STATE OF MICHIGAN

SUPREME COURT

	Supreme Court No. 165008
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Court of Appeals No. 358780
v.	Macomb Circuit No. 17-2252-FC
ROBERT KARDASZ, Defendant-Appellant.	

PLAINTIFF-APPELLEE'S ANSWER TO DEFENANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Plaintiff-Appellee accepts Defendant-Appellant's Statement of Jurisdiction in his Application for Leave to Appeal as accurate.

COUNTER-ISSUES PRESENTED

ISSUE I

DID THE PROSECUTOR'S CLOSING ARGUMENT DEPRIVE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL?

Trial Court's Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

ISSUE II

IS DEFENDANT'S REGISTRATION WITH SORA AND THE LIFETIME ELECTRONIC MONITORING REQUIREMENT CRUEL OR UNUSUAL PUNISHMENT AND DOES LEM VIOLATE THE FOURTH AMENDMENT?

Trial Court's Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

COUNTER-STATEMENT OF FACTS

The People accept as accurate all of the non-argumentative factual assertions contained within Defendant's Statement of Facts in his Brief on Appeal. However, to the extent that any additional factual guidance is necessary, the People will provide those necessary facts with citation in the argument section of this Brief on Appeal.

ISSUE I

THE PROSECUTOR'S CLOSING ARGUMENT DID NOT DEPRIVE DEFENDANT OF A FAIR AND IMPARTIAL TRIAL.

STANDARD OF REVIEW

The Defendant did not object to the prosecutor's statements made during closing argument. Therefore, this Court's review is for plain error affecting the defendant's substantial rights, meaning either that plain error resulted in the conviction of a defendant who was actually innocent or the error was so grievous that it fundamentally undermined the propriety of the proceedings. *People v Callon,* 256 Mich App 312, 329; 662 NW2d 501 (2003); *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is not warranted when "a curative instruction could have alleviated any prejudicial effect." *People v Ackennan,* 257 Mich App 434, 449; 669 NW2d 818 (2003).

ARGUMENT

The prosecutor has considerable discretion in crafting arguments based on facts in evidence and any reasonable inferences, and "need not confine argument to the blandest possible terms." *People v Dobek,* 274 Mich App 58, 66; 732 NW2d 546 (2007). Furthermore, the prosecutor is entitled to fairly respond to the defense. *Id.* at 67-68. However, the prosecutor may *not* intentionally inject "inflammatory references...with no apparent justification except to arouse prejudice." *People v Bahoda,* 448 Mich 261, 266; 531 NW2d

659 (1995). "Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Roscoe,* 303 Mich App 633, 648; 846 NW2d 402 (2014).

Defendant argues that statements made by the prosecutor during closing argument impermissibly appealed to juror sympathy:

> Since April 23rd, 2017, she has had to endure an invasive external genital exam in the emergency room at the age of five; she's had to testify in two different courts; she's had to be watched over by two different judges in each of those courts; she's been questioned by two lawyers about private parts on two different occasions, one exam and , of course, one here at trial; she's had to talk about these things in front of 14 strangers in this forum, in this environment, with a microphone, so that everybody could hear all those intimate words that five, six year olds don't like to say to anyone anyway; and, she's had to do all while the defendant has been present. (Tr. 2/27/ 18 at 20-21).
>
> So every victim in every crime loses something, whether it is money, whether it's property, whether it's time healing from wounds, sometimes it's a loved one, but these cases are different. These cases cause a victim to lose a sense of trust. They lose a sense of self, they lose a sense of security. These are not cases that happen where they can be witnessed by someone else. These are cases that are not disclosed right away and many times there aren't these are cases that happen when no one else is around to protect the victim. These are cases that happen in the cloak of night, in a basement, when no one is there to protect a five or six year old. (Tr. 2/27/ 18 at 49-50).
>
> JZ deserves the same opportunity to be believed that any other adult witness deserves. JZ deserves a verdict that speaks the truth and that is guilty as to both counts and I ask that, when you go back in the jury room and you think about this case and put all those pieces together, that you find the defendant guilty of

> both counts of criminal sexual conduct in the first degree. (Tr. 2/27/ 18 at 50).
>
> Why else should you believe the details JZ provided you, details about an experience that a six year old can't provide you unless it happened to her? No six year old can describe the mechanics of body position that is necessary for a penis to go inside a vagina, unless it happened to her. (Tr. 2/27/18 at 32).

"Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson,* 245 Mich App 572, 591; 629 NW2d 411 (2001). "The prosecutor commits misconduct when he or she invites jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty." *People v Lane,* 308 Mich App 38, 66; 862 NW2d 446 (2014). Here, however, considering the prosecutor's remarks in context of the entire trial, the Defendant has not shown plain error and he is not entitled to relief. The aforementioned comments were isolated and not so inflammatory as to prejudice the Defendant. See *Watson,* 245 Mich App at 591. Notably, the prosecutor in the instant matter did not urge the jury to suspend their powers of judgment to convict on the basis of sympathy. See *Lane,* 308 Mich App at 66. Rather, the prosecutor here urged the jury to give the victim the same consideration that they would an adult witness. In fact, the prosecutor here urged the jury to find the Defendant not guilty if they believed his theory of the case. (Tr. 2/27/ 18 at 20). Moreover, the prosecutor's statements regarding JZ's credibility refutes the Defendant's theory that she was being coached. The trial court also instructed the jurors not to let sympathy or prejudice influence their decision. (Tr. 2/27/ 18 at 107); See also *Watson,* 245 Mich App at 592.

Jurors are presumed to follow their instructions. *People v Ericksen,* 288 Mich App 192, 200; 739 NW2d 120 (2010). Defendant had not shown plain error and he is not entitled to reversal of his conviction.

Defendant also argues the prosecution engaged in misconduct by denigrating defense counsel. Specifically, the prosecutor commented on the fact that defense counsel asked an improper, open-ended question to a six-year-old victim. (Tr. 2/27/ 18 at 42-43). A prosecutor may not personally attack defense counsel. *People v McLaughlin,* 258 Mich App 635, 646; 672 NW2d 860 (2003). Here, although the prosecutor's comments may be viewed as snippy, the comments were fleeting and not so remarkable as to constitute an obvious error denying Defendant a fair trial. See *McLaughlin,* 258 Mich App at 647. While the prosecutor clearly took issue with question posed to the child victim by defense counsel, the prosecutor here did not personally attack the character of defense counsel or attempt to shift the jury's focus from the evidence to defense counsel's personality. See *People v Unger,* 278 Mich App 210, 236; 749 NW2d 272 (2008). Moreover, even if the prosecutor's remarks were somewhat intemperate, any prejudice could have been cured with a jury instruction, and the jury was in fact instructed that the lawyers' comments and arguments were not evidence, that the prosecutor bore the burden of proof and the Defendant did not have to prove anything, and that the jurors should not let sympathy or prejudice influence their decision. (Tr. 2/27/ 18 at 107-109). Again, jurors are presumed to follow their instructions, *Ericksen,* 288 Mich App

at 199-200, and Defendant has not shown plain error affecting his substantial rights.

ISSUE II

DEFENDANT'S REGISTRATION WITH SORA AND THE LIFETIME ELECTRONIC MONITORING REQUIREMENT IS NOT CRUEL OR UNUSUAL PUNISHMENT NOR DOES LEM VIOLATE THE FOURTH AMENDMENT.

STANDARD OF REVIEW

This Court reviews de novo preserved issues of constitutional law. *People v Benton,* 294 Mich App 191, 203; 817 NW2d 599 (2011). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Id.*

ARGUMENT

Defendant argues that SORA and lifetime electronic monitoring (LEM) constitutes cruel and/or unusual punishment. Defendant also argues that LEM violates the Fourth Amendment. The Michigan Constitution prohibits cruel or unusual punishment and the United States Constitution prohibits cruel and unusual punishment. Const 1963, art 1, § 16; US Const, Am VIII. A party challenging the constitutionality of a statute has the burden of proving its invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). Defendants facially challenging a statute must meet the rigorous standard of proving there is no set of circumstances under which the statute is valid. *People v Wilder*, 307 Mich App 546, 556; 861 NW2d 645 (2014). An as-applied challenge to a statute requires a court to analyze whether the statute led to a denial of a specific right in light of the facts developed in defendant's particular case. *Id.*

It has previously been held that SORA's registration requirement was not a punishment because it was designed to protect the public, not punish the offender. *People v Tucker*, 312 Mich App 645, 681-683; 879 NW2d 906 (2015). As such, the requirement could not constitute cruel or unusual punishment. *Id.* at 683. In resolving whether retroactive application of the 2011 version of SORA violated the ex post facto clause of the United States Constitution, however, the Michigan Supreme Court recently held that the registration requirements under that version of the law are criminal punishments. *People v Betts*, ___ Mich ___, ___; ___ NW2d ___ (2021) (Docket No. 148981); slip op at 29. Defendant was sentenced under the 2011 version of SORA, so it must now be determined whether this registration penalty is cruel or unusual.[1]

Because the Michigan Constitution's protection from cruel *or* unusual punishment is broader than the United States Constitution's protection from cruel *and* unusual punishment, "if a particular punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Tucker*, 312 Mich App at 654 n 5. To determine whether a punishment is cruel or unusual, courts assess whether it is "unjustifiably disproportionate" to the offense committed by considering four factors: (1) the harshness of the penalty compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed for other offenses in

[1] Defendant was sentenced on March 18, 2021. The 2021 version of SORA would have been in effect. However, his crimes occurred after the 2011 amendments, but before the 2021 amendments. Defendant does not raise any ex post facto challenge between the 2011 and 2021 SORA, nor did *Betts* address the 2021 SORA in relations to its ex post facto analysis.

Michigan, (3) the penalty imposed for the offense in Michigan compared to the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the goal of rehabilitation. *People v Bullock*, 440 Mich 15, 30, 33-34; 485 NW2d 866 (1992).

Courts considering an as-applied challenge to a punishment under the United States Constitution examine all of the circumstances of a defendant's case to determine if the punishment is "grossly disproportionate" to the offense. *Graham v Florida*, 560 U.S. 48, 60; 130 S Ct 2011; 176 L Ed 2d 825 (2010). The three factors courts consider in this examination are identical to the first three factors under the Michigan test. *Bullock*, 440 Mich at 33-34. When considering whether a punishment is to be categorically barred as cruel and unusual under the United States Constitution, courts first consider objective indicia of society's standards demonstrating whether there is a national consensus against the sentencing practice and, second, whether the punishment violates the United States Constitution, considering the Eighth Amendment's text, history, meaning, and purpose. *Graham*, 560 U.S. at 61.

Looking first at the harshness of the penalty compared to the gravity of the offense, defendant relies on *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), to support his contention that lifetime registration is too harsh a penalty. The defendant in *Dipiazza* was an 18-year-old boy who had a consensual sexual relationship with a nearly-15-year-old girl. *Id.* at 140. The defendant was adjudicated under the Holmes Youthful Training Act (HYTA) for attempted third-degree CSC, and was sentenced to probation. *Id.* The

defendant was also required to register as a sex offender for 10 years under SORA. *Id.* On appeal, this Court found that the defendant's conduct was not very grave because there was only a minor age difference between the defendant and the adolescent, their relationship was consensual, their parents knew of and approved of the relationship, and the defendant eventually married the adolescent. *Id.* at 154. The Court also found, on the other hand, that the defendant's penalty was harsh when compared to the particular facts of the defendant's case. *Id.* Looking at the other three factors, the Court determined that the defendant's penalty was unique in Michigan and is becoming less common among other states, and that rehabilitation was not served by this penalty because the defendant posed no risk of reoffending and would suffer numerous lasting, negative effects from being on the registry. *Id.* at 154-156. Consequently, the Court held that SORA's 10-year registration requirement was cruel or unusual punishment as applied to the defendant. *Id.* at 156. The facts of Defendant's case, however, are so distinguishable from *Dipiazza* that this logic is not persuasive.

Defendant's conduct was much more severe than the defendant's in *Dipiazza*. First, and perhaps most importantly, Defendant and his victim were not in a consensual relationship—Defendant was the five-year-old victim's father and she did not consent to any incident. This created a power imbalance that was lacking in *Dipiazza*. Further, there was a significant age difference between Defendant, who was a grown man in his thirties, and his victim, who was well under the age of 13 at the time of the incident. Again, it was not a

consensual relationship. The attendant circumstances in Defendant's case are also more disturbing than in *Dipiazza*. Much of Defendant's conduct often occurred in the basement while others were asleep in the house. Notably, as Defendant did not independently choose to cease the exploitation of her victim—he did not cease until the victim informed her mother of the abuse and the police got involved—there is no telling how long this conduct would have continued. Defendant took advantage of the child, and instilled in her lasting fear and distrust, in addition to other psychological issues for which counseling is required. The gravity of Defendant's offense should not be discounted merely because he had no prior record. Considering the gravity of Defendant's offense, mandatory lifetime registration is not a disproportionately harsh punishment in Defendant's case.

Turning next to Defendant's sentence compared to sentences for other offenses in Michigan, lifetime registration is a unique penalty among Michigan offenses, but it is not the only mandatory penalty. Many other offenses have statutorily mandated penalties.[2] Further, the unique circumstances surrounding CSC offenses justify the uniqueness of Defendant's lifetime registration requirement. For example, sex offenders tend to recidivate at higher rates than other offenders.[3] See *McKune v Lile*, 536 U.S. 24, 32-34; 122

[2] See, e.g., MCL 750.520b(2)(b) and (c) (mandating minimum terms of imprisonment for a defendant convicted of CSC-I against a victim younger than 13 years of age); MCL 769.12(1)(a) (mandating a 25-year minimum term of imprisonment for certain fourth-offense habitual offenders); MCL 750.227b(1) and (2) (mandating terms of imprisonment for a defendant who possessed a firearm during the commission of a felony).

[3] Although the Supreme Court recently noted that a growing body of research supports the proposition that recidivism rates for sex offenders may be lower than previously thought, the

S Ct 2017; 153 L Ed 2d 47 (2002) (concluding that, based on United States Department of Justice data, sex offenders face a "frightening and high risk of recidivism"). Additionally, victims of CSC under 13 years of age tend to be more vulnerable victims, especially when considering the relationship and power dynamic to the defendant. See *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008) (listing factors demonstrating vulnerability in the context of Offense Variable 10, including the victim's youth, the existence of a domestic relationship, whether the offender abused his or her authority status, and whether the offender exploited a victim by his or her difference in size or strength or both). Thus, SORA's unique lifetime registration requirement is not without justification.

Turning to CSC sentences in Michigan compared to CSC offenses in other states, it is clear that lifetime registration for sex offenders is not unique.[4] Defendants across the states who engage in conduct similar to defendant are routinely required to register for life, even if defendants in other states are afforded greater latitude to petition for removal from the registry. Thus, SORA's registration requirement is not materially different from sex offender registries in other states.

Finally, turning to the goal of rehabilitation, the People acknowledge that SORA's asserted rehabilitative effect is uncertain. As the Supreme Court

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Court cited the studies only to demonstrate that the efficacy of SORA's asserted public-safety purpose is unclear. *Betts*, slip op at 27-28.

[4] See Collateral Consequences Resource Center, *50-State Comparison: Relief from Sex Offense Registration Obligations* <https://ccresourcecenter.org/state-restoration-profiles/50-statecomparison-relief-from-sex-offender-registration-obligations/> (last accessed September 30, 2021) (comparing sex offense registration obligations across the states).

pointed out, recent studies have demonstrated recidivism rates for sex offenders may be lower than previously thought. *Betts*, slip op at 27. Nonetheless, lifetime registration is not unjustifiably disproportionate as applied to Defendant because the registry may still have a deterrent effect on her behavior. Based on the facts of Defendant's case, it is unclear whether her exploitative behavior would have ever ceased if her victims did not finally speak out against her. Thus, being placed on the sex offender registry for life may serve as a deterrent against recidivating. Defendant, however, argues that the stigmatizing effects of lifetime registration will counteract her ability to move beyond this offense and rehabilitate herself. While this argument has some merit, it is unclear whether the stigmatizing effects will result from the public fact that defendant has been convicted of CSC or from the registry itself. See *Tucker*, 312 Mich at 661 (citing the United States Supreme Court's reasoning that the negative consequences sex offenders face flow from the conviction itself, not the registry). For these reasons, SORA's lifetime registration requirement is not unjustifiably disproportionate as applied to the grave facts of Defendant's offense. *Bullock*, 440 Mich at 30; *Wilder*, 307 Mich App at 556.

Defendant has also failed to meet the standard of proving that SORA's registration requirement is facially cruel or unusual. Although the Supreme Court recently held that SORA's mandatory requirements were excessive as a civil regulation and determined the requirement was a criminal punishment, the Court made no mention as to whether such mandatory provisions were

facially cruel or unusual as criminal punishments. *Betts*, slip op at 28-29. Defendant argues that because the trial court had no discretion to fit the term of registration to the facts of defendant's case, the mandatory penalty violates Michigan's established principle of individualized sentencing and, therefore, constitutes cruel or unusual punishment. But registration was statutorily mandated for defendant—it was not a discretionary provision under the sentencing guidelines. "Legislatively mandated sentences are presumptively proportional and presumptively valid," *People v Brown*, 294 Mich App 377, 390; 811 NW2d 531 (2011), and "a proportionate sentence is not cruel or unusual," *People v Bowling*, 299 Mich App 552, 558; 830 NW2d 800 (2013). If a statute "is valid under the facts applicable to defendant then it is certainly capable of being upheld against a facial challenge." *People v Hallak*, 310 Mich App 555, 569; 873 NW2d 811 (2015), rev'd in part on other grounds 499 Mich 879 (2016). Because Defendant's sentence was constitutional as applied to her, there is at least one set of circumstances under which SORA's mandatory lifetime registration requirement is valid; the provision, therefore, is not facially cruel or unusual. *Id.*; *Wilder*, 307 Mich App at 556. Thus, SORA's lifetime registration requirement is not invalid facially or as applied under the Michigan Constitution.

Because the requirement is not cruel or unusual punishment under the Michigan Constitution's broader protection, it also is not cruel and unusual punishment under the United States Constitution's narrower protection. *Tucker*, 312 Mich App at 654 n 5. Since the test for whether a

punishment as applied to a defendant is cruel and unusual under the United States Constitution is identical to the first three factors under the test for whether a punishment as applied to a defendant is cruel or unusual under the Michigan Constitution, it need not be repeated. *Bullock*, 440 Mich at 33-34. Because Defendant's registration requirement was not an unjustifiably disproportionate sentence under the Michigan Constitution, it was not a grossly disproportionate sentence under the United States Constitution. *Tucker*, 312 Mich App at 654 n 5.

Similarly, there is no basis to categorically bar SORA's mandatory lifetime registration requirement as cruel and unusual under the United States Constitution. First, Defendant has failed to present sufficient objective indicia of society's standards demonstrating a national consensus against mandatory lifetime registration for sex offenders. Defendant argues only that there is no clear national consensus as to the efficacy of sex offender registries and that only 18 states maintain a sex offender registry. However, as discussed earlier, lifetime registration for sex offenders is not unique to Michigan. Defendants across the states who engage in conduct similar to defendant are routinely required to register for life, even if defendants in other states are afforded greater latitude to petition for removal from the registry. Thus, while sex offender registry requirements vary across states, there exists no national consensus against mandating lifetime registration for sex offenders.

Second, Defendant has failed to demonstrate that mandatory lifetime registration for sex offenders violates the United States Constitution in light of

the Eighth Amendment's text, history, meaning, and purpose. The Eighth Amendment is meant to ensure criminal punishments are proportionate to a defendant's offense. *Graham*, 560 U.S. at 60. Considering the "frightening and high risk of recidivism" among sex offenders and the severity and lasting impact of sex offenses, *McKune*, 536 U.S. at 32-34, as well as the potential deterrent effect of registries, a mandatory lifetime registration requirement does not contradict the purpose of the Eighth Amendment. For these reasons, SORA's mandatory lifetime registration requirement does not constitute cruel and unusual punishment in violation of the United States Constitution.

Moreover, while the above analysis looked at the 2011-SORA given that was the SORA in effect at the time of Defendant's crimes, she is currently subject to the provisions of the 2021-SORA. As such, this Court should reject Defendant's claim that even the far less restrictive 2021-SORA is punitive. In March, 2021, our Legislature repealed several parts of the 2011 SORA. 2020 PA 295. This was in response to the holdings in *Does #1-5 v Snyder*, 834 F3d 696 (CA 6, 2016), and related cases, that the 2011 SORA imposed ex post facto punishment. See Senate Legislative Analysis, HB 5679 (December 9, 2020), at 7-8. Of particular concern to the Sixth Circuit was the Legislature's creation in 2006 of "student safety zones" – areas within 1,000 feet of a school in which registrants were prohibited from living, working, or loitering. *Does #1-5*, 834 F3d at 698, 701-702. This was the "[m]ost significant" affirmative disability or restraint imposed under the 2011 SORA. *Id.* at 703. It resembled "the ancient punishment of banishment." *Id.* at 701. The Sixth Circuit was also troubled by

the publishing of SORA tier classifications, which it likened to "traditional shaming punishments." *Id.* at 702. Further, the frequent requirement for registrants to report in person for various reasons was restrictive. *Id.* at 703, 705. These were largely the same points that led our Supreme Court to hold that retroactive application of the 2011 SORA violated ex post facto principles. *Betts*, slip op at 17-23.

The amendments to SORA in 2020 PA 295 addressed these concerns. They included "the removal of the student-safety zones; the removal of the retrospective application of in-person reporting requirements for vehicle information, electronic mail addresses, Internet identifiers, and telephone numbers; and the removal of registrants' tier-classification information from the public website." *Betts*, slip op at 33. Moreover, the Court in *Betts* expressly declined to consider "whether the retroactive application of any post-2011 SORA amendments violate[d] constitutional ex post facto provisions." *Betts*, slip op at 40 n 30.

Determining whether a law violates the Ex Post Facto Clause is a two-step inquiry. *People v Earl*, 495 Mich 33, 38; 845 NW2d 721 (2014). The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. *Id.* If the Legislature's intention was to impose a criminal punishment, retroactive application of the law violates the Ex Post Facto Clause and the analysis is over. *Id.* However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the

statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil. *Id.*

Both *Does #1-5*, 834 F3d at 700-701, and *Betts*, slip op at 16, concluded that the Legislature did not intend the 2011 SORA as a criminal punishment. Neither Court, then, would be likely to conclude that the less restrictive 2021 SORA was so intended.

Whether a statute not intended as a criminal punishment nonetheless imposes punishment under an ex post facto analysis entails examining seven factors:

> "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." [*Earl*, 495 Mich at 44, quoting *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 664 (1963).]

Of these, factors 1, 2, 4, 6, and 7 are most relevant to evaluation of a sex offender registration law. *Betts*, slip op at 12-13, 17; *Smith v Doe*, 538 US 84, 97; 123 S Ct 1140; 155 L Ed 2d 164 (2003).

Regarding the first factor, the restraints of SORA that concerned our Supreme Court were the student safety zones and the extensive reporting requirement, especially the "particularly onerous" requirement of immediate, in-person reporting whenever a registrant established an email address or instant message address. *Betts*, slip op at 21-23. The 2021-SORA has done

away with the student safety zones and the most onerous of the reporting requirements. Regarding the second factor, removing the student safety zones also eliminates the Supreme Court's concern (*Betts*, slip op at 18) that SORA registration resembles the historic punishment of banishment, including exclusion from public transportation and homeless shelters. Factors 4 and 6 are presumably unaffected by the 2021 amendments to SORA. The Supreme Court would likely still find that SORA supports the aims of deterrence and retribution, since its application is not individualized; but that it also bears a rational connection to a nonpunitive purpose. *Betts*, slip op at 24-26. As to the last factor, again, the 2021-SORA has eliminated or reduced many of the aspects that led the Court to find SORA excessive. *Betts*, slip op at 28-29. For all these reasons, Defendant has not carried his burden of demonstrating to this Court that the prospective application of the 2021-SORA to his case affords grounds for relief.

Defendant further argues that the SORA requirement was unreasonable and disproportionate because of the mandatory nature of SORA and LEM. Defendant cites to *Miller v Alabama*, 567 U.S. 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012), and other holdings regarding juveniles. Defendant is not even close to a juvenile. Thus, the trial court was not required to make any of the findings or consideration of mitigating factors under *Miller* in Defendant's case.

Finally, whether LEM constitutes cruel and unusual punishment has been addressed and decided by the Court of Appeals. See *People v Hallak*, 310

Mich App 555, 576–577; 873 NW2d 811 (2015), rev'd in part in other grounds by 499 Mich 879 (2016) (holding that "lifetime electronic monitoring is not cruel or unusual punishment.").[5] Defendant contends that *Betts* changes the calculus for LEM. However, assuming *Betts* identifies SORA as a punishment, it still does not qualify as cruel or unusual under the same rationale that LEM is not cruel or unusual.

Defendant perverted his fatherly role by sexually assaulting the victim. This Court has previously held that the crime of CSC–I "represents an act that has been historically viewed by society and this Court as one of the worst types of sexual assault," *People v Sabin (On Second Remand)*, 242 Mich App 656, 662–663; 620 NW2d 19 (2000), and that those crimes, when committed against minors, are "offense[s] that violate deeply ingrained social values of protecting children from sexual exploitation." *Benton*, 294 Mich at 206. As to the harshness of the penalty, the statutory maximum in Michigan for CSC–I is imprisonment for life, MCL 750.520b(2)(a). LEM, which requires Defendant to wear an ankle tether but allows him to travel, work, or otherwise move about the community, is obviously a lesser punishment than life imprisonment. This penalty is not unduly harsh considering the gravity of Defendant's crimes.

As to the second prong of the test in *Bullock*, how the punishment in this case compares to other grave cases in Michigan, the punishment of LEM is only required for CSC–I and certain CSC–II convictions. The defendant in *Hallak* was convicted of CSC–II, not the more serious crime of CSC–I like our

[5] *Hallak* also held that LEM did not violate the Fourth Amendment.

Defendant, and the Court rejected the exact constitutional challenge he makes here. *Hallak*, 310 Mich App at 577. And as discussed above, although defendant is required to submit to LEM, this does not exceed the maximum of life imprisonment for other heinous, capital crimes in Michigan such as murder, armed robbery, carjacking, kidnapping, and arson. Further, the Legislature distinguished certain sex crimes from other capital crimes by identifying a specific societal benefit to LEM: to ensure that sex offenders would not be in a position to exploit children. *Hallak*, 310 Mich App at 576–577. Sentencing such defendants to LEM is not unjustifiably disproportionate given the nature of the crime, and so is not cruel or unusual punishment.

With regard to comparing sentences in other jurisdictions to those in Michigan for the same crime, as noted in *Hallak*, there are at least 10 other states that impose LEM for various CSC convictions, ranging from the most serious CSC convictions to those CSC convictions where the victim is a minor. Clearly, this punishment is not unusual or unjustifiably disproportionate, given that mandatory LEM is considered necessary to prevent the offender from causing further injury to society. *Id.* at 575–576. Finally, because sex offenders are more likely to re-offend than other criminals, the goal of sentencing defendants to LEM is "to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate." *Id.* at 580.

Defendant also argues that imposition of LEM violates the Fourth Amendment. In *Grady v North Carolina*, 575 U.S. 306; 135 S Ct 1368, 1371;

191 L Ed 2d 459 (2015), the United States Supreme Court held that North Carolina's satellite based monitoring system for tracking the movement of convicted sex offenders amounts to a search within the meaning of the Fourth Amendment. The Supreme Court, however, declined to review the constitutionality of North Carolina's system, observing that the Fourth Amendment prohibits only unreasonable searches and seizures. *Id.* Noting that the North Carolina Supreme Court did not determine whether the search was reasonable in its initial review of the defendant's case, the United States Supreme Court declined to address that issue, and remanded the case to the North Carolina Supreme Court for just such a determination. *Id.*

The Supreme Court cited to *Samson v California*, 547 U.S. 843; 126 S Ct 2193; 165 L Ed 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v Acton*, 515 U.S. 646; 115 S Ct 2386; 132 L Ed 2d 564 (1995) (random drug testing of student athletes was reasonable). By citing *Samson* and *Vernonia*, the Supreme Court provided an instructive framework for conducting the reasonableness balancing test to determine whether imposing LEM on a limited category of convicted sex offenders is valid. See *Samson*, 547 U.S. at 848; *Vernonia*, 515 U.S. at 652–53. In *Samson* the Supreme Court evaluated the reasonableness of a statute that required parolees to agree to any warrantless search, without cause, at any time. Samson, 547 U.S. at 846, 852–53 n.3. The Court began "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate

governmental interests." *Id.* at 848. The Court first concluded that parolees "have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852. Viewing that diminished privacy expectation in the totality of the circumstances, the Supreme Court concluded the warrantless search did not intrude upon "an expectation of privacy that society would recognize as legitimate," despite the unlimited breadth of the right to search and regardless of the crime. *Id.* Therefore, balancing no intrusion upon any reasonable expectation of privacy against the State's substantial interests in deterring recidivism, the Court found the statute constitutional under the Fourth Amendment. *Id.* at 853, 857.

In *Vernonia* the Supreme Court applied the same balancing test for another categorical warrantless search "when special needs, beyond the normal need for law enforcement, ma[d]e the warrant … requirement impracticable." *Vernonia*, 515 U.S. at 653. A school policy required that high school athletes consent to random drug screenings in order to participate in school athletics. *Id.* at 650. The Court noted that the school had a special relationship with the students and that "[p]ublic school locker rooms [where the drug screenings take place] … are not notable for the [bodily] privacy they afford." *Id.* at 655–57. As such, the Court determined that student athletes based on their status have diminished expectations of privacy. *Id.* at 657. Next, the Court examined the intrusion upon privacy by the drug screening process and determined it had a "negligible" effect on a student athlete's privacy interests. *Id.* at 658. The Court then noted that "a drug problem largely fueled by the 'role model' effect of

athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." *Id.* at 663. Therefore, the State's important interest in deterring drug use among all teenagers, particularly for the narrow, at-risk category of student athletes, justified the search under a Fourth Amendment reasonableness analysis. Id. at 661–62, 665.

In *Belleau v Wall*, 811 F3d 929 (7th Cir. 2016), the United States Court of Appeals for the Seventh Circuit rejected a Fourth Amendment challenge to a Wisconsin law which required persons convicted of certain sex offenses to wear an electronic monitoring device for the rest of their lives. In so ruling, the Seventh Circuit read the United States Supreme Court's holding in *Grady* as concluding "that electronic monitoring of sex offenders is permitted if reasonable[,]." *Belleau*, 811 F3d at 932. The Seventh Circuit further concluded that "[H]aving to wear a GPS anklet monitor is less restrictive, and less invasive of privacy, than being in jail or prison, or for that matter civilly committed, which realistically is a form of imprisonment." *Id.* The Seventh Circuit suggested that such monitoring of convicted sex offenders was reasonable in light of the high recidivism rates of persons who have sexually molested children. *Id.* at 932-936. The Seventh Circuit concluded that the ankle monitoring of Mr. Belleau was reasonable. *Id.*

In *State v Gordon*, 378 NC 692; 862 SE2d 806 (2021), the North Carolina Supreme Court next addressed the constitutionality of the satellite-based monitoring regime as applied to aggravated offenders, and concluded that the

satellite-based monitoring "statute as applied to aggravated offenders is not unconstitutional" because the "search effected by the imposition of lifetime [satellite-based monitoring] on the category of aggravated offenders is reasonable under the Fourth Amendment." *Id.* As the Court explained, the lifetime satellite-based monitoring of aggravated offenders is reasonable under the totality of the circumstances, given the program's "limited intrusion into [the] diminished privacy expectation" of aggravated offenders, when weighed against the State's "paramount interest in protecting the public—especially children—by monitoring certain sex offenders after their release[,]" which the Court determined is manifestly furthered by the satellite-based monitoring regime. *Id.* Indeed, the Court explicitly "recognized the efficacy of [satellite-based monitoring] in assisting with the apprehension of offenders and in deterring recidivism," and concluded that therefore "there is no need for the State to prove [satellite-based monitoring]'s efficacy on an individualized basis." *Id.*

The North Carolina Supreme Court then analyzed the necessity of assessing the future reasonableness of the imposition of satellite-based monitoring on an aggravated offender, where the offender is sentenced to serve a lengthy prison term prior to the anticipated imposition of satellite-based monitoring. See *State v Strudwick*, 379 NC 94; 864 SE2d 231 (2021). In *Strudwick*, the trial court sentenced the defendant to a minimum of thirty years in prison. *Id.* The trial court also ordered that the defendant, as an aggravated offender, enroll in lifetime satellite-based monitoring for the remainder of his

natural life upon his release from imprisonment. *Id.* The Supreme Court clarified that "the State is not tasked with the responsibility to demonstrate the reasonableness of a search at its effectuation in the future for which the State is bound to apply in the present"; instead, the State need only "demonstrate the reasonableness of a search at its evaluation in the present for which the State is bound to apply for future effectuation of a search." *Id.* With regard to the reasonableness of the search of the defendant, an aggravated offender, the Court ultimately concluded that "the lifetime [satellite-based monitoring] program is constitutional due to its promotion of the legitimate and compelling governmental interest which outweighs its narrow, tailored intrusion into [the] defendant's expectation of privacy in his person, home, vehicle, and location." *Id.*

In *Hallak, supra*, the Court of Appeals addressed the Fourth Amendment issue and the reasonableness of the search. The *Hallak* Court stated:

> The reasonableness of a search depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. The applicable test in determining the reasonableness of an intrusion is to balance the need to search, in the public interest, for evidence of criminal activity against invasion of the individual's privacy.
>
> Turning first to the public interest, it is evident that in enacting this monitoring provision, the Legislature was seeking to provide a way in which to both punish and deter convicted child sex offenders and to protect society from a group known well for a high recidivism rate. As the Court pointed out in *Samson v California*, "this Court has repeatedly acknowledged that a State's interests in reducing recidivism and thereby promoting reintegration and positive citizenship among

probationers and parolees warrant privacy intrusions that would not otherwise be tolerated under the Fourth Amendment." "This Court has acknowledged the grave safety concerns that attend recidivism," *Samson* continued, and that "the Fourth Amendment does not render the States powerless to address these concerns effectively." As the prosecution points out, electronic monitoring not only acts as a strong deterrent, but also assists law enforcement efforts to ensure that these individuals, who have committed the most egregious and despicable of societal and criminal offenses, do not frequent prohibited areas (elementary schools, etc.) and remain compliant with the Sex Offenders Registration Act, MCL 28.721 et seq. Consequently, when enacting this monitoring system and requiring it only for those 17 or older who commit CSC against children under the age of 13, the Legislature was addressing punishment, deterrence, and the protection of some of the most vulnerable in our society against some of the worst crimes known. As we earlier noted, the need to prevent the individual offender from causing further injury to society is a valid consideration in designing a punishment.

Having examined the public interest in this type of monitoring, we now balance that interest against the invasion of defendant's privacy interest. We begin by recognizing that parolees and probationers have a lower expectation of privacy, even in the comfort of their own homes, than does the average law-abiding citizen. The monitoring does not prohibit defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes. Instead, the monitoring device simply records where he has traveled to ensure that he is complying with the terms of his probation and state law. And although this monitoring lasts a lifetime, the Legislature presumably provided shorter prison sentences for these CSC–II convictions because of the availability of lifetime monitoring. In that regard we also cannot forget that minor victims of CSC–II are often harmed for life. Though it may certainly be that such monitoring of a law-abiding citizen would be unreasonable, on balance the strong public interest in the benefit of monitoring those convicted of CSC–II against a child under the age

> of 13 outweighs any minimal impact on defendant's reduced privacy interest. [Cleaned up].

Thus, Legislature's imposition of LEM is not unreasonable. The imposition of LEM is not for all defendants convicted of CSC or other offenses. It only applies to those convicted CSC 1st Degree or CSC 2nd Degree where the victim is less than 13 and the defendant is over 17.

The Legislature has reserved LEM for the worst cases of CSC to in order to reduce recidivism and protect the most vulnerable of society. This puts Michigan on par with jurisdictions such as Wisconsin and North Carolina. While Georgia seems to have gone the opposite direction, see *Park v State*, 305 Ga 509 (2019), it did so based upon the unique aspects of the Georgia state statute. Indeed, *Park* distinguished other cases that allow for LEM based upon those statutory differences, specifically Michigan and North Carolina. Specifically, the *Park* Court stated:

> Statutes authorizing a lifelong GPS search of persons classified as sexually dangerous predators have passed constitutional muster in a few other jurisdictions, but OCGA § 42-1-14 (e) is distinguishable from those statutory schemes. For example, OCGA § 42-1-14 (e) does not include the GPS monitoring of sexually dangerous predators as part of the offenders' actual sentences (see *People v. Hallak*, 310 Mich. App. 555, 873 N.W.2d 811 (2015), rev'd in part on other grounds, 499 Mich. 879, 876 N.W.2d 523 (2016) (Michigan statutes at issue specifically included lifetime GPS monitoring as part of the sex offender's actual sentence for the crime or crimes committed)). Nor does OCGA § 42-1-14 (e) on its face allow for individuals classified as sexually dangerous predators to be removed from the GPS monitoring requirements at any point after the classification has become final. See N.C. Gen. Stat. § 14-208.43 (a) (North Carolina statute allows for sexual offenders to "file a request for

> termination of [the] monitoring requirement … one year after the offender: (i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence")). Instead, OCGA § 42-1-14 (e), on its face, simply allows for warrantless searches of individuals – that these individuals must pay for8 – to find evidence of possible criminality for the rest of their lives, despite the fact that they have completed serving their entire sentences and have had their privacy rights restored. See OCGA § 42-1-14 (e) (3).

While *Park* dealt with the unreasonableness of the search, it did so in the specific context of the Georgia statute at play. For all the reasons cited above, our state's statute that provides for the imposition of LEM is not unreasonable under the Fourth Amendment.

RELIEF REQUESTED

Given the foregoing, Plaintiff respectfully urges this Honorable Court to **DENY** Defendant's Application for Leave to Appeal.

Respectfully Submitted,

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I certify that this Answer contains 7981 words in 12-font Bookman Old Style typeface.