

# **An Update on Michigan Sentencing Law & Procedure Seminar & Webcast**

September 28, 2004  
Michigan Hall of Justice  
Lansing, Michigan

## **Sex Offender Registration Act**

### **Materials Prepared by:**

Hon. Richard Ryan Lamb  
9<sup>th</sup> Circuit Court  
Kalamazoo, Michigan



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STATE OF MICHIGAN  
DEPARTMENT OF STATE POLICE  
EAST LANSING



COL. TADARIAL J. STURDIVANT  
DIRECTOR

June 10, 2003

Mr. Tom Furtaw, Bureau Chief  
Office of the Attorney General  
Criminal Justice Division  
G. Mennen Williams Building – 7<sup>th</sup> Floor  
525 West Ottawa  
P.O. Box 30212  
Lansing, Michigan 48909

Dear Mr. Furtaw:

The Michigan Department of State Police requests assistance from your agency in addressing the recent problem of prosecutorial discretion allowing individuals charged with offenses requiring registration on the Sex Offender Registry to avoid the registration requirements. Specifically, individuals charged with crimes requiring registration have been allowed to plead to offenses that are remote to the originally charged offense and thereby avoiding the Sex Offender Registry. Recently, our Sex Offender Registration Unit has been overwhelmed with inquiries and cases from various law enforcement agencies requesting whether individuals, who have had their original charge (a registerable offense) pled to offenses such as felony seduction, assault and battery, child abuse, etc., are still required to register as a convicted sex offender.

To illustrate the point, the following are a few examples of cases received by our Sex Offender Registration Unit that highlight the crisis. A father was charged with two counts of Criminal Sexual Conduct First Degree and two counts of Criminal Sexual Conduct Second Degree, the victim being his 14-year-old daughter. He pled to Aggravated Assault and is currently not on the public registry. A 17-year-old male was charged with Criminal Sexual Conduct First Degree, the victim being a 12-year-old girl. He pled to Child Abuse and is also currently not on the public registry. Additionally, your office is quite familiar with the court order issued by a judge on two occasions ordering that offenders convicted of felony seduction not be placed on the registry.

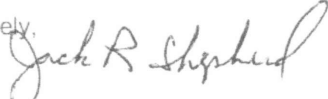
A Michigan Court of Appeals case, People v Meyers, 250 Michigan App 637 2001, held that the "behavior underlying the criminal offense should be examined to determine whether it is subject to registration." Our department would like clarity on whether the court means the behavior underlying the original arrested offense or the subsequent convicted offense. Additionally, under the "catch all" provision of MCL 28.722(e)(x), the inquiry to determine if a subject has committed a registerable crime depends on whether an offense is "by its nature" a "sexual offense against an individual less than 18 years of age." Would this "catch all" provision provide the justification for registering those individuals who are originally charged with a registerable offense and subsequently plead to a non-registerable offense?

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Our goal is to enforce the provisions of the Sex Offender Registration Act as intended when enacted by the Legislature. However, the current state of the law and its enforcement require your guidance in examining these issues.

If further information is needed, please contact F/Lt. Kari Kusmierz at (517) 336-6326 or Sgt. James Bennett in the Executive Resource Section at (517) 336-6441.

Sincerely,

A handwritten signature in cursive script that reads "Jack R. Shepherd". The signature is written in dark ink and is positioned above the typed name.


JACK R. SHEPHERD, CAPTAIN  
Commanding Officer  
Executive Division

DEPARTMENT OF  
ATTORNEY GENERAL  
MEMORANDUM

September 12, 2003



TO: Capt. Jack Shepherd  
Executive Division  
Michigan State Police

FROM: Thomas P. Furtaw   
Senior Deputy Director  
Criminal Justice Bureau

RE: Sex Offender Registration Act (SORA), MCL 28.721, et al

You advise that the Michigan State Police (MSP) receive a significant number of convictions that may require registration under SORA's catch-all provision, MCL 28.722(d)(x). These cases, while grounded in sexual misconduct, are usually convictions by plea for offenses such as assault and battery, seduction, etc.

The catch-all provision of SORA was discussed at length in *People v Meyers*, 250 Mich App 637, 2002. In *Meyers*, the defendant pled guilty to utilization of the internet to communicate with a person for the purpose of attempting to commit conduct prescribed under MCL 750.145a, specifically MCL 750.145d(1)(b). In addition to probation, the trial court ordered the defendant to register pursuant to SORA. Meyers appealed, as the offense for which he was convicted was not a specifically enumerated offense under SORA.

MCL 28.722(d)(x) mandates registration as a sex offender for conviction of "any other violation of the law of this state or a local ordinance of a municipality that by its nature constitutes a sexual offense against an individual who is less than 18 years of age." Therefore, a defendant must register if a three-part test is met. First, the defendant was convicted of a state law violation or a municipal ordinance violation. Second, the offense, by its nature, constitutes a sexual offense; and third, the victim is under 18 years of age. The second element relates to your inquiry. The court observed that, "...the Legislature did not define what it meant by a violation that 'by its nature,' constitutes a 'sexual offense'." The court, therefore, determined that "by its nature" referred to "inherent qualities" and a "sexual offense" was any offense that is "of or pertaining to sex." The court further stated:

"However, not all of these other substantive crimes are inherently related to sex. The stalking, aggravated stalking, felony inducement, and kidnapping statutes do not include any language reference to prohibited sexual acts or intent. Similarly, though accosting a child contrary to MCL 750.145a explicitly includes the possibility that the criminal conduct at issue was sexual in nature in that the statute refers to 'sexual intercourse,' accosting a child may also consist of nonsexual acts, such as 'delinquency.'"

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"At first blush, this possibility--that the conduct that each of these statutes prohibits might not require a sexual component--suggests that these are not statutes that encompass inherently sexual offenses. However, by referring to 'sexual offenses,' rather than 'sexual offense statutes,' the language of MCL 28.722(d)(x) directs us to examine the unique nature of the criminal conduct underlying the charge that the defendant violated a state law or municipal ordinance to determine whether the criminal conduct was inherently sexual. Only the facts of the individual 'offense' itself will reveal whether the stalking, kidnapping, felony inducement, or accosting offense was inherently sexual, as this second element requires."

Therefore, the offense for which one is convicted is not controlling. The underlying facts which give rise to the charge, not merely the conviction offense or facts elicited in the allocution, control whether the registration requirements of SORA are triggered. In many of the cases that have been brought to our attention, the underlying facts involved CSC conduct ranging from touching to penetration, but were pled as assault and battery, seduction, etc. Such factual underpinnings would trigger the registration requirements of SORA.

I trust the above answers your inquiry. If you have any further questions, please advise.

c: Wally Hart  
Leo Friedman