

STATE OF MICHIGAN
IN THE
SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
REDFORD, P.J. AND RIORDAN AND FEENEY, J.J.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court
No. 166766

-vs-

JAMES ELLIS, JR.,

Defendant-Appellant.

Court of Appeals No. 363845
Berrien County CC No. 2021-016148-FH

SUPPLEMENTAL BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION
OF MICHIGAN AS *AMICUS CURIAE* IN SUPPORT OF THE PEOPLE OF THE
STATE OF MICHIGAN

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COUNTERSTATEMENT OF JURISDICTION

Amicus Curiae has adopted Plaintiff-Appellee's statement of jurisdiction.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I-V. Does *People v Kardasz* __Mich__ ; __NW2d__ (2025) (Docket No. 165008) support the People’s argument that defendant is not entitled to relief?

The sentencing judge: was not asked to answer the question.

The Court of Appeals: did not address this question but found that defendant did not have to register in Michigan and in any event, registration did not amount to cruel or unusual punishment.

Defendant-Appellant: presumably answers the question, “No”

Plaintiff-Appellee: argues that defendant’s issue is not ripe, but even if so, and even assuming registration amounted to punishment, it was not cruel or unusual punishment.

Amicus-PAAM: answers the question, “Yes.”

COUNTERSTATEMENT OF FACTS

Amicus Curiae relies on the statement of facts as set forth by the Plaintiff-Appellee as well as the statement in amicus' initial brief.

Argument

I-V. *People v Kardasz* ___Mich___; ___NW2d___ (2025) (Docket No. 165008) supports the People’s argument that defendant is not entitled to relief.

Standard of Review and Issue Preservation:

Amicus relies on amicus’ standard of review and issue preservation arguments in amicus’ initial brief.

Discussion:

Amicus continues to support the People’s argument that defendant’s claims are not ripe for this Court to review. Defendant does not have to register in Michigan (or in his home state of Indiana). MCL 28.723(1)-(3). He has said that he is an out-of-state resident and there is no indication that he intends to become a permanent or temporary resident.

Amicus also continues to agree with the People that SORA registration doesn’t amount to punishment at all for ex post facto purposes. This Court in *People v Kardasz*, ___Mich at ___ n 2; slip op at 3 n 2 stated that it was not resolving the question of whether the 2021 SORA was punishment for ex post facto purposes. This question should be resolved in a case where the issue is squarely presented such as *People v Johnson*, MSC No. 165814 (which is being held in abeyance for *Kardasz*). The ex post facto inquiry is different from the question of whether all the obligations imposed by the 2021 SORA amount to punishment under Const 1963, art 1, §11. Ex post facto claims will be decided differently depending on the date of a defendant’s conviction for a listed offense. Issues concerning severance are also unique to an ex post facto claim. And again, whether the 2021 SORA amounts to punishment for ex post facto purposes is a weighty issue since the answer could impact approximately 30,000 registrants.

But in this case, the SORA was passed before defendant violated its provisions. There is no ex post facto violation when the defendant committed the crime *after* the law requiring registration was enacted. Commission of an attempted unarmed robbery by defendant alone would not have triggered sex offender

registration but for his 1983 attempted rape conviction. However, it was his post-2011 crime which mandated that he register his earlier listed offense. His prior criminal record informed the consequences of his 2021 conviction, consequences that were in place at the time of his 2021 crime. It is analogous to a habitual offender enhancement insofar the prior crime informs the consequences of a later conviction for which the offender is on notice.

Amicus acknowledges that this Court has held for the purposes of a cruel or unusual punishment analysis under the Michigan Constitution, that the 2021 SORA does result in punishment for Tier III offenders. *Kardasz*, ___Mich at ___; slip op at 33. However, this Court has rejected a facial challenge to lifetime registration for Tier III offenders based on Article 1, §16 of the Michigan Constitution. This Court has held, “Tier III offenders committed the most severe registrable offenses and are subject to the most onerous requirements under the 2021 SORA. We hold that the 2021 SORA is not grossly disproportionate in all instances. Therefore, we cannot conclude that 2021 SORA is cruel or unusual punishment on its face.” *Kardasz*, ___Mich at ___; slip op at 34. Defendant committed a Tier III offense, and, therefore, defendant’s facial challenge must fail.

This Court also rejected Kardasz’s as-applied challenge. This Court found that when considering the harshness of the penalty compared to the gravity of the offense, there was “no question that defendant’s crime was a grave offense or that Tier III is inclusive of other abhorrent crimes.” *Kardasz*, ___Mich at___; slip op at 34. This Court also determined when considering the penalty imposed for the offense compared to other offenses, that that factor did not favor a finding of disproportionality. “Since defendant was convicted of CSC-1, the most elevated Tier III offense, we necessarily conclude that this factor also does not favor a finding of gross disproportionality.” *Kardasz*, ___Mich at___; slip op at 37-38. When considering the penalty imposed for the offense in Michigan as compared to other states, this Court also determined that this factor did not favor a finding of disproportionality. “Nothing in the record shows there is a ‘clear national trend’ shifting away from a more punitive sexual-registration scheme or that certain

components of the 2021 SORA are uniquely punitive for all individuals convicted of sexual offenses.” *Kardasz*, ___Mich at ___; slip op at 39-40. This Court did find, however, that the penalty did not advance the goal of rehabilitation for most Tier III offenses. *Kardasz*, ___Mich at ___; slip op at 41. This Court ultimately determined that the 2021 SORA was not cruel or unusual punishment as applied to Kardasz. This Court noted, “Tier III offenders have committed serious sexual offenses. Their punishment is unique to sex offenses, but it is in alignment with a plurality of states that utilize sex-offender-registration schemes in accordance with the federal SORNA requirements. Moreover, defendant committed the most elevated registrable offense and has not provided evidence to support a claim that lengthy registration requirements are not appropriate relative to his individualized level of risk of reoffending.” *Kardasz*, ___Mich at ___; slip op at 41-42.

Defendant likewise cannot prevail on an as-applied challenge. First and foremost, defendant is not subject to any punishment at all. He is not on the public database since he does not have to register in Michigan or in his home state and defendant is not subject to in-person reporting. *Kardasz*, ___Mich at ___; slip op at 21-23. He is not subject to shaming, he is not subject to any restraints, much less restraints which are akin to parole. *Kardasz*, ___Mich at ___; slip op at 18-20. The 2021 SORA cannot be considered as a deterrent or retributive as to defendant. *Kardasz*, ___Mich at ___; slip op at 23-24. Even if he visited the state of Michigan on a short-term basis, as soon as he left, as an out-of-state registrant who committed his listed offense before July 1, 2011, all obligations would cease. MCL 28.723(1)-(3).

But, even if hypothetically, defendant had to currently register:

- Defendant was convicted of an offense akin to one that this Court has categorized as one of the “gravest sexual crimes, such as assault with intent to commit criminal sexual conduct involving penetration.” *Kardasz*, ___Mich at ___; slip op at 37. Defendant was convicted of attempting to rape the victim at knifepoint.
- Unlike other Tier III offenders in Michigan and across the United States, defendant could control whether he had to register since he could have abstained from committing a felony after 2011.

- Defendant has not shown that he could reintegrate “as a noncriminal member of society.” *Kardasz*, ___Mich at ___; slip op at 40 citing *People v Lymon*, 514 Mich___, ___; ___NW3d___ (2024); slip op at 37. Defendant has shown a tendency to recidivate not only by committing the crime that triggered his registration on the sex offender registry, but by his commission of 22 felonies and 14 prior misdemeanors. The mere prospect of re-arrest and re-conviction and SORA registration has not been enough to curb his criminal conduct.
- Where a defendant commits a sex offense in the past and has shown a recent general tendency to recidivate by committing a new felony offense, he poses a potential threat of committing a new sex offense in the future and therefore registration is not a grossly disproportionate punishment.

People v Kardasz supports the People’s argument that defendant is not entitled to relief.

RELIEF

WHEREFORE, Amicus respectfully requests that this Honorable Court either deny leave or affirm the Court of Appeals' opinion.

Respectfully submitted,

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Word Count

I certify that this document contains 1254 countable words and is set in 12-point Century Schoolbook type with one-inch margins and 1.5-line-spaced text, except quotations and footnotes are single-spaced. Amicus has filed a motion to exceed the word count.

/s/ Danielle Walton
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