

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 166766

Court of Appeals No. 363845

Berrien Circuit Court No. 2021-016148-FH

v

JAMES ELLIS, JR.,

Defendant-Appellant.

**AMICUS CURIAE BRIEF OF
THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN**

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QUESTIONS PRESENTED

- I. Where the “recapture” provision of Michigan’s Sex Offenders Registration Act (SORA) imposes registration on a defendant who is convicted of a non-sexual offense after July 1, 2011, if (and only if) the defendant was previously convicted of a registrable sexual offense that did not result in registration because it predates SORA, is it the later, non-sexual offense that triggers registration under SORA or the earlier sexual offense? (Question 4 of this Court’s Order.)

Amicus answers:	The earlier sexual offense.
Mr. Ellis answers:	The earlier sexual offense.
The prosecutor answers:	The later, non-sexual offense.
The Court of Appeals answers:	The later non-sexual offense.
The Circuit Court answers:	Did not answer.

- II. If the focus of the recapture inquiry is properly on the earlier sexual offense, does SORA, as amended effective March 24, 2021, constitute ex post facto punishment under the United States or Michigan Constitutions, US Const, art I, § 9; Const 1963, art 1, § 10, and is the defendant entitled to relief on ex post facto grounds because this Court decided in *People v Kardasz*, __ Mich __; __ NW3d __ (2025) (Docket No. 165008), that SORA is punishment? (Questions 1 and 6 of this Court’s Order.)

Amicus answers:	Yes.
Mr. Ellis answers:	Yes.
The prosecutor answers:	No.
The Court of Appeals answers:	No. Did not consider <i>Kardasz</i> .
The Circuit Court answers:	Did not answer.

- III. If the focus of the recapture inquiry is properly on the later non-sexual offense, does requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 *et seq.*, constitute cruel or unusual punishment under Const 1963, art 1, § 16, and does the sexual nature of the prior unregistered sexual offense affect the determination whether recapture is punishment for the non-sexual offense and whether it is cruel or unusual punishment? (Questions 2 and 5 of this Court’s Order.)

Amicus answers:	Yes. Prior sexual offense not relevant to cruel/unusual punishment analysis.
Mr. Ellis answers:	Yes. Prior sexual offense not relevant to cruel/unusual punishment analysis.

The prosecutor answers:

No. Can base punishment on the prior sexual offense.

The Court of Appeals answers:

No. Can base punishment on the prior sexual offense.

The Circuit Court answers:

Did not answer.

INTERESTS OF AMICUS¹

The American Civil Liberties Union Fund of Michigan (“ACLU”) is the Michigan affiliate of a nationwide, nonpartisan organization dedicated to protecting core constitutional liberties. The ACLU or its attorneys have been involved in numerous cases involving the constitutional rights of people convicted of sexual offenses, including representing the plaintiffs in *Does #1-5 v Synder*, 834 F3d 696 (CA 6, 2016), cert den 583 US 814 (2017) (“*Does I*”), and a class of all Michigan registrants in *Does v Snyder*, 449 F Supp 3d 719 (ED Mich, 2020) (“*Does II*”)—two cases that struck significant portions of Michigan’s 2011 version of SORA as unconstitutional. ACLU counsel currently represent a class of all Michigan registrants in *Does v Whitmer*, 751 F Supp 3d 761 (ED Mich, 2024) (“*Does III*”), a case where the district court held, *inter alia*, that the 2021 version of SORA violates the federal Ex Post Facto Clause and that registration of people with non-sexual convictions violates the federal Due Process Clause.²

The ACLU counsel have represented registrants and filed amicus briefs on registration issues before this Court including in *People v Kardasz*, __ Mich __; __ NW3d __ (2025) (Docket No. 165008); *People v Lymon*, 515 Mich 145; 29 NW3d 58 (2024); *People v Betts*, 507 Mich 527; 968 NW2d 497 (2021); *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018); and *People v Cole*, 491 Mich 325; 817 NW2d 497 (2012).

¹ This brief was not authored in whole or part by counsel for a party, nor did such counsel or a party make a monetary contribution intended to fund the brief’s preparation or submission.

² The district court permanently enjoined SORA’s retroactive application to registrants who committed the offense requiring registration before July 1, 2011, and barred registration based on non-sexual convictions unless certain requirements are met. *Does v Whitmer*, amended judgment of the United States Court for the Eastern District of Michigan, issued April 22, 2025 (Case No. 22-cv-10209), ECF No 177. The state appealed the ex post facto ruling, and the Sixth Circuit has stayed relief. *Does v Whitmer*, unpublished order of the United States Court of Appeals for the Sixth Circuit, issued June 20, 2025 (Case Nos. 25-1413 and 25-1414). The state did not appeal the district court’s decision barring registration based on non-sexual convictions, and that decision is therefore fully in effect.

INTRODUCTION

Michigan's Sex Offenders Registration Act (SORA) ordinarily does not apply to people who completed their sentences and any post-release supervision before the enactment of that statute in 1995. Under SORA's recapture provision, however, those individuals must register as sex offenders if they commit a subsequent non-sexual felony offense. That is what happened to defendant James Ellis, Jr., who committed a sex crime in 1983—more than a decade before SORA even existed. To this day, Mr. Ellis has not committed another sexual offense. But in 2021, he incurred a felony conviction after attempting to steal food from a Walmart. Because of the recapture provision, he cannot live, work, volunteer, study, or even temporarily reside in Michigan without subjecting himself to SORA's restrictions for the rest of his life.

This Court has already held in *People v Kardasz*, __ Mich __; __ NW3d __ (2025) (Docket No. 165008); 2025 WL 3691966, that SORA is punishment, so the threshold question here is whether that punishment is being imposed based on the old 1983 sexual offense or the new conviction for a non-sexual offense. If the recapture provision punishes the decades-old sex crime, it violates the Michigan and federal Constitutions' prohibitions against ex post facto laws. Amicus submits that this is the correct analysis because the registration and reporting obligations imposed on defendants subject to the recapture provision are based entirely on the underlying sexual offense, not the more recent non-sexual felony. The government argues otherwise by insisting that the recapture provision punishes only the new felony offense, not the long-ago sex crime. But even if the government were correct, Mr. Ellis still prevails, because the recapture provision then runs headlong into the Michigan Constitution's bar on cruel or unusual punishment, which this Court held in *People v Lymon*, 515 Mich 145; 29 NW3d 58 (2024), prohibits punishment as a sex offender based on a crime that lacks a sexual element. Either way, the recapture provision is unconstitutional.

BACKGROUND

Both this Court and the federal courts have recognized that SORA imposes a life-altering punitive regime. *Kardasz*, ___ Mich at ___; slip op at 17-20; 2025 WL 3691966, at *8-9 (describing SORA’s extensive reporting obligations, stigma from online registry, and fact that registrants who fail to “compl[y] with any aspect” of SORA face “the cudgel of potential imprisonment”); *Does v Snyder*, 834 F3d 696, 697 (CA 6, 2016), cert den 583 US 814 (2017) (SORA creates “a byzantine code governing in minute detail the lives of [Michigan’s] sex offenders”). It wasn’t always that way. The version of SORA that Michigan first passed, effective October 1995, established a non-public law enforcement database containing only basic information, exempt from all public disclosure, but subsequent amendments ultimately transformed SORA “into a publicly accessible database that imposed significant restrictions on the lives of registrants.” *People v Betts*, 507 Mich 527, 536; 968 NW2d 497 (2021); see generally 1994 PA 295.

SORA’s retroactive reach has also changed over time. When initially adopted, SORA applied only to people convicted of certain sex crimes (“listed offenses”) after October 1995 or who were still serving a sentence for the listed offense at that time. See 1994 PA 295, § 3. In 2011, however, the Legislature passed the amendment to SORA at issue here: the “recapture provision.” 2011 PA 17, § 3(1)(e). Under that provision, someone who finished serving a sentence for a listed offense before October 1, 1995, must nonetheless register as a sex offender if they are “convicted of any other felony on or after July 1, 2011.” MCL 28.723(1)(e). By its plain terms, the recapture provision applies only to people with sexual offense convictions that are now at least three decades old and who have not committed another sexual offense that would independently require registration.

Mr. Ellis is one such individual. In 1983, he committed an attempted sexual assault in Illinois and “was sentenced to two years [of] [p]robation and six months in jail.” See Appendix to

Appellant's Supplemental Brief at 64. He has not committed another sex crime since. In 2022, he was convicted of attempted unarmed robbery after he tried to steal food from a Wal-Mart in Michigan. The trial court sentenced him to 12 to 60 months' imprisonment. See *id.* at 81. Further, based on the 1983 sexual offense, the trial court found that he is subject to SORA under the recapture provision. See *id.* at 39-40.

Mr. Ellis moved to correct his sentence, arguing that he could not be required to register. The trial court denied his motion. See *id.* at 86-91. The Court of Appeals agreed that the recapture provision applies to Mr. Ellis, holding that (1) the recapture provision was not ex post facto punishment because it attached legal consequences to his new non-sexual conviction, not his old sexual offense; and (2) while it would be cruel or unusual punishment to impose SORA for a non-sexual offense, Mr. Ellis has a prior conviction for a sexual offense and therefore the punishment of mandatory lifetime registration was not unduly harsh. *People v Ellis*, unpublished per curiam opinion of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), p 4-7; 2024 WL 203788, at *3-5. Mr. Ellis—who lives around five miles from the Michigan border, see PSI Report at 3—can no longer live, work, volunteer, study, or temporarily reside in the state without having to register as a sex offender for the rest of his life, even though he has not committed a sex crime in four decades. MCL 28.723(1).

ARGUMENT

This Court's decision in *Lymon* establishes that SORA, as amended effective 2021 ("SORA 2021"), constitutes punishment for people convicted of non-sexual offenses. This Court's decision in *Kardasz* establishes that SORA 2021 constitutes punishment for people convicted of sexual offenses. To be sure, both *Lymon* and *Kardasz* involved challenges under the Michigan Constitution's prohibition against "cruel or unusual punishment," Const 1963, art 1, § 16, not the state or federal Ex Post Facto Clauses. But in deciding that SORA is punishment, *Lymon* and

Kardasz applied the federal intent-effects test that this Court used in an earlier ex post facto decision. See *Lymon*, 515 Mich at 160-162, citing *People v Earl*, 495 Mich 33, 38; 845 NW2d 721 (2014); *Kardasz*, __ Mich at __; slip op at 14-15; 2025 WL 3691966, at *6 (same). In other words, this Court has already found that SORA is punishment both for non-sexual and sexual offenses under the most stringent potentially-applicable test. The Court therefore need not decide here whether Michigan’s constitutional protections against ex post facto punishment and against cruel or unusual punishment would require a more protective test.³

The initial question for this Court to resolve is not whether SORA is punishment—it has already answered that question in *Kardasz* and *Lymon*—but whether the recapture provision imposes that punishment on Mr. Ellis’s decades-old sex crime or subsequent conviction for attempted unarmed robbery. If the recapture provision increases the punishment for his 1983 sex crime, it violates the state and federal Ex Post Facto Clauses because punishment cannot be imposed retroactively. Conversely, if the recapture provision punishes him for his 2022 attempted unarmed robbery, it violates this Court’s holding in *Lymon* that forcing someone to register as a sex offender based on a non-sexual offense constitutes cruel or unusual punishment. Both routes lead to relief for Mr. Ellis.

Still, amicus respectfully urges the Court to resolve this appeal on ex post facto grounds because that is the analytically correct approach. The recapture provision punishes Mr. Ellis’s long-

³ In both *Lymon* and *Kardasz*, this Court reserved the question whether a different test for punishment is appropriate under Michigan’s bar on cruel or unusual punishment. See *Lymon*, 515 Mich at 160 n 8; *Kardasz*, __ Mich __; slip op at 14 n 21; 2025 WL 3691966, at *6 n 21. And in *Earl*, this Court reserved the question “whether our Ex Post Facto Clause provides greater protections than its federal counterpart.” 495 Mich at 37 n 1. Because the parties have briefed this case under the assumption that the intent-effects test applies, and because the recapture provision is unconstitutional even under that test for what constitutes “punishment,” the Court should continue to reserve the question whether Michigan’s Constitution is more protective.

ago sexual offense under a statute whose avowed purpose is to protect society from the “serious menace and danger to . . . health, safety, morals, and welfare” that people convicted of sex crimes purportedly pose. MCL 28.721a. SORA only applies to people convicted of “listed offenses,” and only Mr. Ellis’s sexual offense qualifies as a “listed offense.” Moreover, both the type and amount of punishment are keyed entirely to that offense, not to the subsequent non-sexual conviction. As a result, Mr. Ellis is now threatened with the very same punitive registration and reporting requirements that would be imposed if he were sentenced for his sexual offense today, even though those sanctions did not exist when he was convicted of a sexual offense. Accordingly, this Court should strike down the recapture provision as an ex post facto law.⁴

⁴ This Court also asked “whether the defendant’s out-of-state residency and the conditional application of SORA while the defendant remains an out-of-state resident renders the constitutional issues here not ripe for review.” *People v Ellis*, __ Mich __; 13 NW3d 642, 642 (2024). Although that question is not the focus of this brief, amicus offers three friendly additions to Mr. Ellis’s explanation of why the issues in this appeal are ripe. First, the government attempts to put Mr. Ellis between a rock and a hard place. It insists that Mr. Ellis cannot yet challenge the application of the recapture provision to him, but if Mr. Ellis were to do as the government suggests and commence a separate proceeding after a change in circumstances, the government would almost certainly argue that the trial court’s determination has *res judicata* effect. See *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004) (discussing elements of *res judicata*). Second, the trial court’s finding inflicts a sufficiently serious injury to warrant this Court’s attention. Mr. Ellis—who lives just five or so miles outside the Michigan border, see PSI Report at 3—cannot work, volunteer, study, or temporarily reside in the state, much less live here, unless he is willing to register as a sex offender for the rest of his life. The threat of registration in Michigan “hangs over [him] like the sword over Damocles, creating a ‘here-and-now [injury]’ . . . sufficient to raise constitutional questions.” *Metro Washington Airports Auth v Citizens for Abatement of Aircraft Noise, Inc*, 501 US 252, 265 n 13; 111 S Ct 2298; 115 L Ed 2d 236 (1991). Third and finally, one of the chief concerns underlying the ripeness doctrine is avoiding judicial intervention when the record “would benefit from further factual development.” *Ohio Forestry Ass’n, Inc v Sierra Club*, 523 US 726, 733; 118 S Ct 1665; 140 L Ed 2d 921 (1998); see also 13B *Wright & Miller’s Federal Practice & Procedure* (3d ed September 2025 update), § 3532.1 (issues are not ripe where there is a “need for further factual development to aid decision”). Here, the undisputed facts are that Mr. Ellis was convicted of a sex crime in 1983, that he was convicted of a non-sexual offense after 2011, and that the trial court determined that he is subject to the recapture provision as a Tier III offender. The record does not require any more development for this Court to pass on the recapture provision’s constitutionality.

I. The Recapture Provision Punishes Decades-Old Sex Crimes.

The recapture provision punishes defendants for the long-ago sex crime, not the new non-sexual offense. First, the statutory text demonstrates as much. Michigan’s criminal code does not provide for sex offender registration as punishment for crimes like attempted unarmed robbery. That offense is punishable by up to five years’ custody, not sex offender registration. See MCL 750.530; MCL 750.92. SORA, on the other hand, subjects people convicted of specific crimes to registration and reporting obligations. SORA applies only to convictions for “listed offense[s].” MCL 28.723 (providing that people convicted of a “listed offense” are subject to SORA when certain conditions are met); see also *Kardasz*, __ Mich at __; slip op at 41; 2025 WL 3691966, at *18 (noting that SORA’s “punishment is unique to sex offenses”). The statute uses the phrase “listed offense” more than 30 times, see MCL 28.721 *et seq.*, including in the recapture provision, which applies only to defendants who were “previously convicted of a listed offense,” MCL 28.723(1)(e). SORA defines the term “listed offense” to include Mr. Ellis’s 1983 sexual offense,⁵ but not his attempted unarmed robbery conviction. Simply put, SORA punishes “listed” offenses, and the recapture provision is no different.

Second, the amount of punishment imposed under the recapture provision is pegged entirely to how SORA—a statute that proclaims anyone convicted of a sex crime to be a “menace and danger” to society, MCL 28.721a—classifies the underlying sexual offense. SORA categorizes listed offenses into three tiers, which determine how long someone must register as a sex offender and how frequently they must report to law enforcement. MCL 28.722(q)-(v). A Tier I offense requires 15 years’ annual reporting and non-public registration. MCL 28.725(11). A Tier II offense

⁵ MCL 28.722(i) (defining “listed offense” to mean “a tier I, tier II, or tier III offense”); MCL 28.722(v)(ix) (defining “Tier III offense” to include “[a]n offense substantially similar to an offense described in subparagraphs (i) to (viii) . . . under a law of any state”).

requires 25 years' biannual reporting and online registration. MCL 28.725(12). Finally, Tier III requires lifetime quarterly reporting and online registration. MCL 28.725(13). The recapture provision, like the rest of SORA, uses the tier system to determine the amount of punishment. Here, because Mr. Ellis's sex crime conviction falls into Tier III, he would be subject to the harshest possible sanction under the statute—a punishment dictated entirely by his 1983 sexual offense, not his new conviction for attempted unarmed robbery.⁶

Notably, the restrictions under SORA—and, by extension, the amount of punishment imposed—have changed over the years. When SORA first went into effect in 1995, the standard registration period was 25 years, even for registrants whose offenses would fall into Tier III today; there was no requirement for regular reporting, and their personal information was stored in a confidential database accessible only to law enforcement. See generally 1994 PA 295. Under the recapture provision, by contrast, Mr. Ellis faces the threat of lifetime registration and requirements to report even minor changes in his information within three days, appear in person every three months to update his information with law enforcement, and be branded as a “sex offender” on the public registry. See MCL 28.725(1) and (13); MCL 28.725a(3)(c); MCL 28.728(2). Those are the exact same requirements imposed on anyone convicted of a Tier III offense under SORA 2021 today. The plain effect of the recapture provision, then, is to subject defendants like Mr. Ellis to punishment that SORA 2021 would impose *today* for sex crimes that they committed *decades ago*.

⁶ Amicus Prosecuting Attorneys Association of Michigan (PAAM) leans heavily into the assumption that Tier III registrants represent “the States’ [sic] worst sex offenders.” PAAM Amicus Brief at 1. The reality is more complicated. Tier III includes offenses like statutory rape that do not include any element of force. MCL 28.722(v). In the *Does III* litigation, for example, one of the lead plaintiffs is a Tier III registrant because he had sex with an underage woman who had used a fake ID to sneak into an 18-and-over nightclub. The two are now married with three children. See Plaintiffs-Appellants/Cross-Appellees’ First Brief at 12, *Does v Whitmer*, Nos. 25-1413 and 25-1414 (CA 6, appeal docketed April 28, 2025).

Moreover, the Legislature could amend SORA again at any time. And if those requirements change (say, by reclassifying some Tier III offenses as Tier I or II, or removing them altogether), it is Mr. Ellis's 1983 sexual offense, not his 2022 attempted unarmed robbery conviction, that would determine whether and how SORA applies to him. Similarly, the recapture provision turns on whether a pre-SORA offense qualifies as a "listed offense" in the first place. The fact that what qualifies as a "listed offense" has changed over time again shows that it is the old sexual conviction, not the new non-sexual felony, that triggers punishment. For example, currently, engaging a person's services for purpose of prostitution is a listed offense requiring registration if the person is under 18 (MCL 750.449a(2)), but not if the person is over 18 (MCL 750.449a(1)). See MCL 28.722(r)(iv). Imagine that a defendant was convicted in 1980 of violating MCL 750.449a(1) and then convicted in 2020 of felonious assault. At the time of the 2020 conviction, the recapture provision would not apply because MCL 750.449a(1) is not a "listed offense." Now, suppose that the Legislature decides that MCL 750.449a(1) should also result in registration and adds it to the definition of "listed offense." The government would almost surely argue that our hypothetical defendant would have to register under the recapture provision because he was "previously convicted of a listed offense" in 1980 and was then "convicted of . . . [an] other felony on or after July 1, 2011" (the assault). MCL 28.723(1)(e). If the recapture provision applies in such circumstances, it can only be because the conviction under MCL 750.449a(1) triggers registration. The 2020 assault cannot be the trigger because, in 2020, there was no duty to register. In other words, if, under the recapture provision, a defendant can be required to register based on a pre-SORA sexual conviction that did not require registration at the time of sentencing for the non-sexual offense, then SORA is necessarily tied to the sexual offense.

The government counters that the recapture provision “attache[s] legal consequences to the defendant’s *subsequent* (post-2011) conviction, not his earlier sexual assault.” Answer at 6 (emphasis in original). Its answer to Mr. Ellis’s application for leave gestures to two reasons why, in the government’s view, that is so. Neither of those reasons persuades.

First, the government points to a now-vacated Court of Appeals decision that also addressed the recapture provision; there, the court emphasized that, “had [the] defendant not committed a new felony, he would remain free from the requirements of SORA.” *Id.* (quoting *People v Klinesmith*, 342 Mich App 39, 45; 993 NW2d 21 (2022), vacated __ Mich __; 28 NW3d 697 (2025)); see also PAAM Amicus Brief at 5 (same). The problem with the court’s reasoning is that the same can be said of the underlying sexual offense: had Mr. Ellis not been convicted of a sex crime in 1983, he could not be subject to SORA under the recapture provision either. Mr. Ellis’s long-ago sex crime and his subsequent non-sexual conviction are both but-for conditions of the punishment that the recapture provision imposes.⁷ Because the nature and extent of those penalties are keyed entirely to the first offense, *that* is the conduct the recapture provision punishes.

Second, the government argues that the recapture provision rests on a justification “analogous” to recidivist statutes, which authorize harsher punishments for defendants who reoffend. Answer at 6. Courts have reasoned that these statutes do not punish defendants’ earlier offenses and instead “enhance the charge in the case at bar.” *People v Reichenbach*, 459 Mich 109,

⁷ Those are not the only two “but-for” conditions. For example, Mr. Ellis is only subject to SORA if his Illinois conviction is “substantially similar” to a Michigan registrable offense. MCL 28.722(v)(ix). While Mr. Ellis has not challenged the accuracy of the cross-jurisdictional comparison in this appeal, the necessity of a cross-jurisdictional comparison to determine the severity of the SORA sanctions to be imposed again shows how SORA sanctions are keyed to the sexual offense. If Mr. Ellis’s Illinois sexual offense were “substantially similar” to a Tier I or Tier II offense, the SORA requirements—and the extent of the punishment imposed—would be different. MCL 28.722(r)(xi), (t)(xiii). The new non-sexual offense is irrelevant to the comparison.

113; 587 NW2d 1 (1998). The theory underlying recidivist statutes is that because of a defendant's "persistence in the perpetration of crime, he has evinced a depravity, which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense." *Moore v State of Missouri*, 159 US 673, 677; 16 S Ct 179; 40 L Ed 301 (1895).

The recapture provision operates differently, both conceptually and in practice. The provision does not allow a prosecutor to charge someone as a habitual offender or increase the level of the charged offense. Compare *Reichenbach*, 459 Mich at 111-112 (holding prior conviction allowed prosecutor to charge OUIL 3d rather than OUIL 2d). Nor is SORA akin to a sentencing enhancement based on past criminal conduct. The recapture provision does not add a single day's imprisonment to the 12-to-60-month sentence that Mr. Ellis received in 2022. Rather, it constitutes an altogether different form of punishment that lacks any nexus to his more recent conduct. Forcing him to register as a sex offender is not related to some alleged "depravity" he "evinced" by attempting to steal food. *Moore*, 159 US at 677. Nor does subjecting him to sex offender monitoring "restrain[]" him from committing further property offenses. *Id.* The post-2011 felony conviction represents only the occasion for the recapture provision's application, not conduct that the law treats as more blameworthy based on a defendant's criminal history.

Indeed, any concern that Mr. Ellis's criminal history made him more deserving of punishment for attempted unarmed robbery was already baked into the custodial sentence he received; the trial court imposed 12 to 60 months' custody for the unarmed robbery offense only after scoring Mr. Ellis's criminal history under the sentencing guidelines, and only after the government decided to enter a plea agreement in which it promised not to designate him as a habitual offender. See Appendix to Appellant's Supplemental Brief at 81; *id.* at 29 (scoring offense under guidelines); PSI Report at 1, 22. Mr. Ellis's punishment thus had two components: (1) the

12 to 60 months' custody keyed to the conduct underlying the unarmed robbery charge and any additional culpability that his offense reflected based on his criminal history and (2) the imposition of SORA, with the requirements keyed to his earlier sexual offense. These are two distinct punishments for two distinct crimes, not a single punishment for attempted unarmed robbery, as a true recidivist statute would impose.

In sum, the recapture provision imposes sex offender registration based on sex crimes that occurred decades ago under a statutory scheme that restricts people convicted of those offenses. The subsequent felony conviction simply serves as the occasion for “recapturing” and punishing people whose offenses pre-date SORA’s adoption. For the reasons set out above, this Court should hold that it is the earlier sexual offense, not the subsequent non-sexual offense, that the recapture provision punishes.

II. Because the Recapture Provision Punishes the Long-Ago Sexual Offense, It Violates the Ex Post Facto Clauses.

If the Court agrees that the recapture provision punishes decades-old sex crimes, the analysis under the Ex Post Facto Clauses is straightforward.⁸

The Michigan and U.S. Constitutions both prohibit ex post facto laws. See US Const, art I, § 10; Const 1963, art 1, § 10. An ex post facto claim has “two critical elements”: (1) “it must be retrospective, that is, it must apply to events occurring before its enactment” and (2) “it must disadvantage the offender affected by it.” *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L

⁸ Amicus PAAM protests that the ex post facto issue is not fit for resolution on the theory that “[e]x post facto claims will be decided differently depending on the date of a defendant’s conviction for a listed offense.” PAAM Supplemental Brief at 2. PAAM’s concern is misplaced. The date of the conviction could, at most, affect whether SORA 2021 retroactively increases the punishment imposed, but not whether SORA 2021 is punishment in the first place. Here, applying SORA 2021 based on Mr. Ellis’s 1983 sex crime necessarily increases his punishment because his conviction predated SORA’s earliest iterations. Any nuances in the ex post facto inquiry that a defendant’s date of conviction might create are simply not present in this case.

Ed 2d 17 (1981). Here, “disadvantag[ing] the offender” means that the law “imposes additional punishment.” *Id.* at 28 (cleaned up).

The foregoing discussion explains why the first element is satisfied. This Court’s holding in *Kardasz* that SORA 2021 imposes punishment satisfies the second.

The government’s principal counterargument is that there cannot be an ex post facto problem if MCL 28.723(1)(e) gave Mr. Ellis “‘fair notice’ that his conduct would likely trigger registration.” Answer at 7 (quoting *People v Callon*, 256 Mich App 312, 319; 662 NW2d 501 (2003)). Again, that just begs the question at the heart of this appeal: what “conduct” does the recapture provision punish? If it increases the penalty for the prior sexual offense, then Mr. Ellis had no notice before committing that offense in 1983 that his conduct could trigger registration. Subsequent notice cannot cure the ex post facto problem; if it could, the government could easily circumvent the Clauses’ protections. Suppose, for example, that the Legislature enacts a statute that (1) prospectively punishes the act of performing an abortion with 10 years’ imprisonment; and (2) provides that a person who previously performed an abortion is also subject to 10 years’ imprisonment if, in the future, they file a false tax return. In the government’s view, the Clauses offer no protection because people had notice when they filed their returns that they were at risk of retroactive punishment. This Court should decline the government’s invitation to craft such an easy end-run around the Clauses and should instead invalidate the recapture provision as the ex post facto law that it is.⁹

⁹ Mr. Ellis submits that, if this Court deems the recapture provision an ex post facto law, SORA 2021 cannot be applied to anyone convicted of a listed offense before its enactment date. Appellant’s Second Supplemental Brief at 5. Amicus notes that this Court can grant Mr. Ellis relief without deciding how broadly its ex post facto ruling sweeps. *See* note 8, *supra*.

III. In the Alternative, Subjecting Mr. Ellis to SORA 2021 for a Non-Sexual Offense Constitutes Cruel or Unusual Punishment.

Even if the Court adopts the government's view that the recapture provision punishes Mr. Ellis's non-sexual felony offense, the government is caught in a constitutional catch-22. As this Court held in *Lymon*, 515 Mich at 152, it is cruel or unusual to punish someone as a sex offender based on a conviction that lacks a sexual element. On the government's own logic, that is what the recapture provision does here.

The government attempts to distinguish *Lymon* by noting that the defendant there did not have a sex crime on his record. See Answer at 8. So does amicus Prosecuting Attorneys Association of Michigan (PAAM). See PAAM Supplemental Brief at 4. The Court of Appeals adopted a similar argument, reasoning that "[e]ven though lifetime registration under SORA may not advance the goal of rehabilitation, the three other factors [under *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992)] strongly support that the punishment is neither cruel nor unusual as applied to defendant's CSC-I conviction." *Ellis*, unpub op at 6-7. This argument, by emphasizing Mr. Ellis's prior sexual offense (which was not actually CSC-1¹⁰), is self-contradictory. On the one hand, the government, amicus PAAM, and Court of Appeals respond to Mr. Ellis's ex post facto challenge by reasoning that he is being punished for his attempted unarmed robbery conviction, not the earlier sexual offense. On the other hand, they insist that it is not cruel or unusual to punish him for unarmed robbery with sex offender registration, contending that this sanction can be imposed because he committed an earlier sex crime. One cannot have it both ways.

Furthermore, the analysis in *Lymon* did not hinge on whether the defendant had a criminal history, sexual or otherwise. Rather, the Court applied the four *Bullock* factors, which all turn on

¹⁰ CSC-1 (criminal sexual conduct in the first degree) is a Michigan offense. Mr. Ellis was convicted in Illinois.

the specific offense before the court at sentencing and the specific penalty imposed for that offense, not on any prior offenses. Indeed, the four factors really only make sense in relation to the offense that is being punished. *Bullock* analyzes whether the punishment is too severe for the crime at issue, not whether the punishment would be appropriate for some past crime.¹¹ The question here, then, is whether sex offender registration is cruel or unusual punishment for attempted unarmed robbery, not whether it is cruel or unusual punishment for the earlier sexual offense. *Lymon* answers that question: registration is “grossly disproportionate” for a non-sexual offense. *Lymon*, 515 Mich at 189.

Even if the Court considered Mr. Ellis’s 1983 conviction in its cruel-or-unusual-punishment analysis, it would not affect the outcome. Now that Mr. Ellis has gone over four decades without incurring another conviction for a sex crime, studies show that he has reached the point of “desistance,” meaning that he is “no more likely than males in the general population [who have not been convicted of a sex crime] to be convicted of a new sex offense.” *Does III*, Expert Report on Michigan Registrants,¹² Exhibit A at 18; see also *id.* at 17-22. A robust body of evidence demonstrates that most people with sex-crime convictions “cross below the desistance threshold around 10 years.” *Does III*, Expert Rebuttal Report by Dr. Karl Hanson,¹³ Exhibit B at 17. Mr. Ellis has been sex-offense-free for much longer than that. It is cruel or unusual to punish him under

¹¹ Those factors are: “(1) the harshness of the penalty compared to the gravity of the offense; (2) the penalty imposed for the offense compared to the penalties imposed for other offenses in Michigan; (3) the penalty imposed for the offense in Michigan as compared to the penalty imposed for the same offense in other states; and (4) whether the penalty imposed advances the goal of rehabilitation.” *Lymon*, 515 Mich at 183, quoting *Bullock*, 440 Mich at 33-34.

¹² This expert report was prepared in the *Does III* litigation and analyzes Michigan registrant data obtained in discovery.

¹³ This expert declaration was likewise prepared in the *Does III* litigation and responds to reports submitted by the State.

SORA—a statute intended to “protect[] against the commission of future criminal sexual acts,” MCL 28.721a—when he presents no greater risk of committing a sex crime than the defendant in *Lymon*. For all the reasons the Court recognized there, the Michigan Constitution protects him from having to register as a sex offender based on the commission of a non-sexual offense.

CONCLUSION

For the foregoing reasons, amicus ACLU respectfully urges this Court to hold that the recapture provision subjects Mr. Ellis to ex post facto punishment—or, alternatively, that subjecting him to SORA 2021 based on a non-sexual offense constitutes cruel or unusual punishment.

Respectfully submitted,

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**WORD COUNT STATEMENT AND ATTESTATION REGARDING AMICUS'S TAX-
EXEMPT STATUS**

This brief contains 5,199 words in the sections covered by MCR 7.212(C)(6)-(8). This amicus brief is also filed on behalf of a tax-exempt organization under section 501(c)(3) or 501(c)(6) of the Internal Revenue Code. MCR 7.312(H)(2)(f).

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