COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

Essex County 2022-P-0785

COMMONWEALTH,
Appellee,

v.

MICHAEL J. MCNEIL,
Appellant.

On Appeal from a Judgment
of the Salem District Court

Brief for the Appellant Michael J. McNeil

October 17, 2022

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Issue Presented

Persons convicted under the shoplifting statute, G.L. c. 266, § 30A, are subject to enhanced sentencing for second, third, and subsequent "offense[s]." McNeil was adjudicated a third offender under the statute, but one of the predicates for the adjudication was guilty filed. Was the adjudication invalid as a matter of law when guilty-filed dispositions are not convictions for purposes of the repeat-offender provisions of the shoplifting statute?

Statement of the Case

The defendant Michael J. McNeil appeals from his conditional plea of guilty to shoplifting by asportation of goods valued at less than $250, third offense. At the conditional plea hearing, he reserved his right to challenge on appeal the legality of his adjudication as a third offender because one of his prior offenses was a guilty-filed disposition. The judge who accepted McNeil's conditional plea had previously reported this question to the Court under Mass. R. Crim. P. 34 (R. 18-33).[1]

On June 25, 2021, Lynn District Court Complaint 2113-CR-1878 charged McNeil with shoplifting by asportation of goods valued at less than $250, third offense (G.L. c. 266, § 30A) (R. 3). The complaint alleged that McNeil had previously been convicted of "such offense two or more times, in violation of G.L. c. 266, § 30A" (R. 3).

On July 23, 2021, an order issued from the Lynn District Court transferring the case as well as two other cases involving McNeil to the Salem District Court "to avoid a conflict of interest or appearance thereof" (R. 10). *See* G.L. c. 211B, § 10(iv). On July 28, the case was entered in the Salem District Court under Docket Number 2136-CR-1198 (R. 5).

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[1] Numbers preceded by "R." refer to the pages of McNeil's record appendix. Those preceded by "P." refer to the pages of the transcript of the plea hearing.

On February 17, 2022, McNeil moved to dismiss that part of the complaint alleging that he was a third offender under G.L. c. 266, § 30A (R. 6, 11-17). He asserted that he had only one prior conviction for shoplifting, the remaining shoplifting cases appearing on his criminal record having been guilty filed (R. 12, 13). He argued that guilty-filed dispositions do not constitute convictions, that he was at most a second offender, and that the third-offender charge should be dismissed (R. 16-17).

On February 28, a hearing was held on McNeil's motion, and the judge took the motion under advisement (Chapman, J.) (R. 6).

On March 25, 2022, the judge reported the question raised in McNeil's motion to dismiss to this Court under Mass. R. Crim. P. 34: "Where a defendant is charged with third offense shoplifting, does a 'guilty-filed' disposition on a shoplifting charge constitute a conviction which may be used as a predicate offense?" (R. 7, 18-33).

On May 2, 2022, this Court entered the judge's reported question on its docket under Docket Number 2022-P-0402.

Then on June 9, 2022, McNeil entered, under Mass. R. Crim. P. 12(b)(6), a conditional plea to shoplifting, third offense, reserving his right to appeal the issue raised by the judge's reported question—whether a guilty-filed disposition constitutes a conviction for purposes of repeat-offender statutes such G.L. c. 266, § 30A (R. 34-35; P. 16-17). In exchange for his plea, the judge sentenced McNeil to one year in the House of Correction, to run concurrently with the concurrent, one-

year, House-of-Correction terms that he received for his pleas under Docket Numbers 2136-CR-1196 and 2036-CR-1197 (Chapman, J.) (R. 34; P. 18-19). According to the parties' written agreement, if McNeil prevails on appeal, then on remand the Commonwealth will amend the charge to shoplifting, second offense under G.L. c. 266, § 30A, and a penalty of $500 will be imposed as punishment, at the discretion of the sentencing judge (R. 34).

On June 15, 2022, McNeil timely filed a notice of appeal form his conditional plea (R. 36).

On August 16, 2022, this Court entered McNeil's appeal from his conditional plea on its docket and consolidated it with the appeal involving the judge's reported question (Docket Number 2022-P-0785).

Statement of Facts

1. The conditional plea.

1.1 The parties' written agreement under Mass. R. Crim. P. 12(b)(6).

On June 9, 2022, the parties submitted a tender-of-plea form reflecting their agreement concerning a conditional plea under Mass. R. Crim. P. 12(b)(6) (R. 34-35). Pursuant to the agreement, McNeil would conditionally plead guilty to shoplifting, third offense, reserving his right to appeal the issue raised in the judge's previously reported question to this Court—whether a guilty-filed disposition may serve as the predicate for a repeat-offender adjudication (R. 34; P. 6-7).

In exchange for McNeil's plea, McNeil would be sentenced to one year in the House of Correction, to run concurrently with the concurrent one-year terms that he would receive on each of his contemporaneous pleas to larceny from a building under Docket Number 2136-CR-1196 and carrying a dangerous weapon under Docket Number 2136-CR-1197 (R. 34).

The parties further agreed that should McNeil prevail on appeal, the Commonwealth on remand would amend the charge to shoplifting, second offense, and McNeil would be resentenced to a $500 fine, his punishment remaining in the sentencing judge's discretion (R. 34).

1.2 The recitation of the facts.

The prosecutor recited the facts underlying the shoplifting charge (P. 12-13):

On June 22, 2021, Swampscott police officers were dispatched to the Walgreens at 505 Paradise Road on a report of shoplifting (P. 12). The store manager showed the officers footage from a surveillance camera, which depicted the following:

At 9:01 p.m., a white U-Haul van pulled into the Walgreens parking lot (P. 12). A white man entered the store and proceeded to the aisle where Red Bull, an energy drink, could be found (P. 12). Five minutes later, the same man left the aisle carrying a black duffel bag on his shoulder (P. 12). Ignoring the manager's request to stop, he left the store (P. 12).

An inventory check revealed that ten six-packs of Red Bull were missing from the aisle (P. 12). The value of each six-pack was $9.99, and the total value of the merchandise was $99.99 before taxes (P. 12).

While viewing the footage with the police, the manager identified the man as McNeil, with whom the manager had previously interacted (P. 12).

The prosecutor stated that McNeil's record reflected two prior charges of shoplifting by asportation under G.L. c. 266, § 30A: (1) under Salem District Court Docket Number 2036-CR-1693, McNeil pleaded guilty and received a sentence of three days in the House of Correction; and (2) under Lynn District Court Docket Number 1913-CR-2219, McNeil pleaded guilty, and the case was guilty filed (P. 13).

McNeil confirmed that the facts recited by the prosecutor were true and that he was pleading guilty to third-offense shoplifting (P. 13).

1.3 The plea colloquy.

In response to the judge's inquiry, McNeil stated that he was 40 years old and had received a GED (P. 13-14). He said that he did not have any psychiatric or mental-health conditions and had not consumed any drugs, alcohol, or medication within the preceding twenty-four hours (P. 14). He said that no one had threatened or coerced him to plead guilty (P. 14).

The judge confirmed with McNeil and defense counsel that defense counsel had explained the constitutional rights that McNeil would be waiving by pleading guilty, the elements of the offense to which he was pleading guilty, any possible defense he had to the charge, the maximum sentence to which he was exposed by his plea, and any immigration consequences resulting from his plea (P. 9, 13-14, 19). McNeil stated that he was satisfied with his attorney's advice and believed that counsel was acting in his best interests (P. 14-15).

The judge advised McNeil that by pleading guilty, he would be waiving certain constitutional rights, including the rights to a jury or non-jury trial at which the prosecution has the burden of proving his guilt beyond a reasonable doubt, to confront and cross-examine the prosecution's witnesses, to present his own witnesses, and to remain silent or testify on his own behalf (P. 15-16, 17). McNeil stated that he understood (P. 16).

The judge also advised McNeil that by pleading guilty, he waived his right to challenge prior rulings on any motions, with one

exception—his conditional plea's reservation of his challenge to the propriety of his third-offense conviction (P. 16, 17, 18-19). The judge further explained that if this Court ruled in McNeil's favor, his third-offense conviction would "default down to a second offense which is just a maximum fine" (P. 16-17). McNeil stated that he understood (P. 17).

Finally, the judge advised McNeil that if he was not a United States citizen, his conviction could result in his deportation, exclusion from the United States, or denial of naturalization (P. 17).

The judge accepted McNeil's conditional plea (P. 17).

2. The sentence.

The judge sentenced McNeil to one year in the House of Correction, to run concurrently with the concurrent one-year terms that he received in exchange for his pleas under Docket Numbers 2136-CR-1196 and 2136-CR-1197 (P. 18-19).

ARGUMENT

McNeil's adjudication as a third offender under the shoplifting statute was unlawful.

McNeil's conviction of being a third offender under the shoplifting statute, G.L. c. 266, § 30A, is invalid as a matter of law. He has only one prior conviction for shoplifting, the other charge relied on by the prosecutor having been guilty filed (P. 13). Guilty-filed dispositions are not convictions for purposes of repeat-offender provisions such as the one set forth in § 30A. Accordingly, McNeil is at most a second offender, and this Court must vacate his conviction of being a third offender.

When considering issues of statutory construction such as the one presented here, this Court applies the de novo standard. *See Commonwealth v. Mansur*, 484 Mass. 172, 174–75 (2020).

1. Sentencing provisions like those contained in G.L. c. 266, § 30A, treat the term "offense" as tantamount to a "conviction."

When interpreting a statute, a court is obliged "to effectuate the legislature's intent" in enacting the statute. *Wallace W. v. Commonwealth*, 482 Mass. 789, 796 (2019). Its analysis begins with the language of the statute itself, mindful of the presumption that "the Legislature intended what the words of the statute say." *Sheehan v. Weaver*, 467 Mass. 734, 737 (2014) (citations and quotations omitted); *Commonwealth v. Gopaul*, 86 Mass. App. Ct. 685, 687 (2014).

If the statute's language is clear and unambiguous, it is conclusive of legislative intent. *Thurdin v. Sei Boston, LLC*, 452 Mass. 436, 444 (2008); *Gopaul*, 86 Mass. App. Ct. at 687. When a statute does not define a term, the Legislature is presumed to have incorporated the common-law definition unless the definition conflicts with the statute's terms or purposes. *Commonwealth v. Burke*, 390 Mass. 480, 484–85 (1983); *Commonwealth v. Ricardo*, 26 Mass. App. Ct. 345, 356–57 (1988).

Enacted in 1981,[2] the repeat-offender provisions of G.L. c. 266, § 30A, provide that a person convicted of shoplifting goods valued at less than $250 may be punished as follows:

- "[F]or a first offense" by a fine of not more than $250;
- "[F]or a second offense," by a fine of not less than $100 nor more than $500; and
- "[F]or a third or subsequent offense," by a fine of not more than $500 or imprisonment in a jail for not more than two years, or both.[3]

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[2] *See* St. 1981, c. 618, § 3. The statute has been amended four times, but only the last amendment had any impact on the repeat-offender provisions, which was to increase the value of the goods from $100 to $250. *See* St. 2018, c. 69, § 139 (The 2018 amendment, effective April 13, 2018, substituted "$250" for "one hundred dollars" twice in the third to the last paragraph, and once in the second to the last paragraph.).

[3] Section 30A further provides that when the value of the goods equals or exceeds $250, "any violation of this section shall be

Section 30A does not define the term "offense," and the term "has different meanings in different contexts." *Wallace W.*, 482 Mass. at 796. In *Wallace W.*, the Supreme Judicial Court observed that sentencing statutes "tend to treat the word 'offense' as synonymous with 'conviction' or 'adjudication,'" specifically citing as an example the text of G.L. c. 266, § 30A.[4] *Id.*

Thus, this Court should rule that the word "offense" in G.L. c. 266, § 30A, means "conviction." *Id.*

2. The term "conviction" is ambiguous.

The common-law definition of conviction applies to criminal statutes unless the statute provides an alternative definition. *See Commonwealth v. Foreman*, 63 Mass. App. Ct. 801, 803 (2005) (defendant's delinquency adjudication of armed robbery with a knife could serve as a predicate for armed-career-criminal adjudication under G.L. c. 269, § 10G(a), because § 10G incorporates G.L. c. 140, § 121's definition of "violent crime," which includes designated acts of

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punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two and one-half years, or by both such fine and imprisonment." G.L. c. 266, § 30A.

[4] *See also* G.L. c. 270, § 6A ("A person who sells tobacco rolling papers to a person under the age of [21] shall be punished by a fine of [$25] for the first offense, [$50] for the second offense and [$100] for a third or subsequent offense.").

juvenile delinquency involving "deadly weapon[s]," and a knife is a deadly weapon under the common law).

But like the term "offense," the term "conviction" also has different meanings in different contexts. *See Commonwealth v. Preston*, 393 Mass. 318, 323 n.6 (1984). *See also Commonwealth v. Baldi*, 250 Mass. 528, 537–38 (1925). Most commonly, "it signifies the finding of the jury that the defendant is guilty." *Commonwealth v. Gorham*, 99 Mass. 420, 422 (1868). But "it is very frequently used as implying a judgment and sentence" upon a guilty verdict or plea. *Id.* In criminal cases, the sentence is the judgment. *Commonwealth v. Hernandez*, 481 Mass. 582, 595 (2019).

2.1 When a conviction triggers a disability, disqualification, or forfeiture, the term "conviction" is construed to include a judgment.

Generally speaking, Massachusetts courts construe the term "conviction" to imply a judgment when a statute imposes disabilities, disqualifications, or forfeitures upon conviction:[5]

- Impeachment of a witness with a prior misdemeanor conviction, G.L. c. 233, § 21;[6]

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[5] *See Notes: The Meaning of Conviction*, 30 Colum. L. Rev. 1011, 1047 (1930).

[6] *See Commonwealth v. Devlin*, 365 Mass. 149, 163 (1974) (witness's guilty-filed misdemeanor complaints were not convictions under G.L. c. 233, § 21, because they were not final judgments); *Commonwealth v. Gorham*, 99 Mass. 420, 422 (1868) (same regarding

- Forfeiture of a liquor license upon conviction of alcohol-related offenses;[7]
- Forfeiture-of-pension proceedings, G.L. c. 32, § 15(3A);[8]
- Requirement that sex offenders on probation wear GPS devices, G.L. c. 265, § 47;[9] and

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brought-forward, guilty-filed forgery indictment admitted under prior version of G.L. c. 233, § 21); *Commonwealth v. Jackson*, 45 Mass. App. Ct. 666, 670–71 (1998) (same regarding continuance without a finding); *Commonwealth v. Rossi*, 19 Mass. App. Ct. 257, 258–59 (1985) (same regarding three prior misdemeanors when one was placed on file and on the remaining two defendant received probation). *Cf. Forcier v. Hopkins*, 329 Mass. 668, 670–71 (1953) (misdemeanor convictions on which defendant received suspended sentences were convictions for purposes of impeachment because they were final judgments).

[7] *See Commonwealth v. Kiley*, 150 Mass. 325, 326 (1889) (for purposes of statute mandating loss of liquor license upon conviction for violations of provisions relating to intoxicating liquor, "nothing less than a final judgment, conclusively establishing guilt, will satisfy the meaning of the word 'conviction' as here used"). *But see Munkley v. Hoyt*, 179 Mass. 108, 112 (1901) (guilty-filed complaint for unlawful sale of intoxicating liquor was a "conviction" for purposes of statute providing for revocation of pharmacist's certificate of registration).

[8] *DiMasi v. State Board of Retirement*, 474 Mass. 194, 199–203 (2016) (In the context of forfeiture of a public employee's retirement allowance after final conviction, a "final conviction" occurs when the individual is sentenced); *State Board of Retirement v. Woodward*, 446 Mass. 698, 707 n.8 (2006) (the term "final conviction" in the pension-forfeiture statute given its "specialized technical meaning" of "the sentence imposed in a criminal proceeding".

[9] *Commonwealth v. Doe*, 473 Mass. 76, 79–84 (2015) (holding that defendant on probation under G.L. c. 265, § 47, for sex offense that

- Entitlement to relief from sex-offender registration, G.L. c. 6, § 178K(2)(d).[10]

2.2 When "conviction" is used to refer to a particular stage in a criminal proceeding, the term is construed to mean a guilty verdict or plea.

By contrast, Massachusetts courts interpret the term "conviction" as meaning a guilty plea or verdict when statutes use the term "conviction" to refer to a stage in a criminal prosecution. *Commonwealth v. Lockwood*, 109 Mass. 323, 325 (1872); *Commonwealth v. Cathy C.*, 64 Mass. App. Ct. 471, 473 (2005).

The following cases illustrate this principle:[11]

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was continued without a finding was not required to wear a GPS device because he had not been convicted of a sex offense for purposes of the statute).

[10] *Doe, Sex Offender Registry Board No. 1211 v. Sex Offender Registry Board*, 447 Mass. 750, 757 n.5 (2006) (provisions of G.L. c. 6, § 178K(2)(d)—prohibiting relief from registration for persons convicted of two or more sex offenses as defined under the Wetterling Act, requiring registration for life for persons convicted of one or more designated offenses against minor victims—did not apply to Doe because one of two counts of indecent assault and battery on a child under 14 was guilty filed).

[11] *See also* Advisory Sentencing Guidelines, Mass. Sentencing Commission, at 39 (2018) (defining "conviction" for purposes of determining criminal-history category as "any final disposition requiring a finding of guilt," including guilty-filed dispositions) (R. 23).

- Automatic revocation of a defendant's license upon conviction of operating under the influence of intoxicating liquor, G.L. c. 90, § 24(1)(b);[12]
- The governor's power to pardon offenses after conviction, Part II, c. 2, § 1, art. 8, of the Constitution of the Commonwealth;[13] and
- Trial court's authority to report a question of law after conviction to the Appeals Court, Mass. R. Crim. P. 34 & Reporter's Notes.[14]

3. Because the term "conviction" is ambiguous, this Court should strictly construe § 30A's repeat-offender provisions and rule that a conviction implies a judgment.

The rule of lenity—also called the rule of strict construction—states that when a law is unclear or ambiguous, courts should apply it

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[12] *Commonwealth v. LeRoy*, 376 Mass. 243, 245 (1978) (affirming denial of defendant's motion seeking an alternative disposition to avoid automatic revocation of his license upon conviction of operating under the influence because jury's verdict constituted a "conviction" under the statute, and revocation of defendant's license was required).

[13] *Commonwealth v. Lockwood*, 109 Mass. 323, 325 (1872) (jury verdict amounted to a "conviction" within the meaning of the pardon clause).

[14] *Commonwealth v. Carr*, 373 Mass. 617, 625–26 (1977) (under predecessor statute to Mass. R. Crim. P. 34, judge may report a question of law after conviction, which occurs after verdict but before sentence); *Commonwealth v. Baldi*, 250 Mass. 528, 536–37 (1925) (same).

in a way that is most favorable to the defendant. *See Commonwealth v. Montarvo*, 486 Mass. 535, 542 (2020). The rule applies to both sentencing and substantive provisions. *Commonwealth v. Gagnon*, 387 Mass. 567, 569 (1982).

Section 30A uses the term "offense," which is generally understood as meaning "conviction," but Massachusetts courts have defined the term "conviction" differently depending on the context. *See, supra,* pp. 15-18. Consequently, this Court should conclude that the term "conviction" is ambiguous, apply the rule of lenity, and conclude that the term "conviction" as used in the penalty provisions of the shoplifting statute implies a judgment. *See Montarvo*, 486 Mass. at 536-43 (because the habitual-offender statute, G.L. c. 279, § 25, was ambiguous concerning the lawfulness of a probationary sentence under § 25(a), the Supreme Judicial Court concluded that judges had discretion under § 25(a) to impose probation); *Wallace W.*, 482 Mass. at 799 (because the term "first offense" in G.L. c. 119, § 52—excluding from the Juvenile Court's jurisdiction juveniles who commit first offenses of six-months-or-less misdemeanors—was ambiguous, rule of lenity applied).

4. A guilty-filed disposition is not a conviction for purposes of the shoplifting statute because it is not a final judgment.

The common-law practice of placing a case on file—now codified in Mass. R. Crim. P. 28(e)—is unique to Massachusetts. *See Commonwealth v. Simmons*, 448 Mass. 687, 699 (2007). It permits a

court, after a guilty plea or verdict, to place a case on file "if public justice does not require an immediate sentence." *Commonwealth v. Bianco*, 390 Mass. 254, 257 (1983), quoting *Commonwealth v. Dowdican's Bail*, 115 Mass. 133, 136 (1874). The disposition is a "suspension of active proceedings" and does not constitute "a final judgment." *Bianco*, 390 Mass. at 257. For that reason, a defendant's right to appeal from a guilty-filed disposition is suspended as long as the case remains on file. *Commonwealth v. Delgado*, 367 Mass. 432, 438 (1975).

In 2007, the Supreme Judicial Court affirmed the practice of guilty-filing cases in *Commonwealth v. Simmons*. 448 Mass. at 694. It noted that the practice enjoys legislative support, specifically pointing to the enactment of criminal statutes prohibiting the filing of prosecutions under them. *Id.*, citing *Commonwealth v. Simmons*, 65 Mass. App. Ct. 274, 277 n.8 (2005).

In a footnote, the Court clarified that guilty-filed cases are not convictions because they are not final judgments:

> We note that our jurisprudence commonly has referred to this practice as placing "convictions" on file. *See, e.g.*, *Commonwealth v. Ford*, 424 Mass. 709, 713 n.2 (1997). It is well established that a judgment of conviction does not enter unless sentence is imposed, *see Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd.*, 447 Mass. 750, 757 n.5 (2006), and cases cited, meaning that the phrase "to place a conviction on file" is internally contradictory. Although this error in nomenclature is minor, we shall

> refer to the practice as placing the "case" or "indictment" on file.

Id. at 688 n.2. *See also Doe, Sex Offender Registry Board No. 1211 v. Sex Offender Registry Board*, 447 Mass. 750, 757 n.5 (2006) (guilty-filed sex offense did not constitute a conviction for purposes of disqualifying Doe from relief from sex-offender registration).

Simmons is the Supreme Judicial Court's most recent case concerning guilty-filed dispositions. It concluded that guilty-filed dispositions are not convictions, and that conclusion is unambiguous. *See United States v. Carey*, 716 F. Supp. 2d 56, 64–66 (D. Me. 2010) (Massachusetts guilty-filed dispositions were not convictions under federal armed-career-criminal statute). *Cf. United States v. Curet*, 670 F.3d 296, 303-08, 307 n.9 (1st Cir. 2012) (concluding that guilty-filed dispositions are convictions under the career-offender guidelines but declining to comment on whether *Carey* was correctly decided and noting that the ACCA language at issue in *Carey* differed from the guidelines' language).[15]

Accordingly, this Court should rule that guilty-filed dispositions do not constitute convictions for purposes of the repeat-offender

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[15] *See also* May 23, 2008 Memorandum from Executive Office of Public Safety & Security to Mass. State Police Forensic Services Group at 3-4 (based on *Simmons* and *Doe (No. 1211)*, guilty-filed dispositions are no longer recognized as "convictions" for purposes of G.L. c. 22E, § 3, requiring persons convicted of certain offenses to submit DNA samples) (R. 28-30).

provisions of the shoplifting statute and that McNeil's conviction of being a third offender under that statute was unlawful.

Conclusion

For these reasons, this Court should vacate McNeil's conviction of being a third offender under G.L. c. 266, § 30A, and remand the case to the District Court for resentencing in accordance with the parties' written agreement.

October 17, 2022

Respectfully submitted,

Michael J. McNeil

By his attorney,

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COMMONWEALTH,
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ADDENDUM

Addendum

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SALEM DISTRICT COURT
DOCKET NO. 2136CR1198

COMMONWEALTH

v.

MICHAEL MCNEIL

REPORT OF QUESTION OF LAW TO THE APPEALS COURT
PURSUANT TO MASS. R. CRIM. P. 34

Pursuant to Mass. R. Crim. P. 34, this Court reports the following question of law to the Appeals Court:

Where a defendant is charged with third offense shoplifting, does a "guilty-filed" disposition on a shoplifting charge constitute a conviction which may be used as a predicate offense?

Reported questions pursuant to Mass. R. Crim. P. 34 are appropriate where the report presents "serious questions likely to be material in the ultimate decision, and that subsequent proceedings in the trial court will be substantially facilitated by doing so." John Gilbert, Jr., Co. v. C.M. Fauci Co., 309 Mass. 271, 273 (1941). See also Commonwealth v. Cavanaugh, 366 Mass. 277 (1974) (discretion to report may be appropriate when the alternative may be dismissal of the indictment). Here, the defendant is seeking dismissal of so much of the complaint that charges a third offense. Allowing the motion would be the difference of whether the punishment

the defendant faces is a fine or incarceration, whether he is entitled to court-appointed counsel and whether the case will be a jury trial or a possible disposition. Furthermore, the answer to this report will have far-reaching application to many criminal offenses which contain sentencing enhancements that rely upon prior convictions. Finally, the answer will be important for future consideration of the imposition of "guilty-filed" dispositions.

Statement of the Case

The defendant is charged pursuant to G.L. c. 266, § 30A with a third offense shoplifting. One of the predicate offenses upon which the Commonwealth relies is a 2019 charge in the Lynn District Court where the disposition is "guilty-filed." (Docket No. 1913CR2219). The defendant argues that a "guilty-filed" cannot be used as a predicate conviction for any subsequent charge, including shoplifting. He relies upon the dicta in the footnotes of Commonwealth v. Simmons, 448 Mass. 687, 688, f. 2 (2007) and Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd., 447 Mass. 750, 757, f. 5 (2006) for the proposition that "(i)t is well established that a judgment of conviction does not enter unless sentence is imposed" and that a sentence is not imposed on a "guilty-filed" disposition.

In considering the defendant's arguments, this Court notes that there is inconsistency and confusion surrounding the use of "guilty-filed" dispositions for sentencing enhancement purposes. For example, the Massachusetts Sentencing Commission defines a "conviction" for sentencing enhancements to include "guilty-filed" dispositions. The Commission Guidelines, Step 4, Chapter 4, entitled "Determine Criminal History", reads "(a) conviction is defined as any final disposition of guilty. Examples of final dispositions considered to be convictions include: **Guilty Filed**...." (emphasis added) (Copy of Chapter 4 attached hereto, marked Attachment A).

Conversely, since 2008, the Executive Office of Public Safety and Security (EOPSS), as a direct result of Simmons, supra, has taken the position that it would no longer require DNA sample collection from those whose sole felony disposition resulted in a "guilty-filed". (See EOPSS memo attached hereto, marked Attachment B). It applied this interpretation prospectively, recognizing that there has been historical uncertainty about the use of a "guilty-filed" disposition as a conviction.

Issue

Section 30A punishes "a third or subsequent offense (shoplifting) by a fine of not more than five hundred dollars or imprisonment in a jail for not more than two years, or by both such fine and imprisonment."[1] Most appellate court decisions holding that a "guilty-filed" disposition is not a conviction, even if a jury returned the guilty verdict, focus on the "lack of finality" of the conviction for appellate purposes rather than use as subsequent or prior offenses for sentencing enhancement purposes.[2] See Simmons, 448 Mass. at 688 f.2 ("It is well established that a judgment of conviction does not enter unless sentence is imposed, [] meaning that the phrase 'to place a conviction on file' is internally contradictory. Although this error in nomenclature is minor, we shall refer to the practice as placing the 'case' or 'indictment' on file."); see also Doe, Sex Offender Registry Bd. No. 1211, 447 Mass. at 757 f. 5 ("Under established Massachusetts law, there is no judgment of conviction on a criminal charge unless a sentence is imposed.").

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[1] The statute does not define "offense." However, in Wallace W. v. Commonwealth, 482 Mass. 789 (2019), while interpreting a juvenile diversion statute, the Supreme Judicial Court held that "sentencing statutes tend to treat the word 'offense' as synonymous with 'conviction' or 'adjudication'."

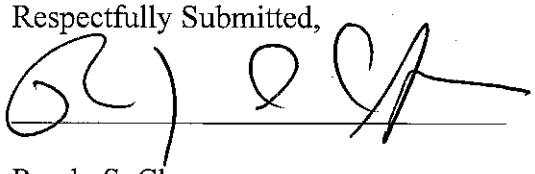
[2] Notwithstanding the "lack of finality", a witness may still be impeached with a felony where the disposition was "guilty-filed". See G.L. c. 233 sec. 21 (a party may impeach a witness with a "conviction of a felony upon which no sentence was imposed...").

Notwithstanding these cases, this Court is unaware of any decisions which squarely address whether the disposition of a "guilty-filed" can be treated as a predicate offense under a subsequent offense statute.

The interpretation of whether a "guilty-filed" disposition is a conviction for purposes of subsequent offense statutes has wide-ranging implications. Several statutes within both Superior and District Court jurisdiction have sentencing enhancement clauses that are predicated upon prior convictions. See, e.g., G.L. c. 265, § 13H (indecent assault and battery on a person fourteen or older; increased penalty for "whoever commits a second and subsequent such offense"); G.L. c. 265, § 13M (assault and battery on a family household member; increased penalty when "convicted of a second or subsequent offense"); G.L. c. 265, § 15D (strangulation; increased penalty when "having been previously convicted of the crime of strangling or suffocating another person under this section"); G.L. c. 90, § 23 (operation of motor vehicle after suspension; increased penalty "for any subsequent offence").

More immediately, the answer to the reported question will establish in this case whether the defendant is facing potential incarceration, is entitled to court-appointed representation and ultimately whether the case is likely to go to trial. It will also provide clarity to an issue which will have far reaching implications in the charging and sentencing in many other cases. Finally, it will also provide guidance to the trial courts when considering imposing "guilty-filed" dispositions in the future.

Respectfully Submitted,



Randy S. Chapman
Associate Justice of the District Court

March 23, 2022

Attachment A

Advisory Sentencing Guidelines

Massachusetts Sentencing Commission

November 2017

Step 4 / Chapter 4

Determine Criminal History Category

Based on the number and seriousness of prior convictions, place individuals to be sentenced in one of five criminal history categories: *No/Minor Record*, *Moderate Record*, *Serious Record*, *Violent or Repetitive Record*, or *Serious Violent Record*.

This is an incident-based approach for determining placement within a criminal history category. This means that multiple prior convictions with the same arraignment date are presumed to have arisen from the same criminal conduct, and are to be counted as one prior conviction based on the most serious offense of conviction. The presumption that several offenses arraigned on the same date arose from the same criminal conduct is rebuttable.

A conviction is defined as any final disposition requiring a finding of guilt. Examples of final dispositions considered to be convictions include: Guilty Filed; Guilty; Probation; Fine; House of Correction Commitment; State Prison Commitment; Split Sentence; and Suspended Sentence. Examples of final dispositions not considered to be convictions include: Dismissed; Continued Without a Finding (even with probation); Filed (absent a finding of guilt); and Not Guilty.

Prior convictions should only include those offenses which reached final disposition before the disposition date of the offense for which the defendant is being sentenced. The reader may wish to consider that deep police penetration into minority and/or poor neighborhoods may increase an individual's criminal history for certain offenses. This may be the basis for a downward departure.

To place a defendant into a criminal history group:

1. Group defendant's prior convictions by arraignment date into criminal incidents;
2. Determine if a Gap/Decay provision applies;
3. Using the Master Crime List, assign an offense seriousness level to each criminal incident based on the most serious offense of conviction;

4. Record the number of criminal incidents at offense seriousness level 1, level 2, level 3, … level 9 and;.
5. Using the criminal history definitions, assign the defendant to the appropriate criminal history category.

Considerations

Adult Gap and Decay Provisions

When calculating a defendant's criminal history for purposes of the guidelines, a period of 8 consecutive years after arraignment date including juvenile adjudications, shall be deemed to have erased the defendant's criminal history prior to that date, subject to the following exception: all prior convictions at offense seriousness levels 6 and above shall be counted for criminal history placement on the sentencing grid where the current governing offense is at offense level 6 or above.

If a person was in correctional custody, or under probation or parole supervision, excluding continuance without a finding supervision during a decay period, the judge may depart on that basis.

The judge should consider whether a shorter or longer decay period and/or departure is warranted based on the nature of the instant offense.

Juvenile Gap and Decay Provisions

No prior adjudication of delinquency for a misdemeanor shall be counted for criminal history placement on the sentencing grid. Prior adjudications of delinquency for a felony shall be counted for the criminal history placement on the sentencing grid but shall be reduced by two levels.

When calculating a defendant's criminal history for purposes of the guidelines, a period of 8 consecutive years after arraignment date including juvenile adjudications, shall be deemed to have erased the defendant's criminal history prior to that date, subject to the following exception: all prior convictions at offense seriousness levels 6 and above shall be counted for criminal history placement on the sentencing grid where the current governing offense is at offense level 6 or above.

If a person was in correctional custody, or under probation or parole supervision, excluding continuance without a finding supervision during a decay period, the judge may depart on that basis.

The judge should consider whether a shorter or longer decay period and/or departure is warranted based on the nature of the instant offense.

A youthful offender adjudication shall be treated for the purposes of calculating a defendant's criminal history score in the same manner as a delinquency adjudication where the juvenile was committed to the Department of Youth Services or received a combination sentence under G.L. c. 119, § 58(b) or (c). A youthful offender adjudication shall be treated for the purposes of calculating a defendant's criminal history score in the same manner as an adult conviction where the juvenile was sentenced to an adult sentence under G.L. c. 119, § 58(a).

Prior Convictions: Staircasing

Where a prior conviction is for a crime which has been staircased, unless one or more of the staircasing factors are ascertainable, the conviction should be assigned the lowest seriousness level for that offense.

***Illustration 3**: A defendant has a prior conviction for Assault and Battery with a Dangerous Weapon, though the degree of injury to the victim is unknown. This conviction should be placed at offense seriousness level 3, the lowest of the three seriousness levels to which a conviction for Assault and Battery with a Dangerous Weapon may be assigned.*

Prior Convictions: Multiple Incidents/Single Arraignment Date

The presumption that several offenses arraigned on the same date arose from the same criminal conduct is rebuttable. Multiple convictions with the same arraignment date may each be counted for purposes of criminal history placement on the sentencing guidelines grid where the court is satisfied that each such conviction represents separate criminal conduct.

Prior Convictions: Single Incident/Multiple Arraignment Dates

Multiple convictions with different arraignment dates may be treated as the same criminal conduct for purposes of criminal history placement on the sentencing guidelines grid where the court is satisfied that such convictions represent the same criminal conduct.

Figure 2. Criminal History Categories

E **Serious Violent Record**
Two or more prior convictions in any combination for offenses in Level 7 through 9

D **Violent or Repetitive Record**
Six or more prior convictions in any combination for offenses in Levels 3, 4, 5, or 6; or
Two or more prior convictions in any combination for offenses in Levels 5 or 6; or
One prior conviction for offenses in Levels 7 through 9

C **Serious Record**
Three to five prior convictions in any combination for offenses in Levels 3 or 4; or
One prior conviction for offenses in Levels 5 or 6

B **Moderate Record**
Six or more prior convictions in any combination for offenses in Levels 1 or 2; or
One or two prior convictions in any combination for offenses in Levels 3 or 4

A **No or Minor Record**
One to five prior convictions in any combination for offenses in Levels 1 or 2; or
No prior convictions of any kind

ATTACHMENT 25

The Commonwealth of Massachusetts
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Deval L. Patrick
Governor

Timothy P. Murray
Lieutenant Governor

Kevin M. Burke
Secretary

MEMORANDUM

To: Massachusetts State Police Forensic Services Group

From: John A. Grossman, Undersecretary for Forensic Sciences and Technology
Gregory I. Massing, General Counsel

Re: Qualifying Offenses for Inclusion in State DNA Database

Date: May 23, 2008

This memorandum addresses under what circumstances it is appropriate to collect DNA samples for inclusion in the state DNA database, as established in chapter 22E of the General Laws of Massachusetts.

Background

The state DNA database was established by St. 1997, c. 106, which was approved September 30, 1997, with an effective date of December 29, 1997 (hereinafter "ED1"). As originally drafted, G.L. c. 22E, § 3, provided that any person "convicted" of any of 33 designated offenses,[1] "or of an attempt or a conspiracy to commit" any of those offenses "shall submit a DNA sample . . . within 90 days of such conviction."

Effective February 10, 2004 ("ED2"), G.L. c. 22E, § 3 was amended to require any person "convicted" of "an offense that is punishable by imprisonment in the state prison" (that is, a felony, see G.L. c. 274, § 1), or any person "adjudicated a youthful offender by reason of an offense that would be punishable by imprisonment in the state prison if committed by an adult," to submit a DNA sample "within 1 year of such conviction or adjudication." (Section 3 was subsequently amended to require submission of the sample within one year of the date of conviction or, if incarcerated, before release from prison, whichever occurs first. St. 2004, c. 149, § 46.)

[1] The 33 designated offenses were G.L. c. 265, §§ 1, 13, 13B, 13F, 13H, 14, 15, 16, 17, 18, 18A, 18B, 18C, 22, 22A, 23, 24, 24B, and 26; G.L. c. 266, §§ 14 and 15; and G.L. c. 272, §§ 2, 3, 4A, 4B, 16, 17, 29, 29A, 29B, 35, 35A and 53A. All of these are felonies, except G.L. c. 272, § 53A(a) (prostitution, either party); § 53A(b) is a felony (paying or accepting payment for child prostitution).

In addition, uncodified sections of the bills establishing and amending c. 22E required certain previously convicted offenders to submit DNA samples. Section 8 of the 1997 Act required that any person who had been convicted of any of the 33 designated offenses and "who is incarcerated . . . on the effective date of this act, notwithstanding the date of such conviction, shall submit a DNA sample."[2] This provision required DNA samples from anyone "incarcerated" on ED1, who had a past conviction for any of the original § 3 offenses, "regardless of the reason for the current incarceration." Murphy v. Department of Correction, 429 Mass. 736, 738 (1999). When the qualifying offenses were expanded in 2003, a similar provision was included, requiring samples from anyone "incarcerated" on ED2, regardless of the reason, who had a previous felony conviction. St. 2003, c. 197, § 2.[3] In addition, each of these uncodified sections required a sample from anyone on probation or parole, on ED1 or ED2, as the result of a qualifying offense.

Categories of Offenders Included in the Database

General Laws chapter 22E, § 3, as amended, thus creates two classes of persons eligible for inclusion in the database: persons convicted, as an adult, of any of the original 33 designated offenses on or after ED1 but before ED2, and persons convicted of a felony, as an adult or youthful offender ("YO"), on or after ED2.

In addition, the uncodified sections create four more categories of eligible offenders. The first sentence of section 8 of 1997 Act, which required samples from anyone convicted of any of the 33 offenses and incarcerated on ED1 for whatever reason, was challenged in Murphy. The basis for the challenge was that, read literally, section 8 would apply to someone who was incarcerated on the effective date, but not to someone who was incarcerated the following week, which is an irrational distinction if the purpose is to expand the database. Murphy, 429 Mass. at 741. The SJC agreed, but rather than striking section 8, it

[2] The full text of St. 1997, c. 106, § 8, is as follows: "Any person convicted of any offense listed in section 3 of chapter 22E of the General Laws, who is incarcerated in any prison or house of correction on the effective date of this act, notwithstanding the date of such conviction, shall submit a DNA sample to the department within 90 days of the effective date of this act or prior to release from custody, whichever first occurs. Any person currently on probation or parole as the result of a conviction or judicial determination resulting from a charge of any of the above listed offenses, notwithstanding of the date of such conviction or judicial determination, shall submit a DNA sample to the department within 90 days of the effective date of this act."

[3] The full text of St. 2003, c. 107, § 2, is as follows: "Any person convicted of an offense punishable by imprisonment in the state prison, and any person adjudicated a youthful offender by reason of an offense punishable by imprisonment in the state prison if committed by an adult, who is incarcerated in any prison, house of correction or department of youth services facility on the effective date of this act, notwithstanding the date of such conviction, adjudication or other judicial determination, and who has not previously submitted a DNA sample to the department under chapter 22E of the General Laws, shall, within 1 year of the effective date of this act or before release from custody or from the department of youth services, whichever first occurs, submit a DNA sample to the department. Any person currently on probation or parole as a result of such conviction, adjudication or other judicial determination, notwithstanding the date of such conviction, adjudication or judicial determination, who has not previously submitted a DNA sample to the department under said chapter 22E, shall submit a DNA sample to the department within 1 year after the effective date of this act. The submission of such DNA sample shall not be stayed pending a sentence appeal, motion for new trial, appeal to an appellate court or other post-conviction motion or petition."

construed the section to "to apply to individuals incarcerated on *or after* December 29, 1997." Id. at 744 (emphasis in original). Accordingly, section 8 requires a sample from anyone convicted as an adult of any of the original 33 offenses prior to ED1, and incarcerated in prison or a house of correction for any crime after ED1. Applying Murphy to section 2 of the 2003 Act, which is worded identically in relevant part, requires a sample from anyone convicted of a felony, either as an adult or a YO, prior to ED2, and incarcerated in a prison or house of correction, or sentenced to DYS custody, for any crime, after ED2.

Finally, the uncodified sections create two more limited classes: anyone convicted as an adult of any of the 33 offenses prior to ED1, and on probation or parole for that same offense on ED1, and anyone convicted as an adult or a YO of any felony prior to ED2, and on probation or parole for that same offense on ED2. The SJC held that limiting these two classes to the effective date was a rational distinction. Murphy, 429 Mass. at 744 & n.7.

To summarize, the six categories for inclusion in the DNA database are:

- Anyone convicted as an adult, of any of the 33 offenses designated in the original statute, between ED1 and ED2.
- Anyone convicted as an adult or a YO of a felony ED2 and after.[4]
- Anyone convicted as an adult of any of the 33 offenses prior to ED1, and incarcerated in prison or a house of correction for any crime after ED1.
- Anyone convicted as an adult or a YO of any felony prior to ED2, and incarcerated in a prison, house of correction, or DYS facility for any crime after ED2.
- Anyone convicted as an adult of any of the 33 offenses prior to ED1, and on probation or parole for that same offense on ED1.
- Anyone convicted as an adult or a YO of any felony prior to ED2, and on probation or parole for that same offense on ED2.

[ED1 = Dec. 29, 1997; ED2 = Feb. 10, 2004]

Meaning of "Convicted"

The baseline requirement for being *required* to submit a DNA sample for inclusion in the database is to be "convicted" of a qualifying offense or "adjudicated" a YO on a qualifying offense. The Massachusetts State Police ("MSP") and the Department of Correction ("DOC") have consistently interpreted "convicted" as meaning a guilty finding. Accordingly, alternative dispositions such as a CWOF, filing without a finding of guilt, or pre-trial probation do not count as convictions.

Previously, MSP and DOC have considered a "guilty filed" disposition to be a conviction. Going forward, we will be making a policy change and no longer recognizing a "filed" disposition as a

[4] A violation of G.L. c. 272, § 53A(a) (prostitution, either party), is a misdemeanor. A violation of § 3A(b) (paying or accepting payment for child under 14 prostitution) is a felony. Accordingly, a violation of § 53A(a) between ED1 and ED2 was a qualifying offense, but it is not a qualifying offense after ED2.

conviction. This is the result of reconsideration of the issue in light of statements in two recent Supreme Judicial Court decisions. See Commonwealth v. Simmons, 448 Mass. 687, 688 n.2 (2007) (noting that "a judgment of conviction does not enter unless sentence is imposed, meaning that the phrase 'to place a conviction on file' is internally contradictory"); Doe (No. 1211) v. Sex Offender Registry Bd., 447 Mass. 750, 757 n.5 (2006) (holding that a guilty finding placed on file is not a judgment of conviction and, therefore, does not count for purposes of requiring registration as a sex offender). This is not to say that the MSP's and DOC's previous practice of considering a guilty filed to be a conviction was an unreasonable interpretation of existing law. Accordingly, this policy change will be prospective only, and will not require removal of previously included guilty filed dispositions for qualifying offenses.

As an additional policy change, we see no reason why MSP cannot accept a DNA sample for inclusion in CODIS if the defendant was ordered by the court to provide a sample, for example, as a condition of a CWOF or pre-trial probation, even though these dispositions do not amount to convictions. Judges have wide discretion to impose conditions of probation reasonably related to the goals of sentencing and probation, which include the deterrence of unlawful conduct and the protection of the public. Commonwealth v. Williams, 60 Mass. App. Ct. 331, 332 (2004), and cases cited therein. Chapter 22E and the acts creating and amending it are all written entirely in terms of when a person is *required* to *submit* a sample, not when the Commonwealth may take a sample. See, e.g., G.L. c. 22E, § 3 (qualifying offenders "shall submit a DNA sample to the department"); St. 2003, c. 107, § 2 (qualifying offenders "shall . . . submit a DNA sample to the department"). Nothing in the statute precludes additional entries in the database for other valid reasons. Accordingly, if there is a valid court order, the MSP should honor it. However, in such cases, MSP will verify that the defendant has been required to submit a sample by a written order of a judge, not just an administrative decision by a probation officer.

Meaning of "Incarcerated"

The term "incarceration" is significant only for determining who is required to submit a sample under the uncodified sections, on the basis of a qualifying offense the predates the relevant effective date. MSP and DOC have consistently interpreted "incarcerated," as used in the first sentences of the uncodified sections, to mean being in custody on the basis of a conviction or an adjudication as a sexually dangerous person (SDP). We will retain this interpretation for purposes of the uncodified sections, even though the term could be read more broadly.[5]

Thus, for someone who was required to submit a sample because of a qualifying conviction after ED1 or ED2, but did not do so, whether or not that person is "incarcerated" within the meaning of the uncodified sections has no relevance. For example, MSP should be able to take a DNA sample from an offender with a qualifying felony who has not submitted a sample and is currently being held in a DOC facility on a pre-trial basis. However, DOC's present policies could be read to require even these offenders to be "incarcerated." DOC has agreed that this aspect of its policy is not required by statute and will amend its policies accordingly.

[5] "Incarcerate" means "[t]o put in jail," "[t]o shut in; confine." American Heritage Dictionary (2d college ed. 1982). The Legislature's purpose in passing the uncodified sections was to provide for collection of DNA samples from as many people as possible, and incarcerated individuals were targeted because "it is much less burdensome for law enforcement and correction officers to collect samples from individuals who are already in custody *for whatever reason*" than to go after "every free individual who has ever been convicted of a listed offense." Murphy, 429 Mass. at 739 (emphasis added).

Significance of the statutory time limit

General Laws c. 22E, § 3, and the uncodified sections have variously required offenders to submit samples within 90 days or one year of a qualifying conviction, or prior to release from custody.

When an offender is deemed to have a conviction that requires submission of a sample, the sample can and should be taken even if the time set forth in the statute for submitting the sample has elapsed. The statute places the burden on the convict to "submit" the sample within the designated period, not for the MSP to obtain the sample. The Commonwealth should not be precluded from carrying out the law because the convict fails to comply. See Eisan v. DiFava, No. MICV-2000-02925, 2000 WL 991698 (July 12, 2000) (Neel, J.) (because the statute "speaks not to the Commonwealth['s] burden during the 90-day period, but to [convict's], and where the statute is a regulatory rather than a criminal statute, . . . the Commonwealth is not to be precluded from taking a sample under uncodified § 8 beyond the expiration of the relevant 90-day period provided therein").

This conclusion is further reinforced by G.L. c. 22E, § 4, which provides that "[d]uly authorized law enforcement and correction personnel may employ reasonable force to assist in collecting DNA samples in cases where an individual refuses to submit to such collection as required under this chapter." Under this section, if an offender has failed to submit a sample within the relevant time period, that is, "refuse[d] to submit . . . as required under this chapter," law enforcement and correction personnel can use reasonable force to collect one.

Relevance of Prior Samples

If the Crime Lab has the opportunity to take a DNA sample from any person who was convicted of a qualifying offense after ED1 or ED2, a sample should be taken, whether or not a DNA record already exists from a previous crime. (However, the Lab should ensure that the person has not already submitted a sample for the same crime).

If the Crime Lab is presented with the opportunity to take a DNA sample from any person who fits any of the four other categories, the sample should be taken, but only if the person has not previously provided a DNA sample. St. 2003, c. 107, § 2, is explicitly limited to persons who have not previously submitted a sample. Although St. 1997, c. 106, § 8, does not have the same limitation, as a matter of administrative convenience it makes sense to treat both classes alike.

Decision Tree

To facilitate implementation of these decisions, we have developed a flow chart for deciding when a person is required to submit a sample, using the following steps:

1. Does the person have a conviction for one of the 33 qualifying offenses after ED1 or any felony after ED2? If "Yes," take the sample, regardless of whether the person's time for submitting a sample has lapsed, or whether the person is "incarcerated." If "No," go to Step 2.

2. Has a judge ordered a DNA sample in writing? If "Yes," take the sample. If "No," go to Step 3.

3. Does the defendant have a felony conviction prior to ED2? If "Yes," go to Step 4. If "No," this is the end of the inquiry; do not take a sample.

4. If the person was convicted for one of the 33 designated offenses prior to ED1, or any felony prior to ED2, was the person subsequently "incarcerated" for any offense? If "Yes," take a sample (unless the person has already submitted a sample). If "No," go to Step 5.

5. If the person was convicted for one of the 33 designated offenses prior to ED1, or any felony prior to ED2, was the person on parole or probation *for that offense* on ED1 or ED2? If "Yes," take a sample (unless the person has already submitted a sample). If "No," this is the end of the inquiry; do not take a sample.

Mass. Const., Part II, c. 2, § 1, art. 8.

[The power of pardoning offences, except such as persons may be convicted of before the senate by an impeachment of the house, shall be in the governor, by and with the advice of council: but no charter of pardon, granted by the governor, with advice of the council before conviction, shall avail the party pleading the same, notwithstanding any general or particular expressions contained therein, descriptive of the offence or offences intended to be pardoned.] [Annulled and superseded by Amendments, Art. LXXIII.]

G.L. c. 6, § 178K(2)(d)

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

or minimum registration requirements as determined by the board pursuant to section 178D.

G.L. c. 32, § 15(3A)

In no event shall any member after final conviction of an offense set forth in section two of chapter two hundred and sixty-eight A or section twenty-five of chapter two hundred and sixty-five pertaining to police or licensing duties be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member.

G.L. c. 90, § 24(1)(b)

A conviction of a violation of subparagraph (1) of paragraph (a) shall revoke the license or right to operate of the person so convicted unless such person has not been convicted of or assigned to an alcohol or controlled substance education, treatment or rehabilitation program because of a like offense by a court of the commonwealth or any other jurisdiction preceding the date of the commission of the offense for which he has been convicted, and said person qualifies for disposition under section twenty-four D and has consented to probation as provided for in said section twenty-four D; provided, however, that no appeal, motion for new trial or exceptions shall operate to stay the revocation of the license or the right to operate. Such revoked license shall immediately be surrendered to the prosecuting officer who shall forward the same to the registrar. The court shall report immediately any revocation, under this section, of a license or right to operate to the registrar and to the police department of the municipality in which the defendant is domiciled. Notwithstanding the provisions of section twenty-two, the revocation, reinstatement or issuance of a license or right to operate by reason of a violation of paragraph (a) shall be controlled by the provisions of this section and sections twenty-four D and twenty-four E.

G.L. 119, § 52

"Delinquent child", a child between 12 and 18 years of age who commits any offense against a law of the commonwealth; provided, however, that such offense shall not include a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment.

G.L. c. 140, § 121

"Violent crime", shall mean any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or possession of a deadly weapon that would be punishable by imprisonment for such term if committed by an adult, that: (i) has as an element the use, attempted use or threatened use of physical force or a deadly weapon against the person of another; (ii) is burglary, extortion, arson or kidnapping; (iii) involves the use of explosives; or (iv) otherwise involves conduct that presents a serious risk of physical injury to another.

G.L. c. 211B, § 10(iv)

Subject to the superintendence authority of the supreme judicial court as provided in section 3 of chapter 211, the chief justice and the deputy court administrator shall be responsible for the operation of their department, its clerks, other officers and employees subject to section 99 of chapter 276 and the appropriate collective bargaining agreement. To achieve sound operation of their department they shall have the following powers, authority and responsibilities, and shall allocate between themselves and the deputy court administrator primary responsibility for each in a manner that conforms to the division of responsibilities between the chief justice of the trial court and the court administrator under sections 9 and 9A of chapter 211B; provided, however, that any power specifically assigned to the chief justice in the subsections that follow shall be performed by the chief justice alone:

(iv) the power to suspend any particular session in any court within their department; the power to move sessions so that the availability of court personnel is consistent with the needs of individual courts; and to make such periodic adjustments in the scheduling and locations of court sessions as are deemed necessary for the proper administration of justice.

G.L. c. 233, § 21

The conviction of a witness of a crime may be shown to affect his credibility, except as follows:

First, the record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.

Second, the record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.

Third, the record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.

Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such

purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.

For the purpose of this section, any period during which the defendant was a fugitive from justice shall be excluded in determining time limitations under the provisions of this section.

Upon order of the court, a party may obtain a witness's criminal offender record information from the department of criminal justice information services.

G.L. c. 265, § 47

Any person who is placed on probation for any offense listed within the definition of "sex offense", a "sex offense involving a child" or a "sexually violent offense", as defined in section 178C of chapter 6, shall, as a requirement of any term of probation, wear a global positioning system device, or any comparable device, administered by the commissioner of probation, at all times for the length of his probation for any such offense. The commissioner of probation, in addition to any other conditions, shall establish defined geographic exclusion zones including, but not limited to, the areas in and around the victim's residence, place of employment and school and other areas defined to minimize the probationer's contact with children, if applicable. If the probationer enters an excluded zone, as defined by the terms of his probation, the probationer's location data shall be immediately transmitted to the police department in the municipality wherein the violation occurred and the commissioner of probation, by telephone, electronic beeper, paging device or other appropriate means. If the commissioner or the probationer's probation officer has probable cause to believe that the probationer has violated this term of his probation, the commissioner or the probationer's probation officer shall arrest the probationer pursuant to section 3 of chapter 279. Otherwise, the commissioner shall cause a notice of surrender to be issued to such probationer.

The fees incurred by installing, maintaining and operating the global positioning system device, or comparable device, shall be paid by the probationer. If the court finds that such fees would cause a substantial financial hardship to the offender or the person's immediate family or the person's dependents, the court may waive such fees.

G.L. c. 266, § 30A

Section 30A. Any person who intentionally takes possession of, carries away, transfers or causes to be carried away or transferred, any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of the possession, use of benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof; or

any person who intentionally conceals upon his person or otherwise any merchandise offered for sale by any store or other retail mercantile establishment with the intention of depriving the merchant of proceeds, use or benefit of such merchandise or converting the same to the use of such person without paying to the merchant the value thereof; or

any person who intentionally alters, transfers or removes any label, price tag or marking indicia of value or any other markings which aid in determining value affixed to any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment and to attempt to purchase such merchandise personally or in consort with another at less than the full retail value with the intention of depriving the merchant of all or some part of the retail value thereof; or

any person who intentionally transfers any merchandise displayed, held, stored or offered for sale by any store or other retail mercantile establishment from the container in or on which the same shall be displayed to any other container with intent to deprive the merchant of all or some part of the retail value thereof; or

any person who intentionally records a value for the merchandise which is less than the actual retail value with the intention of depriving the merchant of the full retail value thereof; or

any person who intentionally removes a shopping cart from the premises of a store or other retail mercantile establishment, without the consent of the merchant given at the time of such removal, with the intention of permanently depriving the merchant of the possession, use or benefit of such cart; and where the retail value of the goods obtained is less than $250, shall be punished for a first offense by a fine not to exceed two hundred and fifty dollars, for a second offense by a fine of not less than one hundred nor more than five hundred dollars and for a third or subsequent offense by a fine of not more than five hundred dollars or imprisonment in a jail for not more than two years, or by both such fine and imprisonment. Where the retail value of the goods obtained equals or exceeds $250, any violation of this section shall be punished by a fine of not more than one thousand dollars or by imprisonment in the house of correction for not more than two and one-half years, or by both such fine and imprisonment.

If the retail value of the goods obtained is less than $250, this section shall apply to the exclusion of section thirty.

Law enforcement officers may arrest without warrant any person he has probable cause for believing has committed the offense of shoplifting as defined in this section. The statement of a merchant or his employee or agent that a person has violated a provision of this section shall constitute probable cause for arrest by any law enforcement officer authorized to make an arrest in such jurisdiction.

G.L. c. 269, § 10G

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

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

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

(d) The sentences imposed upon such persons shall not be reduced to less than the minimum, nor suspended, nor shall persons convicted under this section be eligible for probation, parole, furlough, work release or receive any deduction from such sentence for good conduct until such person shall have served the minimum number of years of such sentence; provided, however, that the commissioner of correction may, on the recommendation of the warden, superintendent or other person in charge of a correctional institution or the administrator of a county correctional institution, grant to such offender a temporary release in the custody of an officer of such institution for the following purposes only: (i) to attend the funeral of a spouse or next of kin; (ii) to visit a critically ill close relative or spouse; or (iii) to obtain emergency medical services unavailable at such institution. Prosecutions commenced under this section shall neither be continued without a finding nor placed on file. The provisions of section 87 of chapter 276 relative to the power of the court to place certain offenders on

probation shall not apply to any person 18 years of age or over charged with a violation of this section.

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

G.L. c. 270, § 6A

A person who sells tobacco rolling papers to a person under the age of 21 shall be punished by a fine of $25 for the first offense, $50 for the second offense and $100 for a third or subsequent offense.

G.L. c. 279, § 25

(a) Whoever is convicted of a felony and has been previously twice convicted and sentenced to state prison or state correctional facility or a federal corrections facility for a term not less than 3 years by the commonwealth, another state or the United States, and who does not show that the person has been pardoned for either crime on the ground that the person was innocent, shall be considered a habitual criminal and shall be punished by imprisonment in state prison or state correctional facility for such felony for the maximum term provided by law.

(b) Whoever: (i) has been convicted 2 times previously of 1 or more of the following offenses: section 1, section 13, section 13.5, clause (i) of subsection (b) of section 13A, section 13B, subsection (a) of section 13B .5, section 13B .75, section 13F, committing an assault and battery upon a child and by such

assault and battery causing bodily injury or substantial bodily injury under subsection (b) of section 13J, section 14, section 15, clause (i) of subsection (c) of section 15A, section 16, sections 17 and 18 if armed with a firearm, shotgun, rifle, machine gun, or assault weapon, section 18A, section 18B, section 18C, section 21, section 22, section 22A, section 22B, section 22C, section 23A, section 23B, section 24, section 24B, section 26, section 26B, section 26C, section 28, and subsection (b) of section 39 of chapter 265, section 14 or section 102C of chapter 266, section 4A, section 17, subsection (b) of section 29A, subsection (b) of section 29B, section 29C, section 35A and subsection (b) of section 53A of chapter 272, or has been convicted 2 times previously of a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority, arising out of charges separately brought and tried, and arising out of separate and distinct incidents that occurred at different times, where the second offense occurred subsequent to the first conviction; (ii) has been sentenced to incarceration at a state prison or state correctional facility or federal correction facility for at least 3 years to be served for each of the prior 2 convictions; and (iii) does not show that he has been pardoned for either prior offense on the ground that he was innocent shall, upon conviction of 1 of the enumerated offenses in clause (i), where the offense occurred subsequent to the second conviction, shall be considered a habitual offender and shall be imprisoned in the state prison or state correctional facility for the maximum term provided by law for the offense enumerated in clause (i). No sentence imposed under this subsection shall be reduced or suspended nor shall such person so sentenced be eligible for probation, parole, work release or furlough or receive any deduction from such person's sentence for good conduct. A sentence imposed on a habitual offender under this subsection, if such habitual offender is incarcerated at a state prison or state correctional facility, shall commence upon the conclusion of the sentence such habitual offender is serving at the time of sentencing.

(c) No person shall be considered a habitual offender under subsection (b) based upon any offense for which such person was adjudicated a youthful offender, a delinquent child, or a like violation of the laws of another state, the United States or a military, territorial or Indian tribal authority for which a person was treated as a juvenile.

(d) Upon sentencing a defendant to a qualifying term of incarceration, or prior to accepting a guilty plea for any qualifying offense listed in subsection (b), the court shall inform the defendant that a conviction or plea of guilty for such an offense implicates the habitual offender statute and that upon conviction or plea of guilty for the third or subsequent of said offenses: (1) the defendant may be imprisoned in the state prison for the maximum term provided by law for such third or subsequent offense; (2) no sentence may be reduced or suspended; and (3) the defendant may be ineligible for probation, parole, work release or furlough, or to receive any deduction in sentence for good conduct. No otherwise valid plea or conviction shall be vacated based upon the failure to give such warnings.

Mass. R. Crim. P. 12(b)(6)

With the written agreement of the prosecutor, the defendant may tender a plea of guilty or an admission to sufficient facts while reserving the right to appeal any ruling or rulings that would, if reversed, render the Commonwealth's case not viable on one or more charges. The written agreement must specify the ruling or rulings that may be appealed, and must state that reversal of the ruling or rulings would render the Commonwealth's case not viable on one or more specified charges. The judge, in an exercise of discretion, may refuse to accept a plea of guilty or an admission to sufficient facts reserving the right to appeal. If the defendant prevails in whole or in part on appeal, the defendant may withdraw the guilty plea or the admission to sufficient facts on any of the specified charges. If the defendant withdraws the guilty plea or the admission to sufficient facts, the judge shall dismiss the

complaint or indictment on those charges, unless the prosecutor shows good cause to do otherwise. The appeal shall be governed by the Massachusetts Rules of Appellate Procedure, provided that a notice of appeal is filed within thirty days of the acceptance of the plea.

Mass. R. Crim. P. 28(e)

The court may file a case after a guilty verdict or finding without imposing a sentence if the defendant and the Commonwealth both consent. With the consent of both parties, the judge may specify a time limit beyond which the case may not be removed from the file, and may specify any events that may cause the case to be removed from the file. The defendant shall file a written consent with the court as to both the filing of the case and any time limit or events regarding removal from the file. Prior to accepting the defendant's consent, the court shall inform the defendant on the record in open court:

(i) that the defendant has a right to request sentencing on any or all filed case(s) at any time;

(ii) that subject to any time limit imposed by the court, the prosecutor may request that the case be removed from the file and a disposition imposed if a related conviction or sentence is reversed or vacated or upon the prosecutor's establishing by a preponderance of the evidence either that the defendant committed a new criminal offense or that an event occurred on which the continued filing of the case was expressly made contingent by the court; and

(iii) that if the case is removed from the file the defendant may be sentenced on the case.

In sentencing the defendant after the removal of a case from the file, the court shall consider the over-all scheme of punishment employed by the original sentencing judge.

Mass. R. Crim. P. 34

> If, prior to trial, or, with the consent of the defendant, after conviction of the defendant, a question of law arises which the trial judge determines is so important or doubtful as to require the decision of the Appeals Court, the judge may report the case so far as necessary to present the question of law arising therein. If the case is reported prior to trial, the case shall be continued for trial to await the decision of the Appeals Court.

Certificate of Compliance

Pursuant to Rule 16(k) of the Massachusetts Rules of Appellate Procedure

I, Valerie A. DePalma, hereby certify that the foregoing brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to:

1. Mass. R. A. P. 16 (a)(13) (addendum);
2. Mass. R. A. P. 16 (e) (references to the record);
3. Mass. R. A. P. 18 (appendix to the briefs);
4. Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
5. Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it was produced in the proportional font Equity at size 14 and contains 3,864, total non-excluded words as counted using the word-count feature of Microsoft Word.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

Essex County

Commonwealth, Plaintiff-Appellee; v. **Michael J. McNeil**, Defendant-Appellant.	2022-P-0785 **Certificate of Service**

Pursuant to Mass. R.A.P. 13(e), I hereby certify, under the penalties of perjury, that on October 17, 2022, I served electronically a copy of the appellant's brief and record appendix on the Commonwealth's attorney of record:

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October 17, 2022

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