

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

James Ellis, Jr.,

Defendant-Appellant.
/

Mark Sanford (P35150)
Assistant Prosecuting Attorney
Berrien County Courthouse
St. Joseph, MI 49085
(616) 983-7111, Ext. 8311
/

Jessica Zimbelman (P72042)
Attorney for Defendant
200 North Washington, Suite 250
Lansing, MI 48913
(517) 334-6069
/

Supreme Court No. 166766

Court of Appeals No. 363845

Lower Court No. 2021-016148-FH

PLAINTIFF'S BRIEF IN RESPONSE TO
DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii-iii
COUNTERSTATEMENT OF JURISDICTION.....	
.....iv	
COUNTERSTATEMENT OF QUESTIONS PRESENTED.....	v
COUNTERSTATEMENT OF FACTS.....	1
ARGUMENTS:	
I. Defendant is required to register as a sex offender if he is domiciled in, or is a temporary resident of, Michigan.....	3
II. The 2011 amendments to SORA do not constitute ex post facto punishment.....	4
III. Lifetime registration for sex offenders does not constitute cruel or unusual punishment in violation of Michigan’s constitution.....	9
REQUEST FOR RELIEF.....	18

INDEX OF AUTHORITIES

Cases

<i>Commonwealth v Torsilieri</i> , ___ Pa ___; 316 A3d 77 (2024)	15
<i>Connecticut Department of Public Safety v Doe</i> , 538 US 1; 123 S Ct 1160; 155 L Ed 2d 98 (2003)	12
<i>Does v Whitmer</i> , ___ F Supp 3d ___ (ED Mich, 2024), 2024 WL 4340707	12
<i>Fullmer v Michigan Department of State Police</i> , 360 F3d 579 (CA 6, 2004)	12
<i>Gryger v Burke</i> , 334 US 728; 68 S Ct 1256; 92 L Ed 1683 (1948)	7
<i>Nichols v United States</i> , 511 US 738; 114 S Ct 1921; 128 L Ed 2d 745 (1994)	7
<i>People v Benton</i> , 294 Mich App 191; 817 NW2d 519 (2011)	13
<i>People v Betts</i> , 507 Mich 527; 968 NW2d 497 (2021)	4
<i>People v Bullock</i> , 440 Mich 15; 485 NW2 d 866 (1992)	10
<i>People v Callon</i> , 256 Mich App 312; 662 NW2d 501 (2003)	7
<i>People v Ellis</i> , unpublished per curiam opinion of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), 2024 WL 203788	2
<i>People v Fabela</i> , unpublished per curiam opinion of the Court of Appeals, issued June 23, 2022 (Docket No. 337365), 2022 WL 2284855	11
<i>People v Fraly</i> , unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 361362), 2023 WL 4141081	11
<i>People v Gregorczyk</i> , 178 Mich App 1; 443 NW2d 816 (1989)	15
<i>People v Hall</i> , 499 Mich 446; 884 NW2d 561 (2016)	3
<i>People v Jarrell</i> , 344 Mich App 464; 1 NW3d 359 (2022)	10
<i>People v Kennedy</i> , 502 Mich 206; 917 NW2d 255 (2018)	4
<i>People v Kiczinski</i> , ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 364957)	8
<i>People v Klinesmith</i> , 342 Mich App 39; 993 NW2d 21 (2022)	5
<i>People v Kozicki</i> , unpublished per curiam opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 362939), 2024 WL 4182295	9
<i>People v Lymon</i> , ___ Mich ___; ___ NW3d ___ (2024) (Docket No. 164685)	8
<i>People v Miller</i> , 357 Mich 400; 98 NW2d 524 (1959)	6
<i>People v Morales</i> , unpublished opinion of the Court of Appeals, issued September 26, 2024 (Docket No. 363236), 2024 WL 4311304	10
<i>People v Reichenbach</i> , 459 Mich 109; 587 NW2d 1 (1998)	6
<i>People v Ringle</i> , unpublished opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 352693), 2021 WL 5405753	13
<i>People v Sands</i> , 261 Mich App 158; 680 NW2d 500 (2004)	3
<i>People v Swoffer-Sauls</i> , unpublished per curiam opinion of the Court of Appeals, issued April 6, 2023 (Docket No. 353827), 2023 WL 2817499	11
<i>People v Tanksley</i> , 103 Mich App 268; 303 NW2d 200 (1981)	15
<i>People v Tucker</i> , 312 Mich App 645; 879 NW2d 906 (2015)	6
<i>Smith v Doe</i> , 538 US 84; 123 S Ct 1140; 155 L Ed 2d 164 (2003)	11

Statutes

MCL 28.721a	11
MCL 28.723(1)(e)	2
MCL 333.7401(2)	13

MCL 750.227b	14
MCL 750.316	14
MCL 750.520(b)	14
MCL 750.529	13
MCL 750.530	2
MCL 769.12	14

Other Authorities

Catherine Wagner, <i>The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary Harm at the Expense of Effectiveness</i> , 38 Am J Crim L 263 (2011)	16
Collateral Consequences Resource Center, <i>50-State Comparison: Relief from Sex Offense Registration Obligations</i> , https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/ (accessed October 29, 2024)	14

COUNTERSTATEMENT OF JURISDICTION

Plaintiff does not dispute the statement of jurisdiction in defendant's appellate brief.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. Whether defendant is required to register as a sex offender if he is domiciled in, or is a temporary resident of, Michigan.
- Plaintiff-Appellee answers: “Yes.”
Defendant-Appellant answers: “Yes.”
The trial court answered: “Yes.”
- II. Whether the 2011 amendments to SORA constitute ex post facto punishment.
- Plaintiff-Appellee answers: “Yes.”
Defendant-Appellant answers: “No.”
The trial court answered: “No.”
- III. Whether lifetime registration for sex offenders constitutes cruel or unusual punishment in violation of Michigan’s constitution.
- Plaintiff-Appellee answers: “Yes.”
Defendant-Appellant answers: “No.”
The trial court answered: “No.”

COUNTERSTATEMENT OF FACTS

On Saturday, March 12, 1983, defendant was at a house party in Wheaton, Illinois, with several of his friends. At approximately 4:00 a.m., defendant pushed a female guest, Debra Mueller, into an empty bedroom and closed the door behind him. He then pulled out a knife and told Ms. Mueller that if she didn't do what he wanted, he and his friends would "take care of her good" (Probation Department Report, DuPage County, Illinois, p 3).¹ After pinning her down on the bed, defendant pulled Ms. Mueller's pants off and attempted to have sexual intercourse. When Ms. Mueller screamed, one of her friend's came into the bedroom and told defendant to "get off of her." *Id.* As he was leaving, defendant removed \$68.00 from Ms. Mueller's purse. *Id.*

Defendant was charged with attempted rape, armed robbery, and unlawful restraint. Pursuant to plea negotiations, defendant pled guilty on October 24, 1983, to attempted rape and a reduced charge of robbery. The charge of unlawful restraint was dismissed. He was sentenced on February 7, 1985, to a twenty-four month term of probation with 6 months in the county jail. *Id.*

Following his release, defendant returned to Indiana, where he spent the next 40 years in and out of jail/prison for mostly theft-related crimes (PSIR, Adult History, pp 5-15).

On November 4, 2021, defendant entered the Wal-Mart located at 2107 South 11th Street in Niles, Michigan. Once inside, defendant removed food items from the store's shelves and concealed them in re-useable Wal-Mart bags. Defendant then placed these bags into his shopping cart and proceeded past the store's point of sale (PSIR, Agent's Description of the

¹ This report was incorporated into defendant's current PSI by the trial court at the time of sentencing (Sentencing transcript, pp 7-8).

Offense, p 4). When confronted by a store employee about the theft, defendant punched the employee in the face, then pushed the shopping cart full of goods into the parking lot. *Id.* Defendant left the scene in a red SUV with merchandise valued at \$18.17. *Id.* The remaining items taken from the store were recovered from inside the abandoned shopping cart (Guilty Plea, 12/8/21, p 17).

Defendant was charged with one count of unarmed robbery, MCL 750.530. He later pled guilty to the reduced charge of attempted unarmed robbery, a five-year felony. On January 24, 2022, defendant was sentenced to prison for a term of 12 to 60 months (Sentencing transcript, p 20). Defendant was also ordered to register as a Tier III sex offender pursuant to the recapture provision of the Sex Offenders Registration Act (SORA) found at MCL 28.723(1)(e). *Id.* at 21.

Defendant subsequently filed an appeal with the Court of Appeals, arguing, as he does here, that his lifetime registration not only violated ex post facto prohibitions, but constituted cruel or unusual punishment. *People v Ellis*, unpublished per curiam opinion of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), 2024 WL 203788. The Court of Appeals rejected these arguments and affirmed the trial court's order requiring defendant to register as a Tier III sex offender. *Id.*

Defendant thereafter filed an application for leave to appeal with this Court. In an Order dated September 20, 2024, this office was directed to respond.

Additional facts will be included below where pertinent.

ARGUMENT

- I. Defendant is required to register as a sex offender if he is domiciled in, or is a temporary resident of, Michigan.

Standard of Review. Questions of constitutional law and statutory interpretation are reviewed de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

Defendant first argues that he is not required to register under SORA because he is not a Michigan resident.²

The Court of Appeals here held that the recapture provision of MCL 28.723(1)(e) did not “immediately apply” to defendant as he was neither domiciled in, nor a temporary resident of, Michigan. *Ellis*, unpub op at 2. The *Ellis* panel further held, however, that “if defendant domiciles or temporarily resides in Michigan in the future, [he] will need to register pursuant to his judgment of sentence.” *Id.* As defendant does not argue that this conclusion is wrong, no response is required.

² Defendant was paroled from his Michigan sentence in April of this year, and as of this writing is incarcerated at the Westville Correctional Facility in Indiana on an unrelated offense.

- II. The 2011 amendments to SORA do not constitute ex post facto punishment.

Standard of Review. Questions of constitutional law are reviewed de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 255 (2018). Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

As indicated above, defendant pled guilty to attempted rape in DuPage County, Illinois, on October 24, 1983. Defendant concedes that this conviction would be considered a Tier III offense in Michigan (Sentencing transcript, pp 11-12). More than 38 years later, on November 4, 2021, defendant entered the Wal-Mart store located in Niles, Michigan, stole property, and then struggled with an employee while leaving the store. As a result, defendant was charged with one count of unarmed robbery. Pursuant to plea negotiations, defendant subsequently pled guilty to attempted unarmed robbery – a 5-year felony (Pre-trial conference, p 17). At defendant’s sentencing on January 24, 2022, the trial court ordered defendant to register as a sex offender pursuant to the 2011 “recapture” provision found at MCL 28.723(1)(e): “[T]he following individuals . . . are required to be registered under this act: (e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.”

Defendant argues that this recapture provision is an “unconstitutional ex post facto punishment” as it requires him to register for acts he committed long before the enactment of Michigan’s current registration laws (Defendant’s brief, p 11). This argument appears to take two tacks. First, defendant contends that this Court’s decision in *People v Betts*³ “invalidated the

³ *People v Betts*, 507 Mich 527; 968 NW2d 497 (2021).

entire [2011 SORA] statute as ex post facto punishment” -- including the recapture provision.

As part of this claim, defendant necessarily argues that the Court of Appeals opinion in *People v Klinesmith*, 342 Mich App 39; 993 NW2d 21 (2022),⁴ holding that *Betts* did nothing to limit the application of the recapture provision, was wrongly decided. Second, defendant makes these same arguments with regard to the 2021 version of SORA.⁵

In *Betts*, this Court concluded that SORA, as amended by Public Acts 17 and 18 of 2011, constituted criminal punishment rather than civil regulation, and that, accordingly, the retroactive imposition of such punishment violated the constitutional prohibitions on ex post facto laws. *Betts*, 507 Mich at 562. This holding was specifically limited to those “registrants whose criminal acts predated the enactment of the 2011 SORA amendments.” *Id.* at 574.

The question of whether the 2011 recapture provision was invalidated as part of this holding was addressed nearly a year later by the Court of Appeals in *People v Klinesmith*. In *Klinesmith*, the defendant had been convicted of attempted criminal sexual conduct in 1983. Following a felony conviction for OWI 3rd in 2017, the defendant was ordered by the trial court to register pursuant to the 2011 recapture provision discussed above. On appeal, the defendant argued that *Betts* had overturned “the entire 2011 SORA amendatory Act.” *Klinesmith*, 342 Mich App at 43. The Court of Appeals disagreed. After initially noting that *Betts* “did not involve the recapture provision of SORA,” the Court concluded that the holding in *Betts* was “much narrower” than suggested by the defendant: “[*Betts*] provid[ed] only that the act cannot be

⁴ Defendant Klinesmith’s application for leave to appeal to this Court was held in abeyance pending the decision in *People v Lymon* (Docket No. 164685). See *People v Klinesmith*, 986 NW2d 597 (2023).

⁵ 2021 SORA, based on Public Act 295 of 2020, took effect on March 24, 2021. *Betts*, 507 Mich at 563 n 23. Defendant committed his current offense on November 4, 2021, more than 6 months after the 2021 SORA became law.

applied retroactively to those individuals ‘whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments.’ ” *Id.* at 43, quoting *Betts*, 507 Mich at 574. However, as *Betts* did not address the recapture provision, the *Klinesmith* Court was left to decide which “criminal act” – the defendant’s 1983 criminal-sexual-conduct conviction, or his 2017 conviction for OWI 3rd – subjected the defendant to registration.

Relying on its earlier holding in *People v Tucker*, 312 Mich App 645; 879 NW2d 906 (2015), the *Klinesmith* Court held that the recapture provision attached legal consequences to the defendant’s *subsequent* (post-2011) conviction, not his earlier sexual assault. As observed by the Court, “had defendant not committed a new felony, he would remain free from the requirements of SORA.” *Id.* at 45. This reasoning led the Court to conclude that the validity of the recapture provision was unaffected by *Betts*: “[W]e find nothing in *Betts* that disturbs the conclusion in *Tucker* that the recapture provision of SORA attached legal consequences to defendant’s subsequent conviction, not to his original conviction.” *Id.* at 44.

The holding of *Klinesmith* rests on solid legal ground. Although the recapture provision is not a “traditional recidivist statute,” *Tucker*, 312 Mich App at 653, the logic underlying such statutes nonetheless applies. As early as 1959, this Court rejected analogous *ex post facto* challenges to amendments subjecting drunk drivers to increased punishment on the basis of pre-amendment convictions: “Heavier penalties for a second offense are well known to the law. They are in no manner *ex post facto*, nor do such amendments as we have before us have a retroactive effect. It is the subsequent offense that is punished more harshly, not the first. *People v Miller*, 357 Mich 400, 409-410; 98 NW2d 524 (1959). See *People v Reichenbach*, 459 Mich 109, 123; 587 NW2d 1 (1998) [“Enhancement statutes . . . do not change the penalty imposed for the earlier conviction,” but rather, “only the last offense committed by the

defendant,” quoting *Nichols v United States*, 511 US 738; 114 S Ct 1921; 128 L Ed 2d 745 (1994)], and *Gryger v Burke*, 334 US 728; 68 S Ct 1256; 92 L Ed 1683 (1948) (“Nor do we think the fact that one of the convictions that entered into the calculations by which petitioner became a fourth offender occurred before the Act was passed, makes the Act invalidly retroactive or subjects the petitioner to double jeopardy. The sentence as a fourth offender or habitual criminal is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime . . .”). Similarly, the 2011 SORA did not attach legal consequences (i.e., registration) to defendant’s 1983 attempted rape conviction, but rather, to his future felonious conduct (i.e., his 2021 felony conviction for attempted unarmed robbery).

Additionally, as the acts leading to defendant’s unarmed robbery conviction in 2021 were committed 10 years after the passage of the 2011 recapture provision, defendant had “fair notice” that his conduct would likely trigger registration requirements. See *People v Callon*, 256 Mich App 312, 319; 662 NW2d 501 (2003).

Defendant’s argument that *Betts* refused to sever portions of the 2011 SORA is inapposite. This Court in *Betts* was clear to note that its holding would not affect “the prospective application” of the 2011 SORA to those “registrants who committed listed offenses after 2011 . . .” *Betts*, 507 Mich at 563, 572. Accordingly, either the 2011 amendments apply retroactively to defendant, or they don’t. If they do – that is, if the criminal acts subjecting defendant to registration occurred *after* 2011 – then all of the amendments apply, regardless of severance concerns. If, on the other hand, the 2011 amendments cannot be applied retroactively – that is, if the criminal acts subjecting defendant to registration occurred *before* 2011 – then none of them are valid. Given this all-or-nothing approach, severance does not come into play. As defendant was required to register as a result of criminal acts occurring *after* 2011 (i.e., his 2021 unarmed

robbery conviction), all of the 2011 amendments apply prospectively, including the recapture provision.

Defendant's second argument fares no better. Initially, the 2021 SORA amendments did not alter or amend the 2011 recapture provision. Second, no published Michigan appellate case has held that the 2021 SORA constitutes punishment for sexual (versus non-sexual) offenders. See *People v Lymon*, ___ Mich ___; ___ NW3d ___ (2024) (Docket No. 164685); slip op at 14 n 20 ("Our opinion does not reach the question whether the 2021 SORA constitutes punishment as to sexual offenders – and, in fact, explicitly vacates the portion of the Court of Appeals opinion that so concluded."). To the contrary, a panel of the Court of Appeals in *People v Kiczinski*, ___ Mich App ___; ___ NW3d ___ (2024) (Docket No. 364957), recently held that the 2021 SORA does not constitute punishment as applied to sexual offenders. *Id.* at ___; slip op 13. If 2021 SORA does not constitute punishment, any ex post facto concerns would be irrelevant.

Further, even if 2021 SORA does amount to punishment, *Klinesmith* and *Tucker* are still good law. In other words, as defendant's current registration requirements resulted from his 2021 conviction for attempted unarmed robbery – and *not* his 1983 conviction for attempted rape – the validity of the recapture provision remains unaffected.

- III. Lifetime registration for sex offenders does not constitute cruel or unusual punishment in violation of Michigan's constitution.

Standard of Review. Questions of constitutional law are reviewed de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 255 (2018). Statutes are presumed to be constitutional, and the party challenging the statute has the burden of showing the contrary. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

Defendant also argues that lifetime reporting requirements as applied to him constitute cruel or unusual punishment. This is so, he continues, because he is being required to register for a non-sexual offense. This argument, however, overlooks the fact that, regardless of which act actually triggered registration, he was and is a convicted sex offender. Defendant's argument that he must register for committing a non-sexual offense is accordingly inaccurate.

Initially, as noted above, no published Michigan appellate case has held that the 2021 SORA constitutes punishment for sexual (versus non-sexual) offenders. See *Lymon*, ___ Mich at ___; slip op at 14 n 20. If SORA does not constitute punishment, no cruel-or-unusual analysis is necessary.⁶

Even if the 2021 SORA is found to constitute punishment for sexual offenders, it is neither cruel nor unusual.

⁶ The People do not believe that the 2021 SORA constitutes punishment. As neither the *Ellis* panel nor defendant addressed this issue, any discussion here would seem premature. The People would suggest, however, that the sexual nature of defendant's crime (i.e., an attempted rape at knifepoint versus the unlawful-imprisonment convictions at issue in *Lymon*) tips the scales in favor of a finding that the 2021 SORA is indeed a civil remedy. The Court of Appeals recently held as much in *People v Kiczenski*, a published opinion released on October 28, 2024. *Kiczenski*, ___ Mich App at ___; slip op at 13. See also *People v Kozicki*, unpublished per curiam opinion of the Court of Appeals, issued September 12, 2024 (Docket No. 362939), p 11, 2024 WL 4182295 ("[A]fter reviewing [the *Lymon*] decision, it appears to us that a stronger argument can be made in this case – involving a sexual offender – that the 2021 SORA has the impact of a civil regulation as opposed to criminal punishment.").

To determine whether a punishment is cruel or unusual, see Const. 1963, art. 1, Section 16, this Court routinely considers the following four factors: (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*, ___ Mich at ___; slip op at 14, citing *People v Bullock*, 440 Mich 15, 33-34; 485 NW2d 866 (1992). As defendant is challenging the constitutionality of the 2021 SORA, he has the burden of proving its invalidity: “[O]ut of separation of powers concerns, . . . [courts] presume that a statute is constitutional, and therefore the party challenging the constitutional validity of the law bears a heavy burden.” *People v Morales*, unpublished opinion of the Court of Appeals, issued September 26, 2024 (Docket No. 363236), p 3, 2024 WL 4311304. See *People v Jarrell*, 344 Mich App 464, 486; 1 NW3d 359 (2022).

Harshness of the penalty

Here, defendant’s sexual assault would have subjected him to a maximum of 5 years in prison had it been committed in Michigan. MCL 750.92. Further, as noted by the trial court, defendant’s conduct would have also constituted an assault with intent to commit sexual penetration, a crime punishable by up to 10 years in prison. MCL 750.520g(1). Additionally, defendant unlawfully restrained Ms. Mueller to facilitate the sexual assault, a 15-year offense. MCL 750.349b. While registration may very well be burdensome, it nonetheless imposes significantly less loss of liberty than confinement in prison. See *People v Fabela*, unpublished per curiam opinion of the Court of Appeals, issued June 23, 2022 (Docket No. 337365), p 4,

2022 WL 2284855.⁷ Moreover, the gravity of these offenses was elevated exponentially when defendant brandished a knife and threatened that he and his friends would “take care of [Ms. Mueller] good” if she did not comply with his demands. Considering the seriousness of these crimes and the potential imprisonment that defendant faced as a result of his conduct, lifetime registration as a Tier III offender is not unduly harsh.

Defendant argues that registration in his case is excessively harsh because a “validated risk assessment would likely score [him] at a very low risk of reoffending sexually” (Defendant’s brief, p 14).⁸ However, when enacting SORA, our Legislature rejected the notion of utilizing individual risk assessments, choosing instead to base registration on the fact of conviction alone: “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.” MCL 28.721a (emphasis added). See *People v Fraly*, unpublished per curiam opinion of the Court of Appeals, issued June 22, 2023 (Docket No. 361362), p 8, 2023 WL 4141081 (our legislature “has eschewed such individual assessments and established defendant’s risk of reoffending as a matter of general policy”). See *People v Swoffer-Sauls*, unpublished per curiam opinion of the Court of Appeals, issued April 6, 2023 (Docket No. 353827), p 3, 2023 WL 2817499.

When addressing a similar challenge to Connecticut’s version of SORA, the United States Supreme Court ruled that the lack of an individualized assessment was “of no consequence,” as registration turned on “an offender’s conviction alone – a fact that a convicted offender has

⁷ “The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.” *Smith v Doe*, 538 US 84, 100; 123 S Ct 1140; 155 L Ed 2d 164 (2003).

⁸ Not all sexual offenders are treated the same. Defendant’s placement into one of three tiers based on the severity of his offense provides at least some level of individual assessment.

already had a procedurally safeguarded opportunity to contest.” *Connecticut Department of Public Safety v Doe*, 538 US 1, 7; 123 S Ct 1160; 155 L Ed 2d 98 (2003). Thus, the Court concluded, the state’s determination that all sex offenders – currently dangerous or not – must be publicly disclosed was constitutionally valid. *Id.* Our Court of Appeals has also rejected the claim that an individualized risk assessment is constitutionally required: “Defendant’s classification as a tier III offender . . . already took into consideration the significant circumstances of the crime and defendant’s risk level. . . . That . . . is enough of an ‘individualized’ determination to pass constitutional muster.” *Morales*, unpub op at 4. See *Fullmer v Michigan Department of State Police*, 360 F3d 579 (CA 6, 2004).

The United States Supreme Court has concluded that state legislatures are the appropriate forum for addressing the propriety of individual risk assessments. When discussing whether Alaska’s version of SORA constituted punishment for purposes of the ex post facto clause, the Court in *Smith v Doe*, 538 US 84, 103-104; 123 S Ct 1140; 155 L Ed 2d 164 (2003), observed that state legislatures were authorized to “mak[e] reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. . . . The State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment . . .”

Other courts agree that such decisions are best left to the Legislature. Given the “potentially towering costs” of performing individual risk assessments for sexual offenders,⁹ and the risk that “evaluators will make a mistake about who should be required to register and for how long,” a legislature might best conclude that “an offense-based system at least gives some

⁹ One estimate concluded that an individual risk assessment costs between \$8,000 and \$20,000 and takes between eight and 26 hours to complete. *Does v Whitmer*, ___ F Supp 3d ___ (ED Mich, 2024), slip op at 21, 2024 WL 4340707.

certainty that those who commit serious offenses are monitored for significant periods, perhaps for life, and thereby mitigate the risk of an erroneous prediction. Making choices about whether to adopt bright-line rules or customized assessments of people, entities, or transactions subject to government regulation is the hallmark of the legislative function.” *Does v Whitmer*, ___ F Supp 3d at ___; slip op at 22.

The Court of Appeals here concluded that registration is not “a discretionary provision under the sentencing guidelines,” but rather, statutorily mandated. *Ellis*, unpub op at 4. Statutorily mandated sentences are both presumptively proportional and valid, “and a proportionate sentence is not cruel or unusual.” *Id.*, quoting *Jarrell*, 344 Mich App at 486.

Penalty compared to other Michigan offenses

Defendant’s contention here, that “there are no other post-incarceration sentences in Michigan that last for the life of the offender,” even if true,¹⁰ overlooks several countervailing considerations.

Initially, sexual offenses by their nature preclude “a purely qualitative comparison of sentences” with other non-sexual crimes. See *People v Benton*, 294 Mich App 191, 206; 817 NW2d 519 (2011). See *People v Ringle*, unpublished opinion of the Court of Appeals, issued November 18, 2021 (Docket No. 352693), p 3, 2021 WL 5405753 (“[T]he unique circumstances surrounding CSC offenses justify the uniqueness of defendant’s lifetime registration requirement”).

Further, there are clearly other crimes in Michigan that, upon conviction, allow for the

¹⁰ The People would note that several previous versions of MCL 333.7401(2)(iii) and (iv) allowed for the imposition of lifetime probation. Such sentences were routinely upheld against cruel-or-unusual claims. See, e.g., *People v Tanksley*, 103 Mich App 268, 272; 303 NW2d 200 (1981), and *People v Gregorczyk*, 178 Mich App 1, 5; 443 NW2d 816 (1989).

imposition of lifetime sanctions (see, e.g., armed robbery, MCL 750.529, and first-degree CSC, MCL 750.520(b), and many others that have statutorily-mandated penalties (see, e.g., first-degree murder, MCL 750.316, felony-firearm, MCL 750.227b, and fourth-offense violent habitual offenders, MCL 769.12). As noted by the Court of Appeals here, depending on the age of the offender and victim, “a CSC-I conviction may involve a mandatory 25-year minimum sentence or a mandatory life sentence,” *Ellis*, unpub op at 5, quoting *Jarrell*, 344 Mich App at 485-486. In light of these possible sanctions, lifetime registration is not grossly disproportionate to the penalties imposed for other Michigan offenses.

Penalty compared to those imposed in other states

The *Ellis* panel here was not alone in concluding that lifetime registration is not unique to Michigan. As noted in *Morales*, unpub op at 5, “[e]ach of our sister states, the District of Columbia, and the federal system all have sex offender registration systems that include mandatory lifetime registration for at least some offenders.” See Collateral Consequences Resource Center, *50-State Comparison: Relief from Sex Offense Registration Obligations*, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-relief-from-sex-offender-registration-obligations/> (accessed October 29, 2024). See also *Jarrell*, 344 Mich App at 486, and *Ringle*, unpub op at 3 (“Defendants across the states who engage in conduct similar to defendant are routinely required to register for life, even if defendants in other states are afforded greater latitude to petition for removal from the registry. Thus, SORA’s registration requirement is not materially different from sex offender registries in other states”).

Defendant’s contention that only 18 states have substantially implemented the federal Sex Offenders Registration and Notification Act (SORNA), while true, is misleading. Initially, the website referenced by defendant itself notes that 21 additional states are working toward

furthering SORNA implementation. See <https://smart.ojp.gov/sorna/substantially-implemented> (accessed October 29, 2024). Second, and more importantly, there is no direct correlation between SORNA compliance and lifetime registration requirements. In other words, states that have not substantially implemented SORNA may nonetheless require lifetime registration. In fact, a review of the 50-State Comparison table referenced above clearly shows that this is the case – each of the 50 states, regardless of their SORNA compliance, has mandatory lifetime registration for at least some offenders. Michigan’s lifetime registration requirement is accordingly consistent with offender registries in other states.

The goal of rehabilitation

When discussing whether the 2011 SORA constituted punishment for purposes of ex post facto analysis, this Court in *Betts* addressed the question of whether registration was “a reasonable means of protecting the public from sex offenders who allegedly pose . . . a ‘potential serious menace.’ ” *Betts*, 507 Mich at 559, quoting MCL 28.721a. After noting several research studies involving recidivism, the Court acknowledged that “the efficacy of sex-offender registries such as the 2011 SORA [was] unclear.” *Id.* at 560 n 20.¹¹ Three years later, in *Lymon*, this Court once again acknowledged that, despite robust scientific debate, there was no “universally accepted conclusion” concerning whether registries impacted the recidivism rates of sexual offenders. *Lymon*, ___ Mich at ___; slip op at 12 n 18. The Court of Appeals here

¹¹ There are, of course, relevant studies on recidivism in addition to those referenced in *Betts*. On the specific issue of “whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws,” the Pennsylvania Supreme Court in *Commonwealth v Torsilieri*, ___ Pa ___; 316 A3d 77 (2024), referencing testimony provided by the defendant’s own experts, found that “adult sexual offenders reoffend at a rate of at least three times higher than other individuals convicted of non-sexual offenses.” *Id.* See *Morales*, unpub op at 9 (discussing *Torsilieri* at length). See also studies cited in Justice Zahra’s *Lymon* dissent, slip op at 26 n 84.

referenced this uncertainty when analyzing whether lifetime registration advanced the goal of rehabilitation. *Ellis*, unpub op at 5.¹² Assuming without deciding that registration “may not advance the goal of rehabilitation,” the *Ellis* panel nonetheless concluded that the other three factors (discussed above) strongly supported a finding that registration was neither cruel nor unusual as applied to defendant. *Id.*

If current studies are indeed unclear – that is, if registration may, or may not, advance the goal of rehabilitation by reducing recidivism -- this Court should defer to the legislature, whose prior determination in this regard is reasonable in light of existing research. See *Betts*, 507 Mich at 559 (the question is one of reasonableness, not “whether the legislature has made the best choice possible to address the problem it seeks to remedy,” quoting *Smith v Doe*, 538 US at 105). As noted by the Court of Appeals in *Fabela*, “to the extent there are genuine disagreements in what might be shown by ongoing research, [the courts] are not an appropriate forum in which to resolve those disputes.” *Fabela*, unpub op at 5.

Defendant supports his claim that “registration runs contrary to rehabilitation” (Defendant’s brief, pp 18-19) by citing a 2011 article discussing potential difficulties registrants may face when seeking housing and employment opportunities. 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 (2011). Despite these potential difficulties, the article’s author does not argue that registries should be abolished, but rather suggests that housing and employment restrictions be revised. *Id.* at 288. Here, the 2021 amendments to SORA have done

¹² The Court of Appeals did not address whether and to what extent the studies cited in *Betts* on recidivism were applicable to the issue of rehabilitation.

just that -- by eliminating previous restrictions dealing with student-safety zones, registrants are now “free to live and work where they desire[]” *Lymon*, ___ Mich at ___; slip op at 7, quoting *Betts*, 507 Mich at 553.

Further, defendant’s argument does not address whether these potential difficulties flow from “the Act’s registration and dissemination provisions, [or] from the fact of conviction, already a matter of public record.” *Smith v Doe*, 538 US at 101. See *Tucker*, 312 Mich App at 661, and *Swoffer-Sauls*, unpub op at 5.

In any event, given the uncertainty on the issue of efficacy, this factor is at most neutral in the balancing process.

Considering all of the above factors, defendant has not overcome the presumption that lifetime registration for sex offenders is constitutionally permissible.

REQUEST FOR RELIEF

For the above reasons, this Court should deny defendant's application for leave to appeal.

DATED: 11/4/24

Respectfully submitted,

/s/ Mark Sanford

Mark Sanford (P35150)
Assistant Prosecuting Attorney

This brief contains approximately 5,248 countable words