

State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

MSC No. 166766

COA No. 363845

v.

Berrien County Circuit Court

James Ellis

Case No. 21-016148 FH

Defendant-Appellant.

**James Ellis's
Supplemental Brief**

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Statement of the Questions Presented

First Question

Are Mr. Ellis's constitutional claims ripe for review, even though he lives in Indiana, because there are no further legal processes for him to pursue and because he is facing actual injury right now?

James Ellis answers: Yes.

The trial court did not answer.

Second Question

Is 2021 SORA punishment for people required to register under the recapture provision? Are SORA's multitude of obligations, its lifetime nature, its lack of individualization, and the public shame that flows from the registry, excessive for people who have not committed a sex offense in decades?

James Ellis answers: Yes.

The trial court did not answer.

Third Question

Is requiring Mr. Ellis to register under SORA ex post facto punishment because the underlying sex offense is what causes registration?

James Ellis answers: Yes.

The trial court answered: No.

Fourth Question

Under *Lymon*, is requiring Mr. Ellis to register as a sex offender for committing an attempted unarmed robbery cruel or unusual punishment?

James Ellis answers: Yes.

The trial court answered: No.

Fifth Question

Under the *Lorentzen* factors, is requiring Mr. Ellis to register as a sex offender under the recapture provision cruel or unusual punishment?

James Ellis answers: Yes.

The trial court answered: No.

Sixth Question

Does SORA's mandate that Mr. Ellis register based on the recapture provision, with no subsequent sex offense, violate the Eighth Amendment?

James Ellis answers: Yes.

The trial court answered: No.

Introduction

The recapture provision of the Sex Offenders Registration Act (SORA) requires people to register if they commit any new felony (even if it is not sexual) after July 1, 2011, and had previously been convicted of a registerable offense before SORA's enactment in 1995. MCL 28.723(1)(e).

This means that people who have lived decades without committing a subsequent sex offense are being forced into compliance with a detrimental, punitive statutory regime. This is mandatory, even though the absence of a repeat sex offense in their very lives are demonstrations of the Legislature's stated purpose in enacting SORA – protecting society from people committing repeat sex offenses. MCL 28.271a. The people required to register under the recapture provision committed a sex offense before 1995, did not commit another sex offense in the intervening years, but nevertheless must still register as sex offenders if they commit *any* felony.

Mr. Ellis is one such person. Forty-two years ago, Mr. Ellis was convicted of attempted rape of an adult. In 2021, he attempted to steal food from a store, pled to attempted unarmed robbery, and is now forced to register as a sex offender. Registration is required of him even though Mr. Ellis, without the albatross of SORA, met the Legislature's stated purpose – he is not a recidivist sex offender. He should not now be punished for rehabilitating.

The question remains for this Court: which offense causes registration? The pre-1995 sex offense or the new non-sexual felony? Either way, Mr. Ellis and others like him are entitled to relief. If it is the sex offense, SORA is ex post facto punishment for people mandated to register under the recapture provision. If it is the non-sex offense,

under *Lymon*, SORA is cruel or unusual punishment for people mandated to register under the recapture provision.

Under either analysis, the Michigan Constitution prohibits registration for Mr. Ellis, and others like him, who are required to register under the recapture provision.

Statement of Facts

Mr. Ellis admitted to trying to take food from a Wal-Mart without paying for it and on his way out, he bumped a person who was trying to stop him. *Ellis Appendix*, 19-20. Mr. Ellis pled guilty to one count of attempted unarmed robbery.¹ *Ellis Appendix*, 7-8, 15.

At sentencing, there was a lengthy discussion about whether Mr. Ellis was required to register under SORA's recapture provision because of a 1983 offense in Illinois.² *Ellis Appendix*, 28-39. Trial counsel argued that applying the recapture provision to Mr. Ellis would violate ex post facto laws. *Ellis Appendix*, 33-34. The trial court acknowledged that "requiring a registration for lifetime in particular, or any registration for any period of years, is some form of a restraint." *Ellis Appendix*, 34. But the court stated: "I don't have a choice but to order that the recapture provision applies, in my opinion, and so he does have to register as a Tier 3 sex offender." *Ellis Appendix*, 45. The court sentenced Mr. Ellis to a prison term, restitution, and lifetime SORA registration. *Ellis Appendix*, 44-45.

Mr. Ellis challenged SORA registration on appeal, beginning in the trial court with a motion to correct invalid sentence, arguing that SORA was unconstitutional ex post facto punishment and/or cruel or unusual

¹ As part of the plea, Mr. Ellis also agreed to pay restitution on two files; in exchange, the prosecutor dismissed a misdemeanor count of retail fraud second degree and did not seek a habitual offender enhancement. *Ellis Appendix*, 7-8, 15.

² Mr. Ellis was 19 years old at the time of an attempted rape at a college party, to which he subsequently pled guilty. See *Ellis Appendix*, 53-65.

punishment. The trial court denied the motion based on *Klinesmith*³ and that some of the requirements did not apply to Mr. Ellis because he was not a Michigan resident. *Ellis Appendix*, 88-91. Mr. Ellis filed an Application for Leave to Appeal in the Court of Appeals, the court granted leave, and then issued an opinion affirming SORA registration as constitutional. *People v Ellis*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 18, 2024 (Docket No. 363845); *Ellis Appendix*, 67-73. Mr. Ellis then applied for leave to appeal before this Court.

This Court granted oral argument on Mr. Ellis’s Application, asking six questions:

- (1) whether MCL 28.723(1)(e), the “recapture” provision of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2020 PA 295, effective March 24, 2021, constitutes ex post facto punishment under the United States or Michigan Constitutions, US Const, art I, § 9; Const 1963, art 1, § 10, see *People v Betts*, 507 Mich 527 (2021); (2) whether requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 *et seq.*, constitutes cruel or unusual punishment under Const 1963, art 1, § 16, or US Const, Am VIII, see *People v Lymon*, ___ Mich ___ (July 29, 2024) (Docket No. 164685), and *People v Kardasz*, 513 Mich 1118 (2024) (ordering oral argument on the application for leave to appeal in Docket No. 165008); (3) whether the defendant’s out-of-state

³ *People v Klinesmith*, 342 Mich App 39 (2022).

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; (4) for ex post facto purposes, whether it is the later, nonsexual offense that triggers SORA registration rather than the earlier sexual offense, see *People v Klinesmith*, 342 Mich App 39 (2022); (5) how, if at all, the sexual nature of the prior unregistered sex offense affects the determination whether recapture is cruel or unusual punishment, or punishment at all; and (6) assuming arguendo that the focus of the recapture inquiry is properly on the earlier sex offense, whether the defendant's entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*. The Supreme Court has directed the Clerk to schedule the oral argument in this case for the same future session of the Court when it will hear oral argument in *People v Klinesmith* (Docket No. 164649).

This Court should hold that 2021 SORA is punishment for people who are mandated to register under the recapture provision. This holding does not depend on this Court's impending decision *Kardasz* because it is limited to the recapture provision, much like this Court limited the scope of its decision in *Lymon*. If the offense that causes registration is the sex offense, it is ex post facto punishment. See *Betts*, *supra*. If the offense that causes registration is the non-sex offense, it is cruel or unusual punishment under *Lymon*. Mr. Ellis, and others like him, cannot be punished with SORA.

Arguments

- I. Mr. Ellis’s constitutional claims are ripe for review, even though he lives in Indiana, because there are no further legal processes for him to pursue and because he is facing actual injury right now.**

Standard of Review

Questions regarding whether a claim is ripe for review are issues of law and reviewed de novo. *Hendee v Putnam Twp*, 486 Mich 556, 566 (2010).

Issue Preservation

Mr. Ellis argued in the trial court and Court of Appeals that he did not have to register based on the plain language of the statute and that he did not live in Michigan.

Discussion

If Mr. Ellis lives (even temporarily), works (with or without pay), or attends school in Michigan, he must register on Michigan’s registry for life. MCL 28.723(1); *People v Ellis*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 18, 2024 (Docket No. 363845), p 2. “Temporarily reside” is not defined in the statute. See MCL 28.722 Definitions.⁴ It appears that the Michigan State Police considers “temporary” to mean seven days. *Ellis Appendix*, 75-79.

⁴ The Sexual Assault Benchbook notes that the 2011 amendments removed the “former time requirements of 14 or more consecutive days or 30 or more total days in a calendar year” to determine residency, employment, or student status. Michigan Judicial Institute, *Sexual*

A claim is ripe for review when there is “a final decision from which an actual or concrete injury can be determined.” *Paragon Properties Co v City of Novi*, 452 Mich 568, 583 (1996). This inquiry concerns the timing that a claim is brought. *Blanchette v Connecticut General Ins Corporations*, 419 US 102, 140 (1974). For example, this Court has found claims were not ripe in property zoning contexts when there was a failure to exhaust all administrative remedies prior to bringing a lawsuit. *Paragon*, 452 Mich at 583; *Hendee*, 486 at 574. Failure to do so meant there was no “actual, concrete injury.” *Paragon*, 452 Mich at 580-581; *Hendee*, 485 at 573.

So, to be ripe for review there needs to be two things: (1) no further legal processes to pursue and (2) injury. Both are true for Mr. Ellis.

First, unlike *Paragon* and *Hendee*, Mr. Ellis has a “final decision.” *Paragon*, 452 Mich at 583. Mr. Ellis pled guilty to attempted unarmed robbery, which the trial court accepted. *Ellis Appendix*, 12, 20. Mr. Ellis was sentenced pursuant to that guilty plea. *Ellis Appendix*, 25-51. As a part of his sentence, and pursuant to SORA’s recapture provision, Mr. Ellis must register under SORA for the rest of his life if he ever chooses to even temporarily reside in Michigan. *Ellis Appendix*, 45; MCL 28.723(1)(e). Tier III SORA registration was on his judgment of sentence. *Ellis Appendix*, 81.

Assault Benchbook – Third Edition
 <https://www.courts.michigan.gov/4a4fc2/siteassets/publications/benchbooks/sabb/sabbresponsivehtml5.zip/index.html#rhtocid=_9_2_3&t=SA BB%2FCh_9_SORA%2FPart_IIWho_Must_Register_Under_the_SORA-c87x.htm> (accessed February 19, 2025).

The Court of Appeals agreed he must register should he ever temporarily reside in Michigan. *Ellis*, unpub op at 2. Save for this appeal before this Court, there are no further or alternative avenues Mr. Ellis may pursue to appeal his sentence and registration requirements. There is no legal process that still needs to happen.

Second, Mr. Ellis faces “actual or concrete injury.” *Paragon*, 452 Mich at 583. There is nothing hypothetical about the requirements imposed on Mr. Ellis. It is true that Mr. Ellis may choose to continue living outside of the state of Michigan for the rest of his life and thus avoid registering under SORA. That possibility does not change the fact that if at any point in time Mr. Ellis chooses to even temporarily reside in Michigan, he *must* to register with SORA for the rest of his life. MCL 28.732(1)(e). *Ellis*, unpub op at 2.

Mr. Ellis is effectively banished from Michigan. When Mr. Ellis was released from prison in Michigan, he moved to South Bend, Indiana, which is right over the Michigan border. If he later moves to Michigan, if he temporarily resides in Michigan (seemingly meaning spends more than 7 days here), if he works in Michigan, or if he goes to school in Michigan, Mr. Ellis will have to publicly register for life as a Tier III registrant and meet all the attendant punitive obligations and face public shame.⁵ See Part II, *infra*. Because of his sentence to lifetime SORA for trying to steal food from Wal-Mart, Mr. Ellis is effectively banished from coming to Michigan. This is an actual injury to Mr. Ellis

⁵ If Mr. Ellis lives, visits, works in, or is a student in, Michigan, he will also have to register in Indiana. See Ind. Code § 11-8-8-4.5(b)(1) (requiring registration in Indiana if a person is required to register in another state).

and a present restraint on his liberty. While the application of SORA may be conditional on Mr. Ellis living, visiting, attending school, or working in Michigan, that ongoing condition presently exists and will continue for the rest of his life.

Mr. Ellis's constitutional claims are ripe for review.

II. 2021 SORA is punishment for people required to register under the recapture provision. SORA's multitude of obligations, its lifetime nature, its lack of individualization, and the public shame that flows from the registry, are excessive for people who have not committed a sex offense in decades.

Standard of Review

Questions of law are reviewed de novo. *People v Lymon*, __ Mich__ (2024) (Docket No. 164685); slip op at 4.

Issue Preservation

Counsel raised this issue in a timely filed motion to correct invalid sentence. MCR 6.429.

Discussion

As it did in *Lymon*, this Court should find that as to a specific group of registrants, 2021 SORA is punishment. *Lymon*, __ Mich at __; slip op at 14. In *Lymon*, that specific group was people required to register who were not convicted of a sex offense. *Id.* Here, that specific group is people required to register under the recapture provision. MCL 28.723(1)(e).

It is essential to look at people in this recapture group to understand why SORA is punishment for them. SORA was effective October 1, 1995. MCL 28.721 et seq. So, since 1995, people have had to register if they commit a sex offense. The recapture provision only requires registration for people who (1) committed a non-sex offense after July 1, 2011, and (2) committed a listed sex offense before October 1, 1995. MCL 28.723(1)(e). That means that the recapture people have spent at least

26 years without a new sex offense, and often much longer.⁶ For Mr. Ellis, it has been 42 years. He is not a recidivist sex offender. Much like in *Lymon*, it makes little sense to require registration and all its attendant responsibilities and negative effects for Mr. Ellis, who very obviously presents no risk of reoffending sexually.

The threshold question in an ex post facto punishment analysis is whether the sanction is, in fact, punishment. *People v Betts*, 507 Mich 527, 542-543 (2021). The answer here is not dependent on this Court’s opinion in *People v Kardasz*, 513 Mich 1118 (2024). This is a narrow question for this Court about a discreet group of people: those required to register under the recapture provision. Mr. Ellis—and others like him—are subject to punishment under 2021 SORA. It is irrelevant whether SORA is punishment for a person convicted of a listed sex offense.⁷

In the last thirty years, SORA has changed from a private law enforcement database to the albatross it is today. *Lymon* __ Mich at __; slip op at 1-2. SORA is now a “publicly accessible registry that restrict[s]

⁶ Because 2011 SORA was found by this Court in *Betts* to be punishment and the entire statute found to be punitive, and because 2021 SORA was effective March 24, 2021, people who were forced to register based on the 2011 SORA recapture provision should not have to based on *Betts*. So, only people who were convicted of any felony after March 24, 2021 and had a prior sex offense would have to register under the recapture provision of 2021 SORA.

⁷ Of course, if this Court holds in *Kardasz* that 2021 SORA is cruel or unusual punishment for any person required to register, Mr. Ellis and the recapture people would be subsumed by that holding.

registrants' movements and require[s] registrants to regularly report various life details and changes to law enforcement in person." *Id.* at __; slip op at 1.

2021 SORA is punishment for many of the same reasons this Court determined that 2011 SORA was punishment:

- It is a public-facing internet registry that posts substantial personal information about the registrant.
- It is offense-based, where "reporting duration [is] . . . based on an offender's conviction rather than an individualized assessment of the risk a particular offender posed to the community."
- Most people cannot petition to be removed.
- There are long periods, up to life, of registration after state supervision has ended.
- It imposes burdensome and "immediate reporting requirements," including in-person reporting requirements "to law enforcement upon potentially frequent life changes."
- If a person violates it, they can be guilty of a felony and sentenced to jail or prison.

Lymon, __ Mich at __; slip op at 2-3, citing *Betts*, 507 Mich at 549-562.

To determine whether this statute is punishment, this Court first determines the Legislature's intent. *Lymon*, __ Mich at __; slip op at 5. If the Legislature intended the statute to be a civil remedy, this Court determines "whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil."

People v Earl, 495 Mich 33, 38 (2014). This Court determines this by analyzing five of the factors from *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169 (1963). *Lymon*, __ Mich at __; slip op at 5.

This Court has twice held that the Legislature’s purpose in enacting SORA was to enact a civil remedy. *Lymon*, __ Mich at __; slip op at 5-6; *Betts*, 507 Mich at 548-549. Mr. Ellis will not dispute that here. Regardless, the five relevant *Mendoza-Martinez* factors demonstrate that 2021 SORA is punishment for people required to register under the recapture provision.

A. 2021 SORA resembles parole and shaming.

This Court held in *Betts* and *Lymon* that SORA resembles parole and shaming. *Betts*, 507 Mich at 550-553; *Lymon*, __ Mich at __; slip op at 7-9. Nothing has changed since *Lymon* regarding this factor and this Court should reaffirm its own analysis.

1. As this Court has already determined, SORA registration resembles parole. It also resembles probation.

Registration under 2021 SORA “continues to resemble the traditional punishment[] of parole” because registrants, like parolees, are subject to significant reporting and supervision requirements. *Lymon*, __ Mich at __; slip op at 14-15. Much of the same can be said for probation too. Specifically:

- Parolees, probationers, and registrants are all given conditions that must be followed. See MCL 791.236 (parole); MCL 771.3 (probation); *Lymon*, __ Mich at __; slip op at 14, citing MCL 28.724 (SORA).

- Parolees, probationers, and registrants all must pay fees. See MCL 791.236a (parole); MCL 771.3(1)(d); 771.3c (probation); MCL 28.725a(6) (SORA).
- Parolees, probationers, and registrants are all subject to penalties for violating requirements, including incarceration. MCL 791.238, MCL 791.239, MCL 791.239a, MCL 791.240a (parole); MCL 771.4, MCL 771.4b, MCL 771.5, MCL 771.7 (probation); MCL 28.729 (SORA).
- Parolees, probationers, and registrants must report regularly in person, with some options for virtual and written reporting. MCL 791.236 (parole); MCL 771.3(1)(c) (probation); MCL 28.724a, MCL 28.725(1), (3), (7)-(8), MCL 28.725a(3), MCL 28.725(2) (SORA).

However, some of the features these punishments share are even more onerous under SORA than if a person was on probation or parole:

1. Length of term:

- a. Probationary terms generally cannot exceed three years, and can be extended only with specific, individualized findings by the trial court. MCL 771.2(1). Most

probationers can petition to be discharged early after serving half their term. MCL 771.2(2).

- b. Parole terms are generally two years, but rarely, if ever, exceed four years. MCL 791.234(8)(d).⁸
- c. SORA registration lasts 15 years at a minimum, and for the majority, for a life. MCL 28.725.

2. Individualized conditions:

- a. Conditions for parole and probation are imposed based on an individualized assessment. They often loosen over time, based on the person's adjustment, and an agent can allow for phone or electronic reporting, neither of which are available to registrants. MCL 791.236(4) (parole); MCL 771.3(11) (probation);
- b. SORA's requirements are based solely on the offense of conviction, with no individualization or risk assessment.

⁸ MDOC Policy Directive 06.05.104, *Parole Process*, <<https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-06-Field-Operations/PD-06-05-Parole-Evaluation-Eligibility/06-05-104-Parole-Process-effective-10-04-21.pdf?rev=dd142faad2684d5ebd079d2282ede7e3>> (accessed February 20, 2025).

3. Public posting:

- a. There is no public website like SORA for probationers or parolees. The Offender Tracking Information System⁹ (OTIS) is searchable by name and has only a fraction of the personal identifying information that is included on SORA.
- b. SORA is a significantly more invasive website than OTIS, providing the public with detailed personal information about the registrant, the ability to track the registrant's movements, and automatic email updates.

2. Because the internet pervades every facet of daily living, registration is like shaming.

This Court ruled that “2021 SORA also continues to resemble the traditional punishment of shaming.” *Betts*, 507 Mich at 551-552; see also *Lymon*, __ Mich at __; slip op at 16-17. This was because of the “breadth of information available to the public” and “the option for subscription-based notification of the movement of registrants into a particular zip code” as reasons a registrant may face “social ostracism based on registration.” *Betts*, 507 Mich at 551; see also *Lymon*, __ Mich at __; slip op at 16. Shame is inexorably tied to the public nature of SORA’s internet registry. *Betts*, 507 Mich at 551, citing MCL 28.721a.

In *Betts*, while realizing that registration was like shaming, this Court also noted it was not a perfect resemblance because there was not “a conduit for the public to directly criticize and shame registrants,” like in an online forum or public comment space. *Betts*, 507 Mich at 552; see

⁹ OTIS, <<https://mdocweb.state.mi.us/OTIS2/otis2.html>> (accessed February 20, 2025).

also *Lymon*, __ Mich at __; slip op at 16-17. But while SORA itself may not have an online forum or public comment space, the public can use the information from the registry to create their own public square, and has done so. For example, the Michigan-focused Facebook group called Michigan Predator Files (Exposing the Darkness) has 6,000 members, and the members pull directly from the registry website to create some of the posts.¹⁰

The internet is the new town square. See *Packingham v North Carolina*, 582 US 98, 101 (2017). And as such, this Court has acknowledged that SORA is nothing like going to a courthouse to search for a physical file about a person’s offense. See *Lymon*, __ Mich at __; slip op at 16. Internet shaming and cancel culture are the modern equivalents of face-to-face colonial shaming.

The shame is increased for people forced to register under the recapture provision. In *Lymon*, this Court noted that for people who had to register because of a non-sex offense, there was “an additional element of shaming by branding these registrants with the label of ‘sex offender.’” *Lymon*, __ Mich at __; slip op at 8. It was particularly punitive for people not convicted of a sex offense because the purpose of SORA is “to ‘prevent[] and protect[] against the commission of future criminal sexual acts by convicted sex offenders,’ and face the accordant social stigma and community judgment of being a sex offender despite the fact that their crimes did not include a sexual component.” *Id.*, quoting MCL 28.721a (internal citations omitted).

¹⁰ See Michigan Predator Files (Exposing the Darkness) Facebook group, <<https://www.facebook.com/groups/1476930155790767/>> (accessed February 19, 2025).

This is a slightly different situation for people who have in fact committed a sex offense, albeit one before 1995. Nonetheless, the shame is still enhanced. By requiring Mr. Ellis and others like him to register as sex offenders for committing a subsequent non-sexual offense, SORA holds him out to the public as a dangerous sexual recidivist, even though he has not committed a sexual offense in 42 years, since he was a teenager. He, too, faces “social stigma and community judgment” even though he has been rehabilitated as to sexual offenses.

B. SORA imposes a multitude of affirmative disabilities and restraints.

The requirements of 2021 SORA include:

1. In-person initial registration and an initial fee;
2. In-person reporting based on tier;
3. An annual fee;
4. In-person reporting for various life changes;
5. Mail-in reporting for various life changes (the Michigan State Police could change the manner of reporting at any time);
6. Long periods of registration up to life;
7. Registration is conviction-based, not based on an individualized assessment of risk for a specific person of reoffending sexually;
8. Enforced through the threat of imprisonment, revocation of probation, parole, or HYTA.
9. The ubiquitous nature of the online, public registry.

Lymon, __ Mich at __; slip op at 9-10.

As a practical matter, that means a person convicted of a Tier III offense, like Mr. Ellis, will likely be required to have frequent contact with the government, often in person, based on many innocuous activities that are part of life during the internet age. See e.g., MCL 28.722(g) (defining “internet identifier” as “all designations used for self-identification or routing in internet communications or posting”).¹¹

Even though the Michigan State Police is allowed to determine the manner of reporting and has chosen to allow some changes by mail, for the time being, (see MCL 28.725(2)), all registrants are required to report in-person either quarterly, biannually, or annually. MCL 28.725a. They also need to report in-person within three days if, for example, they lose their housing or job. MCL 28.725(1). Further, any convenience stemming from a mail-in option is overshadowed by substantial risk, as the person cannot prove they mailed something within the three required days, or that the Michigan State Police received it and entered it. While a person could use certified mail, given the socioeconomic situations of many people on the registry and the need to physically go to a post office to exercise this option, this does not look much different than in-person reporting. One letter lost by the post office could result in years of prison time.

¹¹ See *Does III v Whitmer*, __ F Supp 3d __, (Docket No 22-cv-10209) (ED Mich Sept 27, 2024); slip op at 99-107 (concluding that 2021 SORA’s internet-identifier reporting requirements violate the First Amendment because they “chill[] a wide swath of speech activity – regardless of whether such activity could further the commission of a sex crime,” and deter anonymous online speech).

And this is all provided a person understands which items require in-person reporting and which items allow for mail reporting. Some may choose to play it safe and always report in-person. That is the reality of living under the dictates of a statute that is confusing for lawyers and judges, let alone lay people who face the threat of incarceration if they assume incorrectly.¹² If the government is able to provide the public with a web-based platform that tracks the activity of people on the registry, it remains unclear why a person cannot report an update (e.g., getting a new email address) to the government through a website, just as members of the Michigan State Bar do to renew their license or report changes in contact information.

These are “significant obligations” and “weigh[] toward a finding that 2021 SORA constitutes punishment.” *Lymon*, __ Mich at __; slip op at 10. Nothing has changed since *Lymon* regarding this factor and this Court should reaffirm its own analysis.

C. SORA promotes the traditional aims of punishment: deterrence and retribution.

This Court adopted its analysis of this factor from *Betts* in *Lymon*. *Lymon*, __ Mich at __; slip op at 10-11, citing *Betts*, 507 Mich at 556-558. SORA’s purpose is deterrence and because there is no individualized assessment of risk, it exacts retribution. *Id.* at __; slip op at 11. Nothing has changed since *Lymon* regarding this factor and this Court should reaffirm its own analysis.

¹² While any violation of SORA must be willful, MCL 28.729, it is likely that a prosecutor will argue every violation is willful if the registrant signs the explanation of duties form, which they are usually forced to do. *Ellis Appendix*, 75-79.

D. It is not rational to require registration based on a non-sexual offense for people who have not committed a subsequent sex offense.

This Court has twice acknowledged that rationality is a low bar for the Legislature and that both 2011 SORA and 2021 SORA were rationally connected to a non-punitive purpose. *Betts*, 507 Mich at 558; *Lymon*, __ Mich at __; slip op at 11-12.

A reminder of the Legislature’s stated purpose in enacting SORA:

The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. MCL 28.721a.

In *Betts*, this Court held that “2011 SORA, by identifying potentially recidivist sex offenders and alerting the public, seeks to further the nonpunitive purpose of public safety.” *Betts*, 507 Mich at 558.

In *Lymon*, as to people who have not committed any sex offense, this Court reasoned that “inclusion of non-sexual offenses in SORA is

rationally related to SORA's purpose of protecting the public against persons who pose 'a potential serious menace and danger' to the community." *Lymon*, __ Mich at __; slip op at 12, quoting MCL 28.721a. This Court specifically noted that the non-sexual offenses the Legislature chose to include in SORA were relevant to the Legislature's statement that people convicted of these offenses "pose[] a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state." *Id.* at __; slip op at 11, quoting MCL 28.721a.

The same cannot be said of Mr. Ellis and others required to register under the recapture provision. Mr. Ellis was convicted of attempted unarmed robbery for trying to steal a steak from Wal-Mart. Mr. Klinesmith was convicted of OWI and a drug possession offense. *Klinesmith*, 342 Mich App at 41. Mr. Ellis and Mr. Klinesmith are *not* recidivist sex offenders. Their non-sexual subsequent offenses were not those listed by the Legislature as posing a "serious menace" to the public that this Court noted in *Lymon*. And, of course, they are not sexual recidivists and presumably very low risk for reoffending sexually.

Therefore, requiring them to register is not rationally connected to the Legislature's stated purpose, even under the low bar this Court has recognized.

E. Requiring registration for people like Mr. Ellis is unreasonable. It is unnecessary and excessive to require registration and all its disabilities and restraints on a person who has not committed a sex offense in decades.

The question this Court must answer as to this fifth and final factor is whether "2021 SORA is a reasonable means for protecting the public from the 'commission of future criminal sexual acts' by" people like Mr.

Ellis, who must register under the recapture provision. *Lymon*, __ Mich at __; slip op at 13. It is not.

In *Lymon*, this Court reasoned that SORA’s “restraints . . . on non-sexual offenders are excessive.” *Id.* at __; slip op at 13. The following were excessive for people who had not been convicted of a sexual offense:

- Branding a person as a “dangerous sex offender”
- No determination they are a risk to the public of offending sexually
- The public will not differentiate between sexual and non-sexual offenders
- Social stigma may affect a person’s ability to find a house and a job and participate in the community
- “Extensive law-enforcement supervision”
- Collateral consequences.

Lymon, __ Mich at __; slip op at 13. In sum, “[t]hese demanding requirements and consequences—imposed on non-sexual offenders regardless of their risk of recidivism as a group or individually—are excessive in comparison to SORA’s asserted public-safety purpose.” *Id.*¹³

¹³ Various federal circuits have also struck down supervised release conditions that are not reasonably related to the sex offense. See *Klinesmith Supplemental Brief*, pp 21-23, 39. There are parallels with a supervised released condition not being reasonably related and SORA being excessive. See, e.g., *United States v Dougan*, 684 F3d 1030, 1037

The same can be said of Mr. Ellis and other people required to register under the recapture provision. While, unlike Mr. Lymon, Mr. Ellis was convicted of a sexual offense 42 years ago, there has been no determination that he is a risk to the public of reoffending sexually. In fact, there is four decades of demonstrated evidence showing that he is *not* at risk of reoffending sexually. Therefore, to impose all these requirements on a person because they committed a non-sex offense decades later is excessive in comparison to SORA's stated purpose.

SORA places people on a public internet registry for lengthy periods of time and labels them as dangerous sexual predators, without any regard to the actual risk a given person poses of reoffending sexually. The Legislature's professed non-punitive purpose is "preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." MCL 28.721a. But, the lack of individualized risk assessments, lengthy registration terms, and the sheer number of listed offenses—including the recapture provision—makes SORA over-inclusive and excessive. The public will not be safer if the state cannot determine who may *actually* pose a threat of reoffending sexually.

Twenty years after *Smith* and countless research studies later, we know that claims of high recidivism rates in people convicted of a sex offense are not true. This Court has acknowledged this: "[a] growing body of research supports" that "the dangerousness of sex offenders has

(CA 10, 2012) (reasoning that a sex offense 17 years prior was "too remote in time to be reasonably related to the imposition of special sex-offender-related conditions of supervised release where the crime of conviction was robbery of a post office.")

been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders.” *Betts*, 507 Mich at 560.¹⁴

The Sixth Circuit similarly noted the “significant doubt cast by recent empirical studies” on the statement in *Smith* that registrants had a “frightening and high” recidivism rate. *Does #1-5 v Snyder (Does I)*, 834 F3d 696, 704 (CA 6, 2016). Registrants are actually “less likely to recidivate than other sorts of criminals,” registration has “no impact on recidivism,” and registration may “actually *increase* the risk of recidivism.” *Id.* at 704-705 (emphasis in original).

SORA remains based on three primary misconceptions: all registrants are the same, all are likely to reoffend sexually, and registries will reduce sexual offending. These are misconceptions because:

- risk varies among people who have been convicted of sex offenses;
- offense of conviction does not correlate to risk;
- risk decreases the longer a person has been offense free and as a person ages;
- people with sex offense convictions recidivate at much lower rates than those convicted of other types of crimes;

¹⁴ For additional studies and research on the nonexistent, and possibly harmful, effect of registries on recidivism, Mr. Ellis refers this Court to the supplemental briefing submitted in *Kardasz*, including briefing by amici there.

- the risk of stranger danger is overstated;
- registries do not decrease but in fact may increase sexual offending.

Studies tell us that risk of reoffending depends on a person's actual risk assessment, and that for all registrants, risk declines over time.¹⁵

Mr. Ellis's own life exemplifies this research: he committed a sex offense as a teenager and has not committed another one since – a period spanning *42 years*.

By failing to use an individualized risk assessment, 2021 SORA does not distinguish between people who may actually be at risk of reoffending by committing another sex offense and people who have minimal to no risk. There are risk assessments that accomplish this task.¹⁶ But right now, SORA publicly brands individuals as dangerous

¹⁵ Hanson et al, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol Pub Pol'y & L 48, 49 (2018).

¹⁶ Assessments exist to determine the likelihood of a person reoffending sexually. See *In re McBrayer*, 511 Mich 403, 410, 417 (2023). And, a person will not be paroled without a psychological or psychiatric evaluation if that person was convicted of a predatory or assaultive sexual offense. Mich Admin Code, R 791.7715(5). The MDOC routinely uses various risk assessments. See MDOC Policy Directive 04.01.05, *Reception Facility Services*, <<https://www.michigan.gov/corrections/-/media/Project/Websites/corrections/Files/Policy-Directives/PDs-04-Institutional-Operations/PD-0401-General-Provisions/04-01-105-Reception-Facility-Services-effective-10-01->

sexual predators regardless of the actual risk of reoffending sexually, if any, that they pose.

Like Mr. Ellis, there are likely thousands of people on SORA who present no more of a threat of committing a new sex offense than any random person who has never been convicted of a sex offense. Nowhere can this be seen more clearly than with the recapture people. A registry that fails to distinguish between people who are likely or unlikely to reoffend sexually is not a useful tool to protect against people recommitting sex offenses.¹⁷

* * * *

This Court should hold that the *Mendoza-Martinez* factors demonstrate that 2021 SORA is punishment as applied to people like Mr. Ellis who are required to register under the recapture provision.

19.pdf?rev=1f8b02488447437e9fdc028277384f9a> (accessed February 20, 2025).

¹⁷ As the Sixth Circuit concluded, “the record before us provides scant support for the position that SORA in fact accomplishes its professed goals.” *Does #1-5*, 834 F3d at 704. Empirical research demonstrates that SORA is counterproductive to public safety because it exacerbates risk factors for recidivism such as unemployment and housing instability, and it impedes successful reintegration into society. Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 JL & Econ 161 (2011).

III. Requiring Mr. Ellis to register under SORA is ex post facto punishment because the underlying sex offense is what causes registration. Mr. Ellis was not required to register in 1983, and his punishment has been unconstitutionally increased.

Standard of Review

Questions of law are reviewed de novo. *People v Lymon*, __ Mich__ (2024) (Docket No. 164685); slip op at 4.

Issue Preservation

Counsel raised this issue in a timely filed motion to correct invalid sentence. See MCR 6.429.

Discussion

The recapture provision of SORA violates the ex post facto clause of the Michigan and United States constitutions. Const 1963, art 1, § 10; US Const, art 1, § 10. The recapture provision increased the punishment for Mr. Ellis’s 1983 sex offense. See *People v Betts*, 507 Mich 527, 542 (2021). It is the 1983 sex offense that “triggers” registration.¹⁸

To begin, 2021 SORA is punishment for people required to register under the recapture provision. See Part II, *supra*. The Court of Appeals erred in holding that the recapture provision attaches consequences to the subsequent felony conviction and that SORA is not ex post facto punishment. *People v Ellis*, unpublished opinion per curiam of the Michigan Court of Appeals, issued January 18, 2024 (Docket No.

¹⁸ Even if this Court finds that the non-sex offense triggers registration, it is cruel or unusual punishment under *People v Lymon*, __ Mich__ (2024) (Docket No. 164685). See Parts IV-V, *infra*.

363845), p 4; see also *People v Tucker*, 312 Mich App 645, 651-653, 683 (2015); *People v Klinesmith*, 342 Mich App 39, 44-45 (2022).

Here, the trial judge stated at the post-conviction motion hearing that it was bound by *Klinesmith*, even if he disagreed. *Ellis Appendix*, 88-89. The Court of Appeals also held it was bound by *Klinesmith*. *Ellis*, unpub op at 3-4.

But *Klinesmith* is inapplicable here. There, the court held that “nothing in *Betts* . . . disturbs the conclusion in *Tucker* that the recapture provision of SORA attached legal consequences to the subsequent conviction, not the original conviction.” *Klinesmith*, 342 Mich App at 44. *Klinesmith* involved 2011 SORA and the recapture provision that was part of the 2011 statute. *Id.* at 41-43. In addressing 2011 SORA in *Betts*, this Court did not sever the statute to retain certain provisions, like the recapture provision, but rather invalidated the entire statute as ex post facto punishment. *Betts*, 507 Mich at 573-574. It seems obvious that Mr. Klinesmith should not register under a provision of a statute that no longer exists and that this Court deemed punitive in its entirety.

Regardless, the Court of Appeals relied on *Klinesmith* and held that “the recapture provision of SORA attached legal consequences to defendant’s 2022—attempted unarmed robbery—conviction, not his original 1983 sex-offense conviction.” *Ellis*, unpub op at 4.

The Court of Appeals is wrong that no punishment was imposed because of the pre-SORA sex offense. But for that underlying sex offense, Mr. Ellis would not have to register.

This Court asked what offense—the prior sex offense or the non-sexual offense—“triggers” registration or, in other words, which offense

causes registration. This Court can look to its precedent on causation for guidance:

In criminal jurisprudence, the causation element of an offense is generally comprised of two components: factual cause and proximate cause. The concept of factual causation is relatively straightforward. In determining whether a defendant's conduct is a factual cause of the result, one must ask, "but for" the defendant's conduct, would the result have occurred? If the result would not have occurred absent the defendant's conduct, then factual causation exists.

People v Schaefer, 473 Mich 418, 35-436 (2005).

Here, factual causation is simple. But for the prior sexual offense, Mr. Ellis would not have had to register as a sex offender for committing attempted unarmed robbery. The same cannot be said of the non-sexual offense. Without the prior existence of the sex offense, Mr. Ellis would not have had to register under SORA for attempted unarmed robbery.

Proximate cause is not as clean as a comparison. The simplest analysis is that nothing severed and superseded the causal link between the underlying sex offense and registration. Registration is a direct and natural result only of the underlying sex offense; registering as a sex offender is not a direct and natural result of committing attempted unarmed robbery. See *Schaefer*, 473 Mich at 438.

This Court can find another parallel in contract law and conditions precedent. "A 'condition precedent' is a condition that must be met by one party before the other party is obligated to perform." *Archambo v Lawyers Title Ins Co*, 466 Mich 402, 411-412 (2002). If this Court views

the duty to register for committing any felony as the “obligation to perform,” the prior sex offense is the condition precedent. Without the condition precedent, Mr. Ellis (or anyone) does not have the duty to register for committing a non-sexual felony.

Lastly, this Court should also look to the text of SORA to determine which offense causes registration because this Court must interpret statutes “in accordance with legislative intent.” *People v Mazur*, 497 Mich 302, 308 (2015). “[T]he most reliable evidence’ of that intent is the plain language of the statute.” *People v Rea*, 500 Mich 422, 427 (2017), quoting *Mazur*, 497 Mich at 308.

The Legislature’s stated purpose indicates that registration is caused by the sex offense. The Legislature enacted SORA to “better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders.” MCL 28.721a. The Legislature discussed that it was people convicted of sex offenses that they considered to be a danger to the public, and that it was those people who they wanted to monitor. *Id.* It is not people convicted of any felony that inherently need to register. It is those who committed a prior “listed offense.” MCL 28.723(1)(e). A “listed offense” is defined as “a tier I, tier II, or tier III offense.” MCL 28.722(i). Tier I, Tier II, and Tier III offenses are also defined in the statute as very specific sexual offenses. MCL 28.722(q)-(v). Of course, attempted unarmed robbery is not among the listed, registerable offenses.

Registration is caused by the sex offense and retroactively increasing Mr. Ellis’s punishment for his 1983 sex offense is ex post facto punishment, in violation of the Michigan and United States

constitutions. Const 1963, art 1, § 10; US Const, art 1, § 10. See *Betts*, 507 Mich at 573-574.

IV. Under *Lymon*, requiring Mr. Ellis to register as a sex offender for committing an attempted unarmed robbery is cruel or unusual punishment.

Standard of Review

Questions of law are reviewed de novo. *People v Lymon*, __ Mich__ (2024) (Docket No. 164685); slip op at 4.

Issue Preservation

Counsel raised this issue in a timely filed motion to correct invalid sentence. See MCR 6.429.

Discussion

This Court asked whether it is cruel or unusual punishment to require Mr. Ellis to register under SORA and whether the prior unregistered sex offense has any bearing on this determination. These questions are only relevant if this Court determines that registration stems from the later conviction.¹⁹ If registration stems from the prior unregistered sex offense, and registration is punishment, it violates the ex post facto clause. See Issue III, *supra*.

If this Court agrees that the punishment stems from the later conviction, this is a simple question for this Court, as the answer is

¹⁹ The Court of Appeals stated that registration stemmed from the subsequent non-sex offense, but then in its cruel or unusual analysis said three of the four factors “strongly support that the punishment is neither cruel nor unusual as applied to defendant’s CSC-I conviction.” *Id.* at 6.

controlled by *Lymon*. Mr. Ellis must register based on his non-sexual subsequent offense: attempted unarmed robbery. For the reasons outlined by this Court in *Lymon*, it is cruel or unusual punishment to require a person to register based on a non-sexual offense.

The Court of Appeals tried to distinguish *Lymon* and reasoned that, unlike Mr. Lymon, Mr. Ellis’s attempted rape conviction from 1983 suggested that he “may commit a sexual offense in the future.” *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), p 5.

However, the Court of Appeals opinion was issued before this Court’s opinion in *Lymon*, so it did not have the benefit of this Court’s rationale as to what made registration cruel or unusual punishment when a person was forced to register based on a non-sexual offense. This Court made clear in *Lymon* that it is unconstitutional to mandate registration for a person who committed a non-sexual offense.

Even if this Court determines that Mr. Ellis is required to register because of the attempted unarmed robbery, it is cruel or unusual punishment. This Court should explicitly hold that its reasoning in *Lymon* applies to people required to register under the recapture provision.

- V. Under the *Lorentzen* factors, requiring Mr. Ellis to register as a sex offender under the recapture provision is cruel or unusual punishment.

Standard of Review

Questions of law are reviewed de novo. *People v Lymon*, __ Mich__ (2024) (Docket No. 164685); slip op at 4.

Issue Preservation

Counsel raised this issue in a timely filed motion to correct invalid sentence. See MCR 6.429.

Discussion

If this Court determines that *Lymon* does not control because of the existence of a decades-old sex offense, this Court should still find that mandatory, public registration is cruel or unusual punishment for people required to register under the recapture provision. This argument is only relevant if this Court determines both that *Lymon* is inapposite and registration stems from the later conviction. If registration stems from the prior unregistered sex offense, and registration is punishment, it violates the ex post facto clause. See Issue III, *supra*.

The Michigan Constitution’s “cruel or unusual punishment” clause is broader than the United States Constitution’s Eighth Amendment. *People v Parks*, 510 Mich 225, 241 (2022); *People v Bullock*, 440 Mich 15, 30 (1992); *People v Lorentzen*, 387 Mich 167, 172 n 3 (1972). Michigan’s cruel or unusual punishment “standard is informed by ‘evolving standards of decency that mark the progress of a maturing society.’” *Parks*, 510 Mich at 241, quoting *Lorentzen*, 387 Mich at 179. “[T]his standard is ‘progressive and is not fastened to the obsolete but may

acquire meaning as public opinion becomes enlightened by a human justice.” *Id.*, quoting *Lorentzen*, 387 Mich at 178.

Sentences in Michigan must be proportional. *Parks*, 510 Mich at 241. Michigan has developed a four-prong test to determine if a sentence is proportional under the cruel or unusual punishment clause: “(1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically ‘rooted in Michigan’s legal traditions’” *Id.* at 242, quoting *Bullock*, 440 Mich at 33-34.

Parks is instructive. This Court reasoned that “an automatically harsh punishment without consideration of mitigating factors is unconstitutionally excessive and cruel.” *Parks*, 510 Mich at 259-260. SORA is such an unconstitutionally excessive and cruel punishment, given that it is mandatory with numerous harsh requirements, there is no individualized assessment of risk of reoffending sexually, there is no way for most people to petition for removal, and the public nature of the registry is harmful. This is especially true for people required to register under the recapture provision, where a person, like Mr. Ellis, did not commit a subsequent sex offense.

If the Legislature wants an effective registry, the only people who should have to register are people who may actually pose a risk²⁰ of reoffending sexually, which is the stated purpose of the statute. MCL

²⁰ Assessments exist to determine the likelihood of a person reoffending sexually. See n 16, *supra*.

28.721a.²¹ Such individualized assessments of risk would provide for more proportionate punishments. Mr. Ellis would surely be at low risk for reoffending sexually, given he has not committed a sex offense in 42 years and since he was a teenager.

A. Public registration with in-person reporting requirements and no individualized assessment of risk is an excessively harsh penalty for a person who is not a sexual recidivist.

The first prong weighs the gravity of the offense against the harshness of the sentence. *Lymon*, __ Mich at __; slip op at 14.

The gravity of the offense requiring registration is shockingly low. Mr. Ellis tried to steal a steak from Wal-Mart and bumped into someone on his way out. He pled guilty to attempted unarmed robbery, which is a Class E offense.

Yet the harshness of SORA registration is wildly disproportionate. As this Court noted in *Lymon*, there is in-person reporting, fees, long periods of registration, an offense-based registration not based on risk, threats of imprisonment and revocation of probation, parole, or HYTA, and the harm that flows from the online registry. *Lymon*, __ Mich at __; slip op at 9-10.

²¹ See also *Parks*, 510 Mich at 260 (“[S]uch a harsh sentence should be reserved for those whose criminal culpability mandates automatic, permanent removal from society.”); *Lymon*, __ Mich at __; slip op at 15, quoting *Harmelin v Michigan*, 501 US 957, 1023 (1991) (White, J., dissenting) (“[t]o be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt.”)

Mr. Ellis will be branded as a sex offender online and face the social stigma and ostracism that is part-and-parcel of registration. *Betts*, 507 Mich at 551-552; *Lymon*, __ Mich at __; slip op at 8, 13, 15, 17. The public registry will brand Mr. Ellis as “a potentially violent menace,” in perpetuity. *Betts*, 507 Mich at 561; see MCL 28.728(2).

The social stigma of being labeled a sex offender will follow Mr. Ellis until he dies. It will impact virtually every aspect of daily living, including where he can live, his ability to get a job, his interactions with coworkers, neighbors, or a future spouse, his ability to participate in social groups, his personal safety from vigilantes,²² his vulnerability to scam artists,²³ and his mental health.²⁴ He must report, often in-person and quickly, if any of his registration information changes. MCL 28.724a, MCL 28.725, MCL 28.725a.

This Court listed the publicly available information²⁵ in 2011 SORA. The only thing that was removed from that list in 2021 SORA was the tier classification. MCL 28.728(2). This is a vast amount of personal

²² See Sections II.A.2. *supra* and V.D. *infra*.

²³ See Section V.D. *infra*.

²⁴ See Meyer, I.H., Bouton, L., Maszak-Prato, S., Semple, L. & Lave, T.R., *LGBTQ People on Sex Offender Registries in the US*, <<https://williamsinstitute.law.ucla.edu/wp-content/uploads/SORS-LGBTQ-May-2022.pdf>> (accessed February 20, 2025).

²⁵ This included: “information regarding a registrant’s criminal conviction . . . registrant’s home address, place of employment, sex, race, age, height, weight, hair and eye color, discernible features, and tier classification.” *Betts*, 507 Mich at 551.

information that can be easily accessed by the public. *See Betts*, 507 Mich at 551.

SORA takes a one-size-fits-all approach to imposing its excessively harsh, lengthy-to-lifetime punishment on a broad swath of registrants, even to those like Mr. Ellis who have not committed a sex offense in decades. SORA indiscriminately doles out the same punishment, regardless of the registrant's risk of reoffending. Because the punishment is never tailored to the offense, it is harsh. It is harsh to continue to punish a person without assessing whether he presents a danger to the public of reoffending sexually.

Mr. Ellis's risk was never analyzed by the trial court because registration was mandatory. In fact, the trial court here acknowledged that SORA was a restraint, but then ordered registration because: "*I don't have a choice but to order that the recapture provision applies.*" *Ellis Appendix*, 34, 45 (emphasis added). This Court has struck down mandatory penalties where the circumstances of the person and the offense were not able to be considered. *See Parks*, 510 Mich at 268; *Bullock*, 440 Mich at 37-38; *Lorentzen*, 387 Mich at 176.

Individualized and proportionate punishment has been the cornerstone of Michigan sentencing jurisprudence for over fifty years. *See People v McFarlin*, 389 Mich 557, 574 (1973) ("the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential."); *People v Posey*, 512 Mich 317, 352 (2023) ("[T]his Court has consistently required sentencing decisions to be based on the principle of proportionality across different sentencing regimes.") Sentences that are not individualized are harsh.

In *Parks*, this Court held that mandatorily sentencing 18-year-olds violated the cruel or unusual punishment clause, given that “for a punishment to be ‘constitutionally proportionate’ it ‘must be tailored to a [person’s] personal responsibility and moral guilt.’” *Parks*, 510 Mich at 259, quoting *Bullock*, 440 Mich at 39. In the context of SORA, this Court held that it was inconsistent with this principle to require Mr. Lymon to register as a sex offender when he had not committed a sex offense, because he was “not personally or morally responsible for having committed a sex offense, and yet SORA treats him as if he is.” *Lymon*, __ Mich at __; slip op at 15.

The recapture provision also ignores these principles. Requiring Mr. Ellis to register is not at all tailored to his “personal responsibility” given his very life is a demonstration that he has not and will not repeat the sexual offense he committed as a teenager.

The harshness of this penalty is intensified because Mr. Ellis cannot petition for removal after showing he is not at risk for reoffending sexually. MCL 28.728c. Since Mr. Ellis is 61 years old and has not committed a sex offense in 42 years, there really is no question about his likelihood to reoffend. Mr. Ellis was 19 at the time of the sex offense in 1983. His very life demonstrates that what a teenager does without a fully developed brain does not define their lives. See *Parks*, 510 Mich at 249-253. Yet Mr. Ellis must register and be publicly branded for the rest of his life based on a singular sex offense from when he was a teenager. MCL 28.725(13).

Here, like in *Lymon*, the penalty is severe. *Lymon*, __ Mich at __; slip op at 15. Even though this Court stated that Mr. Lymon’s offense was severe, it still found it excessive and weighing “in favor of a conclusion of gross disproportionality.” *Id.* This factor weighs even more heavily

towards gross disproportionality than in *Lymon*, based on the less serious offense (the theft of a steak) and Mr. Ellis's demonstrated low risk of reoffending sexually (i.e., 42 years without a subsequent sex offense).

B. Lifetime and long periods of public registration with no individualized assessment of risk for people who have not committed sex offenses in decades are disproportionate sentences in Michigan.

The second prong compares the sentence with other sentences in the same jurisdiction.

Because Mr. Ellis pled guilty to attempted unarmed robbery, Mr. Ellis must register as a sex offender until he dies, even though he has lived four decades without committing another sex offense.

Besides Lifetime Electronic Monitoring, there are no other mandatory post-incarceration punishments in Michigan that last for the life of the offender. Even in cases of commutation, where a life-in-prison sentence has been commuted, the person on parole serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d).²⁶ Additionally, for the person who paroled off of a life sentence, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. State monitoring for such lengthy terms is a unique punishment and one rarely applied in Michigan.

²⁶ See also n 8, *supra*.

To the extent that attempted unarmed robbery is made more severe by a sex offenses committed 42 years prior, lifetime public registration, in-person reporting requirements, no individualized assessment of risk, and no means of petitioning for removal “go[] far beyond a proportionate increase in punishment.” *Lymon*, __ Mich at __; slip op at 15.

C. Lifetime and long periods of public registration with no individualized assessment of risk for a non-sexual offense are disproportionate sentences compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. In *Lymon*, this Court did not find this factor to be particularly compelling, given the wide variations in other state’s registries. *Lymon*, __ Mich at __ slip op at 16. Yet, it still found that this factor supported that SORA was not grossly disproportionate because “Michigan is in a large majority of states whose sex-offender registries categorize persons who committed non-sexual offenses as sex offenders.” *Id.*

The opposite is true of the recapture provision. Michigan is one of three states with a recapture provision. Illinois and Maryland²⁷ are the

²⁷ In Maryland, it is not clear whether the part of their recapture provision is even constitutional. See *Doe v Dept of Public Safety and Correctional Services*, 430 Md 535 (2013) (finding the 2009 and 2010 amendments of Maryland’s sex offender registry to be ex post facto punishment); *Sanchez v State*, 215 Md App 42 (2013) (finding that *Doe* applied to Mr. Sanchez who was required to register under Maryland’s recapture provision and vacating his failure to register convictions); but see *Rodriguez v State*, 221 Md App 26, 41-44 (2015) (noting distinctions

other two states. 730 ILCS 150/3 (c)(2.1); MD Criminal Procedure Code § 11-702.1(a)(3).

Even with just three states with an explicit recapture provision, there are different registration requirements, meaning people are not being punished in Illinois and Maryland the same way they are being punished in Michigan. One difference with Illinois is that there are two registration periods: 10 years and life.²⁸ A difference with Maryland is that registrants are allowed to report in writing and failure to comply with registry requirements is a misdemeanor.²⁹

But, even if every state had a registry exactly like Michigan's and had a recapture provision, this factor would not be dispositive. *Parks*, 510 Mich at 263-264; *Lymon*, __ Mich at __; slip op at 16. 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. *Parks*, 510 Mich at 263-264 (internal citations omitted). Here, Michigan is

between Mr. Rodriguez's retroactive registration obligations and those in *Doe*.)

²⁸ *Illinois Sex Offender Registry FAQs* <<https://isp.illinois.gov/Sor/FAQs>> (accessed February 19, 2025).

²⁹ *Maryland Sex Offender Registry Frequently Asked Questions* <<https://www.dpscs.state.md.us/onlineservs/socem/documents/faq.pdf>> (accessed February 19, 2025).

much closer to the facts underlying *Bullock*—where we were the only state imposing the harsh penalty. *Bullock*, 440 Mich at 40.

D. Lifetime and long periods of public registration hinder rehabilitation.

The fourth factor is the relationship to the penological goal of rehabilitation. *Parks*, 510 Mich at 255; *Lorentzen*, 387 Mich at 179; *Bullock*, 440 Mich at 34. Rehabilitation “is a criterion specifically ‘rooted in Michigan’s legal traditions . . .’” *Parks*, 510 Mich at 242, quoting *Bullock*, 440 Mich at 33-34.

This Court was succinct in finding that requiring people who did not commit a sex offense to register as sex offenders did not advance rehabilitation and may even hinder it:

Branding an offender who did not commit a sexual offense as a sex offender and subjecting that offender to the attendant social stigma and law-enforcement supervision of that label does not address the underlying causes of a defendant’s conduct or support a defendant’s reintegration as a noncriminal member of society. In fact, the imposition of SORA on defendant could actually “work[] at an opposite purpose [to rehabilitation], [by] preventing defendant from securing employment and otherwise moving forward with his life plans.”

Lymon, __ Mich at __; slip op at 17, quoting *People v Dipiazza*, 286 Mich App 137, 156 (2009).

The same is true of Mr. Ellis and others required to register under the recapture provision. Mr. Ellis has rehabilitated by not committing another sexual offense since his first and only, when he was a teenager,

in 1983. He should not now be punished for rehabilitating sexually. He should be able to move forward with his life plans.

Mr. Ellis cannot move forward under SORA's yoke because registration does not promote rehabilitation. SORA's punishment can ruin almost every aspect of a person's life.³⁰ Sex offender registries "likely and paradoxically increase risk for reoffending by producing traumatic stress that leads to emotional dysregulation." Harris, D.A. et al, *Life on "the List" is a Life Lived in Fear: Post-Conviction Traumatic Stress in Men Convicted of Sexual Offenses*, Int'l J Offender Therapy & Compar Criminology (2020), at 21.³¹

1. SORA harms the job prospects, financial security, and housing stability of registrants.

Registration under SORA negatively impacts areas essential to daily living that many of us take for granted – employment, finances, and housing.

With respect to employment, a 2022 national study of registries across the United States found that 56% of registrants lost a job owing to their registration status, and 30% of registrants changed jobs once, twice, or more in two years.³² Participants in the Meyer study also

³⁰ See Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness*, 38 Am J Crim L 263, 267-274 (2011).

³¹ <<https://floridaactioncommittee.org/wp-content/uploads/2021/10/Life-on-the-List-PTSD-Jill-Levenosn-Sep-2020.pdf>> (accessed February 20, 2025).

³² See n 24, *supra*, tables 11 and 12.

reported having job offers rescinded after their prospective employer learned of their registration status.³³

Owing to their vulnerable status and the detailed information available about them online, registrants are prime targets for financial scams that prey on their fears of being sent back to prison for failing to comply with SORA's numerous and obscure requirements. For example, Michigan's Oakland County Sheriff's Office warned registrants about a phone scam where the caller impersonates the registrant's compliance officer, claims that the registrant is out of compliance, and claims that the registrant will be arrested if a portion of bond is not paid, resulting in the loss of \$2,000 for one Michigan registrant.³⁴ Many states have reported similar scams that target registrants. See, e.g., Colorado

³³ *Id.* at 27.

³⁴ Brandon Carr, *Oakland County Sheriff's Office warns residents not to fall for latest sex offender scam*, Local 4 News Click On Detroit (November 6, 2023) <<https://www.clickondetroit.com/news/local/2023/11/06/oakland-county-sheriffs-office-warns-residents-not-to-fall-for-latest-sex-offender-scam/>> (accessed February 20, 2025).

Bureau of Investigation Notice³⁵; King County Washington Sheriff's Notice³⁶; Nevada Department of Public Safety Notice.³⁷

The negative effects of the registry extend to housing. In the Meyer study, nearly 30% of surveyed registrants had to move for financial reasons caused by the registry and 22% had to move owing to registry related difficulties like harassment from neighbors.³⁸ 50% of surveyed registrants had had trouble with landlords who refused to rent to them because of their registration status.³⁹

2. SORA jeopardizes the physical safety and mental health of registrants.

Approximately 21% of the participants in the Meyer study reported having been hit, beaten, physically attacked, or sexually assaulted while on a sex offender registry.⁴⁰ 45% had been threatened with violence, 66% had been verbally insulted or abused, and nearly 37% had been the

³⁵ <<https://cbi.colorado.gov/news-article/sex-offenders-targeted-in-phone-scam>> (accessed February 20, 2025).

³⁶ <<https://kingcounty.gov/en/legacy/depts/sheriff/news-media/scam-alert>> (accessed February 20, 2025).

³⁷ <<https://rccd.nv.gov/About/Sex-Offender-Community-Notification/>> (accessed February 20, 2025).

³⁸ See n 24, *supra*, at table 12.

³⁹ *Id.*

⁴⁰ *Id.* at table 14.

victims of robbery or vandalism.⁴¹ Nearly 90% of these incidents were attributable to the registrant's status.⁴²

That some people may feel free to act on their violent impulses against registrants should come as no surprise. Social media platforms can nurture mob mentality and calls for violence. See, e.g., Michigan Predator Files (Exposing the Darkness) Facebook group. SORA's internet registry has a direct role in enabling such violence, as the website offers e-mail alerts, tracking features, and can be shared on social media pages, making it easy for any internet user to target and persecute people on the registry.

A person's mental health is an equally important consideration for this Court. Nearly 71% of the participants in the Meyer study considered suicide while on the registry.⁴³ Another study of registrants found that registrants' descriptions of their mental health captured the primary DSM-5 symptoms for post-traumatic stress disorder (PTSD), including intrusive thoughts, avoidance, negative emotions, and hypervigilance. See Harris, et al (2020), *supra*, at 17. These findings were tied to registrants living in a constant state of fear and anxiety about nearly every aspect of their life. *Id.* at 8-10.

Half of the participants in the Meyer study had been subject to in-person harassment, half had been subject to harassing or threatening calls, emails, and notes, and half reported that they had been unable to

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at table 17.

date or have intimate partners.⁴⁴ 75% lost a friend when the friend learned of their registry status.⁴⁵

Living in a perpetual state of fear – struggling to find work, struggling to keep a steady income, struggling to maintain stable housing, enduring verbal harassment, enduring vandalism, enduring physical assault, losing family, losing friends – wreaks havoc on one’s mental health.

This Court held that “even the most compelling interests . . . should not be permitted to overwhelm ‘the equally important belief that only the rarest individual is wholly bereft of the capacity for redemption.’” *Bullock*, 440 Mich at 39-40, n 23, quoting *People v Schultz*, 435 Mich 517, 533-534 (1990). As evidenced by his own life, Mr. Ellis is not wholly bereft of the capacity for redemption. In 1983, when he was 19 years old, he was convicted of an attempted sex offense against an adult at a college party. He has not committed any similar conduct in the 42 years since. His actions as a teenager do not warrant the lifelong burden of SORA.

* * * *

For the rest of Mr. Ellis’s life, he will be labeled a sex offender, on a public registry, suffering all the attendant obstacles because he tried to steal food from Wal-Mart.

The mandatory and arbitrary statutory scheme mandating public registration for committing any felony offense violates the Michigan

⁴⁴ *Id.* at table 15.

⁴⁵ *Id.*

Constitution. *Lymon*, __ Mich at __; slip op at 17. This Court must apply these greater protections of the Michigan Constitution to find that mandatory registration under SORA for people subject to the recapture provision is cruel or unusual punishment. The lack of an individualized assessment of risk (after decades without committing a sex offense), the unique lifetime and long periods of public registration, the shame that flows from the internet registry, and the lack of a penological justification all describe a disproportionate and excessive sentencing scheme, which violates the Michigan constitution.

VI. SORA’s mandate that Mr. Ellis register based on the recapture provision, even after over four decades without a sex offense, violates the Eighth Amendment.

Standard of Review

Questions of law are reviewed de novo. *People v Lymon*, __ Mich__ (2024) (Docket No. 164685); slip op at 4.

Issue Preservation

Counsel raised this issue in a timely filed motion to correct invalid sentence. See MCR 6.429.

Discussion

Under the federal constitution, the United States Supreme Court frequently employs an “as applied” analysis because the Eighth Amendment embodies a theory of proportionality. The “right not to be subject to excessive sanctions” necessarily “flows from the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ to both the offender and the offense.” *Roper v Simmons*, 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v Louisiana*, 554 US 407 (2008) and *Atkins v Virginia*, 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper, supra* (Eighth Amendment bars the death penalty when applied to children); *Woodson v North Carolina*, 428 US 280 (1976) (plurality opinion) and *Lockett v Ohio*, 438 US 586 (1978) (Eighth Amendment bars mandatory imposition of the death

penalty); *Graham v Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to children who have committed non-homicide offenses); *Miller v Alabama*, 567 US 460 (2012) (life without possibility of parole violates the Eighth Amendment when mandatorily applied to children).

At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is based on proportionality. *Weems v United States*, 217 US 349, 367 (1910). “[T]he Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive” and employs a test that has the same first three factors as Michigan’s test. *Graham*, 560 US at 59-60. As such, Mr. Ellis’s sentence is “grossly disproportionate” and unconstitutional under the Eighth Amendment. See Sections V.A.-C., *supra*.

Requiring people to register under SORA’s recapture provision is categorically unconstitutional under the Eighth Amendment. In addressing categorical bars, the Court follows a two-part test and considers:

“[O]bjective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by “the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,” the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.

Graham, 560 US at 59-60, quoting *Roper*, 543 US at 572 and *Kennedy*, 554 US at 421 (internal citations omitted).

A reviewing court “must look beyond historical conceptions ‘to the evolving standards of decency that mark the progress of a maturing society.’” *Id.* at 58, quoting *Estelle v Gamble*, 429 US 97, 102 (1976). Determining cruelty “embodies a moral judgment,” and while “[t]he standard itself remains the same . . . its applicability must change as the basic mores of society change.” *Kennedy*, 554 US at 419.

When it comes to registries, “the basic mores of society” have changed as we have learned more. No longer is it a given that registries are effective but rather support the opposite conclusion. See Elmann, “*Frightening and High*”: *The Supreme Court’s Crucial Mistake About Sex Crime Statistics*, 30 Constitutional Commentary 495, 497-498 (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). At best, SORA’s efficacy in preventing a person who has committed a sex offense of committing another is “unclear.” *Betts*, 507 Mich at 561. Society’s standards, especially with the explosion of the internet as the new town square, see Sections II.A.2. and V.D., *supra*, are changing when it comes to public, online registries. See also *Packingham v North Carolina*, 582 US 98, 101, 107 (2017).

Requiring Mr. Ellis to register as a sex offender under the recapture provision is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

Conclusion and Relief Requested

For the reasons stated above, James Ellis respectfully requests that this Honorable Court hold that 2021 SORA is unconstitutional punishment for people required to register under the recapture provision.

Respectfully submitted,

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