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State of Michigan

In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Robert Kardasz

Defendant-Appellant.

MSC No. 165008

COA Nos. 343545 & 358780

Macomb County Circuit Court

Case No. 17-2252-FC

Robert Kardasz's
Supplemental Reply Brief

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Reply

The State's response to Mr. Kardasz's Supplemental Brief does not provide this Court with any reason not to determine that 2021 SORA and LEM are unconstitutional.

I. Mandatory lifetime SORA registration, under *Bullock*'s test, constitutes cruel or unusual punishment.

The State claims that Mr. Kardasz "originally relied on *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009) to support his contention that lifetime registration is too harsh a penalty," and goes on to distinguish the decision. State's Resp at 5. Mr. Kardasz agrees with the State that *Dipiazza* is distinguishable, as the offense there was less serious and, therefore, Dipiazza did not have to register for life. That is precisely why *Dipiazza* was not cited in *any* of Mr. Kardasz's briefing before this Court.[1, 2] Nonetheless, this Court must still decide for itself

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[1] While Mr. Kardasz pointed to *Dipiazza* in his Brief on Appeal before the Court of Appeals, he did so because *Dipiazza* was the only decision out of that court granting relief. Mr. Kardasz acknowledged how the decision was distinguishable and tried to explain to that court how some of its reasoning in *Dipiazza* – namely, the harms flowing from the "social stigma of being labeled [ ] a sex offender," 286 Mich App at 154 – still applied to more serious offenses.

[2] The State similarly asserts that Mr. Kardasz "cites to *Miller v Alabama*, 567 US 460 (2012), and other holdings regarding juveniles," and argues that Mr. Kardasz is "not even close to a juvenile." State's Resp at 11. However, Mr. Kardasz never relies on *Miller* in any of his briefs before this Court, only citing to it in a string cite in his Supplemental Brief as he listed Eighth Amendment cases. Kardasz's Supp Br at 71, 89. The holding Mr. Kardasz does rely on is this Court's decision in *People v Parks*, for the proposition that "an automatically

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whether mandatory lifetime registration, with no individualized assessment or ability to petition for removal, constitutes cruel or unusual punishment under *Bullock*'s framework. As detailed in Mr. Kardasz's Supplemental Brief, it does.[3]

In addressing *Bullock*'s second prong, the State argues that SORA registration is not the only mandatory sentence in Michigan. State's Resp at 7-8. Mr. Kardasz agrees, but SORA registration is the only mandatory post-incarceration punishment that lasts for life.[4] The State also points to debunked data that is nearly a quarter of a century old to assert that because "sex offenders tend to recidivate at higher rates," a mandatory lifetime registration requirement is justified. *Id.* at 7.[5] But

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harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel." 510 Mich at 259-260; Kardasz's Supp Br at 45.

[3] The State's heavy reliance on *Does III v Whitmer*, __ F Supp 3d __, (Docket No 22-cv-10209) (ED Mich Sept 27, 2024), is also misplaced. State's Resp at 10-11, 18-19. *Does III* is a civil class action lawsuit that continues to be litigated in federal district court, whose findings under the United States Constitution's due process clause and equal protection clause are subject to a different standard than the standard governing this Court's cruel or unusual punishment inquiry under Michigan's Constitution. The Eastern District's decision in *Does III* is persuasive authority for this Court.

[4] This of course excludes mandatory LEM, which Mr. Kardasz also challenges.

[5] The State cites *McKune v Lile*, 536 US 24, 32-34 (2002). But see Elmann, "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498

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Mr. Kardasz's Supplemental Brief directs this Court to current research showing that recidivism rates decrease significantly with age and time since last offense, and that this prior data has since been proven inaccurate. See Kardasz Supp Br at 36, 68, 86. The State cannot escape this Court's acknowledgement just a few years ago in *People v Betts*, 507 Mich 527, 560 (2021) that a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown." Mr. Kardasz asks this Court to again, as it did in *Betts,* rely on current science.

In addressing *Bullock*'s third prong, the State argues that lifetime SORA registration is not "unique." But the sentence does not have to be unique in order for this factor to weigh in Mr. Kardasz's favor.[6] And of the only 18 states that have implemented SORNA's minimum standards, Michigan's *mandatory* lifetime registration falls into an even more restrictive minority. See Kardasz's Supp Br at 51-52 (listing, of the 18, states that have discretionary sex offender registration or removal processes).

In addressing *Bullock*'s fourth prong, the State concedes that SORA's rehabilitative effect is at the very least uncertain and acknowledges that

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(2015) (tracing how an unsubstantiated claim in *Smith v Doe* about the high rate of recidivism of people who have committed a sex offense has been debunked by current scientific research).

[6] This Court said in *Parks* (where 17 states and the federal government allowed for mandatory life without parole for people convicted of first-degree murder) that even if "Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*," the fact remains that our Constitution does not allow for excessively harsh punishment. 510 Mich at 263-264 (internal citations omitted).

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the harms raised in Mr. Kardasz's brief have "some merit,"[7] but nonetheless claims that registration may still have a deterrent effect on Mr. Kardasz. State's Resp at 8-9. This point, however, ignores that this factor specifically focuses on rehabilitation, "which is a criterion specifically 'rooted in Michigan's legal traditions . . .'" *Parks*, 510 Mich at 242, quoting *Bullock*, 440 Mich at 33-34. This Court should also question the logic behind the State's argument here given that Mr. Kardasz perpetrated his offense at home. A person's registration status is unlikely to dissuade them from committing a sex offense within the confines of their home, as a person's registration status has no bearing on the likelihood of such an offense being reported to authorities.[8]

Nor should this Court adopt the State's argument that the harms registrants face flow from the conviction itself, not the registry. State's Resp at 9. SORA's internet registry has a direct role in enabling violence and other harms, as the readily accessible website offers e-mail alerts, tracking features, and can be shared on social media pages, making it easy for any internet user to identify, target, and persecute people on the registry. Kardasz's Supp Br at Sections I.A.2 and II.D. Indeed, as this Court has acknowledged: "While the initial version of SORA might have been more analogous to a visit to an official archive of criminal

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[7] 2021 SORA is not "far less restrictive," as the State claims. State's Resp at 14. This Court has held that 2021 SORA's amendments "include[d] both additional ameliorative changes and *more restrictive* changes." *Betts*, 507 Mich at 567-568 (emphasis added).

[8] This reasoning applies similarly to LEM. Notwithstanding the State's argument that LEM will deter Mr. Kardasz from engaging in future CSCs (State's Resp at 20-21), electronic monitoring does nothing to assist law enforcement when such data would merely show that the person was home.

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records . . . its [current] iteration contain[s] more personal information and require[s] less effort to access that information." *People v Lymon*, __ Mich __ (2024) (Docket No. 164685); slip op at 16 (quoting *Betts*, 507 Mich at 551-552) (internal quotations and citations omitted).

Furthermore, the State's suggestion that striking down SORA "would potentially reduce [a CSC defendant's] ability to get a favorable plea agreement," strains credulity. State's Resp at 12. The State has great power and can freely add SORA registration, on a case-by-case basis, as a condition to a plea offer. Mr. Kardasz again takes issue with the mandatory imposition of SORA based on the conviction for a listed offense. Individual cases may call for individualized bargains.

Lastly, the State's argument that "nothing on the registry labels registrants as dangerous," but "[r]equiring individualized assessments might actually transform the registry into the very thing [Mr. Kardasz] complains[, as it] would essentially label individuals as dangerous with confirmation from government or medical personnel," borders on the absurd. State's Resp at 10-11. Even without a warning label, people still assume that a steaming skillet of food is hot until told otherwise. Here too, regardless of whether SORA's internet registry has an explicit label about a registrant's dangerousness, people generally assume that anyone on the registry is dangerous. See, e.g., *Lymon*, slip op at 26 (acknowledging that "offenders [on the registry] are branded dangerous sex offenders . . . even though there has been no determination that they pose such a risk of harm to the community"); Kardasz's Supp Br at 29 (discussing Facebook posts linked to a registrant's SORA page, telling the 6,000 members of the Facebook group where the registrant was going to be (at a fair), and warning people to "[b]e aware"). The State cannot both claim that SORA's internet registry keeps the public safe

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but that limiting registration to those with individualized assessments would result in more harm to people like Mr. Kardasz. The State should want exactly what Mr. Kardasz is asking for – an effective registry that actually identifies truly dangerous people, at risk for reoffending sexually, as determined on an individual basis by our courts and informed by accurate scientific tools such as the Static-99.[9]

II. Mandatory lifetime electronic monitoring (LEM) constitutes cruel or unusual punishment in violation of the Michigan Constitution.

The State's arguments on whether mandatory LEM constitutes cruel or unusual punishment can be dealt with in relatively short order.

With respect to *Bullock*'s first factor, this Court should not be persuaded by the State's characterization that LEM is "obviously a lesser punishment than life imprisonment" because it permits the person being monitored to "travel, work, or otherwise move about the community." State's Resp at 17. While LEM is not as confining of an experience as prison, its attendant harms (electric shocks, bleeds, scarring, numbness, etc.) and permanent anatomical intrusion are nonetheless substantial in their own right. See Kardasz's Supp Br at Section IV.D. LEM – which risks the return to prison if GPS signal is lost while traveling, working, or entering a building – is simply not the vacation the State makes it out to be, but a different form of

[9] The State complains that Mr. Kardasz does not explain with precision how individualized assessments would work in practice. State's Resp at 11 n 5. First, Mr. Kardasz refers this Court to page 37 of his Supplemental Brief. Second, neither Mr. Kardasz nor this Court need wade into the precise details of what would make a constitutional registration requirement. That is the duty of the Legislature.

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incarceration. See, e.g., James Kilgore, *We Need a New Paradigm Halt the Unprecedented Growth of Electronic Monitoring*, Truthout (October 24, 2022); see also Kate Weisburd, *Punitive Surveillance*, 108 Va. L. Rev. 148, 152 (2022) (the use of EM creates a "carceral experience [that] is no longer defined by physical walls and prison bars," and instead extends the walls of the prison to homes, workplaces, and neighborhoods).

With respect to *Bullock*'s second and third factors, the State relies heavily on *People v Hallack*, 310 Mich App 555 (2015), and argues that "the Court rejected the exact constitutional challenge [Mr. Kardasz] makes here." State's Resp at 17-18. That, among other reasons, is why Mr. Kardasz argues that *Hallack* is wrongly decided, and it is for this Court to now determine whether *Bullock*'s factors weigh in Mr. Kardasz's favor with respect to LEM. See, e.g., Kardasz's Supp Br at Section VI.B.2.[10] They do. See *id*. at Sections IV.B and IV.C.

With respect to *Bullock*'s fourth prong, the State argues that LEM serves "other critical penological goals, such as securing a just and proper punishment," "general deterrence," and "individual deterrence." State's Resp at 19. But *Bullock*'s framework controls this Court's inquiry here, and the proper inquiry is whether the penalty imposed advances the penological goal of rehabilitation, not whether it serves "other critical penological goals."

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[10] The State's reliance on *Does III* here is misplaced as well (State's Resp at 18-19), as that case was about SORA registration, not LEM, and as argued *supra*, is a distinguishable civil case that applied a different standard.

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In sum, this Court should not be persuaded by the State's arguments. Mandatory LEM constitutes cruel or unusual punishment in violation of the Michigan Constitution.[11]

[11] The arguments presented in the State's response on the subject of whether LEM constitutes an unreasonable search (State's Resp at Section III) are identical to the arguments it presented to this Court in its April 2023 Answer to Mr. Kardasz's Application for Leave to Appeal. To avoid redundancy, Mr. Kardasz refers this Court to his May 2023 Reply in Support of Application for Leave to Appeal.

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Conclusion and Relief Requested

For the reasons stated above and in his Supplemental Brief, Robert Kardasz respectfully requests that this Honorable Court find mandatory lifetime sex offender registration and mandatory lifetime electronic monitoring to be unconstitutional, remand for resentencing, and grant whatever other relief it deems necessary and just.

Respectfully submitted,

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