of the elements required for conviction under each statute, concluding that the hearing examiner's equating of the two statutes did not constitute an error of law. We agree. Connecticut law requires the prosecution to prove that a lewd exposure was intended to arouse or satisfy the defendant's sexual desire. State v. Cutro, 37 Conn. App. 534, 544, 657 A.2d 239 (1995); State v. Lynch, 123 Conn. App. 479, 487, 488 n.4, 1 A.3d 1254 (2010). The judge correctly equated this with the Massachusetts requirement that the exposure produce alarm or shock. The requirement that an adjudication be a "like" offense or violation is not a requirement that it be identical. Commonwealth v. Becker, 71 Mass. App. Ct. 81, 86-87, 879 N.E.2d 691 (2008) (essence of criminalized behavior rather than category of charge determines whether it is a "like" offense).

The plaintiff's reliance on Doe, Sex Offender Registry Bd. No. 151564 v. Sex Offender Registry Bd., 456 Mass. 612, 925 N.E.2d 533 (2010), **[*3]** is unavailing. That decision affirms the analysis set forth in Becker. Id. at 615. While Doe also states that the "like violation" requirement is satisfied where the proof necessary to obtain an out-of-State conviction is

likewise sufficient in Massachusetts, id. at 616, we decline the plaintiff's invitation to conclude that the converse also obtains. The important consideration remains whether "the essence of the two crimes was the same." Id. at 615. Thus, even if we accept the plaintiff's argument that the intended production of shock and alarm are necessary for conviction in Massachusetts but not in Connecticut, this does not lead to the foregone conclusion that these are not essentially similar offenses.

The remaining assertions of missteps by the hearing examiner do not withstand scrutiny, essentially for the reasons set forth in the board's brief pp. 47 et. seq. To the extent that we do not address these, "they 'have not been overlooked. We find nothing in them that requires discussion.'" Department of Rev. v. Ryan R., 62 Mass. App. Ct. 380, 389, 816 N.E.2d 1020 (2004), quoting from Commonwealth v. Domanski, 332 Mass. 66, 78, 123 N.E.2d 368 (1954).

Judgment affirmed.

By the Court (Berry, Katzmann & **[*4]** Grainger, JJ.)

Entered: March 18, 2011.

Footnotes

- 1[†]

  We use the pseudonym used in the Superior Court.