STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **No. 164685**

CORA LYMON,
Defendant-Appellee.

Third Circuit Court No. 14-10811
Court of Appeals No. 327355

PLAINTIFF-APPELLANT'S BRIEF ON LEAVE GRANTED
ORAL ARGUMENT REQUESTED

KYM WORTHY
Prosecuting Attorney
County of Wayne

JON P. WOJTALA (P-49474)
Chief of Research, Training, and Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5748

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Case **Page**

Court Rule

Statutes

STATEMENT OF JURISDICTION AND JUDGMENT APPEALED

On April 8, 2015, following a jury trial, defendant, Cora Lymon, was convicted of, among other charges, three counts of Unlawful Imprisonment. On April 22, 2015, defendant was sentenced to serve terms of 7 to 15 years imprisonment for these convictions. As required by statute, because two of the victims were minors, defendant was ordered to register under the Sexual Offender Registration Act (SORA) for a period of 15 years.

On June 16, 2022, the Court of Appeals, in an unanimous decision of the three judges: Presiding Judge Kirsten Frank Kelly, Judge Michael J. Kelly, and Judge Amy Ronayne Krause, affirmed defendant's convictions but reversed the condition of defendant's sentence requiring registration on the sex offender registry.[1] The Court held that the 2021 version of the Sex Offender Registration Act (SORA) constituted punishment and, as applied to a defendant who was not convicted of an offense containing a sexual component, was cruel or unusual under the Michigan Constitution.

The People applied to this Supreme Court requesting leave to appeal the Court of Appeals decision on the issue of defendant's registration on the sex offender registry. On January 11, 2023, the Supreme Court granted the People's application and directed the parties to address "whether requiring a defendant to register as a sex offender under the Sex Offender Registration Act (SORA), MCL 28.721 et seq.,

[1] *People v. Lymon*, ___ Mich App ___ (2022), contained in the Appellant's Appendix,

as amended by 2020 PA 295, effective March 24, 2021 (the 2021 SORA), for a non-sexual crime, such as unlawful imprisonment of a minor, constitutes cruel or unusual punishment under Const 1963, art 1, § 16 or cruel and unusual punishment under US Const, Am VIII."[2]

This Court has jurisdiction over this appeal through MCR 7.303(B)(1).

[2] Appellant's Appendix, 1a.

STATEMENT OF QUESTION PRESENTED

I

The Michigan Constitution, interpreted by this Court as providing broader protection than its federal counterpart, prohibits cruel or unusual punishments. Here, the condition of defendant's sentence for a conviction of Unlawful Imprisonment requiring him to register under SORA was neither punishment nor cruel or unusual. Does defendant's registration under SORA violate the Michigan Constitution's prohibition against cruel or unusual punishments?

The trial court did not answer this question.

The People answer, "NO."

Defendant would answer, "YES."

The Court of Appeals answered: "YES."

STATEMENT OF FACTS

The People concur in the description of facts contained in the Court of Appeals opinion:

"On September 5, 2014, Lymon confronted his wife, Jacqueline Lymon, with what he believed was proof that she was having extramarital affairs. His children, both of whom were minors, were present during the confrontation. When Jacqueline stated that she did not believe him, he said he had text messages to prove it, but, instead of showing her messages, he broke his phone by slamming it onto the table. He left the house to fix his phone, and when he returned, his argument with Jacqueline continued. Eventually, she stated that she wanted to end the marriage. Lymon called her a "cold-hearted bitch" and a "whore." He then fetched his handgun from the pantry. One of his children testified that Lymon "cocked" the gun, and the other saw a bullet enter the chamber when Lymon pulled the slide back.

Lymon pointed the gun at Jacqueline and made her sit at the table. He told her that she was "cold" and "should have left him a long time ago." Jacqueline stood up with her back to the door. One of the children moved to stand in front of her, so Lymon pointed the gun at his child. The child pleaded with him to calm down, saying, "dad, that's our mother. Let's not take it this far." Lymon sat down, but continued to hold the gun and complain that Jacqueline had "done him wrong for so many years." He again pointed the gun at his child and told him, "Well, you can get it, too."

Ranting and raving, Lymon forced Jacqueline and the children to move to the sofa in the family room. While pointing the gun at them, he told his children, "if I kill her, I'm gonna have to kill you guys, too." They described him as angry, noting that his veins were "popping out." They begged and pleaded for their lives, holding their mother and prayed to God that Lymon would not kill their mother. Lymon demanded, "What about me? Don't you love me?" The children, crying and upset, said that they did but that "right now" he was trying to kill their mother. Lymon made Jacqueline and the children get off the sofa and kneel in front of the fireplace. He again stated that he was going to kill them. One of the children testified that they were all screaming at the top of their lung, hoping that the neighbors would hear them.

Jacqueline tried to get Lymon to think about God, but he responded "F God." She told him that she thought "angels are here to protect us." Lymon warned that she was "gonna see angels; you're gonna see a lot of angels in a minute." He then stated, "This is it" and held the gun up. Jacqueline and the children feared they were about to die, but Lymon did not shoot them. Instead, he separated Jacqueline from the children. He paced and continued to make comments that if he killed Jacqueline, he had to kill the children because they "wouldn't be able to take it." He also said he was going to do "demonic … shit" and was "gonna burn this thing down after I kill you all."

Eventually, he had Jacqueline sit on the sofa next to him. He asked questions and when he did not like the answer, he would hit or slap the back of her head. One of the children told him to stop. Lymon pointed the gun at him and asked what he was going to do about it. He

continued to call Jacqueline a bitch and a whore while he had the gun pointed at her side.

At one point, Lymon put the gun in his mouth and told his family to pull the trigger. They did not do so. At another point, Lymon went into the kitchen. One of the children got up from the floor and ran out of the house. He described that he was "freaking out," "scared," and was having trouble breathing. He got to the driveway and stopped because his mother and brother were still inside. Lymon instructed Jacqueline to go and get the child. She went out and convinced him to return to the home because of what might happen to his brother if he did not. She also told him that they could calm Lymon down.

After they returned to the house, Lymon continued to put the gun in his own mouth and point it at his head. They told him not to, that they loved him, and asked him to calm down. He seemed to calm. He allowed everyone to sit on the sofa and placed the gun on a table near to him. He did not permit anyone to leave the room. When the children needed to use the bathroom, he told them that they could urinate against the wall or in a cup because he was "going to burn it down anyway." Around midnight, one of the children was able to retrieve his phone, set an alarm for the morning, and go upstairs. He did not call the police because he was afraid, and after a few minutes, Lymon ordered him to come back downstairs.

Lymon kept Jacqueline and the children in the family room until morning. At some point, someone turned on the television. No one paid attention to it, however, because Lymon still had the gun. The children

slept fitfully. One explained that his difficulty sleeping was because he thought he would get killed while he slept. In the morning, Lymon apologized; the children told him that he had just had a bad night and that they would simply forget about it. Lymon drove one child to work and again apologized to the other child and agreed that Jacqueline could take that child with her when she went to work. Later in the day, Jacqueline picked up both children and they made a police report."[3]

On April 8, 2015, defendant was convicted of three counts of Torture, three counts of Unlawful Imprisonment, one count of Felonious Assault, and one count of Felony Firearm. He was sentenced on April 22, 2015, to three terms of 126 months to 20 years imprisonment for the Torture convictions, three terms of 7 to 15 years imprisonment for the Unlawful Imprisonment convictions, and a term of 2 to 4 years imprisonment for the assault conviction. Those terms would be served concurrent with each other. Defendant was also sentenced to a mandatory term of 2 years imprisonment for the Felony Firearm conviction, which would be served consecutive to the Torture sentences. Because two of the victims of the Unlawful Imprisonment convictions were minor children, he was required by statute to register under the Sex Offender Registration Act (SORA) for a period of 15 years.

Defendant appealed, of right, his convictions and sentences to the Michigan Court of Appeals. Defendant claimed that the prosecution produced insufficient evidence at trial to establish guilt beyond a reasonable doubt. Defendant also claimed that his registration on the

[3] Appellant's Appendix, 3a-4a.

sex offender registry was cruel and/or unusual punishment. Defendant's appeal was held in abeyance in the Court of Appeals for a number of years while the appellate courts considered other SORA-related issues. After the abeyance was lifted, defendant filed a supplemental brief again claiming that the condition of his sentence requiring SORA registration was cruel and/or unusual punishment and also raising two challenges to the scoring of the legislative sentence guidelines. On June 16, 2022, the Court of Appeals, in a published opinion, held that the prosecution had presented sufficient evidence to support defendant's convictions. The Court also found that the current version of SORA, effective in 2021, constituted punishment. As applied to offenders, such as defendant, convicted of offenses lacking a sexual component, SORA registration was disproportionate and constituted cruel or unusual punishment under the Michigan Constitution.

SUMMARY OF THE ARGUMENT

The People appeal, to this Supreme Court, the Court of Appeals opinion. While this Court, in *People v. Betts*,[4] found the previous version of SORA constituted punishment and violated the ex post facto clauses of the federal and state constitutions, the language of SORA has since been amended. The provisions that this Court, and the federal courts, cited as punitive in the 2011 SORA have largely been removed and the current version is nearly identical to the federal sex offender registry statute (SORNA) found, using the same standard employed by Michigan courts, not to be punishment. Applying the same factors employed by this Court in *Betts*, there is no evidence that defendant has met his heavy burden of clearly showing that the effect of the 2021 SORA is so punitive that it overcomes the clear non-punitive intent of the Act. The Court of Appeals reversibly erred in holding that the 2021 SORA was punishment. Even if the 2021 SORA is deemed punitive, the Court of Appeals erred in finding that it constituted cruel or unusual punishment as applied to a class of offenders whose offenses lack a sexual component and are not sexual in nature.

[4] *People v. Betts*, 507 Mich 527 (2021).

ARGUMENT

I.

The Michigan Constitution, interpreted by this Court as offering broader protection than its federal counterpart, prohibits cruel or unusual punishments. Here, the condition of defendant's sentence for a conviction of Unlawful Imprisonment requiring him to register under SORA was neither punishment nor cruel or unusual. Defendant's registration under SORA does not violate the Michigan Constitution's prohibition against cruel or unusual punishments.

Standard of Review

This Court generally reviews both constitutional issues and the interpretation of statutes de novo.[5] Statutes are presumed to be constitutional and the courts have a duty to construe a statute or Act as constitutional unless its unconstitutionality is clearly apparent.[6] It is the burden of the party challenging the constitutionality of a statute to prove its invalidity.[7] Here, defendant did not preserve his claim that his registration under SORA was unconstitutional by raising it in the trial court. Unpreserved constitutional issues are reviewed for plain error affecting substantial rights.[8] A defendant's substantial rights are affected by plain error if (1) there was an error, (2) the error was plain—that is, clear or obvious, and (3) the error prejudiced defendant. If defendant satisfies these three requirements, "reversal is warranted

[5] *People v. Fonville*, 291 Mich App 363, 376 (2011).
[6] *People v. Benton*, 294 Mich App 191, 203 (2011).
[7] *People v. Sadows*, 283 Mich App 65, 67 (2009).
[8] *People v. Carines*, 460 Mich 750, 764 (1999).

only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[9]

Discussion

The Court of Appeals has held that the provisions of the 2021 Sexual Offender Registration Act (SORA) requiring defendant to register and have his information placed on the public SORA database violates the Michigan Constitution's prohibition against cruel or unusual punishments.[10] The People first note, before emerging into the merits of the lower Court's decision, that the Court of Appeals chose to disregard the applicable standard of appellate review in reaching the substantive question of the Act's constitutionality. As stated, defendant did not preserve his claim that SORA was unconstitutional as applied to him by timely raising that issue in the trial court. The standard that the Court of Appeals, as now this Supreme Court, should have applied is whether it was plain error for the trial court to follow the clear directive of the Michigan Legislature that a defendant convicted of unlawful imprisonment of a minor must be placed on the SORA registry.[11] While the applicable standard of review is frequently disregarded, especially in recent years, by appellate courts when questions of the constitutionality of a particular statute or procedure is

---

[9] *Id.*, at 763.

[10] Const 1963, art 1, § 16.

[11] The version of SORA at the time of defendant's crimes, as continues in the current version of SORA, required registration as a Tier I offender following a conviction of Unlawful Imprisonment of a minor. MCL 28.722(s)(iii), now MCL 29.722(r)(iii).

involved, doing so ignores the firmly entrenched precedent of this State requiring issue preservation.[12] Defendants are expected to clearly and timely place their legal challenges on the record before the appropriate court—in this case the trial court—in order to preserve those challenges for appellate review.[13] When that is not done, there are consequences in that the defendant's burden on appeal is increasingly high and increasingly more difficult to overcome. Not only is the defendant required to show that an error occurred, but that the error committed was objectively clear and obvious at the time it was committed. No rational argument can be made, nor was one made by the Court of Appeals, for how it should have been objectively clear and obvious to the sentencing court that following the plainly written legislative directive and ordering that defendant register pursuant to SORA was an error.[14] Absent evidence that the circuit court plainly erred at the time of sentencing, precedent prohibited the Court of Appeals from granting defendant relief on appeal.

The People again pause before addressing the merits of the Court of Appeals opinion to address the question presented to the parties by this Court. The Court has asked whether the 2021 SORA is unconstitutional as it concerns non-sexual crimes, such as unlawful imprisonment of a minor, under either the Michigan or federal

---

[12] See, *People v. Pipes*, 475 Mich 267, 277-279 (2006).

[13] *Carines*, supra.

[14] The error must be "so 'plain' [that] the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *United States v. Frady*, 456 US 152, 163, 102 S Ct 1584, 71 L Ed 2d 816 (1982).

constitutions.[15] However, this Court has determined that, despite the similar language used in the applicable sections of the two constitutions,[16] the protections offered under the Michigan Constitution are broader than its federal counterpart.[17] While the People would direct the Court to and adopt the arguments made by the People just last Term in *People v. Poole*[18] and to Justice Zahra's arguments in dissent in *Stovall*[19] as to why this determination is questionable, the effect of the Court's determination is that it renders half of the Court's question to the parties nugatory as it pertains to this appeal. While the question of whether the federal Constitution would allow requiring defendants convicted of non-sexual offenses to be placed upon a sexual offender registry is legally important, it has been rendered irrelevant here by the conclusion that the Michigan Constitution's nearly identical language means something significantly different. If "cruel or unusual" provides broader protection than "cruel and unusual," then it follows that a sentence deemed constitutional under the former phrase would undoubtedly and automatically be deemed constitutional under the latter phrase. And, if a Michigan sentence is deemed unconstitutional under the Michigan Constitution, it hardly merits a mention, for purposes of this State appeal, if that same sentence is perfectly appropriate under the federal constitution.[20] Although this Court's

---

[15] Appellant's Appendix, 1a.
[16] Const 1963, art 1, § 16 prohibits cruel or unusual punishments while US Const, Am VIII prohibits cruel and unusual punishments.
[17] *People v. Stovall*, 510 Mich 301 (2022).
[18] Appellant's Appendix, 122a-142a.
[19] *Stovall*, slip at *17, fn 24.
[20] See, *Stovall*, slip at *6.

interpretation of Michigan's "cruel or unusual" punishment language relegates the question of constitutionality under the federal "cruel and unusual" punishment language to essentially a passing mention on the path to a decision on constitutionality, the People answer the Court that requiring defendant to register under SORA for the conviction of unlawful imprisonment of a minor is constitutional under both the Michigan and federal constitutions.

Moving to the merits of the Court of Appeals opinion, the Court reversibly erred in finding that registration under the 2021 SORA constitutes punishment. The Court compounded this error by further finding that, applying this "punishment" upon a defendant who was convicted of an offense that lacked a sexual component, was cruel or unusual in violation of Article 1, Section 16 of the Michigan Constitution. The Court reached its holdings by comparing the provisions of the 2021 SORA with the provisions of the 2011 SORA. This Court, as had the Sixth Circuit, found specific provisions of the 2011 SORA rendered the entirety of the statutory scheme to be punitive. While not every provision mentioned by this Court when addressing the 2011 SORA was excised from the 2021 SORA, those provisions the Court found the most punitive and which resulted in the Court's decision to find that the 2011 SORA, as a whole, constituted punishment were removed by the legislature. The Court of Appeals found that, since specific portions of the punitive 2011 SORA remained in the 2021 SORA, the latter statutory scheme was also punishment. The Court erred by flyspecking the 2021 SORA for any specific provisions remaining from the 2011 SORA that may be deemed punitive rather than analyzing the

2021 SORA on its own terms and determining if the Act, as a whole and not by its individual parts, was punishment. Only if defendant proved that the entirety of the Act was punishment, and cruel or unusual punishment at that, could the Court have found the 2021 SORA to be unconstitutional. Defendant failed in this burden and the Court of Appeals erred in its analysis. Had the Court properly considered the entire content of the 2021 SORA, it would have found that it is nearly identical to the statutory scheme contained in the federal SORNA, which, after submitting to the same standard of analysis as that used by the Court of Appeals in *Lymon* and this Court in *Betts*, was found not to constitute punishment. Without a finding of punishment, there was no reason to then determine if the 2021 SORA was cruel or unusual as applied to defendant, or more specific to the Court's opinion, a class of offenders that includes defendant.

A. Unlike the 2011 SORA, the 2021 SORA statutory scheme is not punishment.

To best understand the differences between the 2011 SORA that was found to be punishment and the 2021 SORA that does not constitute punishment, it is important to consider the evolution of the sex offender registry in Michigan, including the legal challenges to the Act. The Michigan Legislature first enacted a sex offender registration law in 1994.[21] The registry was first limited only to law enforcement, but later became available to the public.[22] Over the years, SORA was amended a

[21] 1994 PA 295.
[22] 1999 PA 85.

number of times. Each amendment had aspects that were more onerous to registrants in some respects and less restrictive in others.

In 2006, the legislature created student safety zones which restricted registrants from living, working, or loitering within 1,000 feet of a school. These student safety zones remained in the Act with the 2011 amendments.[23] The Legislature in 2011 also created a tier system which categorized registrants into three publicly available tiers that were applied retroactively. The tier system was adopted, in part, to comply with the comparable federal SORNA legislation.[24] The 2011 SORA also added a retroactive in-person reporting requirement that mandated a registrant to report in-person to the registering authority. The registrant was required to immediately report in-person certain activities or life events, such as 1) residence or place of domicile changes; 2) place of employment; 3) status of employment; 4) enrollment or unenrollment from an institution of higher education; 5) legal name changes; 6) extended travel plans; 7) establishment of email or social media presence; and 8) purchase or sale of a vehicle.[25] A registrant's willful violation of the registration requirements carried possible criminal penalties or the revocation of the registrant's probation, parole, or youthful trainee status.

In 2012, six registrants challenged the 2011 SORA in the federal courts, raising various constitutional claims. In 2015, in two opinions, the United States District Court for the Eastern District of Michigan

[23] 2011 PA 17.
[24] 34 USC § 20911(1)-(4).
[25] 2011 PA 17, 18.

found some portions of the Act constitutional and others unconstitutional.[26] The decisions were appealed to the Sixth Circuit Court of Appeals which limited its opinion solely to the question of whether the 2011 SORA violated the Ex Post Facto Clause.[27] The Court relied heavily upon the United States Supreme Court decision in *Smith v Doe*.[28] In *Smith*, the Court set out the framework for determining whether a statutory scheme constituted punishment. First, the Court asked whether the legislature intended to impose punishment? If not, the determining question was whether the statutory scheme was so punitive either in purpose or effect as to negate the legislature's intent to deem it civil.[29] This last question is answered by analyzing the statutory scheme using the *Mendoza-Martinez*[30] factors: 1) does the law inflict what has been regarded in our history and traditions as punishment? 2) does it impose an affirmative disability or restraint? 3) does it promote the traditional aims of punishment? 4) does it have a rational connection to a non-punitive purpose? and 5) is it excessive with respect to this non-punitive purpose?[31]

The Sixth Circuit found both the student safety zone provisions and the publication of the tier classification on the publicly accessible SORA website were akin to the traditional punishments of banishment

---

[26] See a summary of these decisions in *Does # 1-5 v. Whitmer*, 2022 WL 4110150 (E.D. Mich, September 8, 2022).
[27] *Does #1-5 v. Snyder*, 834 F3d 696 (CA 6, 2016) (*Does I*).
[28] *Smith v. Doe*, 538 US 84, 123 S Ct 1140, 155 L Ed 2d 164 (2003).
[29] *Smith*, supra at 92.
[30] *Kennedy v. Mendoza-Martinez*, 372 US 144, 83 S Ct 554, 9 L Ed 2d 644 (1963).
[31] *Smith*, supra at 97.

and shaming.[32] Further, the requirement of immediate in-person reporting for a multitude of life events resembled the traditional punishments of parole or probation.[33] Accounting for the historical and traditions of punishment, the Sixth Circuit found both the 2006 and 2011 SORA to be punitive. The Court next found the student safety zone, public listing of tier classification, and in-person reporting provisions imposed an onerous and affirmative disability or restraint.[34] The Sixth Circuit further found that, although it had a rational connection to a non-punitive purpose, the 2011 SORA advanced the traditional aims of punishment.[35] Finally, the Court determined that the Act dictated where a registrant could live or work but had no positive impacts to counterbalance this burden.[36] In addition to the plainly punitive in-person reporting requirements, this provision made the Act excessive to its non-punitive purpose. The Sixth Circuit ultimately found that the cumulative effect of the student safety exclusion zones, the public posting of tier classifications, and the immediate in-person reporting of life events requirement amounted to punishment and, since the provisions of the Act were retroactive, constituted an ex post facto violation.[37]

In 2016, another federal class action complaint was filed raising the same grounds that the Sixth Circuit did not address in *Does I*.[38] This

---

[32] *Does I*, supra at 701-702.
[33] *Id.*, at 703.
[34] *Id.*, at 704.
[35] *Id.*
[36] *Id.*, at 705.
[37] *Id.*, at 705-706.
[38] *Doe v. Snyder*, (*Does II*) 449 F Supp 719 (E.D. Mich, 2020).

complaint was brought on behalf of various classes of registrants. After many delays to allow the Michigan Legislature to amend the Act in compliance with *Does I*, the District Court eventually entered an order finding the 2011 SORA to be punishment and several of its provisions unconstitutional as applied to subclass members.

In 2021, this Court considered whether the 2011 SORA violated the federal and state ex post facto clauses.[39] The Court's reasoning in *Betts* mirrored the reasoning of the Sixth Circuit in *Does I* and cited to the same provisions of the Act—the exclusionary zones, the publication of tier classifications, and the immediate in-person reporting requirements—as grounds to find the 2011 SORA to be punishment and a violation of ex post facto.

Also in 2021, a new SORA became effective.[40] The 2021 SORA amended and repealed the provisions of the old SORA that were found to be unconstitutional in *Does I*, *Does II*, and *Betts*. The new Act, among other changes, repealed the student safety zone provisions in their entirety; removed the retrospective in-person reporting requirements for email addresses and internet identifiers and permitted reporting to be done by means other than in-person reporting; removed the registration requirement for the vast majority of new juvenile offenders; removed the remaining youthful trainees from the public registry; and eliminated the publishing of tier information on the public SORA website.[41] In short, the new SORA removed or modified all provisions

[39] *Betts*, supra.
[40] 2020 PA 295.
[41] See, MSP Notice to Registrants, Appellant's Appendix, 24a-28a.

found to be unconstitutional in *Does I* and *Does II* and now largely mirrors the federal SORNA.[42]

The similarity between the current SORA and the federal SORNA is crucial. The federal SORNA has repeatedly sustained constitutional scrutiny employing the same *Smith* standard employed by this Court in *Betts* and the Court of Appeals in *Lymon*.[43] While the Michigan Constitution is broader than the federal constitution in the breadth of the "cruel or unusual" prong of the constitutional analysis,[44] no space exists between how either the federal courts or Michigan determines the issue of punishment. Both rely upon the standard set out in *Smith*. A statutory scheme cannot be deemed cruel and/or unusual punishment unless it first is determined that it is punishment. That the provisions of the 2021 SORA and the provisions of the federal SORNA bear such similarity, there should be no reason for courts to reach opposite conclusions as to whether those similar provisions constitute punishment.

Both this Court in *Betts* and the Supreme Court for the United States in *Smith* employed the same two-step inquiry for determining if a statutory scheme is punitive. First, this Court must determine "whether the Legislature intended the statute as a criminal punishment

---

[42] See Charts Comparing 2021 SORA with SORNA, Appellant's Appendix, 29a-90a.

[43] See, e.g., *Willman v. Attorney General*, 972 F3d 819 (CA 6, 2020); *United States v. Under Seal*, 709 F3d 257 (CA 4, 2013); *United States v. Felts*, 674 F3d 599 (CA 6, 2012); *United States v. Juvenile Male*, 670 F3d 999 (CA 9, 2012); *United States v. Wass*, 954 F3d 184 (CA 4, 2020).

[44] *People v. Bullock*, 440 Mich 15, 30 (1992); *Stovall*, supra.

or a civil remedy."[45] If the Court determines that the legislative intent was to impose criminal punishment, then the inquiry ends, and the statutory scheme is deemed punishment. Here, this Court has already recognized that, in MCL 28.721a, the Legislature indicated its "intent in enacting SORA was the promotion of public safety, a nonpunitive goal."[46] The Legislature intended SORA to be civil regulation, rather than a criminal punishment.[47]

Once it is determined that the intent of the Legislature was to further a nonpunitive goal, the "heavy burden" then falls to the party challenging the statute—here the defendant—to provide "the clearest proof that the statutory scheme is so punitive either in purpose or effect to negate the State's intention to deem it civil."[48] "In determining whether defendant has satisfied this burden, we do not examine individual provisions of SORA in isolation but instead assess SORA's punitive effect in light of all the act's provisions when viewed as a whole."[49] The evaluation considers the effects of the registration requirements as generally felt by those subject to them, and not the effect on only one single class or individual.[50] As previously stated, this Court and the federal Supreme Court have both turned to the *Mendoza-Martinez* factors for determining if a defendant has met the burden of clearly proving that the statutory scheme is so punitive either in purpose

---

[45] *Smith*, supra at 96; *People v. Earl*, 495 Mich 33, 38 (2014).
[46] *Betts*, supra at 548.
[47] *Id.*, at 549.
[48] *Kansas v. Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997).
[49] *Betts*, supra at 549.
[50] *Smith*, supra at 100; *Seling v. Young*, 531 US 250, 262, 121 S Ct 727, 148 L Ed 2d 734 (2001).

or effect as to negate the nonpunitive intent. The particularly relevant factors for consideration are "whether, in its necessary operation, the regulatory scheme: (1) has been regarded in our history and traditions as a punishment; (2) imposes an affirmative disability or restraint; (3) promotes the traditional aims of punishment; (4) has a rational connection to a nonpunitive purpose; or (5) is excessive with respect to this purpose."[51] These factors are neither exhaustive nor individually dispositive.

1. The 2021 SORA does not resemble traditional forms of punishment.

The first *Mendoza-Martinez* factor asks the court to consider "whether SORA has 'been regarded in our history and traditions as a form of criminal punishment.'"[52] Because sex offender registries are of relatively recent origin, they have no direct analogies in our history or traditions.[53] The inquiry under this factor concerns whether the 2021 SORA resembles the traditional punishments of banishment, shaming, and parole. The People agree with the Court of Appeals that "the 2021 SORA does not resemble the traditional punishment of banishment."[54] But the People disagree with the Court of Appeals that the Act resembles shaming and parole.

The lower court's determination that the Act resembles shaming relies on a misconception. The Court believed that the 2021 SORA

---

[51] *Smith*, supra at 97.
[52] *Betts*, supra at 550.
[53] *Smith*, supra at 97.
[54] *Lymon*, at *12.

allows the posting of a registrant's Internet-based information, including email addresses, instant message addresses, and internet identifiers, on the publicly accessible website. "Because a registrant's Internet-based identifiers are no longer prevented from being included on the public website, the registrant is subjected to both ostracization in his or her community as well as while he or she interreacts with individuals using Internet-based communications and interactions. As a result, we conclude that the 2021 SORA continues to resemble the traditional punishment of shaming."[55] Contrary to the Court's belief, email addresses and internet identifiers are not publicly posted.[56] Most importantly though, federal regulations prohibit the public posting of a registrant's internet identifiers.[57] Further, the personal information that is posted on the public website—name, address, vehicle information, birthdate, height and weight, registering conviction, etc.--is easily discoverable through other means in an era where a plethora of information is available through simple Google searches or routine background checks run by employers, landlords, or real estate agents. While the public availability of this basic information may have a lasting and painful impact on the registrant, the consequences flow not from the SORA registration and its public posting, but from the fact of conviction, already a matter of public record.

The information posted to the public website is not analogous to shaming. The 2021 SORA no longer requires the public posting of tier

[55] *Lymon*, at *13.
[56] See, the Public Registry at http://msp.com/Home/Search
[57] See, 34 USC §§ 20916(c), 20920(b)(4).

classifications. The Act no longer requires youthful trainees or juvenile offenders to be posted on the public website. The only significant difference between the information currently publicly posted under the 2021 SORA and the information posted under the Alaska statute upheld in *Smith* is that the 2021 SORA requires registrants to provide the address of any post-secondary or trade school they currently attend. This information is not so dissimilar to the requirement of the Alaska statute requiring disclosure of the registrant's place of employment. The information required to be provided to the public is "accurate information about a criminal record, most of which is already public."[58] A state may maintain a publicly accessible website that publishes, as Michigan does, "the offenders' names, addresses, photos, physical descriptions, license numbers, places of employment, dates of birth, crimes of conviction, dates and places of conviction, and length of sentences, as well the offenders' compliance with the registration requirements."[59] In contrast to traditional shaming punishments, the 2021 SORA does not make the publicity or any resulting stigma an integral part of the objective of the regulatory scheme.[60] Any resulting public shame or embarrassment is a "collateral consequence of a valid regulation" arising from the traditional insistence on public indictment, public trial, and public imposition of sentence.[61]

The 2021 SORA likewise does not bear resemblance to the traditional punishment of probation and parole. The new SORA

---

[58] *Smith*, supra at 98.
[59] *Does I*, supra at 700.
[60] *Smith*, supra at 99.
[61] *Id.*

removed any restrictions on where a registrant may work, reside, or remain. The Act also removed the requirement that registrants immediately report minor life changes in-person. In its analysis, the Court of Appeals cited to the requirements that registrants periodically report to law enforcement, that they pay registration fees, that law enforcement have the ability to investigate a registrant's status at any time, based upon an anonymous tip, and that the willful failure to comply with these requirements subjects a registrant to imprisonment as reasons why the Act resembles parole.[62] But these requirements are also part of the federal SORNA and have been recognized by the Sixth Circuit as not offensive to the Constitution.[63] The requirements of the 2021 SORA are clearly distinguishable from the characteristics of probation or parole. Individuals on probation or parole are subjected to mandatory conditions of release, regular supervision, and revocation of release in the event of an infraction.[64] Those conditions typically involve significant limitations on the offender's daily life, "such as mandating employment, requiring consent before moving or changing jobs, and forbidding drug and alcohol use."[65] Similarly, law enforcement plays a far more active role in a probationer's life by overseeing their reentry, meeting regularly, and providing the required consent for any changes in the offenders living or working conditions. The 2021 SORA obligations fall short of the sort of active law-enforcement supervision typical of probation and parole. As mentioned, the new SORA removed

[62] *Lymon*, at *14.
[63] *Does I*, supra at 700.
[64] *Smith*, supra at 101.
[65] *Millard v. Camper*, 971 F3d 1174, 1182-1183 (CA 10, 2020).

any constraints on where a registrant may live, work, or loiter. The new SORA does not require the registrant to obtain permission before making basic decisions about his or her life. The 2021 SORA requires registrants to report changes in their address, employment, or other circumstances only if and after they occur.[66] Unlike with probation or parole, prior consent for or prohibitions on basic or minor life decisions do not exist. To the extent that offenders are required to pay an initial and periodic registration fee, that fee cannot be deemed punitive. A fee is punitive if it bears no rational relation to a non-punitive goal. Here, the registration fee is a flat amount of $50 irrespective of the crime committed,[67] is waivable if the defendant is indigent,[68] and is earmarked for the specific non-punitive goal of "training concerning, and the maintenance and automation of, the law enforcement database, public internet website, information required under [MCL 28.728], or notification and offender registration duties under [MCL 28.724a]."[69] The registration fee intended to reimburse for the costs associated with collecting information and maintaining the relevant databases as a result of the sentence imposed is civil in nature.[70] Finally, certainly defendants may face criminal prosecution for failing to comply with

---

[66] See, *Shaw v. Patton*, 823 F3d 556, 565 (CA 10, 2016).
[67] See, *Earl*, supra at 45; MCL 28.725a(6).
[68] MCL 28.725b(3).
[69] MCL 28.725b(2).
[70] *People v. Houston*, 237 Mich App 707, 716 (1999); *Mueller v. Raemisch*, 740 F3rd 1128, 1135 (CA 7, 2014) (" The state provides a service to the law-abiding public by maintaining a sex-offender registry, but there would be no service and hence no expense were there no sex offenders." Since the offenders are "responsible for the expense, there is nothing punitive about requiring them to defray it.").

registration and reporting requirements, but that would be, unlike probation or parole, a consequence distinct from the defendant's original offense. The new SORA does not resemble the traditional punishments of banishment, shaming, or parole.

2. The 2021 SORA is not an affirmative disability or restraint.

The next *Mendoza-Martinez* factor is how the effects of the 2021 SORA are felt by registrants—is it an affirmative disability or restraint? Outside of actual physical restraint, it is not evident what statutory requirements amount to a restraint or disability. "What is clear is that very few burdens are significant enough to tip the scale."[71] If the restraint is minor or indirect, its effects are not likely to be considered punitive.[72] The Court of Appeals found that the 2021 SORA imposes significant affirmative obligations on registrants by mandating upon pain of imprisonment that they report common life changes within a short period of time, sometimes in person and sometimes in a manner not specified in statute. The court cited to requirements that registrants report life events within three days, including the reporting of changes to the respondent's Internet identifiers. The Court of Appeals found that, although the time for reporting changes to Internet identifiers had been extended from "immediately" to three days, the burden was still onerous because, as this Court observed in *Betts*, given the ubiquity of the Internet in daily life, this requirement might be triggered dozens of

[71] *Hope v. Comm'r of Indiana Dep't of Correction*, 9 F4th 513, 532 (CA 7, 2021).
[72] *Smith*, supra at 100; *Lymon*, at *14.

times within the year.[73] The Court also cited to the requirement that registrants make periodic in-person reports to law enforcement. The Court found this to be onerous to those who might have difficulty in traveling, such as health issues, lack of access to public transportation, and the lack of funds for private transportation.[74] Finally, the Court cited to the potential for imprisonment if the registrant willfully fails to comply with the requirements.

The Court of Appeals relied heavily upon this Court's analysis in *Betts* of the 2011 SORA for why the reporting of life events were onerous. Yet, the Court of Appeals ignored a crucial fact specifically cited by this Court in *Betts* that differentiated the provisions of the 2011 SORA with the provisions contained in the 2021 SORA. The reporting requirements of the 2011 SORA were "particularly onerous" because they were required to be done immediately in-person.[75] The 2021 SORA removed the immediate in-person requirement and allowed the reporting of changes to life events in another manner "as prescribed by the department."[76] While the Act does not specify what these other manners might be, the Michigan State Police has made it clear that these changes can be reported via first-Class Mail, by simply dropping the form off at a registering authority, or in-person.[77] The ability to make these reports

---

[73] *Lymon*, at *15, citing *Betts*, supra at 555.
[74] *Lymon*, at *15, citing *Betts*, supra at 556.
[75] See, *Betts*, supra at 555-556 ("Particularly onerous was the requirement in former MCL 28.725(1)(f) of *immediate in-person* reporting…") ("Cumulatively, these *frequent in-person* reports imposed a burden on registrants…")
[76] MCL 28.725.
[77] MSP Notice to Registrants, Appellant's Appendix, 25a.

without appearing in-person, dramatically decreases the burden that is placed on registrants.

The Court of Appeals also ignored the determination of the Sixth Circuit that SORA's periodic reporting requirements do not offend the Constitution.[78] SORA's periodic in-person reporting of registrants serves the legitimate purpose of establishing that the individual is in the vicinity and not in some other jurisdiction and confirms the registrant's identity and required information.[79] This purpose is rationally related to the Legislature's stated non-punitive intent to provide an appropriate, comprehensive, and effective means for the public and law enforcement to monitor individuals convicted of specific legislatively enumerated crimes. Admittedly, while periodic in-person reporting may be an inconvenience to the registrant, to some registrants even a substantial inconvenience, that burden is not enough to transform the regulation into a punishment.[80] "To appear in person to update a registration is doubtless more inconvenient than doing so by telephone, mail or web entry; but it serves the remedial purpose of establishing that the individual is in the vicinity and not some other jurisdiction where he may not have registered, confirms identity by fingerprints and records the individual's current appearance."[81] The 2021 SORA provision is comparable to the periodic in-person

---

[78] *Does I*, supra at 700.
[79] See, *United States v. Parks*, 698 F3d 1, 6 (CA 1, 2012).
[80] See, e.g., *Parks*, supra; *Doe v. Cuomo*, 755 F3d 105, 112 (CA 2, 2014); *Under Seal*, supra at 265; *Hatton v. Bonner*, 356 F3d 955, 964 (CA 9, 2003); *United States v. WBH*, 664 F3d 843, 855 (CA 11, 2011); *Shaw v. Patton*, supra at 568-569.
[81] *Parks*, supra at 6.

requirement of the federal SORNA, which has been specifically determined not to constitute an affirmative disability or restraint.[82]

Nothing in the reporting requirements of the 2021 SORA constitutes an affirmative disability or restraint on the registrants. The 2021 SORA is significantly different than the 2011 SORA analyzed in *Betts*. For common life changes, the registrant is relieved of the burden of in-person reporting and, can satisfy the requirement remotely. The onerous burden of immediately reporting changes to Internet identifiers has been modified to allow the registrant three days to report and to do so without appearing in-person. The periodic in-person reporting requirement, although an inconvenience, does not rise to the level of a restraint in the ordinary or punitive meaning of the word.[83] Contrary to the Court of Appeals determination, to the extent the reporting requirements impose a disability or restraint, it is minor and non-punitive.

3. Like the 2011 SORA, the 2021 SORA can be found to promote traditional aims of punishment.

The next *Mendoza-Martinez* factor is whether the 2021 SORA promotes the traditional aims of punishment: retribution and specific and general deterrence.[84] The Legislature made its intent clear that SORA was to prevent and protect against the commission of future

---

[82] *Felts*, supra at 605-606.
[83] *Under Seal*, supra at 265.
[84] *Hudson v. United States*, 522 US 93, 101, 118 S Ct 488, 139 L Ed 2d 450 (1997).

criminal sexual acts by convicted sex offenders.[85] Yet, to "hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' … would severely undermine the Government's ability to engage in effective regulation.'"[86] This Court has already determined that the Legislature's expressed deterrent intent is a main feature of SORA.[87] Since the 2021 SORA did not amend this expressed intent, it appears that deterrence remains a main feature of the statutory scheme. Further, the ongoing obligations under the 2021 SORA all stem from the registrant's prior commission of a legislatively enumerated offense which this Court has construed as promoting the aim of retribution.[88] As such, there is support that the 2021 SORA promotes the traditional aims of punishment. However, as *Smith* instructed, this one factor is not determinative of whether the statutory scheme as a whole is punishment.[89] Instead, these objectives may be equally "consistent with the regulatory objective."[90] Further, the Sixth Circuit has "accordingly give[n] this factor little weight" in determining if a civil remedy amounts to criminal punishment.[91]

4. The 2021 SORA has a rational connection to a non-punitive purpose.

[85] MCL 28.721a; *Betts*, supra at 556-557.
[86] *Smith*, supra at 102.
[87] *Betts*, supra at 557.
[88] *Id.*
[89] *Smith*, supra at 97.
[90] *Id.*, at 102.
[91] *Does I*, 834 F3d at 704.

The next *Mendoza-Martinez* factor is whether there is a rational connection to a non-punitive purpose. The Supreme Court has determined this factor to be the "most significant" factor in determining whether a sex offender registration system is nonpunitive.[92] As previously stated, the Legislature set out its non-punitive purpose in MCL 28.721a. The purpose of SORA is to keep the public safe, attempt to prevent recidivism, and provide an "appropriate, comprehensive, and effective means to monitor those persons who pose … a potential danger" to the people of Michigan. This intent mirrors the Congressional intent in the federal SORNA to create a non-punitive regulatory framework to keep track of sex offenders.[93] This Court in *Betts*, the Court of Appeals in *Lymon*, and the Sixth Circuit in *Does I* have all agreed that SORA, by identifying potentially recidivist sex offenders and alerting the public, has a rational connection to this non-punitive purpose. This rational connection to a non-punitive purpose is the most significant factor weighing against the Court of Appeals's determination that the 2021 SORA is punitive.

5. **The 2021 SORA is not excessive**.

The last *Mendoza-Martinez* factor is whether the regulatory means chosen are reasonable in light of the non-punitive objective.[94] This factor is analyzed for what is reasonable and not "whether the legislature has made the best choice possible to address the problem it

[92] *Smith*, supra at 102.
[93] *Under Seal*, supra at 264-265.
[94] *Smith*, supra at 105.

seeks to remedy."[95] The burden is on defendant to establish that the Act's "nonpunitive purpose is a sham or mere pretext."[96]

The Court of Appeals recognized that the restraints placed upon registrants in the 2021 SORA were lesser than those imposed by the 2011 SORA. Still, the Court found that the restraints were excessive. The Court cited to studies supporting "the uncertainty of the 2021 SORA's efficacy at decreasing recidivism" and the stigma of branding registrants as a menace by the state without an individualized assessment of a registrant's risk of recidivism.[97] The Court of Appeals relied heavily upon statistics and studies that were never cited in the trial court or made part of the record to be considered and relied upon on appeal and used those extra-record studies and statistics as a significant basis for declaring existing legislation unconstitutional.

The Court of Appeals suggests that the registry is excessive because, according to studies and statistics, recidivism rates might be "overblown" or some people on the registry have a lower likelihood of reoffending. The question though is "not whether the weight of the evidence shows that sex offenders are likely to recidivate" or whether the registry and notification restrictions actually prevent future crimes. Instead, this Court's "inquiry is limited to whether it would be rational for a legislature to draw these conclusions."[98] The Court of Appeals seemingly missed the point that perhaps the reason why recidivism

---

[95] *Id.*
[96] *Smith*, supra at 103.
[97] *Lymon*, at *18.
[98] *McGuire v. Marshall*, 50 F4th 986, 1014 (CA 11, 2022).

rates may be less or registrants less likely to reoffend is because the registry is effective in its purpose. Because individuals are on the registry, the public is aware of potential danger and more likely to avoid it. Because individuals are on the registry they might be more likely to comport their behavior in compliance to avoid further legal issues. The end result of registration is that the likelihood of reoffending, as compared to the rates among those not on the registry, is lowered. The studies arguing to the uncertainty of SORA's effectiveness also ignore the fact that the rates of recidivism reported underestimate the actual rate. Many reported recidivism rates are tracked by how many offenders return to the courts on new charges.[99] Yet, it is extremely common knowledge that the number of sexual assaults committed far outpaces the number of those assaults reported and prosecuted.[100] For a myriad of complex social, psychological, and personal reasons, countless numbers of sexual assault victims simply do not report their assaults. Further, arguments that recidivism rates might be "overblown" and that the rates are actually lower diminish the value of any reduction in the rate of recidivism caused by the registry. While the Court of Appeals cited to studies that it used to conclude that previously believed rates of recidivism may be exaggerated, what those studies do not dispute is that recidivist criminal sexual conduct does occur and is a danger.[101] It was

---

[99] To confuse things more, some studies only count subsequent offenses of a sexual nature while others count any subsequent criminal offense.

[100] The Department of Justice estimates that, for 2021, only 21.5% of rapes and sexual assaults were reported to police. https://bjs.ojp.gov/content/pub/pdf/cv21.pdf

[101] "Readers of this opinion who are parents of young children should ask themselves whether they should worry that there are people in their

entirely rational for the legislature to have concluded that recidivism among sexual offender exists, and none of the studies cited by the Court of Appeals refute that it does actually exist. Every sexual assault and every enumerated crime against a minor has tremendous meaning, not just to the victim of the offense but to every person in this state. Preventing an offender from reoffending means something to the person who might otherwise find an intruder in their bedroom at night, or be covertly drugged at a bar, or forced into an unconsented to encounter with a date, friend, or partner. Preventing an offender from reoffending means something to the child who might be kidnapped or forcibly constrained by a stranger or whose sense of trust and innocence may be shattered by a parent, relative, neighbor, or teacher. Preventing an offender from reoffending matters to the citizens who can avoid the expenditure of resources necessary to police, arrest, and prosecute future offenses. Every single instance where the registry keeps the public safe, prevents recidivism, and monitors potential dangers to the public has monumental meaning and value. It is entirely rational for the legislature to have concluded that the regulatory means of the 2021 SORA are reasonable to achieve the highly valuable and non-punitive objective of reducing recidivism.

The 2021 SORA is not excessive simply because an individual assessment of each registrant's likelihood to reoffend is not employed. The United States Supreme Court has specifically rejected finding that

---

community who have 'only' a 16 percent or an 8 percent probability of molesting young children—bearing in mind the lifelong psychological scars that such molestation frequently inflicts." *Belleau v. Wall*, 811 F3d 929, 933-934 (CA 7, 2016).

a registry is unconstitutional because registrants' risk to the public are not individually assessed. "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment [under review for constitutionality]."[102]

6. Consideration of all the Mendoza-Martinez factors confirms that the 2021 SORA is not punishment.

The legislative changes in the new SORA addressed those provisions of the 2011 SORA found to be punitive and excessive and eliminated them. The resulting Act closely mirrors the provisions of the federal SORNA that have been repeatedly upheld as non-punitive.[103] A cumulative consideration of the *Mendoza-Martinez* factors reveals that the collective requirements of the new SORA are appropriate, effective, and reasonable to address the clearly stated non-punitive civil intent of the Legislature. Defendant has not clearly proven the effects of the 2021 SORA's statutory scheme negate the intent to establish a civil regulatory scheme. The new SORA is not punishment and therefore cannot be found to be cruel or unusual punishment under the Michigan Constitution or cruel and unusual punishment under the Eighth Amendment.

B. Even if the statutory scheme could be deemed punishment, applying the 2021 SORA to a class of offenders, including defendant, for convictions that

[102] *Smith*, supra at 104.
[103] See, e.g.. *Willman*, supra; *Under Seal*, supra; *Felts*, supra; *Wass*, supra.

do not contain a sexual element was not cruel or unusual.

Even if the 2021 amendments to SORA amount to punishment, the requirement that defendant register is not cruel or unusual. Defendant bears the burden of proving that the Act is constitutionally invalid.[104] Review of whether a punishment is cruel and/or unusual depends upon the challenge raised. The Court of Appeals indicated that it was reviewing defendant's newly raised challenge on appeal "as-applied" to offenders who have committed a crime that lacks a sexual component and is not sexual in nature. Yet, by expanding the reach of its opinion beyond the specific and particular facts of defendant's case and applying it to any offender convicted of a non-sexual offense lacking a sexual component, the Court employed a quasi-facial review concerning a sub-class of offenders required to register, not one as applied to defendant. The very nature of an as-applied challenge is that an act or statute "is unconstitutional as applied to *this* party, in the circumstances of *this* case."[105] To find the Act unconstitutional as applied to a class of offenders, rather than just one member, the Court was required to find that there is "no set of circumstances under which the enactment is constitutionally valid" when applied to the class of offenders convicted of non-sexual offenses.[106]

---

[104] *Sadows*, supra at 67.
[105] *City of Chicago v. Morales*, 527 US 41, 74, 119 S Ct 1849, 144 L Ed 2d 67 (1999) (emphasis in original).
[106] *Doe v. Reed*, 561 US 186, 194, 130 S Ct 2811, 177 L Ed 2d 493 (2010); *People v. Wilder*, 307 Mich App 546, 556 (2014).

The 2021 SORA survives any quasi-facial or as-applied challenge as it pertains to offenders that have committed a non-sexual offense lacking a sexual component. SORA registration is not "unjustifiably disproportionate" to a conviction for a "non-sexual" offense such as unlawful imprisonment of a minor.[107] By including it as a "listed offense," our Legislature clearly "deemed registration for those convicted of [unlawful imprisonment of a minor] to be a necessary measure to protect the safety and welfare of children of this state."[108] Importantly, "it is well settled that legislatively mandated sentences are presumptively proportional and presumptively valid."[109] In adopting the principle of proportionality for sentences, this Court explained in *People v Milbourn* that the Legislature itself, in developing a sentencing scheme, employed this principle:

> First, the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes. The crime of murder, for example, is punishable by a longer term than is the lesser included crime of assault. Second, offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as reflected in the general and specific habitual offender provisions of the penal statutes. These two elements combine to form what might be called the "principle of proportionality." [110]

---

[107] *Bullock*, supra at 30.
[108] *People v. Fonville*, 291 Mich App 363, 380 (2011).
[109] *People v Eliason*, 300 Mich App 293, 317 (2013), quoting *People v Brown*, 294 Mich App 377, 390 (2011) (cleaned up).
[110] *People v Milbourn*, 435 Mich 630, 650 (1990).

In a similar way, SORA is structured so that an offender of a less-severe crime—for instance, fourth-degree criminal sexual conduct—is required to register for a shorter period than someone convicted of a more-severe crime like first-degree criminal sexual conduct. Tier I offenders must only register for 15 years, while Tier III offenders must register for life.[111] Even more, lifetime electronic monitoring is required only for those convicted of the most egregious offenses of first and second-degree criminal sexual conduct.[112] In addition, like habitual felonious offenders, defendants convicted of a subsequent listed offense are subject to longer registration periods.[113] An individual registered as a Tier I offender who commits a subsequent listed offense must register as a Tier II offender; a Tier II offender who commits a subsequent listed offense must register as a Tier III offender.[114] Implicit in this Court's holding in *Milbourn* "is a presumption not only of proportionality for a legislatively mandated sentence, but of validity as well."[115] It follows that the Legislature's inclusion of unlawful imprisonment of a minor as an offense requiring SORA registration is not grossly disproportionate, but presumptively proportional and valid.

In Michigan, whether a punishment is cruel or unusual requires consideration of four factors to determine if it is "unjustifiably disproportionate" to the offense committed:[116] (1) a comparison of "the

---

[111] MCL 28.725(11), (13). Tier II offenders must register for 25 years. MCL 28.722(12).
[112] MCL 750.520n.
[113] MCL 28.722(r)(i); MCL 28.722(t)(i).
[114] MCL 28.722(r)(i); MCL 28.722(t)(i).
[115] *People v Williams*, 189 Mich App 400, 404 (1991).
[116] *Bullock*, *supra*.

gravity of the offense and the harshness of the penalty," (2) a comparison of "the sentences imposed on other criminals in the same jurisdiction," (3) a comparison of "the sentences imposed for commission of the same crime in other [states]," and (4) whether the goal of the punishment is rehabilitation.[117] To overcome the presumption that SORA registration for an unlawful-imprisonment-of-a-minor conviction, "defendant must present *unusual circumstances* that would render the presumptively proportionate sentence disproportionate."[118]

1. SORA registration is not harsh when the gravity of defendant's offense is considered.

In support of the claim that the gravity of his unlawful imprisonment conviction is outweighed by the harshness of the requirement that he register under SORA, defendant relied in the Court of Appeals on *People v Dipiazza*, from which this case is easily distinguished.[119] In *Dipiazza*, the defendant was an 18-year-old boy who had a consensual sexual relationship with his 15-year-old girlfriend, whom he later married.[120] He was adjudicated under HYTA for attempted third-degree criminal sexual conduct[121] and the charge was dismissed after he successfully completed a period of probation.[122] On appeal, the Court of Appeals held that the requirement that the

---

[117] *Bullock*, *supra* at 33-34 (cleaned up); *Parks*, supra.
[118] *People v Bowling*, 299 Mich App 552, 558 (2013) (quotation marks and citation omitted; emphasis added).
[119] *People v Dipiazza*, 286 Mich App 137 (2009).
[120] *Dipiazza*, *supra*, at 140.
[121] MCL 750.520d; MCL 750.92.
[122] *Dipiazza*, *supra* at 140.

defendant register under SORA for 10 years amounted to cruel and unusual punishment because the numerous, lasting negative effects of SORA were an overly harsh penalty unique to Michigan and, as the defendant posed no risk of reoffending, SORA registration did not serve rehabilitation.[123]

In finding the defendant's conduct in *Dipiazza* was not very grave, the court pointed out there was only a slight age difference between the defendant and the victim, their relationship was consensual—indeed even approved by their parents, and the defendant eventually married the victim.[124] Conversely, here, though not sexual in nature, the gravity of defendant's offense was far more severe. "The gravity of an offense can be assessed by comparing the harm caused to the victim or society and the culpability of the offender with the severity of the penalty."[125] Defendant both caused and threatened harm and violence to the victims. He is the father of the minor victims—a grown man, significantly older, and presumably one of the most influential people in their lives. The actual circumstances of this case are far more heinous than those in *Dipiazza*. Defendant held the victims hostage for roughly 12 hours. Not only did he do so without their consent, but he spent most of that time terrorizing his sons (and wife) by repeatedly threatening to kill them and burn the house down. (96a-97a, 100a-109a, 111a-189118a). What is more, defendant was armed during the entire crime, which only added to the power imbalance that he had over the victims. (91a-92a, 101a,

[123] *Dipiazza*, *supra*, at 155-156.
[124] *Dipiazza*, *supra*, at 154.
[125] *People v Carmony*, 127 Cal App 4th 1066, 1077; 26 CalRptr3rd 365 (2005).

118a) He displayed a willingness to follow through with his threats by ordering the victims to get on their knees and huddle together on the floor; he proceeded to point a gun at their heads, making the victims fear they would be shot "execution style." (93a-94a, 102a-103a) Defendant even put the barrel of the gun in his own mouth and begged his sons and wife to pull the trigger. (95a, 105a, 113a) He had them under such control that he forced the minor victims, I.L. and S.L.,[126] to urinate in cups in the family room, as opposed to allowing them to use the men's room. (96a, 104a,114a) Defendant terrorized the victims to the extent that they were afraid to call for help or even sleep. (96a, 98a-99a, 108a-110a, 112a)

Additionally, here, unlike *Dipiazza*, defendant was not eligible for HYTA, as he was twice the maximum age to qualify for the diversion program.[127] Indeed, he was sentenced to 7 to 15 years' incarceration for the crime of unlawful imprisonment—on top of 2 years for felony-firearm. (119a-120a) When the most serious conviction is considered, defendant will not even be eligible for parole until he has served 12.5 years. Though defendant contended in his Court of Appeals brief that his 15-year period of SORA registration[128] will not begin until he is released from prison, he neglected to acknowledge that he is not currently incarcerated, as he was granted bond pending appeal by the trial court. (121a) Since the time to register under SORA is between

---

[126] Throughout this brief, for the protections of their identities, the names of minors are abbreviated to their respective initials.
[127] MCL 762.11, as amended, 2004 PA 239. Defendant was 43 years old at the time of the crime.
[128] MCL 28.725(11).

conviction and sentence,[129] his registration period has already commenced.[130] Moreover, the statutory maximum in Michigan for an unlawful-imprisonment conviction is 15 years' imprisonment.[131] Considering the gravity and heinousness of defendant's crime, the sanction of 15 years' SORA only requires defendant to register—not remain in prison. Compared to the gravity of defendant's crime, therefore, registration is not excessively harsh.

2. SORA registration, though not imposed for a majority of crimes, is not the only mandatory penalty in Michigan.

To reiterate, the crime for which defendant must register under SORA, unlawful imprisonment, is a Tier I offense. Tier I offenses are the least severe and require 15 years' registration, as opposed to 25 years or lifetime registration.[132] True, a majority of criminal offenses in Michigan do not require SORA registration at all. But the fact that it is a mandatory penalty is by no means novel, as numerous other offenses carry statute-mandated punishments.[133] Moreover, as the Court of

---

[129] MCL 28.724(5).

[130] MCL 28.725(14). It should be noted that a search of SORA reveals that defendant is not registered, despite the fact that MCL 28.724(5) specifically states registration should have been completed between conviction and sentence.

[131] MCL 750.349b(3).

[132] MCL 28.725(11), (12), and (13).

[133] See, MCL 750.316(1) (mandatory life imprisonment without parole for first-degree murder conviction); MCL 750.227b(1) and (2) (mandatory prison terms for felony-firearm convictions); MCL 769.12(1)(a) (mandatory minimum of 25 years of imprisonment for fourth-habitual-violent offenders); MCL 750.520b(2)(b) and (c) (mandatory minimum of 25 years' imprisonment for convictions of first-degree criminal sexual conduct with a victim under 13 years old).

Appeals pointed out in *Fonville*, the intended purpose of the Legislature, when it enacted SORA, was to "protect public safety and monitor those persons who pose a potential danger to children"[134] because:

> The legislature has determined that a person who has been convicted of committing an offense covered by this act [(SORA)] poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state.[135]

Moreover, while a majority of the "listed offenses" included in MCL 28.722 involve a sexual element or nature, many do not. In addition to unlawful imprisonment of a minor, such listed, non-sexual offenses that require SORA registration include tier I crimes requiring 15 years of registration—indecent exposure[136] and voyeurism of a minor[137]—tier II crimes requiring 25 years of registration—forced labor of a minor,[138] accosting a child for an immoral purpose,[139] and use of the internet or computer to commit a crime[140]— and tier III crimes requiring lifetime registration—kidnapping[141] and leading, taking, carrying away a minor.[142] Accordingly, compared to other offenses in Michigan, SORA registration for defendant's conviction of unlawful imprisonment of a minor, though non-sexual, is not unusual.

---

[134] *Fonville*, *supra*, at 380.
[135] *Fonville*, *supra*, at 380.
[136] MCL 750.335a.
[137] MCL 750.539j.
[138] MCL 750.462e.
[139] MCL 750.145a.
[140] MCL 750.145d.
[141] MCL 750.349.
[142] MCL 750.350.

3. Michigan is one of many states that require SORA registration for unlawful-imprisonment-of-a-minor convictions.

As for whether other states require sex-offender registration for unlawful imprisonment, said crime was added to the listed offenses requiring SORA registration in 2011. That year, the Michigan Legislature made extensive changes to SORA in order to comply with the federal SORNA requirements. Pursuant to federal statute, any state that "fails to substantially implement" the federal counterpart to SORA "shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction."[143] Since SORNA required individuals convicted of an offense involving false imprisonment of a minor to register as a sex offender, the State of Michigan amended SORA to include it as well. Indeed, Michigan is one of 18 states, 136 tribes, and 4 territories that have "substantially implemented SORNA's requirements."[144] More specifically, over 25 percent of states in the U.S. require a defendant convicted of unlawful imprisonment of a minor, regardless of whether the victims are the offender's children, to register as a sex offender.[145] As a result,

---

[143] 34 USC 20927(a).

[144] See, *Jurisdictions That Have Substantially Implemented SORNA*, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, <https://smart.ojp.gov/sorna/substantially-implemented>

[145] While SORNA carves out an exception for parents convicted of unlawfully imprisoning their children, several states—some within substantial compliance, like Michigan, and some not in substantial compliance with SORNA—require registration regardless of the relationship status between the offender and the victim. See, e.g., Md Code Ann 11-701(q)(3) (Maryland); Minn Stat Ann 243.166 subd. 1b(2)(ii) (Minnesota); Miss Code Ann 45-33-23(h)(i) (Mississippi); Mo Rev Stat 589.414(5)(e) (Missouri); NH RSA, tit LXII, § 651-B:1(VII)(a) (New Hampshire); Ohio Rev Code Ann 2950.01(E)(1)(e)

Michigan's registration requirement is not materially different from other states' sex-offender registries. That is, the requirement that those convicted of unlawful imprisonment of a minor register under SORA is not unique or unusual to Michigan.

Even more, other jurisdictions have addressed the constitutionality of registration statutes where the crime contained no sexual element, and the circumstances of the crime contradicted any sexual motive. Many have concluded that sex-offender registration for defendants convicted of non-sexual offenses against minors is not a constitutional violation. The United States District Court, in *Collins v Thomas*, held that Alabama's sex-offender registration statute did not violate due process because the purpose of the ASORCNA 'is to assist law enforcement in carrying out their duties and, *most importantly*, to protect the public, *especially children*' and 'further the primary governmental interest of protecting vulnerable populations, *particularly children*,' by 'monitoring and tracking' individuals convicted of sex offenses as defined by state law. 'The . . . intent in imposing certain [restrictions] on sex offenders is not to punish sex offenders but *to protect the public and, most importantly, promote child safety*.' . . . In light of the foregoing, the court finds that ASORCNA is not violative of substantive due process.[146]

(Ohio); Pa Consol Stat 9799.14(b)(2) (Pennsylvania); RI Gen Laws 11-37.1-2(f)(1) (Rhode Island); SDCL 22-24B-1(8) (South Dakota); Tex Crim Pro Code Ann 62.001(5)(E) (Texas); Vt 32 VSA 5401(10)(B)(ii) (Vermont); Va Code Ann 9.1-902(A) (Virginia); Wy Stat Ann, 7-19-301(a)(iv)(C) (Wyoming).

[146] *Collins v Thomas*, No. 212-CV-950-WHA, 2015 WL 5125750, at 7 (MD Ala Aug 31, 2015) (citations omitted, emphasis in original).

Also, in an Alabama federal district court, in *Waldman v Conway*, the court held the defendant, who was convicted of kidnapping a minor, and admitted that he did so for ransom or to use the child as a shield, could "hardly argue that the State shocks the conscience by imposing restrictions on his release in the name of protecting children."[147] The Arizona Court of Appeals held in *State v Coleman*, "[W]e conclude that requiring [the defendant] to register based on his conviction for unlawful imprisonment of a minor who is not his child without a finding that it was committed with sexual motivation does not violate either equal protection guarantees or substantive due process."[148] The Georgia Supreme Court held in *Rainer v State* that the requirement of sex offender registration for the defendant's conviction of false imprisonment of a minor, though it did not involve sexual activity, was not cruel and unusual punishment and did not violate substantive or procedural due process.[149] The Illinois Supreme Court held in *People v Johnson* that, "regardless of whether [the offender's] conduct was sexually motivated," registration as a sex offender for his aggravated kidnapping of a minor (by a nonparent) conviction was not a violation of due process.[150] The Kentucky Court of Appeals held in *Moffitt v Commonwealth* that because the purpose of Kentucky's sex offender registration was the protection of children, it was irrelevant whether the defendant's conviction of child kidnapping included a sexual component (even though, in this case, it did), and there was no violation of

[147] *Waldman v Conway*, 871 F3d 1283, 1293 (11th Cir 2017).
[148] *State v Coleman*, 241 Ariz 190, 196; 385 P3d 420, 426 (Ct App 2016).
[149] *Rainer v State*, 286 Ga 675; 690 SE2d 827 (2010).
[150] *People v Johnson*, 225 Ill2d 573; 870 NE2d 415 (2007).

substantive or procedural due process.[151] In *Thomas v Mississippi Dep't. of Corr.*, the Mississippi Supreme Court held, "Therefore, our statute and the federal statutes are not in 'conflict' such that our statute violates [the defendant's] constitutional rights, as [the defendant] contends. Rather, our Legislature decided to expand the definitions found in the federal statutes to include, as a sex offense subject to classification and registration, the crime of kidnapping a minor under the age of sixteen. The Legislature's expansion of the sex-offender registration laws was permissible and not violative of [the defendant's] constitutional rights."[152] The New York trial court's ruling in *People v Cintron*, 827 NYS2d 445, 460 (NY Sup Ct 2006) was upheld on appeal: "Treating kidnap[p]ing and unlawful imprisonment of a minor as sex offenses subject to registration and notification is rationally related to the legitimate governmental objectives underlying the adoption of JWA[153] and SORA."[154] In *State v Sakobie*, the North Carolina Court of Appeals upheld the requirement that the defendant register as a sex offender for his conviction of kidnapping for nonsexual purposes.[155] Finally, Wisconsin Supreme Court, in *State v Smith*, concluded that, "The legislature opted not to exempt [the defendant], and others like him, from the registration requirement despite the fact that his crime of false

---

[151] *Moffitt v Commonwealth*, 360 SW3d 247, 255-257 (Ky Ct App, 2012).
[152] *Thomas v Mississippi Dep't. of Corr.*, 248 So3d 786, 790-791 (Miss, 2018).
[153] Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (JWA) conditioned federal funding on states establishing "programs that require a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense" to register with the state.
[154] *People v Cintron*, 13 Misc3d 833; 827 NYS2d 445, 460 (2006).
[155] *State v Sakobie*, 165 NC App 447; 598 SE2d 615 (2004).

imprisonment of a minor *was not of a sexual nature*. We must afford deference to the words chosen by the legislature and *cannot conclude* that requiring registration of such offenders *is not rationally related to a legitimate government interest*."[156] Clearly the requirement that those convicted of unlawful imprisonment of a minor register under SORA is not unique or unusual to Michigan.

4. SORA registration may have a deterrent effect on defendant.

While this Court observed in *Betts* that there is some uncertainty surrounding the rehabilitative effects of SORA, the requirement that defendant register for 15 years is not unjustifiably disproportionate because it may have a deterrent effect on him. Defendant's conviction, though it lacked a sexual component, nonetheless demonstrated the fact that he poses a risk to the health, safety, morals, and welfare to children.[157] When released from MDOC, defendant will be monitored, which will serve as a deterrent for him to reoffend.

Returning to the distinction between the Court of Appeals's application of a quasi-facial invalidity of 2021 SORA for a class of offenders convicted of non-sexual offenses lacking a sexual component rather than as applied to the specific circumstances of defendant's case, a set of circumstances can certainly exist in the abstract for requiring a member, not necessarily defendant, to register as a sex offender under SORA. While a defendant could be found by a jury to have intentionally

[156] *State v Smith*, 323 Wis2d 377; 780 NW2d 90, 100 (2010) (emphasis added).
[157] *Fonville*, *supra* at 380.

and unlawfully imprisoned a minor—an offense non-sexual in nature and lacking a sexual component as an element—other evidence admitted at trial or contained in the presentence information report could make it objectively crystal clear that defendant's true intent in committing the non-sexual offense was for a sexual purpose. Although that defendant did not commit an offense one would classify as a sexual offense or, by its commission, would the defendant be generally deemed to be a sexual offender, the circumstances would make it apparent that defendant's conduct was entirely what SORA was intended to address. A jury's verdict of unlawful imprisonment or kidnapping a minor would not reflect evidence exhibiting that, if allowed to continue, the confinement would have led to a sexual assault or evidence that the offender was preparing to produce child exploitive materials or evidence that defendant has a history of committing or attempting similar acts for a sexual purpose.[158] Simply because the offense committed does not contain an element or component that is sexual, does not mean that the circumstances exhibit a sexual nature falling fully within the types of sexual offenses requiring registration under SORA.

---

[158] The People recognize that, if SORA is deemed a punishment, the consideration of facts not found beyond a reasonable doubt by a finder of fact to support that punishment has its own constitutionality issue under the Sixth Amendment. See, *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000); *Alleyne v. United States*, 570 US 99, 103, 133 S Ct 2151, 186 L Ed 2d 314 (2013). Yet, that is a separate issue from the determination of whether SORA itself is facially, quasi-facially, or as-applied invalid under the Eighth Amendment or the Michigan Constitution.

RELIEF

THEREFORE, the People request that this Honorable Court reverse the Court of Appeals opinion finding the 2021 SORA to be cruel and/or unusual punishment and affirm the order requiring defendant's SORA registration.

Respectfully submitted,

KYM WORTHY
Prosecuting Attorney
County of Wayne

/s/ *Jon P. Wojtala*

JON P. WOJTALA (P49474)
Chief of Research, Training,
and Appeals
1441 St. Antoine, 11th Floor
Detroit, Michigan 48226
(313) 224-5748

Dated: April 7, 2023

This document contains 12,266 countable words.

/s/ *Jon P. Wojtala*

JON P. WOJTALA (P49474)
Chief of Research, Training, and
Appeals