

LEGAL BULLETIN

9.3

Pennsylvania Megan's Law

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INTRODUCTION

Pennsylvania's Registration of Sexual Offenders Act, better known as "Megan's Law," requires all individuals who have been convicted of one or more "sexually violent" offenses and currently live, work, or attend school in Pennsylvania to register as "sex offenders" with the Pennsylvania State Police. It also requires offenders to verify their residences on a regular basis afterward, either for ten years or for life. The purpose of Megan's Law is to enable the public to ascertain the identities and whereabouts of the sex offenders living among them; its premise is that sex offenders are more likely to reoffend than persons convicted of other sorts of crimes – and are therefore more dangerous. Consequently, when an offender registers his photograph, home address, and various other information about him are posted on the Pennsylvania Megan's Law website. For individuals who are "sexually violent predators," this information is also provided directly to neighbors and nearby schools and daycare centers. An offender's knowing failure to register or verify his address (or to provide accurate information when he does) is a felony, and punishable – in some cases – by life in prison.

Every state in the United States has a Megan's Law. New Jersey passed the first in 1994, and soon afterward the United States Congress passed legislation¹ requiring all states to enact sex offender registration laws. Pennsylvania enacted its first Megan's Law (now known as "Megan's Law I") in 1995, and a second version in 2000 ("Megan's Law II"). Parts of both versions were found constitutionally infirm, and in 2005 a third version – "Megan's Law III" – was enacted.

Although Megan's Law III appears generally to have redressed the flaws of its predecessors, it is still frequently amended. This bulletin, then, should be used only as a starting point for research. Readers seeking the most recent developments in Megan's law should consult the most recent version of the statute and the latest caselaw.

¹ The Violent Crime Control and Law Enforcement Act of 1994 (PL 103-322).

“SEXUALLY VIOLENT PREDATORS” AND OTHER OFFENDERS SUBJECT TO MEGAN’S LAW

“SVPs” AND “OFFENDERS”

42 Pa. C.S. §9791(b) of Megan’s Law states the following Declaration of Policy

It is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will live in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

Given the repeated reference to “sexually violent predators” (or “SVPs”), and the absence of reference to any other type of offender, one might think that SVPs are the exclusive concern of Megan’s Law – and that if an offender is required to register under the law, it is because he is an SVP. In fact, however, “sexually violent predator” is a term of art in Megan’s Law – and according to the Pennsylvania State Police less than 2% of all registered sex offenders in Pennsylvania are SVPs. See www.pameganslaw.state.pa.us.

The term “sexually violent predator” is defined in Megan’s Law as an individual who has been convicted of a sexually violent offense under section 9795.1 and who is determined to be a sexually violent predator under section 9795.4 due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.²

Most of the individuals subject to Megan’s Law in Pennsylvania have not been diagnosed with “mental abnormalities or personality disorders” that dispose them towards sexually violent offenses. As a result, they are not considered SVPs. They are required to register under Megan’s Law because psychology aside, they have been convicted of offenses deemed “sexually violent.”³ These individuals are known as “sex offenders,” or simply “offenders.” Every individual adjudged an SVP under Megan’s Law is also an offender, but few offenders are SVPs.

² The term “mental abnormality” is in turn defined as “a congenital or acquired condition ... that affects the emotional or volitional capacity of the personal in a manner that predisposes that person to the commission of criminal sexual acts to a degree that makes the personal a menace to the health and safety of other persons.” 42 Pa.C.S. §9794. The term “personality disorder” is not defined in Megan’s Law.

³ The “sexually violent” offenses that trigger the application of Megan’s Law are listed in section 9795.1 of the statute and pages 8-9 of this outline.

The distinction between offenders and SVPs raises a question whose answer is not, as one might expect, self-evident: why should offenders who are not SVPs have to register under Megan's Law at all? The stated reason is that "if the public is provided adequate notice and information about sexually violent predators and certain other offenders, the community can develop constructive plans to prepare themselves and their children for the offender's release." 42 Pa. C.S. §9791(a)(1). The implicit assumption is that sex offenders who are not SVPs – and thus not psychologically disposed towards predatory sexual behavior – are, like SVPs, highly likely to reoffend. (Why else would the public need to prepare for their release?) Is this assumption justified? Perhaps – but not by any legislative finding in the law itself. One might think that the law's registration requirements for non-SVP offenders might be vulnerable on this score. Attacks on them in the Pennsylvania courts have fallen on fairly deaf ears, however. It is enough, the Supreme Court has written, that

Congress, and the legislatures of the several states, have considered the egregiousness of sexual crimes, particularly where children are concerned, and studies have indicated that sexual offenders have high rates of recidivism....When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.

Commonwealth v. Maldonado, 838 A.2d 710 (Pa. 2003), citing *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) (other citations omitted).

The courts have shown little inclination to question whether the sorts of studies cited in this passage adequately distinguish between sex offenders who suffer from psychological impairments and those who do not. "The decision whether a statute is wise or whether it is the best means to achieve the desired result is better left to the legislature, and not the courts.... the General Assembly is presumed to have investigated this question, and ascertained what it best for the general public." *Doe v. Miller*, 886 A.2d 310 (Commw. Ct. 2005). Moreover, "an erroneous underclassification could mean that the public would not be adequately informed about the presence of an offender in the community who poses a threat of committing a sexual offense. This would frustrate the purpose of the act because the public would have a reduced opportunity to protect those vulnerable to sexual offenders." *Commonwealth v. Maldonado*, 838 A.2d 710 (Pa. 2003) (citations omitted).

THE SVP DETERMINATION PROCESS

Whether or not an offender is classified as an SVP under Megan's Law does not depend on what crime he has been convicted of. It depends on the findings made by the sentencing court in a separate SVP determination hearing. These findings depend in turn largely on an assessment of the offender by a body known as the Sexual Offender Assessment Board, or "SOAB".

The SOAB is charged under section 9795.4 of Megan's Law with evaluating every individual convicted of "sexually violent offense" in a Pennsylvania State Court to determine

whether the Commonwealth should seek an SVP classification.⁴ In making its assessment, the Board must, under the same section, consider the following factors:

- (1) The facts of the current offense, including;
 - (i) Whether the offense involved multiple victims.
 - (ii) Whether the individual exceeded the means necessary to achieve the offense.
 - (iii) The nature of the sexual contact with the victim.
 - (iv) Relationship of the individual to the victim.
 - (v) Age of the victim.
 - (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
 - (vii) The mental capacity of the victim.

- (2) Prior offense history, including;
 - (i) the individual's prior criminal record.
 - (ii) Whether the individual completed any prior sentences.
 - (iii) Whether the individual participated in available programs for sexual offenders.

- (3) Characteristics of the individual, including;
 - (i) Age of the individual.
 - (ii) Use of illegal drugs by the individual.
 - (iii) Any mental illness, mental disability or mental abnormality.
 - (iv) Behavioral characteristics that contribute to the individual's conduct.

- (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of re-offense.

The Board has ninety days from the date of an offender's conviction to perform its assessment and submit to the District Attorney a written report containing its findings. If the Board concludes that the offender should be deemed an SVP, the District Attorney will recommend to the sentencing court that he be formally adjudicated one. The court will then schedule a hearing on the matter.

At this hearing, the offender has the right to be represented by counsel, to call and cross-examine witnesses, and to present the testimony of his own expert witness. Under section 9795.4 (E), if the offender cannot afford counsel he has the right to have counsel appointed for him; the Superior Court has ruled that indigent offenders have a right to Court-appointed experts, as well. *See Commonwealth v. McWilliams*, 887 A.2d 784 (Pa. Super. 2005). Under Megan's Law I, every offender convicted of a sex offense enumerated in section 9795.1 was presumed to be an SVP, but the Pennsylvania Supreme Court found this presumption unconstitutional. *Commonwealth v. Williams*, 773 A.2d 593 (Pa. 1999) The Commonwealth now bears the burden of proving that an offender is an SVP by clear and convincing evidence.

⁴ It is also charged with later re-evaluating offenders who becomes eligible for parole, when the Pennsylvania Board of Probation and Parole (as it has the power to do) requests such a re-evaluation.

RELATIVE SIGNIFICANCE OF THE SVP FACTORS

The single factor among those listed in section 9795.4 that is most critical to an SVP determination is the presence or absence of a “mental illness, mental disability, or mental abnormality.” Again, the term “sexually violent predator” is defined in Megan’s Law as a person “who is determined [by the Sexual Offenders Board] to be a sexually violent predator ... due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” It follows that absent a finding by the Board that an offender suffers from some sort of mental abnormality or personality disorder, the sentencing court *cannot* find an offender an SVP. On the other hand, if the Board finds that an individual does suffer from such a disorder or abnormality, the question becomes whether that disorder or abnormality is of a kind that “makes him likely to engage in predatory sexually violent offenses.” (In most cases where the Board finds a mental disability, the answer to this question is yes, for the disabilities diagnosed tend to be conditions like pedophilia and paraphilia which *by definition* predispose an individual to reoffending). How relevant are the other factors enumerated in section 9795.4? The short answer is: not very; or: relevant only to the extent that they enable the Board to predict the likelihood of reoffending when an offender is diagnosed with a mental disorder that *cannot* be said to make him intrinsically disposed towards re-offending. Or, as one court has stated:

The salient inquiry in determining SVP status is identification of the impetus behind commission of the offense, that is, whether it proceeds from a mental defect/personality disorder or another motivating factor. The answer to that question determines, at least theoretically, the extent to which the offender is likely to reoffend, and section 9795.4 provides the criteria by which such likelihood may be gauged. *Thus, predictors of future dangerousness, specifically mental illness, mental disability or mental abnormality... must, by the terms of the statute, be weighted more heavily than those factors which may carry less significant or no implications for potential behavior.*

Commonwealth v. Bey, 841 A.2d 562 (Pa. Super. 2004) (emphasis added).

Or:

To the extent that the determination of sexually violent predator status is made based upon, not criminal activity, but a finding of mental abnormality or personality disorder, it is not applied to conduct at all, but to an individual’s status as suffering from a serious psychological defect.

Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003).

Many of the factors enumerated in section 9795.4 would seem to speak only to how “predatory” an offender’s crime was – and to have little value in predicting an offender’s likelihood to reoffend.⁵ To this extent they should be irrelevant. No absence of “predatory”

⁵ An act is “predatory” for the purposes of Megan’s Law if it is done “in whole or in part, in order to facilitate or support victimization.” 42 Pa. C.S. §9792.

behavior will prevent an offender's being classified as an SVP if he is found to have a mental defect that disposes him towards recidivism. *See, e.g., Commonwealth v. Fletcher*, 947 A.2d 776 (Pa. Super. 2008). Conversely, the fact that an individual *has* engaged in "predatory" behavior should not in and of itself be grounds for an SVP classification if he has not also been found to have a mental defect that disposes him towards sexually violent offenses.

"EXPERTISE" AND THE SVP DETERMINATION PROCESS

Given the pivotal role of the Sexual Offenders Assessment Board in determining whether an offender is an SVP, it is not surprising that the Board should be required by statute to be "composed of psychiatrists, psychologists and criminal justice experts, each of whom is an expert in the field of the behavior and treatment of sexual offenders." 42 Pa.C.S. §9799.3. What is surprising, given this mandate, is that the Pennsylvania Supreme Court has ruled that the particular Board member who "diagnoses" an offender with a mental abnormality or personality disorder *need not be a psychologist or psychiatrist*. Under *Commonwealth v. Conklin*, 897 A.2d 1168 (Pa. 2006), the Commonwealth may carry its "clear and convincing" burden at an SVP hearing by introducing the testimony of any Board member who can be characterized to the satisfaction of the Court as a "criminal justice expert." (In *Conklin*, the Board member was a licensed social worker). What credentials must one possess to qualify as a "criminal justice expert"? The Court has not said. It has been established, however, that the putative expert need not be formally qualified as an expert under Rule 702 of the Pennsylvania Rules of Civil Procedure, which generally applies where "scientific" expertise is concerned. This is because "the statutory formula for an [SVP] assessment cannot be deemed 'novel science.'" *Commonwealth v. Dengler*, 890 A.2d 372 (Pa. 2005). Ultimately, SVP determination is less a matter of empirical observation and principled reasoning than it is an inquiry "responsive to ... a specific legislatively-adopted scheme which sets forth the relevance and contours of the challenged evidence." *Id.* To the extent that the *Conklin* court used any test at all to determine expertise, the test might be described as the Experience Test, for the Court seems to have concluded that the proffered expert was an expert largely because he was experienced, having "seventeen of years of experience as a social worker, all of which involved working with sex offenders" and being the director of a sex offender treatment program.

WEIGHT GIVEN TO THE SEXUAL OFFENDERS ASSESSMENT BOARD'S RECOMMENDATION

Where the Board diagnoses an offender with a mental defect that disposes him towards future sexually violent offenses, and recommends SVP classification as a result, the Commonwealth will nearly always succeed in obtaining that classification. If an offender is to prevail against the Commonwealth, he must either thoroughly impeach the Board's expert or to produce an expert of his own who casts significant doubt on the Board's expert's findings. On the other hand, where the Board recommends SVP classification but fails to diagnose a mental defect – or produces a diagnosis that is somehow flawed – the Commonwealth cannot carry its "clear and convincing" burden. So in *Commonwealth v. Bey*, 841 A.2d 562 (Pa. Super. 2004), the Superior Court rejected the trial court's SVP determination because the Board had not diagnosed the offender with a mental defect and so could not recommend SVP classification. So in

Commonwealth v. Krouse, 799 A.2d 835 (Pa. Super. 2002), the Superior Court rejected the trial court's SVP classification and the Board recommendation on which it was based because the Board's expert had not only not diagnosed the offender with a mental defect; he had failed even to personally interview him. A valid diagnosis of some mental abnormality, the Court stated in *Bey*, is "the statutory sine qua non of SVP status."

CONSEQUENCES OF AN SVP ADJUDICATION

Being adjudged an SVP has three main consequences.

First, SVPs are required to register with the State Police *for life*. 42 Pa.C.S. §9795.1(b)(3). Second, SVPs are subject to "active notification" – the process whereby neighbors, co-workers, and others are notified by the State Police of an SVP's presence among them. §9798. Third, all SVPs are required – again, for life – to attend monthly counseling sessions "in a program approved by [the Pennsylvania Sexual Offenders Assessment Board]." §9799.4.

THE REGISTRATION REGIME

Under section 9795.2(a) of Megan's Law, every individual convicted of a "sexually violent" offense in Pennsylvania must register with the State Police immediately upon being released from a state or county correctional institution, upon being paroled from a state or county correctional institution, or upon starting a probationary sentence.

Under section 9795.2(b), an individual convicted of a sex offense in a jurisdiction *other than* Pennsylvania must register with the Pennsylvania State police within 48 hours of establishing a residence, taking employment, or becoming a student in Pennsylvania. A "residence" for purposes of Megan's law is any location "where an individual resides or is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year." 42 Pa.C.S. §9792.

Sex offenders living, working, or attending school in Pennsylvania are required to register under Megan's Law whether their offenses occurred before or after the law first took effect in 1996. Megan's Law is not an *ex post facto* law, according to the Pennsylvania Supreme Court (a law, that is, that punishes after the fact acts that were legal when done) because the purpose of its registration provisions is not to punish but "to effectuate, through remedial legislation, the non-punitive goal of public safety." *Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. 1999).

Offenders must provide the State Police "with all current or intended residences, all information concerning current or intended employment and all information concerning current or intended enrollment as a student." They must also submit to fingerprinting and photographing so that their images can be posted on the internet and, for offenders who have been adjudged

SVPs, sent to his neighbors. The occurrence of “a natural disaster or other event requiring evacuation of residences” is not a valid excuse for failing to register. §9795.1(c).

Every individual subject to Megan’s Law must register with the Pennsylvania State Police for a term of either ten years or for life, then verify his residence on a regular basis for the length of that term. Individuals with ten-year obligations are sometimes described as “Tier One” offenders, those with lifetime requirements as “Tier Two” offenders. Whether an offender is required to register for ten years or for life depends on three factors: what particular sexually violent offense he has been convicted of; the number of convictions for sexually violent offenses that he has; and whether he has been adjudged an SVP.

OFFENDERS REQUIRED TO REGISTER FOR TEN YEARS

Under 42 Pa. C.S. §9795.1(a) of Megan’s Law, an offender must register for ten years if he resides, is employed, or attends school in Pennsylvania and:

- (1) He has been convicted of committing, attempting to commit, conspiring to commit, or soliciting the commission of a crime under one of the following sections of the Pennsylvania Criminal Code⁶:
 - **18 Pa. C.S. § 2901** (kidnapping), if the victim was a minor;
 - **18 Pa. C.S. § 2910** (luring a child into a motor vehicle or structure);
 - **18 Pa. C.S. § 3124.2** (institutional sexual assault);
 - **18 Pa. C.S. § 3126** (indecent assault), if the offense was a first-degree misdemeanor or higher;
 - **18 Pa. C.S. § 4302** (incest), where the victim was between 12 and 18 years of age;
 - **18 Pa. C.S. § 5902(b)** (prostitution and related offenses), where the offender was found to have promoted the prostitution of a minor;
 - **18 Pa. C.S. § 5903(a)(3), (4), (5) or (6)** (production and promotion of sexual materials and performances) and the victim was a minor;
 - **18 Pa. C.S. § 6312** (sexual abuse of children);
 - **18 Pa. C.S. § 6318** (unlawful contact with minors); and
 - **18 Pa. C.S. § 6320** (sexual exploitation of children);
- (2) He has been convicted under a former Pennsylvania law of a crime “similar” to one of those listed above;
- (3) He has been convicted of a crime similar to one of those listed above “under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.”

⁶ The language concerning conspiracy and solicitation became effective only on December 8, 2008. Under *Commonwealth v. Benner*, 853 A.2d 1058 (Pa. Super. 2004), it applies to all offenders who were convicted of conspiracy or solicitation of an enumerated offense on or after December 8, 2008 *and* all offenders who were convicted *before* December 8, 2008 but were in the custody of the correctional authorities as of December 8, 2008.

- (4) He has been convicted of *attempting* to commit an offense that would have led to his being subject to lifetime registration under §9795.1(b), had he been convicted of *committing* it.

OFFENDERS REQUIRED TO REGISTER FOR LIFE

Under section 9795.1(b) of Megan’s Law, an offender must register for life if he resides, is employed, or attends school in Pennsylvania and:

- (1) He has been adjudged a “sexually violent predator” under Pennsylvania law or the law of most any other jurisdiction;
- (2) He has been convicted in Pennsylvania of committing any of the following crimes:
 - **18 Pa. C.S. § 3121** (rape);
 - **18 Pa. C.S. § 3123** (involuntary deviate sexual intercourse);
 - **18 Pa. C.S. § 3124.1** (sexual assault);
 - **18 Pa. C.S. § 3125** (aggravated indecent assault); and
 - **18 Pa. C.S. § 4302** (incest), where the victim was under 12 years of age;
- (3) He has been convicted of a crime similar to one of those listed above “under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico or a foreign nation.”; or
- (4) He has two or more convictions for committing or attempting to commit a crime that would subject him to a ten-year registration period.

Crucially, a plea to or conviction of two or more *counts* of any sexually violent offense at the same time has been ruled as constituting two or more “convictions” for the purposes of section 9795.1(b). *See Commonwealth v. Merolla*, 909 A.2d 337 (Pa. Super. 2006),

REGISTRATION PROCEDURES, VERIFICATION AND UPDATING REQUIREMENTS ***§9795.2***

REGISTRATION: Offenders and sexually violent predators shall be required to register with the Pennsylvania State Police upon release from incarceration, upon parole from a State or county correctional institution or upon the commencement of a sentence of intermediate punishment or probation. For purposes of registration, offenders and sexually violent predators shall provide the Pennsylvania State Police with all current or intended residences, all information concerning current or intended employment and all information concerning current or intended enrollment as a student.

After initially registering, all offenders subject to Megan’s Law must notify the State Police within 48 hours of any of the following changes in circumstances:

- (1) Any change of residence;
- (2) The establishment of any additional residence;
- (3) Any change of employer or employment location for more than 14 consecutive days, or for an aggregate period of time that will exceed 30 days during any calendar year;
- (4) Any termination of employment.
- (5) Any change of institution or location at which the person is enrolled as a student;
- (6) Any termination of enrollment as a student;
- (7) Becoming employed or enrolled as a student, if the person has not previously provided that information to the State Police.

An offender who moves from Pennsylvania to another state is required both to notify the Pennsylvania State Police and to register in the new state. 42 Pa. C.S. §9795.2(a)(2.1). Any offender who does not will be subject to prosecution under the laws of that state and under 42 U.S.C. §16913 of the federal Sexual Offenders Registration and Notification Act. (SORNA)

Even when his residence, employment, and school enrollment remain the same, an offender has a duty to give the State Police regular updates of his current address for the duration of his registration period. Offenders who have *not* been adjudged SVPs must provide their current address annually at least ten days before the anniversary of the date of their initial registrations. 42 Pa.C.S. §9796(b). Offenders who *have* been adjudged SVPs must verify their addresses four times each year – first between January 5 and January 15; then between April 5 and April 15; then between July 5 and July 15; and finally between October 5 and October 15. 42 Pa.C.S. §9796(a). These updates must be provided *in person* at a registration site approved by the State Police, so that the offender may be photographed each time for the Megan’s Law website.

WHAT VERSION OF MEGAN’S LAW APPLIES?

The registration obligations in Megan’s Law have changed repeatedly since the first version of the law was enacted in 1994. As a result, it often happens that the version of the law in effect on the date on offender’s release is not the same version that was in effect on the date he was convicted and sentenced. (The law may have changed even between conviction and sentencing). The question arises, in these cases, what version of the law determines the length and other aspects of an offender’s registration obligation – the version in effect on the date of conviction, the version in effect on the date of sentencing, or the version in effect on the date of release? The Pennsylvania Supreme Court has yet to rule on the issue, but the Superior Court has held, in *Commonwealth v. Benner*, 853 A.2d 1068 (Pa. Super. 2004), that it is the version in effect *on the date of release* that controls. In *Benner*, the defendant pled guilty to aggravated indecent assault in 1999. At the time Megan’s Law I was in effect; it imposed a ten-year registration requirement for aggravated indecent assault. By the time the defendant was released from prison, Megan’s Law I had been rescinded and replaced with Megan’s Law II, which made aggravated indecent assault a lifetime offense. The Commonwealth sought lifetime registration under Megan’s Law II, and the court in *Benner* ordered lifetime registration. While a defendant “may be subject to conviction only under statutes in effect on the date of his acts,” the Court wrote, “the application

of the registration requirements under Megan’s Law is not so limited.” This, according to the Court, is because under *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) registration requirements are not punitive, but “collateral” to an offender’s actual sentence.

Benner stands for the general proposition that “the most current version of Megan’s Law is applicable [concerning an offender’s registration obligations] so long as the defendant remains in the custody of correctional authorities to discharge any part of his sentence.” *Commonwealth v. Hitner*, 910 A.2d 721 (Pa. Super. 2006).

“TOLLING” FOR TEN-YEAR OFFENDERS RECOMMITTED TO PRISON

Lifetime registration under Megan’s Law means just that: registration for life. There are no exceptions. Ten-year registration, on the other hand, will require registration for *more* than ten years for any offender who is “recommitted for a parole violation or sentenced to an additional term of imprisonment” after initially registering. On the date he is recommitted or sentenced, the offender’s registration period will be “tolled” – that is, paused – for as long as he remains in prison or jail. It will recommence when he is released.

PENALTIES FOR FAILING TO COMPLY WITH REGISTRATION AND VERIFICATION REQUIREMENTS

PENALTIES FOR OFFENDERS SENTENCED BETWEEN JULY 9, 2000 AND JANUARY 22, 2005

Megan’s Law II took effect on July 9, 2000 and provided, in sections 9795.2(d) and 9796(e), for criminal penalties for offenders who failed to register with the State Police or later to verify their residences. On January 23, 2005, Megan’s Law II was superseded by Megan’s Law III; but offenders convicted and sentenced between July 9, 2000 and January 22, 2005 remain subject to the penalty provisions of Megan’s Law II, except insofar as those provisions have been found unconstitutional.

Section 9795.2(d) provides that:

- (1) An individual subject to registration under section 9795.1(a) [requiring ten-year registration of certain offenders] who fails to register with the Pennsylvania State Police as required ... commits a felony of the third degree.
- (2) An individual subject to registration under section 9795.1(b)(1), (2), or (3) [requiring lifetime registration of certain offenders] who fails to register with the Pennsylvania State Police as required ... commits a felony of the first degree and shall be sentenced to a mandatory minimum sentence of probation for the remainder of the individual’s lifetime and may be sentenced to a period of incarceration of up to the individual’s lifetime.

Section 9796(e) provides that:

- (1) Any individual subject to registration under section 9795.1(a) who fails to verify his residence or be photographed as required ... commits a felony of the third degree.
- (2) Any individual subject to registration under section 9795.1(b)(1), (2), or (3) who fails to verify his residence or to be photographed as required ... commits a felony of the first degree and shall be sentenced to a mandatory minimum sentence of probation for the remainder of the individual's lifetime and may be sentenced to a period of up to the individual's lifetime.

In *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003), the Pennsylvania Supreme Court found section 9795.2(d) (2) – and, by implication, section 9796(e)(2) – unconstitutional *as to SVPs* on the grounds that it was “manifestly in excess of what is needed to ensure compliance.”⁷ Shortly afterward, the Superior Court held in *Commonwealth v. Pond*, 842 A.2d 699 (Pa. Super. 2004), that the penalties imposed under section 9796(e)(1) were unconstitutional, because that section did not specify that an offender's failure to verify his residence must be *knowing*, rather than merely inadvertent (i.e., that the section lacked a “*mens rea*” condition). In *Commonwealth v. Killinger*, 888 A.2d 592 (Pa. 2005), however, the Supreme Court placed the precedential value of *Pond* into doubt by ruling that the penalties in subsection 9795.2(d)(1) *were* constitutional.⁸ And then in *Commonwealth v. Wilson*, 910 A.2d 10 (Pa. 2006), the Supreme Court ruled – bizarrely and probably wrongly – that both sections 9795.2(d)(2) and 9796(3) are constitutional as to offenders who are *not* SVPs. At the same time, the Court declined to rule on the issue of whether the lifetime penalties imposed under those section were excessive on the grounds that “Appellee's excessiveness claim is not squarely before us.”

What does all this mean? Apparently, inexplicably, that offenders who *were* adjudged SVPs under Megan's Law II are *not* subject to the criminal penalties under sections 9795.2(d) and 9796(e), but that offenders who have *not* been adjudged SVPs *are*. That said, it would also appear that the penalties under both sections are open to constitutional challenge on the grounds of excessiveness.

PENALTIES FOR OFFENDERS SENTENCED AFTER JANUARY 23, 2005

Offenders convicted and sentenced under Megan's Law III (i.e., after January 23, 2005) are subject to the penalty provisions of section 4915 of the Pennsylvania Criminal Code (18 Pa. C.S. §4915) .

Under section 4915, the knowing failure of a Megan's Law offender to comply with any registration or post-registration verification provision of Megan's Law is a felony which, under 42 Pa.C.S. §9718.3, is punishable by a term of imprisonment from two to seven years, depending on whether an offender's registration obligation is ten years or life. If an offender with a registration obligation in Pennsylvania travels in interstate commerce to another jurisdiction where he is required to register but fails to do so, he will be subject under the law of the

⁷ Technically, the Court found subsection (2) unconstitutional only as to offenders adjudged SVPs under section 9795(b)(3), but presumably the ruling should apply also to other offenders sentenced to lifetime registration under sections 9795(b)(1) and (b)(2).

⁸ Curiously, the *mens rea* issue was not raised in *Killinger*.

jurisdiction to which he travels, and also under the Federal Sex Offender Registration and Notification Act (SORNA).

Penalties Under Megan’s Law III for Offenders with Ten-Year Obligations

A ten-year offender who knowingly fails to register with the Pennsylvania State Police under section 9795.2 or to verify his address or be photographed under section 9796 commits a third-degree felony and faces a mandatory prison sentence of not less than two years. Each subsequent failure to register or verify one’s address is a second-degree felony punishable by no less than five years’ imprisonment. Knowing failure to provide accurate information when registering or verifying one’s address is a second-degree felony carrying a mandatory sentence of not less than three years.

Penalties Under Megan’s Law III for SVPs and Lifetime Offenders

An SVP or other lifetime offender who knowingly fails to register under section 9795.2 or to verify his address or be photographed under section 9796 commits a second-degree felony and faces a mandatory prison sentence of not less than three years. Each subsequent failure to register or verify one’s address is a first-degree felony punishable by no less than seven years’ imprisonment. Knowing failure to provide accurate information when registering or verifying one’s address is likewise a first-degree felony, and carries a mandatory sentence of not less than seven years.

FEDERAL PENALTIES FOR OFFENDERS WHO TRAVEL IN INTERSTATE COMMERCE

A sex offender who travels in interstate commerce and knowingly fails to register in any jurisdiction where the law requires registration faces imprisonment of “not more than ten years” under section 2250 of the federal Sexual Offender Registration and Notification Act (“SORNA”), 18 U.S.C. §2250(a). The penalties fixed by SORNA undoubtedly apply to all offenders convicted after July 27, 2006, and *may* (but probably do not) apply to offenders convicted before that date. Because every state has a Megan’s Law which requires registration of all sex offenders who move to or work in that state, such failure will also subject an offender to prosecution in that state

COMMUNITY NOTIFICATION

The registration requirements of Megan’s Law exist to enable the Pennsylvania State Police to notify the public of the sex offenders and SVPs in their midst. Megan’s Law provides for two types of notification by the police – “active” and “passive.”

ACTIVE NOTIFICATION

Active notification, also known as “neighborhood notification” and “other notification,” applies only to offenders who have been adjudged SVPs. It is defined in Megan’s Law as “any process whereby law enforcement ... notifies persons in the community in which the individual resides ... of the residence, employment or school location of the individual.” 42 Pa.C.S. §9791.

Every individual living, working, or attending school in Pennsylvania is subject to active notification if he has been adjudged an SVP in any jurisdiction. So is every person with such a presence in Pennsylvania who, though never formally determined to be a “sexually violent predator,” was subject to active notification and lifetime registration in another jurisdiction before moving to Pennsylvania. 42 Pa.C.S. §9795.2(b).

Whenever an SVP notifies that State Police that he has moved, changed jobs, or enrolled in a new school (as he is required to do within 48 hours), written notices containing his name, his photograph, his address or addresses, a statement of the offense for which he was convicted, and a statement that he has been adjudged a sexually violent predator, are sent to the following persons:

- the SVP’s neighbors, including any unit owners’ association and all residents of any “common interest community” (i.e., multifamily housing complex) in which the SVP lives;
- the director of the children and youth service agency of the county where the SVP lives;
- the superintendent, or the equivalent for parochial and private schools, of each school district in the area;
- the licensee of each certified day care center and licensed preschool program in the municipality where the SVP lives; and
- the president of each college, university or community college located within 1,000 feet of the SVP’s residence.

SVPs in Pennsylvania are subject to active notification for life. Exceptions are made only for SVPs who, after being released from prison, succeed in (1) living outside prison for twenty years without being convicted of a felony of any kind; and (2) convincing the court in which they were sentenced that they no longer poses a threat “to the safety of any other person.” The procedure is as follows. Under section 9795.5, an SVP is entitled to file a petition for exemption from active notification “provided no less than 20 years have passed since the individual has been convicted in this or any other jurisdiction of any offense punishable by imprisonment for more than one year, or the individual’s release from custody following the individual’s most recent conviction for any such offense, whichever is later.” The sentencing court is then required to hold a hearing to determine whether the petition should be granted. In the meantime, the offender must undergo a new assessment by the Sexual Offenders Assessment Board to determine whether he still suffers from a mental abnormality or personality disorder that might lead him to commit more sexually violent offenses. At the hearing, the SVP has the right to call witnesses, including expert witnesses; to be represented by counsel; and to have an attorney appointed for him if he cannot afford one. (Presumably, under *Commonwealth v. McWilliams*,

887 A.2d 784 (Pa. Super. 2005), the offender is also entitled to a court-appointed expert if he cannot afford one). But whereas at the initial SVP determination hearing the burden of proof lies with the Commonwealth, at the exemption hearing it rests with the SVP. He must prove “by clear and convincing evidence” that his exemption from active notification “is not likely to pose a threat to the safety of any other person.” It is not sufficient for an SVP to prove that he poses no threat to commit additional *sex crimes*; he must prove that he poses no threat of *any kind* to any other person. What an SVP must do to carry this essentially negative burden is not clear. Presumably, he must show conclusively either that he is either no longer an SVP or that although he remains an SVP, he is so disabled or incapacitated as to be innocuous.

PASSIVE NOTIFICATION

“Passive notification” means internet notification – or “notification pursuant to section 9798.1 (relating to information made available on the Internet) or any process whereby persons ... are able to access information pertaining to an individual as a result of the individual as a result of the individual having been convicted or sentenced by a court for an offense similar to an offense listed in section 9795.1 (relating to registration).”

The General Assembly has found that “public safety will be enhanced by making information about sexually violent predators, lifetime registrants and other sex offenders available to the public through the Internet.” 42 Pa.C.S. §9798.1 Thus all individuals subject to Pennsylvania’s Megan’s Law – SVPs and non-SVPs alike – are subject to passive notification. The publication of offender information on the internet, the General Assembly has noted, “is intended solely as a means of public protection and shall not be construed as punitive.” *Id.*

The address of Pennsylvania’s Megan’s Law website is www.pameganslaw.state.pa.us. Posted there is the following information about each offender subject to Megan’s Law:

- the offender’s name and any aliases;
- the offender’s year of birth;
- the address of each residence maintained by the offender;
- the municipality, county, and zip code of the offender’s employment location;
- the offender’s photograph;
- a physical description of the offender including any identifying marks, like scars and tattoos;
- the license plate number and a description of each vehicle owned by the offender;
- a statement indicating whether the offender is currently compliant with registration requirements;
- a statement indicating whether the offender’s victim was a minor;
- a description of the sex offense or offenses for which the offender was convicted; and
- the date of the offense and conviction.

All SVPs are subject to passive notification for life; there is no procedure for exemption. An offender who has not been adjudged an SVP is subject to passive notification for the length of his registration obligation (i.e., ten years or life); however, a lifetime registrant may seek

exemption after twenty years have passed since his release from prison, provided he has not been convicted of any felonies in the meantime.

The procedure when a non-SVP offender seeks relief from passive notification is largely the same as when an SVP seeks relief from active notification: the offender must undergo a assessment by the Sexual Offenders Assessment Board to re-evaluate his likelihood to re-offend; the sentencing court must hold a hearing within 120 days; and the burden of proof at that hearing rests upon the offender. He must prove “by clear and convincing evidence” that his being exempted from active notification “is not likely to pose a threat to the safety of any other person.” Again, it is not sufficient for an offender to prove that he poses no threat to commit additional sex crimes; he must prove that he poses no threat to another person of any kind.

COUNSELING REQUIRMENTS FOR OFFENDERS AND SVPs

PRE-RELEASE COUNSELING (ALL SEX OFFENDERS)

Under 42 Pa. C.S. §9718.1, every individual who has been incarcerated in a State institution for committing or attempting to commit an enumerated sex offense been adjudged an SVP must “attend and participate in a Department of Corrections program of counseling or therapy designed for incarcerated sex offenders” during his imprisonment. Any offender who refuses to participate in such counseling will be ineligible for parole. The enumerated offenses include:

1. Any offense enumerated in Chapter 31 of the Pennsylvania Criminal Code, 18 Pa.C.S. §3101 et seq., (i.e., rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, indecent assault, aggravated indecent assault, institutional sexual assault, indecent exposure), if the offense involved a minor under 18 years of age;
2. Endangering the welfare of children (18 Pa.C.S. §4304), if the offense involved sexual contact with the victim;
3. Corruption of minors (18 Pa.C.S. §6301), if the offense involved sexual contact with the victim;
4. Open lewdness (18 Pa.C.S. §5901), if the offense involved a minor under 18 years of age;
5. Prostitution, or promoting or patronizing prostitution (18 Pa.C.S. §5902), if the offense involved a minor under 18 years of age;
6. Obscene and other sexual materials and performances (18 Pa.C.S. §5903), if the offense involved a minor under 18 years of age;
7. Sexual abuse of children (18 Pa.C.S. §6312);
8. Unlawful contact with a minor (18 Pa.C.S. §6312);
9. Sexual exploitation of children (18 Pa.C.S. §6320);
10. Incest (18 Pa.C.S. §4302), if the offense involved a minor.

Only two of the offenses that trigger the application of Megan’s law under section 9795.1 are absent from this list: kidnapping (18 Pa.C.S. §2901), and luring a child into a motor vehicle (18 Pa.C.S. §2910). Thus, offenders who are subject to Megan’s Law solely due to a kidnapping or luring conviction and who have not been adjudged SVPs need not participate in pre-release

counseling. All other offenders subject to Megan’s Law must participate in counseling under section 9718 whether or not they have been adjudged SVPs.

POST-RELEASE COUNSELING (SVPs ONLY)

Whether a sex offender must undergo counseling after prison depends on whether he has been adjudged an SVP. Individuals who have not been deemed SVPs have no post-release counseling obligations, regardless of what offense or offenses they have been convicted of. Those who have been deemed SVPs must, under section 9799.4, “attend at least monthly counseling sessions in a program approved by the [Sexual Offenders Assessment Board]” for the length of their registration obligation under section 9795.1. They must also be “financially responsible for all fees assessed from such counseling sessions,” unless they can prove “to the satisfaction of the court” that they cannot afford them. *Id.* Any SVP who succeeds in proving his destitution must still attend counseling sessions; he is relieved only of paying for them. Under section 9799.4, that responsibility falls on his parole officer.

To obtain a current list of counselors approved by the Sexual Offenders Assessment Board, one can call the Board at (717) 787-5430 or go to its website, www.soab.state.pa.us.

SORNA: THE FEDERAL MEGAN’S LAW

On July 27, 2006, President Bush signed into law the federal Sex Offender Registration and Notification Act,⁹ or “SORNA.” SORNA imposes on all “sex offenders” living in the United States a *federal* obligation to register “in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” The term “sex offender” is defined in SORNA as “anyone who was convicted of a sex offense.” Offenses deemed “sex offenses” include:

- i. a criminal offense that has an element involving a sexual act or sexual contact with another;
- ii. a criminal offense that is a specified offense against a minor;
- iii. a Federal offense ... under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18, United States Code;
- iv. a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 915 note); or
- v. an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

The only sex-related offenses excepted from this definition are: (1) offenses for which an individual was convicted under foreign law, if the conviction was “not obtained with sufficient safeguards for fundamental fairness and due process for the accused” under guidelines or regulations established by the United States Department of Justice, and (2) offenses involving

⁹ 42 U.S.C. §16901 et seq.

consensual sexual conduct (e.g., prostitution) where the victim is an adult, or at least thirteen years old and no fewer than four years younger than the offender.

Section 141(a) of SORNA, codified at 18 U.S.C. §2250(a), imposes criminal penalties of up to ten years' imprisonment on sex offenders who (1) knowingly fail to register or report in a jurisdiction requiring registration, and (2) travel in interstate commerce. Generally, offenders are prosecuted under SORNA for moving to a new jurisdiction and failing to register there.

All individuals convicted of sex offenses after July 27, 2006, SORNA's effective date, can be prosecuted under the law. Whether offenders convicted of sex offenses *before* July 27, 2006 can be prosecuted remains an open question. SORNA gives the U.S. Attorney General "the authority to specify the applicability of the requirements of this title to offenders convicted before the enactment of this Act," and the Attorney General has, in fact, promulgated rules specifying SORNA's application to individuals convicted before July 27, 2006. See 72 FR 8894, 8895-96; 28 CFS 72.3. It has been argued, though, that the prosecution of offenders convicted before July 27, 2006 violates the *ex post facto* clause of the United States Constitution, and at least one court has agreed. See *United States v. Smith*, 481 F. Supp. 2d 846 (E.D. Mich. Mar. 8 2007). No court in Pennsylvania has addressed the issue; however, the District Court for the Middle District of Pennsylvania has decided that SORNA's criminal penalties cannot be applied to individuals convicted between SORNA's effective date and February 28, 2007, the date that the Attorney General promulgated the rule providing for retroactive application. See *United States v. Kapp*, 487 F. Supp. 2d 536 (M.D. Pa. 2007).