

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BRISTOL, ss.

2020 SITTING

SJC-12875

COMMONWEALTH

V.

FRANCIS HARDING

**ON APPEAL FROM A JUDGMENT OF THE
BRISTOL SUPERIOR COURT**

COMMONWEALTH'S BRIEF

Respectfully submitted,

**THOMAS M. QUINN, III
District Attorney**

**Stephen C. Nadeau, Jr.
Assistant District Attorney
Bristol District
BBO # 683149
888 Purchase Street
New Bedford, MA 02740
(508) 997-6333
stephen.nadeau@state.ma.us**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	3
ISSUES PRESENTED	4
STATEMENT OF THE CASE	4
STATEMENT OF THE FACTS	6
ARGUMENT	8
I. SEX OFFENDERS MUST REGISTER ALL EMPLOYMENT INFORMATION THAT MEETS THE STATUTORY DEFINITION, EVEN IF THE WORK IS TEMPORARY AND SUBSIDIARY TO THEIR PRIMARY EMPLOYMENT	8
II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JUDGE'S CONCLUSION THAT THE DEFENDANT'S WORK AT A RESIDENCE OUTSIDE HIS WORKSHOP CONSTITUTED "EMPLOYMENT," BUT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT HE KNOWINGLY FAILED TO REGISTER THAT LOCATION AS AN EMPLOYMENT ADDRESS	12
III. EVIDENCE THAT THE DEFENDANT WORKED IN A HOME WHILE A CHILD WAS PRESENT WAS SUFFICIENT TO SHOW HE VIOLATED THE CONDITION OF HIS PROBATION THAT HE NOT WORK WITH CHILDREN	14
CONCLUSION	16
ADDENDUM	17
CERTIFICATION	34
CERTIFICATE OF SERVICE	35

TABLE OF AUTHORITIES

Cases

Commonwealth v. Arce, 467 Mass. 329 (2014)	10
Commonwealth v. Becker, 71 Mass. App. Ct. 81 (2008)	10
Commonwealth v. Bolling, 72 Mass. App. Ct. 618 (2008)	11
Commonwealth v. Bush, 427 Mass. 26 (1998)	13
Commonwealth v. Hill, 52 Mass. App. Ct. 147 (2001)	13
Commonwealth v. Kendrick, 446 Mass. 72 (2006)	14,15
Commonwealth v. Rosado, 450 Mass. 657 (2008)	12,14
Commonwealth v. Scipione, 69 Mass. App. Ct. 906 (2007)	11
Commonwealth v. White, 452 Mass. 133 (2008)	13
Doe v. Sex Offender Registry Bd., 447 Mass. 768 (2006)	8

Statutes

G.L. c. 6, § 178C	10,12
G.L. c. 6, § 178E	9
G.L. c. 265, § 13B	5
G.L. c. 272, § 29C	5

ISSUES PRESENTED

1. Must sex offenders register multiple employment addresses when the work at each meets the statutory definition, even if the work is temporary or subsidiary to the offender's primary employment?
2. Even though the record was insufficient to prove that the defendant knowingly failed to register his employment information, was there sufficient evidence to show that the work qualified for the registration requirement?
3. Was there sufficient evidence to prove that the defendant violated the condition of his probation that forbade him from working with children?

STATEMENT OF THE CASE¹

On or about April 28, 2015, facing allegations in the New Bedford District Court that he committed various sex offenses involving a child, the defendant, Francis Harding, entered into a plea agreement that dismissed three of the charges in exchange for his guilty pleas to a single count each of indecent

¹ Record references are cited as follows: hearing transcripts [Tr.vol./page] (this brief follows the same format as in the defendant's brief [DB.7]); the defendant's record appendix [RA.]; the defendant's brief [DB.].

assault and battery on a child under fourteen, in violation of G.L. c. 265, § 13B, and possessing child pornography, in violation of G.L. c. 272, § 29C [Tr.1/10;RA.12-13].

The Court (Hernon, J.) imposed concurrent five-year terms of probation with various conditions. The conditions relevant to this appeal are that the defendant register his workplace address(es) with the Sex Offender Registry Board and that he not work with children under 16 [Tr.1/10].

On or about April 6, 2018, the Probation Department served the defendant with a notice that he had allegedly violated the employment-registration condition. Then, on or about April 11, the department served a second notice alleging that he had similarly violated the work-with-children condition [Tr.1/142-43;RA.18].

Following the surrender hearing on July 24, 2018, the Court (Brackett, J.) found the defendant in violation of both conditions [Tr.1/142-43;RA.15]. At the sentencing hearing on September 4, 2018, the Court extended the defendant's probationary term for one year [Tr.2/32].

The defendant now appeals the finding of violation and the order extending his probation sentence [RA.16,37].

STATEMENT OF FACTS

The defendant's probationary term began in April 2015, and was due to expire in April 2020. While on probation, he worked as a home-improvement contractor operating out of a workshop at his residence in Newton and properly registered this information with the Sex Offender Registry Board (SORB). The defendant sometimes registered directly with SORB, and other times at the Newton Police Department. The Newton detective responsible for SORB registration and oversight informed him during their January 2017 meeting that he would have to notify them within ten days of any change in his work address [Tr.1/6,10,36,38-39,46,53].

The allegations in this case cover an approximate period from September 2017 through April 2018, during which the defendant did some work at a home in Lynn. Throughout this period, as part of his obligation to show proof of employment, he provided the Probation Department with thirteen invoices documenting the specific work he performed there. However, he did not

register this information with SORB or with any police department [Tr.1/6,14;RA.24-36].

The Lynn homeowners, who did not know that the defendant was a sex offender, became parents at some point while the defendant worked there. The defendant occasionally worked inside the house while the infant was present [Tr.1/63-64]. The defendant wore a GPS device as a condition of his probation, and the GPS records showed that, from "the beginning of February right through April" 2018, there were more than thirty days when he went to the Lynn location [Tr.1/74]. The defendant himself acknowledged that, during the period when he worked in Lynn, he was sometimes at the home several times a week [Tr.1/114,116].

During the time he worked in Lynn, the defendant had an interaction with police officer in Revere who asked where he worked. The defendant replied that he worked in Lynn, though not on a regular basis. Following that encounter, he contacted the Newton Police Department and update his SORB information with the address of the Lynn residence [Tr.1/27-30,41-42].

ARGUMENT

I. SEX OFFENDERS MUST REGISTER ALL EMPLOYMENT INFORMATION THAT MEETS THE STATUTORY DEFINITION, EVEN IF THE WORK IS TEMPORARY AND SUBSIDIARY TO THEIR PRIMARY EMPLOYMENT.

The defendant first argues that, under the SORB statutory scheme, his place of employment "was his home workshop and that was the only address he had to register" [DB.14]. The defendant posits several examples purporting to show an absurdity of a contrary requirement [DB.14-15], but ignores that the interpretation would be inconsistent with the entire purpose that registration serves: ensuring that authorities know where sex offenders live and work so they can monitor the offenders to prevent recidivism and protect the public, particularly where children are at risk. See, e.g., *Doe v. Sex Offender Registry Bd.*, 447 Mass. 768, 769 (2006) (noting that the statutory scheme "was adopted to protect the public from 'the danger of recidivism posed by sex offenders'").

For instance, the defendant suggests that his lawyer would have to register only his office and not the courthouse he attends several times a week to represent clients [DB.14]. In the hypothetical

scenario where a lawyer kept his license despite being a sex offender, the defendant's interpretation would allow the lawyer to conceal from authorities the fact that he regularly appears in the Juvenile Court. Likewise, sex offenders in various fields could conceal their participation in part-time, work-related activities in schools or youth-oriented programs.

In any event, the statutory scheme suggests no reason to believe that the Legislature intended to treat a sex offender's places of employment differently from his residences. Sex offenders must register not only the address of their primary residence, but also any secondary residences. See generally G.L. c. 6, § 178E. Their obligation to register changes of address "not later than ten days prior to establishing" the address applies equally to secondary residences, G.L. c. 6, § 178E(h), and to places of employment, G.L. c. 6, § 178E(j).

Likewise, the Legislature has defined both terms similarly. A "secondary address" is one, other than the primary residence, "where a sex offender lives . . . for a period of 14 days in the aggregate during any calendar year[;] . . . or a place where a sex offender routinely lives . . . for a period of 4 or

more consecutive or nonconsecutive days in any month[.]” G.L. c. 6, § 178C. And the term “employment” covers work “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.” *Id.*

The Appeals Court has already determined that an offender must register the address of a residence even if he is merely “spen[ding] the summer months in the Berkshires,” establishing that even temporary addresses fall within the scope of the registration obligation. *Commonwealth v. Becker*, 71 Mass. App. Ct. 81, 88 (2008) (“Even if he may be categorized as a temporary or part-time resident, he was still a ‘resident’ for purposes of the statute.”). *See also Commonwealth v. Arce*, 467 Mass. 329, 333 (2014) (“Therefore, under the broadest definition afforded by the statute, the Commonwealth must show that the defendant ‘lodged’ at the apartment by ‘stay[ing] overnight’ for four days in [one month]’). While the defendant protests that registering temporary employment addresses would create an undue hardship [DB.19-20], the burden is no heavier than the one imposed upon an offender who wants to go on vacation.

There may be circumstances where the fleeting or transitory nature of a particular employment arrangement defies the statutory scheme, making both compliance and enforcement difficult. Such difficulties have also been recognized in the residency context without limiting the registration requirement for temporary residences. See *Commonwealth v. Bolling*, 72 Mass. App. Ct. 618, 626 (2008) ("The difficulties fitting homeless persons into the statutory scheme are not newly discovered"); *Commonwealth v. Scipione*, 69 Mass. App. Ct. 906, 907 (2007) ("[T]he fact that the statute does not particularly state when homeless sex offenders not living in a homeless shelter should register does not nullify the defendant's registration requirement"). Those complications at the margins do not exempt an offender from registering a place of employment where, as here, the defendant works consistently for a period of weeks stretching into months. Accordingly, such "temporary" workplaces are subject to the registration in the same way that temporary residences are.

II. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JUDGE'S CONCLUSION THAT THE DEFENDANT'S WORK AT A RESIDENCE OUTSIDE HIS WORKSHOP CONSTITUTED "EMPLOYMENT," BUT THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT HE KNOWINGLY FAILED TO REGISTER THAT LOCATION AS AN EMPLOYMENT ADDRESS.

Next, the defendant argues that there was insufficient evidence to support the hearing judge's conclusion that the defendant failed to register his employment address in Lowell [DB.24]. As discussed in Part I of this argument, *supra*, the statutory scheme requires an offender to register even temporary employment if it meets the statutory definition: work "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 burden was on the Commonwealth to prove that the defendant's work was subject to the registration requirement and that he knowingly failed to register the employment information. *Commonwealth v. Rosado*, 450 Mass. 657, 662 (2008). "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."

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

Here, the defendant testified that he worked at the Lynn residence several times a week over a period of several months. The thirteen invoices he submitted to the Probation Department, showing thirteen different weeks he worked there, demonstrate the nature and extent of the labor he performed [RA.24-36]. Even without the GPS evidence showing the frequency of his travel to Lynn, the judge could reasonably infer that the defendant's work there exceeded thirty days in a year. See *Commonwealth v. Bush*, 427 Mass. 26, 30 (1998) ("An inference drawn from circumstantial evidence 'need only be reasonable and possible; it need not be necessary and inescapable.'"), quoted in *Commonwealth v. White*, 452 Mass. 133, 136 (2008).

The Commonwealth concedes, however, that there was insufficient evidence to prove the defendant's knowledge. He never attempted to conceal his work in Lynn from official oversight, even submitting proof of that work, with the address clearly displayed, to the Probation Department. When a police officer in Revere approached him, he immediately acknowledged working in

Lynn, and the evidence established that the defendant generally complied with his registration obligations from year to year. The definition of "employment" in this context is hardly intuitive, and the registration forms offer little guidance (although they do provide space to provide employment information for more than one job). See *Rosado*, 450 Mass. at 663 (form's ambiguity relevant in assessing defendant's culpability).

Given these considerations, the record does not support the inference that the defendant knowingly failed to register his employment in Lynn.

III. EVIDENCE THAT THE DEFENDANT WORKED IN A HOME WHILE A CHILD WAS PRESENT WAS SUFFICIENT TO SHOW HE VIOLATED THE CONDITION OF HIS PROBATION THAT HE NOT WORK WITH CHILDREN.

While the defendant may reasonably have misunderstood his obligation to report multiple employment addresses, the same cannot be said for his obligation to refrain from work with children. While "[d]ue process requires that a probationer receive fair warning of conduct that may result in revocation of probation[,] . . . [p]robation conditions . . . need not provide the fullest warning imaginable." *Commonwealth v. Kendrick*, 446 Mass. 72, 75 (2006).

"Reading the condition with due regard to the circumstances in which it was imposed," *id.*, it is unlikely the sentencing judge intended merely to prevent the defendant, a contractor, from working with children as customers of his business or with them directly in some other capacity.

The purpose of such a condition is plainly to prevent a sex offender from being able to use his employment as an opportunity to access potential victims. The defendant's work in this case was not confined to a shop or professional location; it brought him directly inside a child's home. A more intimate point of access is difficult to imagine, and it is precisely this type of proximity that the defendant's probation was designed to prevent. Accordingly, "a reasonable person should have understood that" the terms of his probation "precluded the defendant's activities[.]" *Id.*

CONCLUSION

For the foregoing reasons, the finding of probation violation and the order extending the defendant's sentence should be affirmed.

Respectfully submitted,

THOMAS M. QUINN, III
District Attorney



Stephen C. Nadeau, Jr.
Assistant District Attorney
Bristol District
BBO # 683149
P.O. Box 973
888 Purchase Street
New Bedford, MA 02740
(508) 997-6333
stephen.nadeau@state.ma.us

ADDENDUM

Table of Contents

G.L. c. 6, § 178C	17
G.L. c. 6, § 178E	23
G.L. c. 265, § 13B	32
G.L. c. 272, § 29C	32

G.L. c. 6, § 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; engaging in sexual contact with an animal under section 77C 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 13B½ 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.

G.L. c. 6, § 178E

Transmission of Registration Data to Board; Sex Offender's Duty to Register.

(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.

(b) 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.

G.L. c. 265, § 13B

Indecent Assault and Battery on Child Under Fourteen.

Whoever commits an indecent assault and battery on a child under the age of 14 shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years. A prosecution commenced under this section shall neither be continued without a finding nor placed on file.

In a prosecution under this section, a child under the age of 14 shall be deemed incapable of consenting to any conduct of the defendant for which such defendant is being prosecuted.

G.L. c. 272, § 29C

Child Pornography - Purchase or Possession.

Whoever knowingly purchases or possesses a negative, slide, book, magazine, film, videotape, photograph or other similar visual reproduction, or depiction by computer, of any child whom the person knows or reasonably should know to be under the age of 18 years of age and such child is:

- (i) actually or by simulation engaged in any act of sexual intercourse with any person or animal;
- (ii) actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus or sex organs of the child and the sex organs of another person or animal;
- (iii) actually or by simulation engaged in any act of masturbation;
- (iv) actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, or caressing involving another person or animal;

(v) actually or by simulation engaged in any act of excretion or urination within a sexual context;

(vi) actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or

(vii) depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person is female, a fully or partially developed breast of the child; with knowledge of the nature or content thereof shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than \$1,000 nor more than \$10,000, or by both such fine and imprisonment for the first offense, not less than five years in a state prison or by a fine of not less than \$5,000 nor more than \$20,000, or by both such fine and imprisonment for the second offense, not less than 10 years in a state prison or by a fine of not less than \$10,000 nor more than \$30,000, or by both such fine and imprisonment for the third and subsequent offenses.

A prosecution commenced under this section shall not be continued without a finding nor placed on file.

The provisions of this section shall not apply to a law enforcement officer, licensed physician, licensed psychologist, attorney or officer of the court who is in possession of such materials in the lawful performance of his official duty. Nor shall the provisions of this section apply to an employee of a bona fide enterprise, the purpose of which enterprise is to filter or otherwise restrict access to such materials, who possesses examples of computer depictions of such material for the purposes of furthering the legitimate goals of such enterprise.

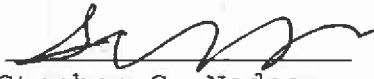
Certificate of Service

RE: Commonwealth v. Francis Harding
2019-P-0468

I hereby certify that I have today served upon counsel for the Defendant a copy of the Commonwealth's brief and record appendix by e-filing to:

Eric Tennen
50 Congress Street # 600
Boston, Ma. 02109
etennen@swomleyandtennen.com

-


Stephen C. Nadeau,
Assistant District Attorney

Dated: January 29, 2020


CERTIFICATION

Commonwealth v. FRANCIS HARDING
2019-P-0468

As counsel for the Commonwealth, I certify that this brief complies with the rules of the court pertaining to the filing of briefs, including Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R.A.P. 16(e) (references to the record); Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h) (length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

This brief is produced in monospaced font. Courier 12, and contains less than 50 pages from the statement of the issues through the conclusion.

COMMONWEALTH OF MASSACHUSETTS

A handwritten signature in dark ink, appearing to read "Stephen C. Nadeau, Jr.", is written over a horizontal line.

Stephen C. Nadeau, Jr.
Assistant District Attorney