



Criminal Defense Attorneys of Michigan

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March 17, 2011

The Honorable John J. Walsh
Chair, House Judiciary Committee
Michigan House of Representatives
Lansing, Michigan 48909

re: *SB 188, 189 (SORNA)*

Chairman Walsh:

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I am writing, on behalf of the Criminal Defense Attorneys of Michigan, in opposition to pending amendments to SB 188 that would prescribe the procedure for resolution of disputes over whether a defendant will be exempted from the SORNA registry in so-called "Romeo and Juliet" cases. While we agree that some procedure should exist to resolve such disputes, we believe that the procedure envisioned by the proposed amendments are problematic.

First, where there is a dispute about consent and, therefore, the defendant's entitlement to the registration exemption, a defendant should be permitted, upon motion, to have the hearing before the plea so that the defendant may know his or her status in order to enter an intelligent plea. While this may not be important in every case where there is a dispute, or even in most, it will be important in some cases and we think it would be prudent to allow this hearing before the plea in those cases.

Second, at such a hearing the burden should be on the prosecutor to prove force/coercion by a preponderance of the evidence, rather than on the defendant to prove lack of force/coercion. This is the standard way of addressing disputes that affect the imposition of penalty and other adverse effects on defendants in our system of justice, and in our view there is no reason for flipping the burden of proof here. Flipping that burden effectively allows the prosecution to avoid its standard proof obligations where force/coercion is alleged by charging the easier "age-only" offense rather than the "force/coercion" offense, a completely unfair tactic that results in the defendant being forced to "prove a negative"--that there was no coercion. As any lawyer familiar with trial practice will confirm, proving a negative is well nigh impossible, and in these cases if the prosecution indeed believes the facts involve coercion the prosecutor should be prepared to prove it.

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Proponents of placing the burden on the defendant claim that the SORNA bills are premised on requiring registration for sex offenders, and applicants for narrow exceptions should be required to prove their eligibility. That justification is overstated in the Romeo/Juliet context where an equally strong premise of SB 188 and 189 is that consensual sexual activity amongst such actors does not warrant registration. This isn't a "narrow exception" if you are in that age range; it is the norm, and a defendant in this circumstance shouldn't be required to "prove" s/he's normal.

Third, contrary to the proposed amendments, the rules of evidence should apply at this hearing. It is common for police reports to be incomplete, inaccurate, or slanted. A complainant's "victim impact letter" or similar unsworn, hearsay statement that claims coercion likewise will often be incomplete, inaccurate, or slanted. It is common that SANE or other forensic medical exam reports contain findings that are ambiguous on the issue of consent vs. coercion. A defendant cannot cross-examine such reports and hearsay statements, which means s/he is seriously hamstrung in attempting to expose their unreliability.

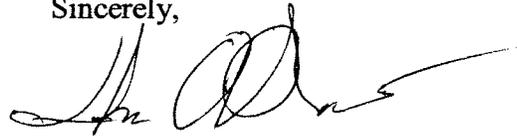
The determination of whether a case involves consent or coercion, with the result of "registration" or "no registration" hanging in the balance, is too important a determination for a judge to base it on unsworn, hearsay reports and statements. If the rules of evidence will NOT apply, the result will be more preliminary examinations, and probably more Romeo/Juliet trials, because a defendant will feel compelled to get the complainant and other witnesses relevant to consent on record for use later in seeking the registration exemption. (As it is now, in age-only cases PEs commonly are waived, to the great relief of everyone, and trial are almost unheard of.)

Final point on this item--it is ironic, and inconsistent, that the proposed amendments call for the rules of evidence to be suspended at this hearing, but that the rape-shield privilege contained in 750.520j (an evidence rule) be observed by defendants. The result is that a complainant can say whatever he or she wants about a defendant no matter how untrue or scurrilous, and not be subject to cross-examination on it, and it will be the defendant's burden to overcome those unsworn, hearsay statements, but the defendant is further restricted in his ability to prove "no force" by being prohibited from discussing the complainant's sexual character and conduct even where it might be relevant (except as very narrowly permitted by the rape-shield act). The double-standard is plain.

In sum, while we agree that some procedure ought exist for resolving a dispute in Romeo/Juliet cases over whether the case truly involved a consensual sexual encounter, the better procedure would be one that permits the hearing to be held prior to the plea upon defense request, where the burden is on the prosecution to prove lack of consent (which is where that burden normally would lie), and where the rules of evidence would apply. This would make plea negotiations more realistic and transparent and determinations of coercion more reliable, and will reduce the number of trials and PEs that otherwise will be demanded.

Thank you for your consideration of our views in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'John A. Shea', with a long, sweeping horizontal line extending to the right.

John A. Shea, Co-Chair
Rules and Laws Committee
Criminal Defense Attorneys of Michigan

