
**Commonwealth of Massachusetts
Supreme Judicial Court**

SJC-12875

**Commonwealth of Massachusetts
Appellee**

v.

**Francis Harding
Appellant/Defendant**

**On Appeal From Judgment of the
Fall River District Court**

BRIEF FOR APPELLANT

ERIC TENNEN, BBO # 650542
Swomley and Tennen, LLP
50 Congress St. #600
Boston, MA 02109
(617) 227-9443

January, 2020

TABLE OF CONTENTS

| | |
|---|-----------|
| TABLE OF CONTENTS..... | 2 |
| TABLE OF AUTHORITIES..... | 4 |
| ISSUES PRESENTED..... | 6 |
| STATEMENT OF THE CASE..... | 7 |
| STATEMENT OF FACTS..... | 8 |
| SUMMARY OF ARGUMENT..... | 12 |
| ARGUMENT..... | 14 |
| I. The Judge’s finding that Harding was required to register every place he physically performed services was clearly erroneous. His place of employment, for purposes of the registration law, was his home workshop and that was the only address he had to register..... | 14 |
| II. The evidence was insufficient to support two different, but mandatory, elements in order to find Harding failed to register..... | 24 |
| <i>A. Even if Harding was required to register every place he physically worked, he would only have to do so if he worked 14 consecutive days or 30 aggregate days in a calendar year. The evidence in this case was insufficient to prove that he met those requirements.....</i> | <i>24</i> |

| | |
|---|----|
| <i>B. Even if Harding was required to register every physical place he performed services, he did not “knowingly” violate the statute when he was never notified of that requirement.....</i> | 26 |
| III. The condition that Harding not work “with” children did not give him fair notice that it prohibited him from working outside a location in which a supervised child was present. | 31 |
| CONCLUSION..... | 36 |
| ADDENDUM..... | 37 |
| CERTIFICATE OF COMPLIANCE..... | 56 |
| CERTIFICATE OF SERVICE..... | 56 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Commonwealth v. Becker</i> , 71 Mass. App. Ct. 81 (2008)..... | 28 |
| <i>Commonwealth v. Hill</i> , 52 Mass.App.Ct. 147 (2001)..... | 24, 28 |
| <i>Commonwealth v. Kendrick</i> , 446 Mass. 72 (2006)..... | 32, 33 |
| <i>Commonwealth v. Kirkpatrick</i> , 44 Mass. App. Ct. 355 (1998)..... | 28 |
| <i>Commonwealth v. Medeiros</i> , 95 Mass. App. Ct. 132 (2019) | 32, 33 |
| <i>Commonwealth v. Ramirez</i> , 69 Mass. App. Ct. 9 (2007)..... | 28 |
| <i>Commonwealth v. Rosado</i> , 450 Mass. 657 (2008)..... | 20, 29 |
| <i>Commonwealth v. Ventura</i> , 465 Mass. 202 (2013)..... | 22 |
| <i>Commonwealth v. Young</i> , 453 Mass. 707 (2009)..... | 16 |
| <i>Collatos v. Boston Retirement Bd.</i> , 396 Mass. 684 (1986)..... | 16 |
| <i>Cote-Whitacre v. Department of Pub. Health</i> , 446 Mass. 350 (2006) | 16 |

| | |
|---|----|
| <i>EMC Corp. v. Commissioner of Revenue,</i> 433 Mass. 568 (2001)..... | 18 |
|---|----|

| | |
|--|----|
| <i>Ives Camargo’s Case,</i> 479 Mass. 492 (2018)..... | 21 |
|--|----|

| | |
|--|----|
| <i>Martha’s Vineyard Land Bank Commn. v.</i> <i>Assessors of W. Tisbury,</i> 62 Mass.App.Ct. 25 (2004) | 15 |
|--|----|

| | |
|---|----|
| <i>Suffolk Constr. Co. v. Division of Capital Asset Mgt.</i> 449 Mass. 444 (2007)..... | 18 |
|---|----|

Statutes and Regulations

| | |
|--------------------------|------------|
| G.L. c. 6 § 178C | 15, 24 |
| G.L. c. 6 § 178E..... | 15, 18, 27 |
| G.L. c. 6 § 178F..... | 15 |
| G.L. c. 151A § 1(k)..... | 21 |

ISSUES PRESENTED

- I. Harding is a registered sex offender and supervised on probation. He was self-employed as a carpenter; his workshop was located at his home. When retained, he would manufacture the parts at his workshop and then provide services on site until the job was completed. He completed every other aspect of his work—billing, advertising, etc.—also at his workshop. He registered his home workshop as his employment address. However, his probation was violated because the Judge found that he failed to register. Specifically, she found that he should have also/instead registered the address of the home at which he had been providing services. Was this finding clearly erroneous?
- II. In order to find Harding had failed to register, the evidence had to support the presence of two different, but mandatory, elements: 1) that Harding was employed for 14 straight days or 30 aggregate days in a year and 2) that Harding “knowingly” failed to register. The evidence of how often Harding provided services consisted of his own invoices, which did not say where or how often he worked outside the home; moreover, no one ever told Harding that he had to register the address of any place at which he performed services. Given these and other facts, were the Judge’s findings that Harding worked for the requisite number of days and “knowingly” violated the law supported by the evidence?
- III. One of the Harding’s conditions of probation was that he not “work, volunteer, reside, with children under 18.” Harding provided services on the exterior of the house (at the site in issue). But an infant, supervised by his parents, was sometimes present inside the house. The Judge also found that he violated this

condition by working “with” children. Was this finding clearly erroneous?

STATEMENT OF THE CASE

Defendant/Appellant, Francis Harding, appeals a decision finding he violated his probation. Harding was originally placed on probation on April 28, 2015. Among his conditions were that he “register with SORB” and that he was “not to work, volunteer, reside, with children under 16 years old.” R.A. 17.¹ On or about April 5, 2018, Harding was served with a notice of violation: that he failed to comply with his sex offender registration requirements. R.A. 18. On April 10, 2018, the notice was amended to add that he failed to abide by the conditions that he “refrain from work, i.e. employment, where children 16 years of age or younger are present.” R.A. 19; Tr. Vol I, 11. On July 24, 2018, there was a hearing on the violation. The court heard from various

¹ References to the Record Appendix will be cited as R.A. [pg]; References to the Transcript from July 24, 2018 will be cited as Tr. Vol I, [pg]; References to the Transcript from September 24, 2018 will be cited as Tr. Vol II, [pg].

witnesses and admitted various documents into evidence. At the end of the hearing, the Judge found Harding violated both conditions of probation. On September 24, 2018, she extended Harding's probation for one year. Tr. Vol. II, 32. Harding filed a timely notice of appeal. R.A. 37.

STATEMENT OF FACTS

Harding was placed on probation for five years in April, 2015. Tr. Vol. I, 10. Among the conditions of his probation were that he register with the Sex Offender Registry Board and that he not "work, volunteer, reside with children under 18 years old." *Ibid.* He was also monitored by GPS. *Ibid.*

Harding lived in Newton. *Id.* at 78. At the time of the hearing, he was self-employed as a home contractor. *Id.* at 78-79. He had been a registered home improvement contractor since 1993. *Id.* at 80. He has a workshop out of his home in Newton. *Id.* at 85.

He would report to probation every two weeks. He would furnish probation with invoices from his work (to

prove he was employed). *Id.* at 85. For almost three-and-a-half years, he had the same probation officer in Newton. *Id.* at 86. At no point during the entire time he was supervised did probation ever tell Harding he had to register an employment address other than his Newton address (where he worked and lived). *Id.* at 86. He never received any instructions indicating he had to register a customer's address as a work address. *Id.* at 86-87; 109-110.

Additionally, Harding was represented by counsel in his initial classification hearing. *Id.* at 107. He had asked her for instructions on filling out his employment address. Ultimately, the lawyer conveyed to the police that she had instructed Harding he did not have to list his customer's addresses as "work" addresses. *Id.* at 109.²

² This evidence was admitted in a rather circuitous route. A Police Officer from Newton testified that Harding ultimately came to register the Lynn address (after his probation officer told him he had to). Tr. Vol. I, 42. While there, she received a phone call from Harding's attorney who said she advised Harding that he did not have to inform them where he was working. *Id.* at 42-43. When Harding later tried to reference this conversation, the judge sustained an objection as to what this attorney told him. *Id.* at 108-109. However, she

At some point, he was contacted by a couple in Lynn; they wanted him to restore their windows. *Id.* at 89-90. This was around January, 2016. *Id.* at 90. Harding removed the windows from the home and took them to his workshop in Newton, where he could service them. *Id.* at 93. He performed a majority of the services at his shop in Newton.

Following that, the same family hired Harding again to repair parts of the exterior of the house (like rotted gutters). *Id.* at 94-95. He again provided services at both his workshop and the house. *Id.* at 95-96. At the hearing, the 13 invoices Harding provided to probation were submitted as evidence; they covered services Harding provided between September 2017 and March 2018. *Id.* at 14; R.A. 24. The invoices did not, however, specify where the services were provided or how many days' worth of services the invoices covered.

then allowed the testimony. The Court seemed to sustain the objection on hearsay grounds, even though the evidence was properly offered as to Harding's state of mind—since the Commonwealth had to prove he “knowingly” failed to register.

The first time Harding provided services for this couple, they did not have a child; the second time, they did: an infant. *Id.* at 96-97. But, by that point, all the services he provided were to the outside of the house. He never had any contact with the child. *Id.* at 97.³

Towards the end of that time period, Harding was stopped by a Revere police officer who asked him about his presence. That stop ultimately led to the allegation that he had failed to register the Lynn address as a work address. *Id.* at 21-35.

The judge ultimately found Harding in violation of probation. She found that Harding knowingly violated

³ The Bristol Probation Officer—who did not supervise Harding—testified that he spoke to the owner of the Lynn address. His testimony about what the owner said with respect to this was not totally clear. The owner did not say how old his child was; rather “he confirmed for [the PO] that [Harding] had done some exterior work on his home, and then [the PO] had asked him if he ever had occasion where Mr. Harding was in the same area – meaning inside the home with his child. He indicated that was – that was the case. Yes, that Mr. Harding had been also inside of the home as well as outside of the home.” Tr. Vol. I, 63-64. The owner himself did not testify at the hearing.

probation by failing to register his “work” address (*i.e.* the Lynn address). She also found that he violated the condition of not working “with” children by working in a home where a child was present. Tr. Vol. II, 30-31.

SUMMARY OF THE ARGUMENT

The registration statute requires someone to register their “employment” address. The statute does not, however, define what constitutes “employment.” The statute only directs registrants to register their “employment” address if they work there for 14 straight days or 30 aggregate days in a year. *See infra* pgs. 14-17.

Harding was self-employed. He registered his employment address—where his workshop was located. Despite providing services in other locations, those locations were not his “employment” address for purposes of registration. The Legislature could have defined employment to encompass any service performed for compensation; but it did not. Accordingly, he did not have to register every address he physically performed services *See infra* pgs. 17-23

Moreover, even if this Court read the statute to require Harding to register everywhere he provided services, the evidence in this case to did not support the judge's findings. First, the evidence did not show that he provided services for more than 14 days in a row or 30 aggregate days. *See infra* pgs. 24-26. Moreover, the evidence did not show that Harding "knowingly" failed to register: no one ever informed him he had to register this address; he was in fact affirmatively advised he did not have to; and the probation office never notified SORB that Harding was working somewhere other than where he was registered, as required by law. *See infra* pgs. 26-31.

The judge also found Harding violated the condition that he not work "with" children under 18. This finding was based on the fact that Harding was providing services to the exterior of a home where a supervised infant was sometimes present inside. The condition at issue was not clear enough to provide Harding with fair notice that this conduct was prohibited. *See infra* pgs. 31-36.

ARGUMENT

- I. The Judge's finding that Harding was required to register every place he physically performed services was clearly erroneous. His place of employment, for purposes of the registration law, was his home workshop and that was the only address he had to register.**

As a lawyer, counsel has an office on Congress street where he works. His files are there, he meets with clients there, he even drafted most of this brief there. But counsel also appears in court, a lot. Counsel physically works at Suffolk Superior Court probably well over 50 days a year (including some long stretches of consecutive days when on trial); counsel works at other courts throughout the year. Yet, no one would claim counsel's place of employment is any courthouse. Rather, common sense and a general understanding of the term employment indicate that counsel's place of employment is at his Congress street address.

There are various examples of this. A landscaper who cuts grass at multiple homes once a week is not employed at

those homes; his place of employment is wherever he stores his equipment, sends out invoices, etc. A pizza delivery person does not work at the homes where she delivers pizza, she is employed at the pizza restaurant. An author who drafts his manuscript at a coffee shop is not employed at the coffee shop.

Harding is no different. It would be absurd to claim he was employed at every house where he physically performed services. At least under the facts of this case, his official place of employment was his home workshop. That is where, for example, he manufactured the parts he ultimately installed, where he drafted his invoices, or where he updated his website for advertising purposes.

Whether or not the conduct in this case fell under the definition of “employment” is a matter of law. [A]n appellate court has plenary power of de novo review of all questions of law, including questions of law involving statutory construction.” *Martha's Vineyard Land Bank Commn. v. Assessors of W. Tisbury*, 62 Mass.App.Ct.

25, 27 n. 3 (2004) (citation omitted). Common sense must guide this Court because the statutory definition of “employment” is not clear. The Sex Offender Registry Law defines employment in terms of time, not substance: “‘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.” G.L. c. 6 § 178C.⁴

The statute provides no guidance as to what conduct, if any, qualifies as “employment.” Rather, it indicates that whatever does constitute “employment” is only registrable if it is done a certain number of times. This is significant since

⁴ The words “employment” and “work” are used interchangeably throughout the registration scheme although “work” is never itself defined. *See* G.L. ch. 6 § 178C-178Q. For example, every year, a sex offender required to register must verify, *inter alia*, “work address or intended work address.” G.L. c. 6 § 178F. Additionally, “[a] sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to change his work address shall notify the board in writing not later than ten days prior to establishing the new work address.” G.L. c. 6 § 178E.

so many jobs require activities at both a central location/office, and then other locations.

A Court interpreting a statute begins with rudimentary tenets of statutory construction. “A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.’ Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and courts must interpret the statute so as to render the legislation effective, consonant with reason and common sense.” *Cote-Whitacre v. Department of Pub. Health*, 446 Mass. 350, 358 (2006) (Spina, J. concurring)(citations omitted).

“We begin with the language of the statute itself and ‘presume, as we must, that the Legislature intended what the words of the statute say.” *Commonwealth v. Young*, 453 Mass. 707, 713 (2009), *quoting Collatos v. Boston Retirement Bd.*, 396 Mass. 684, 687 (1986). “In construing the

Legislature's intent, we may also enlist the aid of other reliable guideposts, such as the statute's 'progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part.'" *Suffolk Constr. Co. v. Division of Capital Asset Mgt.*, 449 Mass. 444, 454 (2007), quoting *EMC Corp. v. Commissioner of Revenue*, 433 Mass. 568, 570 (2001).

These tenets are largely unhelpful in this case. There is no explicit guidance within the statute, or from Legislative history, which would shed light on how the Legislature intended to deal with cases like this. What is clear is that the Legislature envisioned certain activities, even if colloquially considered "work" or "employment," to fall outside the registration scheme. The Legislature may have thought that it would be burdensome or irrational to require persons to register every address at which they physically perform some work-related tasks. Thus, the Legislature did

not require registration of work which did not take place for 14 consecutive days or 30 aggregate days in a calendar year.

The requirement that a registrant must give ten days advance notice before changing his work address is instructive. *See* G.L. c. 6 § 178E. If Harding had to register everywhere he physically performed services, such advanced notice would be impossible. What was Harding to do? Was he supposed to register, and then un-register, every customer's address? When he finished providing services the first time at the Lynn address, he was no longer "employed" there. At what point did he then have to notify the police that his work address was changing? Then, when the owners hired him again, was he supposed to re-register that address? Or should he have never un-registered it to begin with, since there was the possibility that he would work there again?

Or what if, as is typical in these cases, Harding did not know how long he was going to provide services? He would have no obligation to register on consecutive day 13, or aggregate day 29, but if the job was not finished, he would

have to register on consecutive day 14 or aggregate day 30. At that point, he could not comply with the directive to register 10 days prior to changing addresses. And if he then only worked one extra day, he would be registered, in theory, for just one day. The impossibility of complying with these requirements show the absurdity of applying them to Harding under the facts of this case. *See e.g. Commonwealth v. Rosado*, 450 Mass. 657 (2008) (declining to find Rosado culpable of failing to register everywhere he stayed since, as someone who was homeless, it was impossible to comply with the 10 day notice).⁵

⁵ “As a practical matter, if we were to accept the Commonwealth's interpretation of G. L. c. 6, §§ 178E and 178F 1/2, it would lead to illogical results. According to the Commonwealth, the defendant's absence from the Inn is evidence of his intent to change his address and thus, pursuant to G. L. c. 6, §§ 178F 1/2 and 178E (h), the defendant would have to appear in person at the police department to give ten days' notice before establishing a new residence or not staying at the Inn. Because homeless sex offenders, by the very nature of their situation, lack a permanent residence, they have little control over where they live. Here, because the defendant is relying on a lottery system to secure a bed it would be almost impossible to provide ten days' notice.” *Rosado*, at 662-663.

These uncertainties demonstrate the gap in the registration scheme. Either purposeful or not, the registration scheme as it presently exists was not intended to require registration of every place someone physically provides services. Within the statutory scheme, an offender’s “work address” thus denotes some greater degree of permanence than the transitory level of work at a customer’s location.

The Legislature could have defined “employment” differently, as it has in other statutes. For example, for purposes of unemployment insurance, employment is not defined temporally, but by conduct: “service, including service in interstate commerce, performed for wages or under any contract, oral or written, express or implied, by an employee for his employer as provided in this section[.]” G.L.

c. 151A § 1(k).⁶ This definition focuses on the service

⁶ Indeed, as the Supreme Judicial Court observed, “there are at least four distinct methods used to determine employment status in the Commonwealth.” *Ives Camargo’s Case*, 479 Mass. 492, 500 (2018). Yet, even that is inaccurate because the Court failed to cite the sex offender

provided, and not how often it is provided. These different definitions matter. They demonstrate the Legislature's intent to require registration of more permanent, long-lasting work only and not every time someone provides a service for wages.

At best, the statute is ambiguous. "Although the registration requirement is remedial and not punitive, criminal penalties may be imposed on a defendant who is required to register and fails to do so. Accordingly, 'we apply the 'rule of lenity' and resolve any ambiguities' against the Commonwealth.'" *Commonwealth v. Ventura*, 465 Mass. 202, 212 (2013) (citations omitted). Here, because the statute is unclear, and because the lines between where Harding's employment starts and stop are blurry, the statute must be interpreted in his favor and protective of his actions. *See Rosado*, 450 at 663 ("The sex offender registration form is ambiguous because in both the instructions for the registration definition at issue in this case.

permanent address and the instructions for the temporary address it requires a homeless registrant to provide ‘the city and [an] approximate location within the city,’ yet the form fails to provide a homeless registrant with the opportunity to show his homeless status.”).

Just as it would be absurd to say a lawyer is employed at the courthouse, the landscaper is employed where he cuts grass, the delivery person is employed where they deliver food, or the author is employed everywhere he writes, it would be absurd to say Harding was employed at the Lynn residence. Accordingly, it was clearly erroneous to find that he failed to register his work address in this case.

II. The evidence was insufficient to support two different, but mandatory, elements in order to find Harding failed to register.

A. *Even if Harding was required to register every place he physically worked, he would only have to do so if he worked 14 consecutive days or 30 aggregate days in a calendar year. The evidence in this case was insufficient to prove that he met those requirements.*

It was undisputed that Harding performed services at the Lynn address. But the evidence was insufficient to support a finding of just how much.

“The standard of proof in a probation revocation proceeding is the civil standard of preponderance of the evidence rather than the criminal standard of beyond a reasonable doubt. A proposition is proved by a preponderance of the evidence ‘if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.’”

Commonwealth v. Hill, 52 Mass.App.Ct. 147, 154 (2001)

(citations omitted)

The testimony, at best, showed that Harding provided services, on and off, over the course of a few months. But no

one testified as to exactly how many days.⁷ In fact, the best evidence of how many days came from Harding's invoices, submitted into evidence. All parties agreed that he performed the services on the invoices. But he did not submit that many invoices.

He submitted 13 invoices for his services in 2017. They were not for 13 consecutive days but, rather, for 13 days over the course of six months. The invoices are silent as to whether they were for one day's worth of services or more, or whether the service in the invoice was performed at the home workshop or in Lynn. Thus, the only inference the evidence supported was that he provided services, at most, for 13 days over the course of six months. But the invoices do not specify where those services were performed (and it was undisputed that Harding performed services both in Newton and in Lynn).

⁷ The closest anyone came was the Bristol Probation Officer who testified that he "believed" it was in the aggregate more than 30 days. Tr. Vol. I, 74. That testimony was both equivocal and based on GPS records which were not admitted into evidence. *Id.* at 18-20.

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.”

G.L. c. 6 § 178C. The evidence in this case does not meet that definition of “employment.” The judge’s findings were not supported by the evidence on this issue.

B. Even if Harding was required to register every physical place he performed services, he did not knowingly violate the statute when he was never notified of that requirement.

Even if this Court finds that the services at issue did fall under the definition of employment for purposes of registration, Harding could not be found in violation unless he “knowingly” failed to register. The evidence here belied any indication that Harding knew what to do. First, his attorney advised him he did not have to register this address. Second, despite giving his probation officers invoices showing exactly what he was doing and where, his probation officer never advised him he had to register. Third, the registration forms provide no guidance as to how

someone like Harding must register; while it allows him to register as “self-employed,” it does not specify how to register a customer’s address. R.A. 21. Lastly, probation never reached out to SORB to either inquire whether Harding had to register or to report that he had not; despite argument to the contrary at the hearing, there is a statutory obligation for the probation department to notify the SORB of any change of address. *See* G.L. c. 6 § 178E (b).⁸

This evidence could not support a finding of a knowing violation under even the probation revocation standard.

⁸ “An agency that has supervision of a sex offender required to register pursuant to sections 178C to 178P, inclusive, on probation or parole shall, within five days of assuming supervision of such sex offender, transmit to the board such sex offender's registration data which, for purposes of this paragraph, shall include identifying factors, residential address or anticipated future residence, secondary addresses or anticipated secondary addresses, work address, offense history, documentation of any sex offender treatment and documentation of any treatment received for a mental abnormality. *The agency shall also report any changes of address of any sex offender required to register pursuant to said sections 178E to 178P, inclusive, within its jurisdiction to the board.* The board shall promptly transmit the registration data to the police departments in the municipalities.” (emphasis added).

Commonwealth v. Hill, 52 Mass.App.Ct. 147, 154 (2001) (citations omitted). Despite this lower standard, the evidence here did not show Harding “knew” he had to register the Lynn address by a preponderance of the evidence. And knowledge is essential.

In *Commonwealth v. Ramirez*, 69 Mass. App. Ct. 9 (2007), the Commonwealth failed to prove that the defendant had actual notice of his obligation to register. The court held that evidence of knowledge required under this statute must be specific and personal to each defendant and that “[a]bsent a defendant’s conscious disregard of the information necessary to provide him with the requisite knowledge, the Commonwealth cannot meet its burden merely by establishing that the knowledge was available to the defendant.” *Commonwealth v. Ramirez*, 69 Mass. App. Ct. at 12; see *Commonwealth v. Becker*, 71 Mass. App. Ct. 81, 89 (2008), quoting from *Commonwealth v. Kirkpatrick*, 44 Mass. App. Ct. 355, 356 (1998) (“An act is done ‘knowingly’ if it is the ‘product of conscious design, intent or plan that it be

done, and is done with awareness of probable consequences”). Similarly, in *Rosado*, the court found no evidence the defendant had knowledge when, *inter alia*, the forms were ambiguous and no one advised Rosado of his obligations. *See Rosado, supra*.

Here, no one seemed to know Harding’s obligation, and certainly no one conveyed to Harding that he had to register his customer’s addresses. For almost three years, probation was aware of his employment status and aware of where he provided services. Harding never hid that. And yet, for almost three years, no one ever counseled him that he had to register these addresses. Moreover, Harding’s own attorney advised him not to. Right or wrong, those actions could only have indicated to Harding that he had no obligation to register the Lynn address, or any customer’s address.

Even when the Judge sentenced Harding, and reviewed this condition, it still was not clear which addresses, if any, he would have to register going forward:

All right. You know, I’m assuming that when Mr. Harding gets work, that he is, you know,

obviously hired in advance of that and I just want to make it clear to Mr. Harding that he needs to be in full compliance with the Sex Offender Registry Board and he has to report all work addresses. If he has any question as to whether or not there's an address that he needs to report, he should certainly contact the registry – the Sex offender Registry Board and speak with someone there. Speak to legal counsel there and see if that's an address he needs to report.

But going forward, I'm going to tell him that he does need to report all work addresses to the Board unless they tell him otherwise[.]

Tr. Vol. II, 29.

The registration form itself is ambiguous. R.A. 21. For example, it does not give any time gates as to how long someone must live somewhere before it is a residence or secondary address nor how long they must work somewhere before it is registrable. The form does allow someone to register as self-employed (which Harding did). The instructions, however, do explain how long someone must stay somewhere before they must register a secondary address but do not define how long someone must work

somewhere before they must register that address.⁹ Any reasonable person would not believe they had to register a customer's address based on the form and instructions—at least not without some further guidance from the police or SORB or a probation officer. Harding did not receive such guidance.

Given the uncertainty among all involved, it cannot be said Harding had any actual notice, *i.e.* knowledge, that he had to register. The Judge's findings were clearly erroneous.

III. The condition that Harding not work “with” children did not give him fair notice that it prohibited him from working outside a location in which a supervised child was present.

As a condition of probation, Harding was not allowed to “work, volunteer, reside with children under 18 years old.”

R.A. 17. Probation, and the Judge, interpreted that to mean that he could not provide any services in the presence of children. Tr. Vol II, at 30-31; R.A. 18. But this interpretation

⁹ Instructions for completing the registration form can be found online (and normally accompanying a registration form). See < <https://www.mass.gov/how-to/register-as-a-sex-offender> >

was surely contrary to the conditions of probation. At best, the condition was ambiguous requiring it not be held against Harding.

Working “with” children and working “where children are present” are clearly not the same thing. Probation conditions, like statutes are to be interpreted to give meaning to their plain language.

Determining the scope of a condition of probation is essentially a matter of law and, therefore, gives rise to *de novo* review on appeal. As with legislative enactments, the task of construing the scope of a probation condition begins by reference to the plain and ordinary meaning of the words comprising the condition. The words of the probation condition define its scope, measured “by an ‘imprecise but comprehensible normative standard so that [people] of common intelligence will know [their] meaning.’”

Commonwealth v. Medeiros, 95 Mass. App. Ct. 132 (2019)

(Wendlandt, J. dissenting) (citations omitted).

While this case may seem similar to other cases in which a condition, open to interpretation, was held against the probationer, it is different in one important way. In other cases, like *Commonwealth v. Kendrick*, 446 Mass. 72 (2006)

or *Medeiros*, the special conditions were put in place to address specific, troubling conduct in which the probationer had already engaged. In *Kendrick*, the defendant had previously attended car shows to prey on children; the condition that he have no contact with minors included, at the very least, that he not return to car shows where children were present. *See generally, Kendrick, supra*. In *Medeiros*, the defendant's crime involved disseminating harmful minor to children walking home from school. His condition that he "have no involvement with minors without responsible adult supervision" could be construed, at the very least, to prohibit his presence at a school.

Here, there was no evidence that Harding had worked where minors were present in the past. The very nature of his work belies that to have been an issue. He was a carpenter, working alone. Thus, nothing in his past would indicate that the condition to not work "with" minors was going to be interpreted broadly to include simply working where supervised minors are present.

The condition is at best ambiguous. Would it prevent Harding from working as a busboy in a restaurant since children eat at restaurants? Would it prevent him from working at a hardware store, knowing that parents sometimes shop with their children? Rather, the more comprehensible interpretation is that Harding was prohibited from working in jobs that directly service children in some way—like at a daycare center. He did not have fair notice that working on the exterior of a house replacing windows, while a supervised infant was present inside the house, would constitute work “with” minors.

Importantly, to find him in violation, both the Judge and probation referred to this condition differently than as it was written. The condition as written is that he not work “with” children under 18. But probation indicated he violated the condition prohibiting him “from work[ing], i.e. employment, where children 18 years of age or younger are present.” R.A. 18; Tr. Vol I, 11. Likewise, the Judge, in

sentencing him, responded to Counsel's plea this condition prohibited only unsupervised contact with minors as follows:

“Yeah, He's not—that's not my understanding. That doesn't make sense to me. I mean, he's not to work in a home where there are children under the age of 16 that are present. I mean, that's the—can I see the docket? I want to see the way that it was worded.

Sex offender (indiscernible) cannot work reside or volunteer with children. All right. So yeah, he's not—my understanding of the conditions is he's not to work in a – not to work in a home where there are children under the age of 16, not to engage in any volunteer activities with children under the age of 16, or reside in a home with them. So those are the conditions[.]”

Tr. Vol. II, 31.

If that were the true meaning of the condition, it was certainly not clear from the wording of the condition itself. So, either the condition did not prohibit Harding from providing services (unrelated to children) where a supervised minor was present or, if it did, Harding had no fair warning, *i.e.* knowledge, of that the condition. *See, infra*, Part II.

Accordingly, this finding was also clearly erroneous.

CONCLUSION

Based on the foregoing, Appellant respectfully requests this Honorable Court reverse the finding of a violation, enter a judgment in his favor, and reinstate his prior conditions of probation.

Respectfully submitted,

/s/ Eric Tennen

ERIC TENNEN, BBO 650542

Swomley & Tennen, LLP

50 Congress Street. #600

Boston, MA 02109

(617) 227-9443

etennen@swomleyandtennen.com

ADDENDUM

Table of Contents

| | |
|---|----|
| Transcript of Oral Ruling by Judge..... | 38 |
| G.L. c. 6 § 178C | 40 |
| G.L. c. 6 § 178E..... | 42 |
| G.L. c. 6 § 178F..... | 52 |
| G.L. c. 151A § 1(k)..... | 54 |

1 with the purpose of the Sex Offender Registry Requirements.

2 And I lastly find that the defendant failed to report the
3 Deals' address as required. So I find him in violation for that
4 reason. I'm also going to find him in violation for working at
5 the Deals' house when there was a child present there at the
6 time. So I find him in violation.

7 So now with regard to sentencing. You know, there are very
8 unique circumstances here. I mean this is a very unique case,
9 interesting circumstances here, and I want to hear from
10 Probation on what their recommendation is.

11 MR. MCPHERSON: Thank you, Your Honor. Your Honor, I spoke
12 with Probation -- Assistant Chief Probation Officer Costa
13 regarding this. Probation is recommending the maximum allowable
14 sentence to be imposed on this case. And it's not with any
15 slight sense of -- it's with a great sense of gravity that do
16 that, Your Honor. The defendant is on probation for crimes
17 against very young children, children that he victimized and
18 also for possessing child pornography of very young children.
19 And the investigation and what's been shown in the hearing today
20 I would suggest shows a tinderbox waiting to explode, and I'm
21 not trying to be dramatic. I know that sounds dramatic. But
22 this is a level 3 sex offender who finds himself working at a
23 residence with a very young child and not registering with SORB.

24 And I would concede, Your Honor, that there may be more
25 than one motive as to why an individual wouldn't register at

1 Honor.

2 THE COURT: All right. Thank you. All right.

3 (Pause)

4 THE COURT: All right. You know, based on the evidence
5 before me I find by a preponderance of the evidence that during
6 the time that defendant was on probation he was living and
7 working in Massachusetts. That he is a convicted sex offender
8 subject to registration with the Sex Offender Registry Board. I
9 also find by a preponderance of the evidence that the defendant
10 knew -- the defendant knew that he had to be --

11 DEPUTY CLERK: Stand up, please.

12 THE COURT: He can remain seated.

13 DEPUTY CLERK: Okay, Your Honor.

14 THE COURT: You can remain seated for now, sir.

15 That the defendant knew that he had to provide notice of a
16 change in employment. And I know the defendant argues that the
17 Deals' house in Lynn was not his place of employment. But the
18 evidence shows that the defendant was working for the Deals for
19 months, maybe even the better part of a year. And although he
20 did do work within his shop to conduct some of the repairs on
21 their home, he was often at the Deals' home in Lynn, sometimes
22 six to eight hours a day. And although the defendant is
23 self-employed, I find that he was, in fact, employed by the
24 Deals. And I think that's consistent with the definition of
25 employment in Section 178C, and I think it's also consistent

Section 178C: Definitions applicable to Secs. 178C to 178P

Section 178C. 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.

...

"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.

...

"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.

...

Section 178E: Transmission of registration data to criminal history systems board, police departments, and FBI

Section 178E. (a) Within 5 days of receiving upon sentence any sex offender required to register under sections 178C to 178Q, inclusive, the agency which has custody of the sex offender, including the department of correction, the department of youth services and each of the houses of correction, shall transmit to the board said sex offender's registration data, which shall include identifying factors, anticipated future residence, any anticipated secondary addresses, offense history, documentation of any treatment received for a mental abnormality, the official version of any sex offenses, the mittimus, any prior incarceration history, and the projected maximum release date and the earliest possible release date for the sex offender. All custodial agencies shall inform the board immediately of any transfers of sex offenders so that there may be contact with the offender throughout the classification process. The bureau shall classify such a sex offender at least 10 days before the offender's earliest possible release date. The board shall promptly transmit the registration data to the police departments in the municipalities where the sex offender intends to live, maintain any secondary address and work and where the offense was committed and to the Federal Bureau of Investigation. The sex offender shall be informed by, and shall acknowledge in writing to, the agency which has custody of the sex offender of the duty to register in the commonwealth and in any state where he resides, is employed, carries on a vocation or is a student, to verify registration information, to give notice of change of address or intended change of address within the commonwealth or in another state and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and of his duty to register

under this section. If such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. The agency shall transmit such acknowledgment to the board within ten days of receipt of such acknowledgment. Not later than two days before his release from custody, a sex offender shall register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution. No sex offender shall be released from custody unless such registration has been filled out, signed and mailed to the board.

(b) An agency that has supervision of a sex offender required to register pursuant to sections 178C to 178P, inclusive, on probation or parole shall, within five days of assuming supervision of such sex offender, transmit to the board such sex offender's registration data which, for purposes of this paragraph, shall include identifying factors, residential address or anticipated future residence, secondary addresses or anticipated secondary addresses, work address, offense history, documentation of any sex offender treatment and documentation of any treatment received for a mental abnormality. The agency shall also report any changes of address of any sex offender required to register pursuant to said sections 178E to 178P, inclusive, within its jurisdiction to the board. The board shall promptly transmit the registration data to the police departments in the municipalities where such sex offender intends to live and work and where the offense was committed and to the

Federal Bureau of Investigation. The sex offender shall be informed by, and shall acknowledge in writing to, the agency which has custody of the sex offender of the duty to register in the commonwealth and in any state where he resides, has any secondary addresses, is employed, carries on a vocation or is a student, to verify registration information and to give notice of change of address, or any secondary addresses or intended change of address within the commonwealth or in another state and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and his duty to register under this section. If such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or agency having custody of the juvenile in the absence of a legal guardian, and his most recent attorney of record. A sex offender shall, within two days of receiving such notice, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution.

(c) Any court which enters a conviction for a sex offense or adjudication as a youthful offender or as a delinquent juvenile by reason of a sex offense, but does not impose a sentence of confinement of 90 days or more to be served immediately shall inform the sex offender and require the sex offender to acknowledge, in writing, his duty to register in the commonwealth and in any state where he resides, is employed, carries on a vocation or is a student, to verify registration information and to give notice of change of

address or intended change of address within the commonwealth or in another state and the penalties for failure to do so and for giving false registration information, and of his right to submit to the board, according to section 178L, documentary evidence relative to his risk of reoffense, the degree of dangerousness posed to the public and of his duty to register under this section. If such sex offender is a juvenile at the time of such adjudication, the legal guardian or agency having custody of the juvenile and his most recent attorney of record shall also be required to acknowledge, in writing, such information. The court shall cause such sex offender's registration data which, for purposes of this paragraph, shall include identifying factors, anticipated future residence, any anticipated secondary addresses, offense history and documentation of any treatment received for a mental abnormality to be transmitted to the board within five days of sentencing. The board shall promptly transmit the registration data to the police departments in the municipalities where such sex offender intends to live and work and where the offense was committed and to the Federal Bureau of Investigation. A sex offender shall, within two days of receiving such notice or of release from confinement, whichever is later, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution.

(d) Any court which accepts a plea for a sex offense shall inform the sex offender prior to acceptance and require the sex offender to acknowledge, in writing, that such plea may result in such sex offender being subject to the provisions of sections 178C to 178P, inclusive. Failure to so inform the sex

offender shall not be grounds to vacate or invalidate the plea.

(e) Upon written motion of the commonwealth, a court which enters a conviction or adjudication of delinquent or as a youthful offender may, at the time of sentencing, having determined that the circumstances of the offense in conjunction with the offender's criminal history does not indicate a risk of reoffense or a danger to the public, find that a sex offender shall not be required to register under sections 178C to 178P, inclusive. Such motion by the commonwealth shall state the reasons for such motion with specificity. The court may not make such a finding if the 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; has been convicted of a sex offense involving a child or a sexually violent offense; or if the sex offender is otherwise subject to minimum or lifetime registration requirements as determined by the board pursuant to section 178D.

(f) In the case of a sex offender who has been convicted of a sex offense or adjudicated as a youthful offender or as a delinquent juvenile by reason of a sex offense, on or after December 12, 1999, and who has not been sentenced to immediate confinement, the court shall, within 14 days of sentencing, determine whether the circumstances of the offense in conjunction with the offender's criminal history indicate that the sex offender does not pose a risk of reoffense or a danger to the public. If the court so determines, the court shall relieve such sex offender of the obligation to register under sections 178C to 178P, inclusive. The court may not make such a determination or finding if the 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; has been convicted of a sex offense involving a child or a sexually violent offense; or if the sex offender is otherwise subject to minimum or lifetime registration requirements as determined by the board pursuant to section 178D.

(g) A sex offender who moves into the commonwealth from another jurisdiction shall, within two days of moving into the commonwealth, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution. The board shall transmit the registration data to the police department in the municipality where such sex offender intends to live and work and, if the sex offender intends to work at or become a student at an institution of higher learning, to the police departments in the municipalities where the sex offender will work or attend such institution and shall transmit the same to the Federal Bureau of Investigation.

(h) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to move to a different city or town within the commonwealth shall, not later than ten days prior to establishing such new residence, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or

full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution. The board shall transmit notice of such change of address to all the police departments in the municipalities where the offense was committed, where the sex offender last registered and where the sex offender intends to live or attend an institution of higher learning and shall transmit the same to the Federal Bureau of Investigation. A sex offender required to register pursuant to said sections 178C to 178P, inclusive, who intends to change his address within a city or town shall notify the board in writing not later than ten days prior to establishing such new residence. The board shall transmit notice of the change of address to the police departments within such city or town, in the municipality where the offense was committed and to the Federal Bureau of Investigation.

(i) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to move out of the commonwealth shall notify the board not later than ten days before leaving the commonwealth. The board shall transmit notice of the change of address to the police departments in the municipalities where such sex offender last registered, where the offense was committed and to the Federal Bureau of Investigation. The board shall notify such sex offender of the duty to register in the new jurisdiction and shall forward a copy of his registration data to the appropriate law enforcement agency in such new jurisdiction.

(j) A sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to change his work address shall notify the board in writing not later than ten days prior to establishing the new work address. The board shall transmit notice of the change of address and, if the sex offender is or intends to become employed part-time or full-time at an institution of higher learning, the name and address of the institution to the police department in the

municipalities where such sex offender previously worked, where such sex offender intends to work, where such sex offender resides or intends to reside and where the offense was committed. The board shall transmit notice of the change of address to the Federal Bureau of Investigation.

(k) The registrar of motor vehicles shall inform a person applying for or renewing a license to operate a motor vehicle that he has a duty to register with the board if such person is a sex offender, pursuant to regulations established by the board.

(l) Except as hereinbefore provided, a sex offender residing or working in the commonwealth or working at or attending an institution of higher learning in the commonwealth shall, within ten days of the effective date of this section, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of the institution, and, if the sex offender is or intends to become a part-time or full-time student of an institution of higher learning, the name and address of the institution. The board shall promptly transmit the registration data to the police departments where the sex offender intends to live and work, where the offense was committed and, if the sex offender intends to work at or become a student at an institution of higher learning, to the police departments in the municipalities where the sex offender will work or attend such institution and to the Federal Bureau of Investigation. The board shall send written notification of the requirements of sections 178C to 178P, inclusive, to the last known address of all sex offenders residing in the commonwealth who, prior to the effective date of this section, have been released from all custody and supervision. If any such sex offender is a

juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or the agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record.

(m) Upon registering, verifying registration information or giving notice of change of address or intended change of address under this section, a sex offender shall provide independent written verification of the address at which he is registered or, if changing address, will be registered.

(n) Registration data received by the board and disseminated to law enforcement pursuant to this section shall not be disseminated to the public except in accordance with sections 178D, 178I, 178J and 178K.

(o) A sex offender who plans to work at or attend an institution of higher learning part-time or full-time in the commonwealth shall, within 10 days prior to commencing employment or enrollment in classes at an institution of higher learning, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address, and the name and address of the institution of higher learning. The board shall transmit notice of such change of address to all police departments in the municipalities where the sex offender plans to work at or attend an institution of higher learning and shall transmit the same to the Federal Bureau of Investigation.

(p) A sex offender required to register pursuant to section 178C to 178F, inclusive, who intends to transfer from the institution of higher learning he is attending or stop attending shall notify the board in writing not later than 10 days before leaving the present institution of higher learning and shall provide the board with the name and address of the new institution of higher learning, if applicable. The board shall transmit notice of any such change of address to

all police departments in the municipalities where the sex offender previously attended an institution of higher learning and, if applicable, to the police department in the municipality where the sex offender plans to attend an institution of higher learning. The board shall transmit notice of any change of address for the institution of higher learning to the Federal Bureau of Investigation.

(q) Any nonresident person enrolled on a full-time or part-time basis, in any public or private education institution in the commonwealth, including any secondary school, trade or professional institution, shall register with the board if such person is required to register as a sex offender in the state in which he resides. Such student shall, within 10 days of attending such institution, register by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the student's name, date of birth, home address, any secondary addresses and the name and address of the educational institution he is attending.

Section 178F: Annual verification of registration data; homeless sex offenders; juveniles; disclosure of information

Section 178F. Except as provided in section 178F1/2 for a sex offender finally classified by the board as a level 2 or a level 3 sex offender, a sex offender required to register pursuant to sections 178C to 178P, inclusive, shall annually verify that the registration data on file with the board remains true and accurate by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury, the sex offender's name, date of birth, home address or intended home address, any secondary addresses or intended secondary addresses, work address or intended work address and, if the sex offender is or intends to become a part-time or full-time employee of an institution of higher learning, the name and address of said institution and, if the sex offender is a part-time or full-time student at an institution of higher learning or intends to become a part-time or full-time student of an institution of higher learning, the name and address of said institution of higher learning. A homeless sex offender shall verify registration data every 30 days with the board by mailing to the board on a form approved by the board and signed under the pains and penalties of perjury the sex offender's name, date of birth, primary address, any secondary addresses and work address. A homeless shelter receiving state funding shall cooperate in providing information in the possession of or known to such shelter, when a request for information is made to such shelter by the board; provided, however, that such request for information shall be limited to that which is necessary to verify an offender's registration data or a sex offender's whereabouts. A shelter that violates the provisions of this paragraph shall be punished by a fine of \$100 a day for each day that such shelter continues to violate the provisions of this paragraph. In addition, in each subsequent year during the month of birth of any sex offender required to register, the board shall mail a nonforwardable

verification form to the last reported address of such sex offender. If such sex offender is a juvenile at the time of such notification, notification shall also be mailed to such sex offender's legal guardian or the agency having custody of the juvenile in the absence of a legal guardian and his most recent attorney of record. Such sex offender shall, within five days of receipt, sign the verification form under the penalties of perjury and mail it back to the board. The board shall periodically, and at least annually, send written notice to a city or town police department regarding any sex offender required to register whose last known address was in such city or town or who gave notice of his intent to move to or is otherwise believed to live or work or attend an institution of higher learning in such city or town, but who has failed to register or verify registration information as required.

The board shall examine through electronic transfer of information the tax returns, wage reports, child support enforcement records, papers or other documents on file with the commissioner of revenue or any other entity within the executive branch when there is reason to believe a sex offender required to register has not so registered in accordance with this chapter or where the address of such sex offender cannot be verified through other means; provided, however, that nothing herein shall be construed to authorize the disclosure, directly or indirectly, of any information other than the address of such sex offender.

G.L. c. 151A § 1(k)
Section 1: Definitions

Section 1. The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise:

. . .

(h) "Employee", any individual employed by any employer subject to this chapter and in employment subject thereto.

(i) "Employer", any employing unit subject to this chapter, the commonwealth, its instrumentalities, political subdivisions, their instrumentalities, any instrumentality of more than one of the foregoing, and any instrumentality of any of the foregoing and one or more other states or political subdivisions. An instrumentality of a political subdivision may include municipal hospitals, municipal electric companies, municipal water companies, regional school districts and any such other instrumentalities as are financially independent and are created by statute.

For the purposes of this chapter, the commonwealth, including all its branches and departments and its hospitals and institutions of higher education, shall be deemed to be one employer. Each political subdivision shall be deemed to be one employer. Each instrumentality of the commonwealth, or of any political subdivision, or of any combination thereof including any one or more of the foregoing and any one or more states shall be deemed to be a separate employer. In a city or town "employer" for the purpose of electing to become a rated governmental employer or to make payment in lieu of contribution shall mean the city manager in a city having a city manager, the mayor in any other city, the town manager in a municipality having a town council form of government and the selectmen in any other town.

(j) "Employing unit", any individual or type of organization including any partnership, firm, association, trust, trustee,

estate, joint stock company, insurance company, corporation, whether domestic or foreign, or his or its legal representative, or the assignee, receiver, trustee in bankruptcy, trustee or successor of any of the foregoing or the legal representative of a deceased person who or which has or subsequent to January first, nineteen hundred and forty-one, had one or more individuals performing services for him or it within this commonwealth.

(k) "Employment", service, including service in interstate commerce, performed for wages or under any contract, oral or written, express or implied, by an employee for his employer as provided in this section and in sections two, three, four A, five, six and eight C.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Mass. R. App. P. 16(k), the foregoing brief complies with the rules of court pertaining to the filing of briefs. This brief complies with the type-volume limitation of Mass. R. App. P. 20(a)(2)(A) because it was prepared in Microsoft Word and contains 4,488 words, 0 excluded, in the proportionally spaced Century Schoolbook 14-point font.

/s/ Eric Tennen
Eric Tennen

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing brief and accompanying Record Appendix was made on the attorney of record for the Commonwealth, Steven Nadeau, ADA Bristol County, by the Electronic Filing System this 27 day of January, 2020 by sending to:

stephen.nadeau@state.ma.us

/s/ Eric Tennen
Eric Tennen
B.B.O. No. 650542
Swomley & Tennen, LLP
50 Congress Street, Ste 600
Boston, MA 02109
Tel. 617-227-9443
etennen@swomleyandtennen.com