

State of Minnesota v. Michael John Mellencamp
Pine County Court File No. 58-CR-24-74

Exhibit E

Opinion Letter from Pennsylvania Attorney

MINNESOTA
JUDICIAL
BRANCH

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October 3, 2024

Mr. Michael Mellencamp

RE: Megan's Law/SORNA Implications of Minnesota Plea Agreement

Dear: Mr. Mellencamp,

You have asked me to provide an opinion letter with reference to the potential Megan's Law SORNA (Sex Offender Registration and Notification Act) consequences of entering a guilty plea in Minnesota, to Minnesota statute § 609.342 subd.1(a), evidently, (e). I have reviewed the Petition to Enter Plea of Guilty, the Minnesota statute and the registration requirements under Minnesota law at Minn.Stat. §243.166. In addition, I have also conducted legal research into Megan's Law and SORNA's history and its current status in the Commonwealth of Pennsylvania concerning those who are either convicted or under supervision from other jurisdictions and reside in this Commonwealth. This letter will discuss the facts of your case as I understand them, the law and the current status of SORNA as it applies to you and for the reasons that follow, I conclude the Pennsylvania State Police will likely find you are eligible to register as a sex offender in Pennsylvania as a lifetime registered offender, at least as long as you are under supervised probation.

I. THE FACTS OF YOUR CASE:

In reviewing your Guilty Plea Petition and the applicable statutes, I understand you will enter a guilty plea on the record to Criminal Sexual Conduct in the First Degree, Contact with Person Under 13 Actor More Than 36 Months Older, in violation of Minnesota statute § 609.342. The factual basis is an admission of "sexual contact" with a minor less than 13 years old during

summers from 1997 to 2004 when you were 84 months older than the complainant who was less than 13 years old.

II. GUILTY PLEA TERMS AND PROCEDURE:

From speaking with Mr. Ryan Garry and Ms. Elizabeth Duel, I understand the guilty plea would be entered on the record and the Guilty Plea Petition, would be submitted to the Court and made part of the Court's record. Ms. Duel confirmed the Court would not accept the guilty plea; however, probationary terms and conditions will be imposed upon you. Paragraph 21a. of the petition describes the terms of the plea agreement. Significantly, the Petition provides for a Stay of Adjudication that affords you dismissal without a conviction upon successful completion of probation and conditions outlined. As well, the agreement includes you will not be subject to Sex Offender Registration in Minnesota.¹ Finally, my understanding is that any probationary term would be transferred under the Interstate Compact for the Supervision of Adult Offenders² from Pike County, Minnesota, to Chester County, Pennsylvania, where you reside.

III. SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT:

Under the facts in this case the newest version of SORNA determines the terms of Sex Offender Registration.³ Because Pennsylvania pegs the applicable Megan's Law/SORNA to the

¹ Minn.Stat. §243.166 Subd. 1b. registration required. (a) A person shall register under this section if (1) the person was charged with or petitioned for a felony violation of or attempt to violate or aiding, abetting, or conspiracy to commit any of the following, and convicted of or adjudicated delinquent for that offense or another offense arising out of the same set of circumstances...(iii) criminal sexual conduct under §609.342; []. It seems avoiding a conviction under Minnesota's definition spares you sex offender registration in that state.

² Minnesota counsel has expressed concern that additional terms and conditions might be imposed upon you in Pennsylvania including the possibility of electronic home monitoring. The Interstate Compact for the Supervision of Parolees and Probationers, adopted by Pennsylvania at 61 Pa.C.S. §§7102 to 7123 has an 83-page series of rules (attached "A") for county supervision. The transfer is discussed at the end of this letter.

³ 42 Pa.C.S. §9799.51-9799.75, Subchapter I.

offense date rather than conviction date, the case is governed by §9799.52⁴

A. The Definition of “Conviction”

42 Pa.C.S. §§9799.53, 9799.54, and 9799.55 all either refer to or state directly a conviction is necessary to require registration as a sex offender in Pennsylvania. Specifically, the definition of an “offender” at §9799.53 refers to §9799.55(b)(2)(ii):

individuals *convicted*: of offenses *similar to* the crimes cited in subparagraph (i) [i.e. Rape] under the laws of the United States or one of its territories or possessions, another state, [...] or under a former law of this Commonwealth, if committed, or for which registration with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth was required, on or after April 22, 1996, but before December 20, 2012, who currently reside in this Commonwealth.

42 Pa.C.S. §9799.54(4) requires a conviction to make the registration requirements applicable to “out of state individuals who are convicted of an offense similar to an offense set forth in section §9799.55.”

However, §9799.56(b)(4) Registration Procedure and Applicability contains broader language:

An individual who has a residence, is employed or is a student in this Commonwealth and who has been *convicted of or sentenced by a court* or court martial for a sexually violent offense or a *similar offense* under the laws of the United States or one of its territories or possessions, another state, [...] shall register at an approved registration site within three business days of the individual’s arrival in this Commonwealth.

Although a conviction under Minnesota’s SORNA law requires a finding of guilt and a sentence, Pennsylvania SORNA does not separate the two terms. “*Convicted*.” in Pennsylvania includes conviction by “entry of plea of guilty or nolo contendere, conviction after trial or court martial and a finding of not guilty due to insanity or of guilty but mentally ill.” 42 Pa.C.S. §9799.12. Thus, even if the probation under the plea agreement were not considered a *sentence*, the Pennsylvania State Police and courts would likely see the plea as a conviction for registration

⁴ All references are to Title 42 Pa.C.S. unless otherwise noted. The Subchapter applies to those who were: “(2)required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012, whose period of registration has not expired.”

purposes especially considering an admission of guilt and Guilty Plea Petition on the record.

B. Whether Minnesota's First-Degree Sexual Contact offense is "similar" to Pennsylvania's Rape statute to require sex offender registration

Minnesota Statute §609.342 Subd. 1a Victim under the age of 18 is defined as:

A person who engages in penetration with anyone under 18 years of age or sexual contact with a person under 14 years of age as defined in §609.341, subdivision 11, paragraph (c), is guilty of criminal sexual conduct in the first degree if any of the following circumstances exists:

(e) the complainant is under 14 years of age and the actor is more than 36 months older than the complainant.

§609.341 Subd.11(c): "Sexual contact with a person under 14" means the intentional touching of the complainant's bare genitals or anal opening by the actor's bare genitals or anal opening with sexual or aggressive intent or the touching by the complainant's bare genitals or anal opening of the actor's or another's bare genitals or anal opening with sexual or aggressive intent.

Pennsylvania's Rape statute, 18 Pa.C.S. §3121(c) Rape of a child. — A person commits the offense of rape of a child, a felony of the first degree, when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

The definition of "sexual intercourse" under Pa.C.S. §3101 describes it as, "In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.

In *A.L. v. Pa. State Police*, 274 A.3d 1228 (Pa. 2022) the Pennsylvania Supreme Court determined comparing statutes to determine registration eligibility required a court to employ the "categorical approach." That is to consider, not the facts of the individual case but the elements of the statutes. The court then compared the military offense of sexual assault to Pennsylvania's Rape statute to determine whether they were "comparable" and therefore the applicable offense Tier. The court held the categorical approach is to be used in determining whether an extra jurisdictional statute and a Pennsylvania statute are comparable. As well, The court discussed

how the Pennsylvania legislature uses the terms, “comparable,” “similar,” and equivalent” in various contexts without defining the terms. (A.L. 274 A.3d 1228, 1236)

I would anticipate a Pennsylvania appellate court applying A.L. to analyze the Minnesota offense statute and the Pennsylvania Rape statute. While I understand you do not want to be in a position of appealing a sex offender registration, there are differences between the two statutes including that the Minnesota statute provides for both penetration or sexual contact and defines them differently.⁵ Pennsylvania, as noted, does not distinguish between them. Other differences could be argued that the statutes are not “similar” under the categorical approach and therefore you should be exempt from Registration if an appeal was required.

C. Applicable Reporting Requirements.

Under 42 Pa.C.S. §9799.55(b)(ii), assuming the Pennsylvania State Police interpret the Minnesota Statute and the Pennsylvania rape statute as “similar,” you would be subject to lifetime registration.

IV. THE INTERSTATE TRANSFER OF SUPERVISION:

In my experience, the interstate transfer of supervision invariably results in unexpected consequences. Under 61 Pa.C.S. §7122 (d)(3)⁶ and Rule 4.104 of the ICAOS you may be required

⁵ Minn.State §609.341 Subd. 12 defines penetration, in part, as, “any of the following acts committed without the complainant’s consent, except in those cases where consent is not a defense, whether or not emission of semen occurs:

- (1) sexual intercourse, cunnilingus, fellatio, or anal intercourse; or
- (2) any intrusion however slight into the genital or anal openings:

⁶ 61 Pa.C.S. 7122 (d)(2)(iv) The following information must be made available to the receiving state for those cases defined as a sexual offense:

- (A) A summary of any type of treatment received and dates of completion.
- (B) A description of behavioral characteristics that may have contributed to the parolee or probationer’s conduct.

61 Pa.C.S. 7122 (d)(3) Any parolee or probationer convicted of a sexual offense shall be required to:

- (i) Submit to mandatory registration and public notification of all current addresses with the Pennsylvania State Police.
- (ii) Provide a signed copy of the “Pennsylvania State Police Sexual Offender Registration Notification” form and the “Pennsylvania State Police Sexual Offender Registration” form to the receiving state.

to comply with mandatory reporting data to Pennsylvania despite the fact §7122 (c) states the section applies “only to those persons under the supervision of the department [of corrections].”

County Probation and Parole supervision is governed by the Interstate Commission for Adult Offender Supervision (ICAOS). Under the Commission’s rules, you would be an Offender –

an adult placed under, or made subject to, supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies, and who is required to request transfer of supervision under the provisions of the Interstate Compact for Adult Offender Supervision.

General Rule 3.101-3 for transferring sex offenders is attached [“B”]. Because you live in Pennsylvania you *should* be exempt from Subsection (d) requiring an investigation of the offense’s facts including “a narrative description of the instant offense in sufficient detail to describe the circumstances, type and severity of offense and whether the charge was reduced at the time of imposition of sentence.” Nevertheless, facts surrounding the offense conduct may be collected and communicated to both states’ probation departments. Thereafter, it is foreseeable the Chester County Probation Department will inform you to register with the Pennsylvania State Police.

You may also be subject to additional terms and conditions of supervision in Chester County as the Interstate Compact permits this: “At the time of acceptance or during the term of supervision, the receiving state may impose a condition on an offender if that condition would have been imposed on an offender sentenced in the receiving state.” (Rule 4.103 ICAOS). The Rule

(iii) Provide a signed copy of “Addendum to Application for Compact Services/Agreement to Return” form to the receiving state.

Rule 4.104 Offender registration or DNA testing in receiving or sending state.

A receiving state shall require that an offender transferred under the interstate compact comply with any offender registration and DNA testing requirements in accordance with the laws or policies of the *receiving state* and shall assist the sending state to ensure DNA testing requirements and offender registration requirements of a sending state are fulfilled.

explains how out of state probationers and parolees can be placed on electronic home monitoring or house arrest when it was not part of a negotiation.

V. POSSIBLE OPTIONS:

Two related facts of your case are potentially significant for Sex Offender Registration purposes. Since your date of birth is December 8, 1982, and the offense dates are between June 1, 1997, and August 31, 2004, you were a juvenile until December 7, 2000. Pennsylvania's SORNA registration requirements do not apply to juveniles. Although the dates recited in the factual basis extend until you were an adult, if the negotiated plea facts could be shortened so the last date was when you were a juvenile,⁷ registration would not be necessary in Pennsylvania.

As well, I contacted, General Counsel for the Pennsylvania State Police, without providing identifying information about the case. Unsurprisingly, the scenario is unprecedented. Nevertheless, the conversation produced suggestions that may help in obtaining a positive outcome once the terms of the probation are fulfilled and the case is dismissed. PSP's Counsel suggested you seek to obtain an expungement following the dismissal of the case. Taking all evidence of a plea and probation of the national record would be, he believed, helpful in removing you from registration. He further emphasized the Minnesota court record and disposition would influence the PSP's course of action.

Obviously, placing the negotiated term that you do not have to register in Minnesota as well as the fact you are not convicted on the record will provide a potential "full faith and credit" argument in Pennsylvania on appeal. If there is any term for the probation that differentiates it from being a "sentence," noting that aspect might also be of help in Pennsylvania. I am certain your able counsel will cover these issues.

Finally, depending on the length and terms of the probation, perhaps you might consider

⁷ There is a potential due process argument if the dates remain ambiguous.

going to and remaining in Minnesota to fulfill the plea agreement. While this is neither a desirable nor convenient choice, doing so would completely avoid registering in Pennsylvania, possibly having to appeal and later attempting to expunge the registration which would also likely involve litigation. While Megan's Law/Sorna's will continue to produce considerable litigation in the coming years, the intent of the statutes is to have known sex offenders registered.

Thank you for the opportunity to provide you with this opinion letter. Of course, I would be happy to discuss the matter further with you and counsel and am available tomorrow, Friday, October 4, 2024, at the office number. Mr. Garry and Ms. Duel have obtained an excellent outcome for you. Even if you must register it is a remarkable resolution.

Very truly yours,



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Attachments