

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

James Ellis, Jr.,

Defendant-Appellant.
/

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Supreme Court No. 166766

Court of Appeals No. 363845

Lower Court No. 2021-016148-FH

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

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COUNTERSTATEMENT OF JURISDICTION

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

COUNTERSTATEMENT OF QUESTIONS PRESENTED

- I. Whether defendant's case is ripe for review given his out-of-state residency.

Plaintiff-Appellee answers: "No."
Defendant-Appellant answers: "Yes."
The trial court did not address this issue.

- II. Whether the "recapture" provision of the 2021 SORA constitutes ex post facto punishment.

Plaintiff-Appellee answers: "No."
Defendant-Appellant answers: "Yes."
The trial court answered: "No."

- III. Whether defendant's 2021 conviction for attempted unarmed robbery triggered SORA registration rather than his 1983 conviction for attempted rape.

Plaintiff-Appellee answers: "Yes."
Defendant-Appellant answers: "No."
The trial court answered: "Yes."

- IV. Whether defendant's entitlement to relief on ex post facto grounds depends on the *Kardasz* decision.

Plaintiff-Appellee answers: "No."
Defendant-Appellant did not address this issue.
The trial court did not address this issue.

- V. Whether lifetime registration for Tier III sex offenders constitutes cruel or unusual punishment.

Plaintiff-Appellee answers: "No."
Defendant-Appellant answers: "Yes."
The trial court answered: "No."

- VI. Whether the sexual nature of defendant's 1983 attempted rape conviction affects whether the "recapture" provision is cruel or unusual punishment.

Plaintiff-Appellee answers: "Yes."
Defendant-Appellant answer: "Yes."
The trial court did not answer this question.

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 store 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. *People v Ellis*, 10 NW3d 868 (2024). A subsequent Order, dated December 6, 2024, directed this office to file a supplemental brief addressing six related issues concerning the 2021 SORA and its application to defendant. *People v Ellis*, 13 NW3d 642 (2025).

Additional facts will be included below where pertinent.

ARGUMENT

- I. Defendant's case is not ripe for review given his out-of-state residency.

Standard of Review. Questions regarding ripeness are reviewed de novo. *King v Michigan State Police*, 303 Mich App 162, 188; 841 NW2d 914 (2013).

In its December 6th Order, this Court directed the parties to address “whether defendant’s out-of-state residency and the conditional application of SORA while the defendant remains an out-of-state resident renders the constitutional issues here not ripe for review.”

Article 6, Section 1 of the Michigan Constitution vests our state courts with the authority to exercise “judicial power.” Although the limits of this power are not specifically delineated in the Constitution itself, this Court has developed “justiciability doctrines” to ensure that cases before the courts are appropriate for judicial action. *Michigan Chiropractic Council v Commission of Office of Financial and Ins. Services*, 475 Mich 363, 370; 716 NW2d 561 (2006), overruled in part on other grounds *Lansing School Education Association v Lansing School Board*, 487 Mich 349; 792 NW2d 686 (2010). These doctrines include standing, ripeness, and mootness. *Id.* at 370-371.

The doctrine of ripeness, based on both constitutional and prudential considerations,² prevents “the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon ‘contingent future events that may not occur as

² “The ripeness doctrine has both a constitutionally mandated and a discretionary component.” *Michigan Dept of Social Services v Emmanuel Baptist Preschool*, 434 Mich 389, 412 n 48; 455 NW2d 1 (1990) (Cavanagh, J., concurring). See *Twitter v Paxton*, 26 F4th 1119, 1123 (CA 9, 2022) (ripeness “is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction”).

anticipated, or indeed may not occur at all.’ ” *Michigan Chiropractic*, 475 Mich at 371 n 14, quoting *Thomas v Union Carbide Agricultural Products Co.*, 473 US 568, 580; 105 S Ct 3325; 87 L Ed 2d 409 (1985). The doctrine of ripeness, then, focuses on the *timing* of the action. *Id.* at 379, citing *Wilderness Society v Alcock*, 83 F3d 386, 390 (CA 11, 1996) (“When determining ripeness, a court asks whether this is the correct *time* for the complainant to bring the action”). See also *Associated Builders v State Treasurer*, ___ Mich App ___; ___ NW3d ___ (2024); slip op at 8, 2024 WL 1071048.

As recently noted by this Court, whether an issue is ripe for review must be determined by balancing “the need for further factual development, combined with any uncertainty as to whether defendant[] will actually suffer future injury, with the potential hardship of denying anticipatory relief.” *People v Warner*, ___ Mich ___; ___ NW3d ___ (2024) (Docket No. 163805); slip op at 7, 2024 WL 3381079, quoting *Emmanuel Baptist Preschool*, 434 Mich at 412 (Cavanagh, J., concurring). See *Union Carbide*, 473 US at 581, and *People v Carp*, 496 Mich 440, 527; 852 NW2d 801 (2014). Defendant bears the burden of establishing that his claim is ripe for appellate review. *Susan B. Anthony List v Driehaus*, 573 US 149, 158; 134 S Ct 2334; 189 L Ed 2d 246 (2014).

Defendant has failed to establish that his claim here is ripe for review. With regard to the first prong (i.e., uncertainty of injury), the record is clear that defendant is a resident of Indiana, not Michigan.³ As indicated by defendant in his pleadings, he “is not, nor has he ever been, a Michigan resident” (Defendant’s Motion to Correct Invalid Sentence, August 2, 2022, p 3).

³ For instance, defendant’s pre-sentence investigation report indicated that he was “a 58-year-old, divorced, male resident of South Bend, Indiana.” Elsewhere, it indicated that he had been living with his mother at 1921 Olive, in South Bend, since 2011. At sentencing, defendant told the court that he wanted “to get back home” to Indiana to address his medical concerns (Sentencing Transcript, 1/24/22, p 18).

Accordingly, defendant is under no current obligation to register in this state. See MCL 28.723(1). Nor, as defendant admits, is he currently required to register “on any state’s sex offender registry, including his home state of Indiana” (Defendant’s Brief in Support of Motion to Correct Invalid Sentence, p 3. See Defendant’s current Supplemental Brief, p 17 n 5). Defendant, then, has sustained no actual injury as a direct result of the 2021 SORA.⁴

Further, defendant has never expressed either a desire or intent to become a Michigan resident. See *Emmanuel Baptist Preschool*, 434 Mich at 410 n 43 (Cavanagh, J., concurring) (defendant has not “declared an intent to engage in the very acts that would trigger enforcement of [the] statute . . .”). Nor would such a change appear likely on the present facts – for instance, there is no evidence to suggest that defendant has friends, family, housing, or job opportunities in Michigan that would cause him to leave his home state of more than 50 years and relocate here. Importantly, defendant has never suggested that moving to Michigan was even a remote possibility. Defendant, then, has failed to show that he “will actually suffer future injury” due to SORA’s registration requirements. As his claim is based on nothing more than “contingent future events,” it is purely hypothetical. *People v Hulben*, 489 Mich 979, 980; 799 NW2d 172 (2011) (Kelly, J., dissenting).⁵

⁴ Defendant’s status in Michigan does *not* trigger any reporting requirements in Indiana. Compare *Johnson v Madigan*, 880 F3d 371 (CA 7, 2018) (as the defendant, a Wisconsin resident, was required to register in Wisconsin due to his status in Illinois, he had standing to contest his Illinois classification). Accordingly, while defendant may be “subject to the requirements of SORA” (*People v Nyschick*, unpublished per curiam opinion of the Court of Appeals, issued October 11, 2024 (Docket No. 366433), 2024 WL 4481238), unless and until he changes his residence to Michigan, no actual injury has occurred.

⁵ That is to say, defendant has failed to show that a future injury is “certainly impending,” or that there is a “substantial risk that the harm will occur,” *Susan B. Anthony List*, 573 US at 158, or that he has felt the effects of SORA in “a concrete way.” *Abbot Laboratories v Gardner*, 387 US 136, 148; 87 S Ct 1507; 18 L Ed 2d 681 (1967), abrogated by statute on other grounds *Califano v Sanders*, 430 US 99, 105; 97 S Ct 980; 51 L Ed 2d 192 (1977).

With regard to the second prong (i.e., hardship), defendant has failed to show that he would suffer hardship if this Court refused to review his claim. As noted above, defendant has never expressed either a desire or intent to become a Michigan resident. Accordingly, defendant is not forced to choose between refraining from allegedly lawful activity (i.e., moving to Michigan) or engaging in that activity and risking significant sanctions. Compare *Susan B. Anthony List*, 573 US at 167-168 (“Denying prompt judicial review would impose a substantial hardship on petitioners, forcing them to choose between refraining from core political speech on the one hand or engaging in that speech and risking costly Commission proceedings and criminal prosecution on the other”). Stated another way, failure to review defendant’s claim would not require defendant to make “an immediate and significant change” in order to avoid serious penalties that would otherwise attach. *Twitter*, 26 F4th at 1123.

Further, a legitimate fear of prosecution would arise only if defendant first established Michigan residency and thereafter refused to register. This fear is accordingly one step removed from those addressed in *Emmanuel Baptist Preschool* and similar cases. For instance, in *Ellis v Dyson*, 421 US 426; 95 S Ct 1691; 44 L Ed 2d 274 (1975), petitioners Ellis and Love were arrested in Dallas, Texas, and charged with violating the city’s loitering ordinance. *Id.* at 431. Following their pleas of nolo contendere in Municipal Court, both petitioners filed an action in the federal district court asking, first, that their convictions be expunged, and second, that the court declare the ordinance unconstitutional. The district court rejected these claims, holding that the threat of future state criminal prosecutions did not present the likelihood of irreparable injury to the petitioners required for injunctive relief. *Id.* at 430. The circuit court affirmed this holding without opinion.

On appeal, the United States Supreme Court reversed, ruling that the petitioners could proceed if they were able to demonstrate “a genuine threat of enforcement” of the disputed loitering ordinance. *Id.* at 432, quoting *Steffel v Thompson*, 415 US 452; 94 S Ct 1209; 39 L Ed 2d 505 (1974). In closing, however, the Court noted its reservations as to whether an actual case or controversy still existed: “[A]t oral argument counsel for petitioners acknowledged that they had not been in touch with their clients for approximately a year and were unaware of their clients’ whereabouts. . . . [I]f petitioners no longer frequent Dallas, it is most unlikely that a sufficiently genuine threat of prosecution for possible future violations of the Dallas ordinance could be established.” *Id.* at 434. Here, similarly, as defendant has expressed no desire or intent to reside in Michigan, any threat of prosecution is unrealistic.

- II. The recapture provision of the 2021 SORA does 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)

This Court further directed the parties to address whether the “recapture” provision found at MCL 28.723(1)(e) constitutes ex post facto punishment under either the United States or Michigan Constitution. The recapture provision provides in pertinent part: “[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.” Here, defendant was convicted of a listed offense (i.e., attempted rape) in 1983, well before registration for sexual offenses was statutorily required. Approximately 38 years later, in December of 2021, he pled guilty to attempted unarmed robbery, a five-year felony. At his subsequent sentencing, defendant was ordered to register as a Tier III sex offender pursuant to the above recapture provision.

The issue of whether the 2021 SORA recapture provision constitutes ex post facto punishment hinges on whether the provision is indeed a criminal punishment, or rather, a civil regulation. Courts faced with this question routinely engage in a two-step inquiry. *People v Lymon*, 514 Mich __; __ NW3d __ (2024) (Docket No. 164685); slip op at 5, 2024 WL 3573528. The first inquiry focuses on the Legislature’s intent. If it is determined that the Legislature intended the statute as a punishment, the inquiry is at an end. If, however, the intent in drafting the statute was to create a civil regulation, the second inquiry asks “whether the statutory scheme is so punitive either in purpose or effect as to negate the State’s intention to

deem it civil.” *Id.*, quoting *People v Earl*, 495 Mich 22, 38; 845 NW2d 721 (2014). This inquiry is in turn guided by consideration of the following five factors identified in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963): (1) whether the statute has historically been regarded as punishment; (2) whether the statute imposes an affirmative disability or restraint; (3) whether the statute promotes the traditional aims of punishment; (4) whether the statute has a rational connection to a nonpunitive purpose; and (5) whether the statute is excessive with respect to its nonpunitive purpose. *Lymon*, 514 Mich at ____; slip op at 5.

This Court has already determined that “the Legislature intended the 2021 SORA as a civil regulation.” *Id.* at ____; slip op at 6. Accordingly, in order to be successful, defendant must show by the “clearest proof” that the statutory scheme is nonetheless punitive. *People v Betts*, 507 Mich 527, 543-544; 968 NW2d 497 (2021), quoting *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997).

History and tradition

In *Betts*, this Court found that the 2011 SORA bore “significant resemblance” to the traditional punishments of banishment, shaming, and parole because of its “limitations on residency and employment, publication of information and encouragement of social ostracism, and imposition of significant state supervision.” *Id.* at 553. In *Lymon*, this Court recognized that several of these concerns were addressed by the enactment of the 2021 SORA. *Lymon*, 514 Mich at ____; slip op at 7. For instance, the *Lymon* Court noted that its earlier concerns with regard to banishment were no longer valid as the 2021 SORA removed student-safety zone provisions found in the 2011 SORA that had prohibited registrants from living, residing,

working, or loitering near schools. *Id.* at 7. Accordingly, as “their choices are no longer restricted by SORA’s requirements,” registrants are now free to live and work wherever they desire. *Id.*

The *Lymon* Court also acknowledged that the 2021 SORA made changes to the type of supervision imposed on registrants. Significantly, updates may now be made through the mail rather than by in-person reporting. This change “decreases the in-person interactions between law enforcement and registrants and decreases the financial and logistical burden placed on registrants by these requirements.” *Id.*

Yet despite these changes, the *Lymon* Court nonetheless found a “persuasive resemblance” between SORA registration and parole. This finding, however, gives little weight to the stark differences that actually exist between the two. For instance, as noted, registrants are now “free to move where they wish and to live and work as other citizens, with no supervision.” *Smith v Doe*, 538 US 84, 101; 123 S Ct 1140; 155 L Ed 2d 164 (2003). In contrast, parolees must receive prior approval from their agents. Further, parolees can be severely limited regarding post-incarcerations associations. Conditions of parole for sex offenders routinely include strict no-contact provisions with victims and their families, children younger than 18 years of age, and individuals who reside with or have physical custody of children younger than 18 years of age. The 2021 SORA has no similar restrictions.

Additionally, unlike registrants, parolees can be prohibited from purchasing certain items, entering certain businesses, and accessing the internet. Parolees can also be required to take polygraph examinations, enroll in substance abuse or sexual abuse treatment, and complete re-entry programs, all at their own expense. And while registrants must pay a yearly fee of \$50.00,

this amount is significantly less than the yearly supervision fee of \$360.00 required of parolees. MCL 791.236a.

In noting the similarities between the 2021 SORA and parole, the *Lymon* Court noted that the failure to comply with the requirements of SORA “potentially subjects the offender to imprisonment.” *Id.* However, in contrast to parolees, a registrant accused of violating a provision of SORA is entitled to all of the rights afforded to any other citizen charged with a criminal offense, including the right to a trial by jury and the right to be presumed innocent until proven guilty beyond a reasonable doubt. Compare MCL 791.240a (a parolee is entitled only to a fact-finding hearing in front of a parole board member or hearings officer tasked with determining whether a violation was established by a preponderance of the evidence). Further, unlike registrants, parolees may be required to waive their Fourth Amendment rights and consent to a search of their person and property upon the demand of their agent or police officer. See, e.g., *Samson v California*, 547 US 843, 857; 126 S Ct 2193; 165 L Ed 2d 250 (2006) (“[T]he Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee”). Accordingly, while there are some provisions of the 2021 SORA that may resemble parole, the differences are such that any similarities between the two are in reality slight.

With regard to shaming, the *Lymon* Court noted that, unlike the registry at issue in *Smith*, the 2021 SORA contained “substantial personal information of each registrant.” *Lymon*, 514 Mich at ___; slip op at 8. The Court also noted that members of the public can “choose to be notified whenever any registrant moves into a particular zip code.” *Id.* Of particular importance to this Court was the fact that registrants whose crimes did not include a sexual component were nonetheless branded with the label of “sex offender.” *Id.* These concerns post-*Lymon* would appear to be overstated.

Initially, as noted by the Court, a registrant's tier classification is no longer required to appear on the SORA website. *Id.* Further, the large majority of "personal information" contained in the registry (and highlighted by this Court in *Betts* and *Lymon*) – including a registrant's conviction, sex, race, height, weight, hair and eye color, and discernible features, as well as photograph – is already available to members of the public on the Department of Corrections website. Moreover, much, if not all, of the same information contained in the current registry can be gleaned from a simple Google search. Accordingly, the "rising and pervasive influence of the Internet since the *Smith* decision in 2003," *id.* at ____; slip op at 8, would appear to cut both ways – while access to the registry "require[s] less effort" than a "visit to an official archive of criminal records," the same information is readily available from other on-line sources. See *Smith*, 538 US at 98 ("[T]he stigma of Alaska's [registry] results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public").

Most importantly, given this Court's holding in *Lymon*, no defendant will be placed on the sex offender registry unless his or her crime(s) contained a sexual component.

While registration may indeed cause some personal embarrassment to sexual offenders, the purpose and principal effect of notification is "to inform the public for its own safety, not humiliate the offender." *Smith*, 538 US at 99. The on-line dissemination of accurate information, most of which is already public, is a far cry from colonial "face-to-face shaming," a practice that "forc[ed] an offender to appear in public with some visible badge of past criminality." *Id.*

As in *Smith*, the 2021 SORA does not make the publicity and resulting stigma “an integral part of the objective of the regulatory scheme.” *Smith*, 538 US at 99. Accordingly, any weight assigned to this factor as resembling punishment should be minimal.

Affirmative disability or restraint

This Court’s comments in *Lymon* concerning the burdens imposed on registrants by the 2021 SORA are for the most part well taken. For instance, while the State Police now allow mail-in notifications for most changes, registrants are still required to report in-person between one to four times per year to verify or update their initial information.⁶ Further, routine life changes may well require a registrant to report “multiple times in a single calendar year.” *Id.* at ____; slip op at 9. It is also true that compliance with these requirements “is enforced through the threat of imprisonment,” *id.* at ____; slip op at 10, although, as noted above, any violation resulting in criminal charges is a separate proceeding, and entitles the registrant to all the rights afforded any other citizen charged with a criminal offense.

The *Lymon* Court’s concerns with the effect of publication (i.e., that it “might result in the reduction of both housing and employment opportunities,” *id.*), however, are based on “conjecture” rather than record facts: “Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force.” *Smith*, 538 US at 100. This is especially true given the ready availability of such information from other online sources.

⁶ Federal courts have overwhelmingly found that annual and multi-annual in-person reporting requirements, while inconvenient, are not punitive. See *Lymon*, 514 Mich at ____ (Zahra, J., dissenting); slip op 22 n 33 and cases cited therein.

Accordingly, while the 2021 SORA imposes obligations on registrants, these obligations are clearly not as significant as they were pre-2021. See *People v Kiczenski*, ___ Mich App ___, ___ NW3d ___ (2024) (Docket No. 364957); slip op at 6, .

Traditional aims of punishment

The People agree that one of the purposes of the 2021 SORA is to deter future crimes involving sexual misconduct, and that, accordingly, SORA supports the traditional penological goal of deterrence. However, as noted by many courts, whether registration restrictions promote traditional aims of punishment provides “little value” to the overall *Mendoza-Martinez* analysis as “all such regulations inevitably overlap” with such aims. *Nelson v Town of Paris*, 78 F4th 389, 398-399 (CA 7, 2023). See *Hudson v United States*, 522 US 93, 102; 118 S Ct 488; 139 L Ed 2d 450 (1997) (“[A]ll civil penalties have some deterrent effect”).

Further, that the act does not include any individualized assessment of risk beyond assigning registrants to one of three tiers does not of itself render the act punitive. As will be discussed more fully below (see Issue V *infra*, pp 26-27), legislatures are authorized to make reasonable categorical judgments when enacting state regulations: “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 . . .” *Smith*, 538 US at 103-104.

Accordingly, this factor should be given little if any weight toward a finding of punishment.

Connection to nonpunitive purpose

Whether the 2021 SORA has a rational connection to a nonpunitive purpose is perhaps the most important of the *Mendoza-Martinez* factors. See *People v Kiczenski*, ___ Mich App at ___; slip op at 7, and cases cited therein.

This Court in both *Betts* (regarding the 2011 SORA) and *Lymon* (regarding the 2021 SORA) concluded that 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, and *Lymon*, 514 Mich at ___; slip op at 11. Other state and federal courts agree. See *Kiczenski*, ___ Mich App at ___; slip op at 7, and cases cited therein, and *Does v Whitmer*, ___ F Supp 3d ___ (ED Mich, 2024); slip op at 19 (“SORA provides members of the public with valuable information that they can use to protect themselves and their families”). Additionally, studies show that registration systems can have a “measurable deterrent effect” on first-time offenders. *Id.*

The connection here to a nonpunitive purpose is even stronger than the connection in *Lymon*, where an extra step was required to link non-sexual offenders to the prevention of sexual crimes. *Kiczenski*, ___ Mich App at ___; slip op at 7. Accordingly, this factor “weighs strongly against the 2021 SORA being considered punishment for sexual offenders.” *Id.*

Excessiveness

The fifth and final *Mendoza-Martinez* factor is whether the regulatory means adopted in the 2021 SORA are “reasonable in light of the nonpunitive objective.” *Betts*, 507 Mich at 559, quoting *Smith*, 538 US at 105. As noted by the *Betts* Court, “the lynchpin of this analysis is ‘reasonableness,’ not ‘whether the legislature has made the best choice possible to address the problem it seeks to remedy.’ ” *Id.* quoting *Smith*, 538 US at 105.

Research on whether registration provides “a reasonable means of protecting the public from sex offenders . . .,” *Betts*, 507 Mich at 559, has been inconclusive. After noting several studies involving recidivism, the *Betts* Court acknowledged that “the efficacy of sex-offender registries such as the 2011 SORA [was] unclear.” *Id.* at 560 n 20.⁷ 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*, 514 Mich at ____; slip op at 12 n 18.

If current studies are indeed unclear – that is, if registration may 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 *Kebodeaux*, 570 US at 395-396 (despite “conflicting evidence on the point,” Congress was authorized to “weigh the evidence and to reach a rational conclusion,” i.e., that registration requirements for sex offenders after their release can “help protect the public . . . and alleviate public safety concerns”). See also *Betts*, 507 Mich at 559 (the question is one of reasonableness, not whether the legislature has made the best choice possible). As noted by the Court of Appeals in *Fabela*, “to the extent

⁷ 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 *United States v Kebodeaux*, 570 US 387, 395-396; 133 S Ct 2496; 186 L Ed 2d 540 (2013) (citing a study by the Department of Justice concluding that released sex offenders were “four times more likely to be rearrested for a sex crime” than non-sex offenders), *Does v Whitmer*, ____ F Supp 3d at ____; slip op at 17-19 (after a review of numerous “divergent studies,” the Court concluded that there is “undisputed evidence showing that SORN laws promote the goal of public safety, at least by deterring first-time offenders, although there is also mixed evidence regarding whether they reduce recidivism”), and studies cited in Justice Zahra’s *Lymon* dissent, *Lymon*, 514 Mich at ____ (Zahra, J., dissenting); slip op at 26 n 84.

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.

It is important to note that the registry was primarily intended “to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor” convicted sex offenders, MCL 28.721a, much like an early warning system monitors potential weather risks so that members of the public can better make informed decisions concerning their safety. Accordingly, the efficacy of sex-offender registries in decreasing recidivism is somewhat beside the point, as the registry fulfills its stated purpose of “provid[ing] members of the public with valuable information that they can use to protect themselves and their families.” *Does*, ___ F Supp 3d at ___; slip op at 19.

Further, given the uncertainty surrounding the efficacy of registration, the *Betts* Court relied on several other considerations to conclude that SORA’s requirements were excessive. Two of these considerations – the existence of student-safety zones, and frequent in-person reporting – no longer exist, as they were eliminated by the 2021 SORA. See *Lymon*, 514 Mich at ___; slip op at 2. Once these considerations are removed from the analysis, the remaining registration requirements for sex offenders are not excessive when compared to SORA’s public-safety purpose.

Assessing the above *Mendoza-Martinez* factors, with particular weight assigned to the fourth (i.e., connection to a non-punitive purpose), defendant has failed to show by “the clearest proof” that the 2021 SORA is punishment.

- III. Defendant's 2021 conviction for attempted unarmed robbery triggered SORA registration, not his 1983 conviction for attempted rape.

Standard of Review . Questions of constitutional law are reviewed de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 255 (2018).

Even if this Court were to conclude that the 2021 SORA is punishment, its application to defendant does not violate the prohibition against ex post facto laws. This is because defendant's current registration requirements resulted from his 2021 conviction for attempted unarmed robbery -- *not* his 1983 conviction for attempted rape.⁸

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*, 342 Mich App 39; 993 NW2d 21 (2022). 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." *Id.* at 43. The Court of Appeals disagreed. After initially noting that

⁸ The 2021 SORA, based on Public Act 295 of 2020, took effect on March 24, 2021. Defendant committed his current offense on November 4, 2021, more than 6 months *after* the 2021 SORA became law.

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 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 . . . [Rather, repeat-offender laws penalize] 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 2021 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). See *Johnson v Madigan*, 880 F3d at 376 (Illinois’ recapture provision not *ex post facto* as registration was a consequence of defendant’s current crime, not his prior rape conviction).

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).

- IV. Defendant's entitlement to relief on ex post facto grounds may be impacted by this Court's decision in *Kardasz*

Standard of Review . Questions of constitutional law are reviewed de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 255 (2018).

This Court additionally asked the parties to address “whether the defendant’s entitlement to relief on ex post facto grounds depends on this Court’s decision in *Kardasz*.”

In *People v Kardasz*, unpublished per curiam opinion of the Court of Appeals, issued September 22, 2022 (Docket No. 358780), 2022 WL 4391130, a panel of the Court of Appeals addressed whether lifetime SORA registration constituted cruel or unusual punishment. As an initial matter, the panel, citing *People v Lymon*, 342 Mich App 46; 993 NW2d 24 (2022), vacated in part *People v Lymon*, 514 Mich ____; ____ NW3d ____ (2024), summarily concluded that the 2021 SORA was a penalty. Then, following a discussion of the four *Lorentzen*⁹ factors, the panel found that lifetime registration was neither cruel nor unusual. *Kardasz*, unpub op at 2. In an order dated September 13, 2023, this Court held defendant Kardasz’s application for leave to appeal in abeyance pending its decision in *Lymon*. Approximately 8 months later, this Court directed the parties to file supplemental briefs addressing four issues. *People v Kardasz*, 513 Mich 1118; 6 NW3d 405 (2024). Only the first issue – i.e., whether the 2021 SORA constitutes cruel or unusual punishment – is of interest here, as defendant Ellis is not subject to lifetime electronic monitoring.

If, in deciding *Kardasz*, this Court determines (as argued above) that the 2021 SORA does not constitute a penalty, defendant’s appeal is at an end, as by definition his obligation to register would not constitute ex post facto punishment.

⁹ *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972).

If this Court were to find that the 2021 SORA does constitute a penalty, however, its holding would not directly impact this case, as *Kardasz* does not raise any ex post facto concerns. Further, as argued above, defendant's obligation to register here was triggered by his 2011 conviction for attempted unarmed robbery, not his 1983 conviction for attempted rape. As defendant's 2011 crime was committed *after* the 2021 SORA became law, the trial court's order requiring defendant to register as a sex offender does not violate ex post facto laws.

- V. Lifetime registration for Tier III sex offenders does not constitute cruel or unusual 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)

This Court also directed the parties to address whether requiring defendant to register as a sex offender constitutes cruel or unusual punishment under either the state or federal constitutions.

Several initial observations are in order. First, defendant does not specify whether his challenge to the constitutionality of the 2021 SORA is facial or as-applied. See, e.g., *People v Jarrell*, 344 Mich App 464, 482; 1 NW3d 359 (2022) (a “facial” challenge involves a claim that there is no set of circumstances under which the enactment is constitutionally valid, whereas an “as-applied” challenge considers the specific application of a facially valid law to individual facts). At times, he appears to be arguing both. For instance, defendant relies on individual facts when they appear to benefit his position (e.g., that he “cannot petition for removal” from the registry pursuant to MCL 28.728c), yet elsewhere relies on studies that recount how registration has apparently affected *other* convicted sex offenders. As defendant has never been required to register in Michigan or elsewhere, his claims that registration will impact “where he can live, his ability to get a job, his interactions with coworkers,” etc., are speculative at best.

Second, defendant appears to blame all of these potential problems (housing, work, etc.) on the fact of registration. Yet this causal link ignores the fact that defendant is both “personally [and] morally responsible for having committed a sex offense.” *Lymon*, 514 Mich at ____; slip op

at 15. And while defendant's conviction for attempted rape was not the event triggering registration, it was nonetheless a necessary prerequisite.

Third, defendant's argument does not address whether these potential problems flow from "the Act's registration and dissemination provisions, [or] from the fact of conviction, already a matter of public record." *Smith*, 538 US at 101. See *Tucker*, 312 Mich App at 661, and *Swoffer-Sauls*, unpub op at 5. As noted above, employers, landlords, and others could obtain much if not all of the same information by conducting a routine background check or Google search. See *Smith*, 538 US at 100.

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*, 514 Mich at ___; slip op at 14, citing *People v Bullock*, 440 Mich 15, 33-34; 485 NW2 d 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 compared to the gravity of the offense

Defendant initially argues that the gravity of his offense – an attempted unarmed robbery where he “tried to steal a steak from Wal-Mart” – “is shockingly low” (Defendant’s brief, p 46). This argument, however, overlooks the fact that, regardless of which act actually triggered registration, defendant was and is a convicted sex offender. Any suggestion that defendant must register for simply committing a non-sexual offense is accordingly inaccurate.

Further, this singular focus by defendant on his attempted unarmed robbery conviction should be seen for what it is – an attempt to draw this Court’s attention away from the facts surrounding his sexual assault of Ms. Mueller. As noted above, defendant pushed his victim into an empty bedroom, closed the door behind him, pinned her down on the bed, and, after forcibly removing her pants, attempted to have sexual intercourse. This conduct, had it occurred in Michigan, would have subjected defendant to a maximum of 5 years in prison. MCL 750.92. Additionally, 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). And, as defendant unlawfully restrained Ms. Mueller to facilitate the sexual assault, he was likewise guilty of a 15-year offense. MCL 750.349b. While registration may very well impose burdens on sexual offenders, such burdens are significantly less restrictive and oppressive than actual confinement in jail or 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 2284855.¹⁰

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]

¹⁰ “The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.” *Smith*, 538 US at 100.

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 also argues that registration in his case is excessively harsh because no individualized risk assessment was performed.¹¹ Had such an assessment been completed, defendant continues, he would “surely” have been found to be “at low risk for reoffending sexually” (Defendant’s brief, p 46). Elsewhere, defendant assures this Court that he “will not repeat [his] sexual offense.” *Id.* at 49. Yet the people of this state should not be required to sit back and take defendant at his word. Despite the ongoing debate concerning the efficacy of registries noted above, many convicted sex offenders do in fact reoffend. Empirical studies consistently show that between 10 to 15% of sexual offenders are re-arrested for a new sex crime within 5 years of their release from incarceration.¹² These percentages are likely low, as they do not take into account those crimes that go unreported: “[T]here is universal agreement in the

¹¹ Not all sexual offenders are treated the same. A defendant’s placement into one of three tiers based on the severity of his or her offense provides at least some level of individual assessment. See *Morales*, unpub op at 4.

¹² See Hanson, R.K., and Bussiere, M.T., *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *Journal of Consulting and Clinical Psychology*, pp 348-362 (1998) (an analysis of 61 independent studies on sexual offenders showed that, on average, the recidivism rate was 13.4% over a period of 4 to 5 years); Hanson, R.K., and Morton-Bourgon, K.E., *The Characteristics of Persistent Sexual Offenders: A Meta-Analysis of Recidivism Studies*, 73 *Journal of Consulting and Clinical Psychology*, pp 1154-1163 (2005) (an analysis of 82 independent studies on sexual offenders showed that, on average, the recidivism rate was 13.7% over a period of 5 to 6 years); Losel, F., and Schmucker, M., *The Effectiveness of Treatment for Sex Offenders: A Comprehensive Meta-Analysis*, 1 *Journal of Experimental Criminology*, pp 117-146 (2005) (an analysis of 69 independent studies on sexual offenders showed, on average, a recidivism rate of 11.1% over a period of approximately 5 years for treated offenders and 17.5% for untreated offenders); Schmucker, M., and Losel, F., *The Effects of Sexual Offender Treatment on Recidivism: An International Analysis of Sound Quality Evaluations*, 11 *Journal of Experimental Criminology*, pp 597-630 (Dec 2015) (utilizing 29 eligible comparisons, sexual offenders showed, on average, a recidivism rate of 10.1% for treated offenders and 13.7% for untreated offenders).

scientific community that the observed recidivism rates of sex offenders are underestimates of actual reoffending.” United States Department of Justice, Przybylski, *Chapter 5: Adult Sex Offender Recidivism -- Summary* (March 2017), available at <smart.ojp.gov/somapi/chapter-5-adult-sex-offender-recidivism> (accessed March 6, 2025).

This same Department of Justice report also notes that studies utilizing longer follow-up periods consistently showed higher rates of recidivism: “[R]ecidivism rates derived from follow-up periods of five years or less may mislabel a considerable proportion of repeat offenders as nonrecidivists, resulting in a significant underestimation of the absolute risk to public safety that sex offenders pose.” *Id.* For instance, a meta-analysis cited in the report showed that recidivism rates for sexual offenders rose from 14% after 5 years, to 20% after 10 years, to 24% after 15 years. *Id.* These percentages may be even higher for rapists and child molesters. See United States Department of Justice, Przybylski, *Recidivism of Adult Offenders* (July 2015), pp 2-3, available at <smart.ojp.gov/SOMAPI-brief-recidivism> (accessed March 10, 2025).

Further, defendant has provided no information concerning how accurate an individual risk assessment might be at predicting future behavior. Certainly such assessments cannot guarantee that a registrant will not reoffend.

Given these risks, members of the public should be able to access information concerning convicted sexual offenders in order to better gauge what precautions, if any, they believe are warranted to protect themselves and their families from potential harm.

Moreover, when enacting SORA, our Legislature specifically 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 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).

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 United States Supreme Court in *Smith*, 538 US at 103-104, 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,¹³ 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 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.

Although our Legislature did not provide for individual risk assessments, it did set out a process whereby offenders can petition the sentencing court to discontinue their registration. See MCL 28.728c. Generally speaking, Tier I registrants can petition to have their registration discontinued provided that: ten or more years have elapsed since their conviction; they have successfully completed probation or parole; and they have not since been convicted of another felony. MCL 28.728c(12). Petitions for Tier II and III registrants, while more limited, may be filed for those who were juveniles at the time of their offense, see MCL 28.728c(13) and (15), or were convicted for engaging in a consensual sexual act. MCL 28.728c(15). Accordingly, a

¹³ 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.

qualified offender can petition his or her sentencing judge to discontinue registration based on an assessment of the offender's case and individual circumstances, including the "likelihood" of whether the offender will "commit further listed offenses." MCL 28.728c(11)(f). This petition process thereby lessens the harshness of registration for qualified registrants.

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 mandatory post-incarceration sentences in Michigan that last for the life of the offender" (Defendant's brief, p 50), even if true,¹⁴ 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

¹⁴ The People would note that several previous versions of MCL 333.7401(2)(iii) and (iv) involving controlled substances 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 observation that less than a handful of other states have a recapture provision misses the mark. The question here is not whether Michigan’s recapture provision is unique, but

rather, whether our sister states likewise require lifetime registration for felons who have committed a similarly egregious sexual offense. As seen above, the answer is yes.

The goal of rehabilitation

In *Lymon*, this Court 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 referenced this uncertainty when analyzing whether lifetime registration advanced the goal of rehabilitation. *Ellis*, unpub op at 5. 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.*

Given the lack of scientific consensus, 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*, 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 does not promote rehabilitation” (Defendant’s brief, p 54) by referencing several journal articles. One, a 2011 publication by Catherine Wagner entitled *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),

discusses potential difficulties registrants may face when seeking housing and employment opportunities. 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 just that -- by eliminating previous restrictions dealing with student-safety zones, registrants are now "free to live and work where they desire[]" *Lymon*, 514 Mich at ____; slip op at 7, quoting *Betts*, 507 Mich at 553.

A second article, entitled *LGBTQ People on Sex Offender Registries in the US*, by Meyer et al., available at <<https://williamsinstitute.law.ucla.edu/publications/lgbtq-sex-offender-registries>> (accessed March 6, 2025), likewise discusses potential collateral consequences registrants may face post-conviction. However, even the article's authors write that their results "must be interpreted with caution" as their study, based on a survey completed by volunteer respondents, was "not representative of the overall population of people required to register."

The third article cited by defendant, *Life on 'the List' is a Life Lived in Fear: Post-Conviction Traumatic Stress in Men Convicted of Sexual Offenses*, by Harris and Levenson,¹⁵ posits that convicted sex offenders may experience traumatic stress upon their re-entry into the community. However, the study fails to differentiate between the various factors that may cause or contribute to an offender's feelings of stress, including "the devastating physical and psychological effects" of incarceration itself (*id.* at 5), prison conditions (*id.*), or placement on probation or parole (*id.* at 21). In other words, the study does not attribute this stress solely to sex-offender registration. The authors themselves note that "[i]t may well be . . . that individuals convicted of nonsexual crimes face similar obstacles upon release." *Id.* at 18.

¹⁵ International Journal of Offender Therapy and Comparative Criminology (2020), available at <<https://floridaactioncommittee.org/wp-content/uploads/2021/10/Life-on-the-List-PTSD-Jill-Levenosn-Sep-2020.pdf>> (accessed March 4, 2025).

To be clear -- the People do not argue with defendant's basic premise that convicted sex offenders may face potential hardships following their release from incarceration, including problems with housing and employment. However, defendant fails to note that all convicted felons likely face similar problems upon their release, regardless of whether their names appear on a public registry. *Id.* Further, defendant's argument leaves no room for the possibility that such problems would arise regardless of the registry, as evidence of an offender's conviction is a matter of public record. *Smith*, 538 US at 101. Landlords, employers, and others can access most if not all of the information contained in the registry through a variety of other sources, including the Department of Corrections, police agencies, county clerks, the internet, media and news outlets -- even word-of-mouth. Defendant's argument also ignores the possibility that such problems may be the result of something *other* than a criminal conviction. For instance, in the *LGBTQ* article cited by defendant, nearly a third of the respondents (29.8%) attributed post-conviction hardships to their sexual identity, gender expression, or appearance. Defendant has failed to demonstrate that the registry is solely responsible for creating post-conviction hardships for sexual offenders, or that the registry impedes rehabilitation.

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.

- VI. The sexual nature of defendant's 1983 attempted rape conviction affects whether the "recapture" provision is cruel or unusual punishment.

Standard of review. Questions of constitutional law are reviewed de novo. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 255 (2018).

This Court also asked the parties to address the following question: "[H]ow, 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."

In *Lymon*, this Court concluded that the 2021 SORA constitutes punishment as applied to non-sexual offenders. If this Court were to discount the sexual nature of defendant's 1983 attempted rape conviction, then defendant would stand convicted of nothing more than an attempted unarmed robbery, a non-sexual offense. Requiring defendant to register under these circumstances would, under *Lymon*, constitute punishment.

While such punishment would not violate prohibitions on ex post facto laws, as defendant attempted to rob Wal-Mart more than six months *after* the 2021 SORA became effective, a registration requirement would likely constitute cruel or unusual punishment in the absence of a prior conviction involving a sexual offense.

REQUEST FOR RELIEF

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

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Respectfully submitted,

/s/ Mark Sanford

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This brief contains approximately 10,317 countable words