Multiple Documents

Part	Description
1	28 pages
2	Exhibit Exhibit 1
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

JOHN DOES, #1-6, on behalf of themselves and all others similarly situated,

Plaintiff,

v

RICHARD SNYDER, Governor of the State of Michigan, COL KRISTE ETUE, Director of the Michigan State Police, in their official capacities,

Defendants.

No. 2:16-cv-13137

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DEFENDANTS' OPPOSITION TO PLAINTIFFS' AMENDED MOTION FOR ENTRY OF JUDGMENT

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INTRODUCTION

The passage of Michigan's revised SORA, Public Act 295 of 2020 resolves this case definitively. If the full measure of the reporting obligations and student safety zone restrictions under the Michigan's Sex Offenders Registration Act constitute punishment, then the Legislature's act in reducing some of these duties—e.g., allowing for a method of reporting other than in-person for certain minor changes and eliminating the student safety zones in total—is ameliorative and operates retroactively for pending cases. Because the 2020 revisions to SORA apply retroactively, there is no legal basis to prosecute offenders under the old provisions of SORA that have been revised or repealed.

Put simply, Michigan's new and old SORA laws have collapsed into one set of requirements for all pending and future cases as reflected in Michigan Public Act 295 of 2020. After the revised SORA takes effect on March 24, 2021, the question of whether conduct is subject to prosecution under SORA will be decided by applying Public Act 295 of 2020. Therefore, the current controversy is moot and judgment need not enter. This issue is pending before the Michigan Supreme Court, and its construction of Michigan law is controlling.

If the Court disagrees, this Court should refrain from entering judgment, which might conflict with any decision from the Michigan Supreme Court about the continuing operation of Michigan's unrevised SORA. If the Court is resolved to issue a judgment while this question pends in the Michigan Supreme Court, this Court's judgment should make clear that claim preclusion and issue preclusion do not apply and expressly note the ability of the Michigan Supreme Court to resolve the issues of retroactivity and severance of SORA is preserved for purposes of the pending cases of *People v. Betts* (No. 148981) and *People v. Snyder* (No. 153696), consistent with this Court's February 14, 2020 opinion and order.

Moreover, if the Court is inclined to enter judgment, it should not do so until after Public Act 295 of 2020 takes effect on March 24, 2021. Finally, if any judgment is entered, the Court should delay notice of the judgment to registrants, police, and prosecutors until after the Michigan Supreme Court issues a decision in the pending *Betts* and *Snyder* cases.

ARGUMENT

I. The current controversy is moot because the revisions to SORA in Public Act 295 of 2020 apply retroactively such that there is no legal way that any offender could be prosecuted under the old SORA.

A. The revised SORA functions as ameliorative legislation and should be applied retroactively.

Michigan Public Act 295 of 2020 amends and repeals sections of SORA to cure the constitutional deficiencies identified by the Sixth Circuit in *Does #1-5 v. Snyder*, 834 F.3d 696, and this Court in *Doe v. Snyder*, 449 F. Supp. 3d 719 (E.D. Mich. 2020). (*See* R. 105, Page ID # 2120, Defs.' Notice of Supp. Authority (summarizing revisions).) The Legislature revised and repealed provisions of SORA containing requirements enacted by the 2006 and 2011 amendments to save SORA from ex post facto challenge. (*See* Exhibit 1, Muskegon County Prosecuting Attorney's Supp. Br. on Appeal in *Betts*, at 3–6 (summarizing legislative analysis of Public Act 295 of 2020); Exhibit 2, Gratiot County Prosecutor's Second Supp. Amicus Br. in *Betts*, at 2–6 (concurring in retroactivity argument).)

If the old SORA is punishment, the question is whether the revised SORA functions as ameliorative legislation and can be applied retroactively. The Defendants' answer is: "Yes."

Under Mich. Comp. Laws § 8.4a, the repeal of any statute, in whole or part, will not release or relinquish any penalty or liability incurred under such statute unless the repealing act expressly provides otherwise. Here, the Legislature has expressed its intent to apply Public Act 295 of 2020 retroactively to all pending and future cases by repealing or revising the provisions of SORA held unconstitutional. (*See* Exhibit 1, at 3–6.)

In the seminal case, *People v. Schultz*, 460 N.W.2d 505, 510–512 (Mich. 1990), the plurality opinion interpreted § 8.4a to hold that the ameliorative effects of punishment found in an amended statute apply retroactively to a case still pending. In construing Michigan law, the plurality opinion in *Schultz* stated with regard to the same conduct that "in the absence of a contrary statement of legislative intent, criminal defendants are to be sentenced under an ameliorative amendatory act that is enacted subsequent to the date of offense and becomes effective during the pendency of the prosecution." 460 N.W.2d at 511 (Archer, J., plurality). In other words, if the amendatory act continues to address the same conduct, but ameliorates the punishment, the law as amended applies.

Given that the Michigan Court of Appeals adopted this analysis in a published decision, *People v. Scarborough*, 471 N.W.2d 567, 568 (Mich. App. 1991), leave denied, 482 N.W.2d 753 (Mich. 1992), this principle has been the controlling one in Michigan courts for almost thirty years. *People v. Doxey*, 687 N.W.2d 360, 363 (Mich. App. 2004) (noting that the court in *Scarborough* "adopt[ed] the holding and reasoning of *Schultz*, having been decided after November 1, 1990, is binding on this panel under MCR 7.215(J)(1).").

Notably, this retroactivity applies to the few pending cases that remain open on direct review (e.g., *Betts* and *Snyder*). It also applies to "subsequent" or any new cases, but it does not apply to cases final on direct review. *Schultz*, 460 N.W.2d at 510 ("the common-law abatement doctrine did not affect completed prosecutions").

For example, this principle of retroactivity applies to pending cases, e.g., failure to update a new address (*Betts*) or failure to update a new employer (*Snyder*), see Mich. Comp. Laws § 28.725(1) (2020 P.A. 295), as well as to any new case that a prosecutor might wish to bring before the effective date of the new SORA, e.g., failure to report minor changes such as a new electronic mail address or temporary residence, see Mich. Comp. 28.725(2)(a), (2)(b) (2020 P.A. 295). For these later

changes under § 5(2), the same conduct–consistent with the analysis in *Schultz*–is still subject to the same requirement, i.e., the duty to update information with the proper jurisdiction. The only change is procedural for these obligations in § 5(2), which provides three business days to update the information in a manner other than appearing in person. *See* Mich. Comp. Laws § 28.725(2) (2020 P.A. 295) ("An individual required to be registered under this act who is a resident of this state shall report *in the manner prescribed by the department*") (emphasis added); compare Mich. Comp. Laws § 28.725(1) (2020 P.A. 295) ("An individual required to be registered under this act who is a resident of this state ***shall report in person****, or in another manner as prescribed by the department*") (emphasis added). This change in the manner of reporting is a procedural change, not a substantive one. *See United States v. Pertuset*, 160 F. Supp. 3d 926, 933 (S.D.W. Va. 2016) ("Subsection (c) of [§] 16913 [of SORNA], which is titled 'Keeping the registration current,' *addresses the* ***procedure*** when an offender, who has registered, later changes his name, residence, employment, or student status.") (internal quotes, brackets omitted; emphasis added). Thus, all the obligations to report under § 5, as revised in Public Act 295 of 2020, apply retroactively for pending and future cases.

The same is true for the elimination of the student safety zones in that this change applies retroactively. Accepting that premise that the unrevised SORA constitutes punishment, the primary punitive elements were the student safety zones, which the Sixth Circuit concluded were in important respects akin to banishment. *Does #1-5*, 834 F.3d at 701 ("More specifically, SORA resembles, in some respects at least, the ancient punishment of banishment"). It is as if the SORA law no longer allows for banishment. In this way, under *Schultz* their elimination would operate as an amelioration, i.e., an elimination of the SORA elements that made it punitive. *See id.*, 460 N.W.2d at 512 (giving effect to the reduced punishment for a crime that occurred before its effective date). The revised SORA is now – just as SORNA – fully regulatory and non-punitive. (The SORA laws do, of course, punish those who violate their duties.)

As a result, Michigan's new and old SORA laws have collapsed into one set of requirements for all pending and future cases as reflected in Public Act 295 of 2020. Michigan's registrants are governed by one metric for their conduct after March 24, 2021, and the same applies for

any conduct that occurred before.[1] The student safety zones are gone for all pending and future cases.

To break-down this argument, here is a depiction of the version of SORA that applies based on the timing of the offense:

Timing of Offense	**Applicable Version of SORA**
Violations that occur before March 24, 2021 and are **final on direct review**	The old SORA applies and there is no retroactivity
Violations that occur before March 24, 2021 and are **pending on direct review**	The new SORA applies and there is retroactive application of the revisions to the law
Violations that occur before March 24, 2021 and **have not been charged**[2]	The new SORA applies and there is retroactive application of the revisions to the law
Violations that occur on or after March 24, 2021	The new SORA applies

[1] The only arguable exceptions to this point are the other small revisions to SORA, such as the ones addressing the use of vehicles, e.g., see Mich. Comp. Laws § 28.727(1)(j) (2020 P.A. 295), but these changes were merely clarifying to rectify language found to be vague.

[2] This Court's interim order enjoined any prosecution for violations of Michigan's unrevised SORA for conduct that occurred after February 14, 2020. (R. 91, Page ID # 1850.)

In arguing against retroactivity, Plaintiffs rely on federal case law that is not persuasive and discusses cases that are final. (R. 107, Page ID # 2147 (citing, inter alia, *United States v. Richardson*, 948 F.3d 733, 746 (6th Cir. 2020) (holding First Step Act § 403 does not extend to defendants who were sentenced prior to the Act's enactment but had not yet exhausted their direct appeals). It is undisputed that the old SORA applies to cases final on direct review.

And it is clear that Michigan's revised SORA may apply retroactively as a matter of ex post facto law, where as here it is a regulatory, and not a punitive, scheme. Cf. *People v. Golba*, 729 N.W.2d 916, 925 (Mich. Ct. App. 2007) (reviewing an earlier version of Michigan's SORA and finding it regulatory).

There is one final caveat to this point. This brief acknowledges that *Schultz* only applies by analogy here. The SORA is not a criminal law, and Defendants have argued that it is not punitive. The federal courts have ruled to the contrary. If so, the unrevised SORA is a regulatory scheme with some elements that have made it punitive. In that setting, the Legislature has pruned those punitive elements, consistent with the reasoning of the Sixth Circuit in *Does #1-5*, 834 F.3d at 701, leaving again a true regulatory scheme.

The Michigan Supreme Court in *Schultz* was examining a criminal law, which was designed to be punitive, and the amelioration left a lesser punishment in place. This application is different, because once pruned, there is nothing punitive left in the revised SORA, nothing but a true regulatory scheme, which is designed to "protect[] against the commission of future criminal sexual acts." Mich. Comp. Laws § 28.721a. That is why it is applied generally to sex offenders who are convicted on October 1, 1995 or after, among others. Mich. Comp. Laws § 28.723(1)(a). Even so, regarding the principle that the Legislature's authority should be honored, *see Schultz,* 460 N.W.2d at 509 (Archer, J.) ("the people have vested in the Legislature the exclusive authority to determine the terms of punishment imposed for violations of the criminal law"), it applies equally here when the Legislature ameliorates a regulatory statute with punitive elements even if the Legislature leaves a true regulatory statute in its wake.

In sum, Michigan law, Mich. Comp. Laws § 8.4a, and the seminal case *Schultz*, support retroactive application of Public Act 295 of 2020 to remedy any ex post facto challenge to SORA.

B. This case should be dismissed because Public Act 295 of 2020 rendered Plaintiffs' challenges to the old SORA moot.

The current controversy is moot. A case is moot and is outside of this Court's Article III authority "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation omitted). An "advisory opinion[] on abstract propositions of law" must be avoided. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam). "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). The limits of Article III jurisdiction are "built on separation-of-powers principles," which "serve[] to prevent the judicial process from being used to usurp the powers of the political branches." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 407 (2013)).

Generally, and pertinent here, the legislative repeal of a statute renders a case challenging that statute moot. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 644 (6th Cir 1997); *see also Massachusetts v. Oakes*, 491 U.S. 576, 582–584 (1989) (refusing to reach First Amendment overbreadth challenge because legislative amendment of

the challenged statute while the case was pending rendered the issue moot). Stated differently, where "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation," there is no controversy left for the court to decide. *Ammex, Inc. v. Cox*, 351 F.3d 697, 705 (6th Cir. 2003) (quoting *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979)). Such is the case here with passage of Public Act 295 of 2020.

Consistent with these principles, final judgment need not enter, and this case should be dismissed with prejudice.

II. Any final judgment should make clear that it does not preclude the Michigan Supreme Court from reaching decisions in the pending cases of *People v. Betts* (MSC No. 148981) and *People v. Snyder* (MSC No. 153696).

In rejecting the Defendants' request to certify the issue of severance to the Michigan Supreme Court, this Court made clear that it could "conform" its opinion to that decision if necessary. (*See* R. 84, Page ID # 1792, n. 6) ("Should the *Betts* court reach the issue of the of severability of the 2011 amendments and that ruling runs somehow contrary to this court's determination, this court can modify its judgment to conform with *Betts*.").) In other words, this Court expressly contemplated that the Michigan Supreme Court could move forward

with its analysis of the question of state law without its decision having preclusive effect.

Given that the judgment of sentence in *People v. Betts* (No. 148981) entered on August 22, 2013 and that the judgment of sentence entered on December 15, 2014 in the companion case, *People v Snyder* (No. 153696), which is being held in abeyance pending *Betts,* this Court should note that its judgment does not apply to these two pending cases. These state judgments reached finality in state court before any of the adverse orders at issue here, and thus this Court's decision should not supersede them.

Such a conclusion is not only consistent with this Court's statements at argument and in its February opinion and order, but it is also consistent with the federal rules of preclusion as well as the proper reading of Michigan's rules. The federal rules do not apply where the federal judgment was later in time. *See Nationwide Mut Ins Co. v. Liberatore*, 408 F.3d 1158, 1162 (9th Cir., 2005) ("a district court judgment carries preclusive effect going forward, it cannot operate to bar direct review of an extant judgment"; "To permit another action upon the same cause to displace the direct review of the first judgment would be to invert the doctrine's precepts.") (citing *Federated Dep't*

Stores v. Moitie, 452 U.S. 394, 398 (1981)). And the correct reading of Michigan law is that an appeal does not deprive a judgment of its finality. *See Rayfield v. Am. Reliable Ins. Co.*, 641 F. Appx. 533, 536 (6th Cir. 2016) (" 'Michigan and federal courts hold that appeal of a judgment does not alter the judgment's preclusive effect' ") (quoting *Roskam Baking Co. v Lanham Mach Co.*, 105 F. Supp. 2d 751, 755 (W.D. Mich 2000) aff'd, 288 F.3d 895, 905 (6th Cir., 2002) ("Michigan law permits preclusion of issues decided by a judge as part of a summary disposition")).

The attorneys for Plaintiffs argue that this is not a correct understanding of Michigan's rules of issue preclusion (collateral estoppel). (*See* R. 103, Page ID # 2090, n. 13 (asserting "the Michigan Court of Appeals has consistently held that a state court decision is final only when all appeals have been exhausted.") (citing, inter alia, *Leahy v. Orion Twp*, 711 N.W.2d 438 (Mich. Ct. App. 2006)).) But Defendants contend that they offer the better reading of Michigan law, as explained by the decision in *In re Kramer*, 543 B.R. 551, 554 (Bankr. E.D. Mich 2015) ("under Michigan law, collateral estoppel applies to judgments even when they are pending on appeal or the time for appeals has not yet expired"). *Kramer* explained that "the above quote

in *Leahy*, if applied [this] way . . . , would be inconsistent with the rule stated by the Michigan Supreme Court in *Hackley* [*v. Hackley*, 395 N.W.2d 906, 910 (Mich. 1986)] that issue preclusion applies to a judgment 'so long as [it] remains unmodified.' " *Kramer,* 543 B.R. at 557–58.

In the end, the attorneys for the Plaintiffs argue that this Court's decision here should bar the Michigan Supreme Court from ruling on the pending issues in *Betts*. (*See* R. 103, Page ID # 2091.) If this Court enters judgment, this Court should make clear that its decision does not have this effect.

III. This Court should delay entry of any final judgment and any notice until after the new SORA takes effect and the Michigan Supreme Court issues decisions in *Betts* and *Snyder*.

Defendants contend that the passage of Public Act 295 of 2020 resolves this case definitively and obviates the need for entry of final judgment or judicial notice. These same arguments have been presented to the Michigan Supreme Court, and the matter is pending before that court. As a matter of state law, that court's determination of the issue will be controlling. *See, e.g., Montana v. Wyoming,* 563 U.S. 368, 377 n.5 (2011) ("The highest court of each State, of course, remains

"the final arbiter of what is state law."). And, unlike the issue about the constitutionality of Michigan's unrevised SORA or the question of severance, this issue is entirely new, and it has only been pending since the enactment of Michigan's revised SORA less than two months ago.[3] If this Court has decided to enter a judgment, it should at least delay entry of judgment and any judicial notice until after the revised SORA becomes effective on March 24, 2021 and the Michigan Supreme Court issues a decision in the pending cases of *Betts* and *Snyder*.

A. Any final judgment should enter after Public Act 295 of 2020 becomes effective on March 24, 2021.

If this Court has decided to enter final judgment, it should delay entry until after the new SORA takes effect on March 24, 2021. This approach is consistent with the Court's interim order suspending entry of final judgment to allow the Michigan Legislature an opportunity to enact a new SORA statute. (*See* R. 91, Page ID # 1848–1849.) It will

[3] The *Betts* court asked the parties to address the following three questions "if this Court finds that the retroactive application of [SORA] is unconstitutional": (1) whether the constitutional infirmity may be remedied through the application of Public Act 295 of 2020; (2) if not, whether Public Act 295 of 2020 has any effect on the potential remedy; and (3) what effect the answers to these questions have upon defendant's conviction for failure to register under SORA. (Exhibit 3, Order, dated Jan. 29, 2021.)

also allow for a continuous transition to the new SORA and avoid unnecessary disruption and confusion.

If judgment is entered now—less than one month before the new SORA takes effect—the registry will go dark for all pre-2011 offenders. Moreover, if judgment were to enter, Defendants would soon be required to notify registrants of this Court's decision holding that portions of the old SORA violate the Constitution. (*See* R. 84, Page ID # 1804.) The new SORA autonomously requires notice to registrants of their duties under the new law. Mich. Comp. Laws § 28.725a(1) (2020 P.A. 295) ("The department shall mail a notice to each individual registered under this act who is not in a state correctional facility explaining the individual's duties under this act as amended."). It would only sow greater confusion to send (1) notice that this Court held SORA to be (fully or partially) unenforceable against registrants; and (2) notice that registrants must comply with the new SORA. Thus, this Court should delay entry of any final judgment until after the new SORA has become effective.

B. Any final judgment should enter and any notice should issue after the Michigan Supreme Court rules on the issues of retroactivity and severability in *Betts* and *Snyder*.

Again, the new SORA requires notice to registrants of their obligations under the registration statute and renders the need for judicial notice moot. Mich. Comp. Laws § 28.725a(1) (2020 P.A. 295). If this Court disagrees with Defendants' retroactivity analysis, it should delay the issuance of any judgment until after the Michigan Supreme Court decides *Betts* and *Snyder* as noted above. And, at the very least, it should delay the issuance of any judicial notice. The *Betts* court is currently considering whether the 2020 SORA amendments apply retroactively, and, alternatively, whether the 2011 SORA amendments are severable. (*See* Exhibits 1–3.) Entering a judgment, as well as sending a premature notice of this Court's decision to registrants will create greater confusion if the Michigan Supreme Court's ruling runs contrary to this Court's determinations.

To illustrate this argument, here are three potential outcomes that may result in different notice requirements.

First, the *Betts* court holds that Public Act 295 of 2020 can be applied retroactively and therefore there is no legal basis to prosecute

individuals under the old SORA. Thus, the new SORA will obviate the need for judicial notice of this Court's decision regarding the old SORA. Notice to registrants of their obligations under the new SORA will be a function of the change in law, not this litigation.

Second, the *Betts* court elects not to find the 2020 SORA revisions retroactive but holds the 2011 SORA amendments are severable consistent with the Legislature's most recent changes to the law. (*See* Exhibit 2, at 7–9.) This conclusion will create two categories of violations that occur before March 24, 2021: (1) the pre-2011 offenders who would not be subject to the student safety zones, the registration requirements for electronic mail addresses and internet identifiers, or the in-person reporting obligations for certain minor changes to their status, i.e., temporary residence, change in vehicle, or change in telephone number; and (2) the post-2011 offenders who would. This outcome will require judicial notice regarding the constitutionality and enforceability of the 2011 SORA amendments as applied to both categories of pre-2011 and post-2011 offenders.

Third, the *Betts* court and this Court reject both the retroactivity and severability arguments. In this scenario, Defendants will be required to send judicial notice of this Court's final judgment holding

the old SORA unconstitutional and unenforceable as applied to pre-2011 offenders.

If Defendants are required to provide notice of this Court's decision prior to the Michigan Supreme Court's decision in *Betts*, Defendants may be required to subsequently retract or amend such notice to conform to *Betts*. The new law already requires the State to send notices to the registrants about their obligations under the new law. *See* Mich. Comp. Laws § 28.725a(1) (2020 P.A. 295). Sending multiple (and conflicting) notices to registrants runs counter to the purpose of sending notice: to inform registrants. This Court should hold off entering any judgment. But if the Court has decided to enter judgment, the Court should delay the issuance of any notice of the judgment to registrants, police, and prosecutors until after the Michigan Supreme Court issues a decision in the pending *Betts* and *Snyder* cases.

CONCLUSION AND RELIEF REQUESTED

This controversy is moot because none of the offending provisions of SORA survive the enactment of Public Act 295 of 2020. Further, the revisions to SORA in Public Act 295 of 2020 apply retroactively such that there is no legal basis to prosecute an offender under the old

SORA. The revised SORA requires notice to registrants of their obligations under the registration statute and renders the need for final judgment or judicial notice moot. This Court should dismiss the complaint.

Alternatively, if the court disagrees, it should delay any judgment while the Michigan Supreme Court entertains the identical question of retroactivity. But if this Court has decided to issue a judgment, any judgment should make clear that claim preclusion and issue preclusion do not apply and preserve the ability of the Michigan Supreme Court to resolve the issue of retroactivity and severance pending in *Betts*. Further, if the Court is inclined to enter judgment, the Court should wait until after Public Act 295 of 2020 becomes effective on March 24, 2021, and delay issuance of any judicial notice until after the Michigan Supreme Court issues a decision in the pending case of *Betts* as the final arbiter of state law in Michigan.

Respectfully submitted,

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Dated: February 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, I electronically filed the above document(s) with the Clerk of the Court using ECF System, which will provide electronic copies to counsel of record.

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EXHIBIT 1

STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

KIRSTEN FRANK KELLY, P.J., and CYNTHIA DIANE STEPHENS and MICHAEL J. RIORDAN, JJ.

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

Supreme Court
Docket No. 148981

PAUL J. BETTS, JR.,

Defendant-Appellant.
/

Michigan Court of Appeals No. 319642
14th Judicial Circuit Court No. 12-062665-FH

SUPPLEMENTAL BRIEF ON APPEAL – APPELLEE

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STATEMENT OF THE QUESTION PRESENTED

IS ANY CONSTITUTIONAL INFIRMITY IN APPLYING RETROACTIVELY THE SEX OFFENDER REGISTRATION ACT REMEDIED BY APPLICATION OF THE AMELIORATIVE OR MITIGATING EFFECTS OF RECENTLY ENACTED 2020 PA 295 UNDER MCL 8.4A?

Plaintiff-Appellee says, "Yes."
Defendant-Appellant says, "No."
The trial court did not answer this question.
The Court of Appeals did not answer this question.

STATEMENT OF THE FACTS

Following oral argument, the Legislature enacted 2020 PA 295 (Appendix E), which removed from the Sex Offenders Registration Act (SORA), MCL 28.721a, *et seq*., the school-safety-zone provision[1]; the three-day in-person reporting requirement for temporary residence, electronic mail, or any vehicle[2]; and the public nature of tier classifications[3].

The significance of the Legislature's amendment to SORA is how it addresses Defendant's facial challenge to SORA. This challenge has three components. *First*, it declares that the foregoing provisions constitute punishment. *Second*, there is no need to find how these provisions disadvantage a particular defendant because they must be applied globally. *Third*, because SORA constitutes punishment, it is unconstitutional under the *Ex Post Facto Clause*, US Const, art I, § 10, cl 1, when applied retroactively.

The People have already presented their position of why SORA is not punishment. The Legislature's recent amendment to SORA establishes a remedy to Defendant's theory that it does. This Court recognized this potential by

> DIRECT[ING] the parties to file supplemental briefs within 28 days of the date of this order addressing the following issues: if this Court finds that the retroactive application of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., is unconstitutional, (1) whether the constitutional infirmity may be remedied through the application of the recently enacted 2020 PA 295; (2) if not, whether 2020 PA 295 has any effect on the potential remedy; and (3) what effect the answers to these questions have upon defendant's conviction pursuant to MCL 28.729 for failure to register under SORA. [Appendix A.]

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[1] See 2005 PA 121, §§ 33-36, MCL 28.733, MCL 28.734, MCL 28.735, and MCL 28.736.

[2] See, respectively, 2011 PA 17, § 5(1)(e), MCL 28.725(1)(e) ("[t]he individual intends to temporarily reside at any place other than his or her residence for more than 7 days"), 2011 PA 17, § 5(1)(f), MCL 28.725(1)(f) ("[t]he individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings"), and 2011 PA 17, § 5(1)(g), MCL 28.725(1)(g) ("[t]he individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued").

[3] See 2011 PA 18, § 8(2)(*l*), MCL 28.728(2)(*l*).

LAW AND ARGUMENT

ANY CONSTITUTIONAL INFIRMITY IN APPLYING RETROACTIVELY THE SEX OFFENDER REGISTRATION ACT IS REMEDIED BY APPLICATION OF THE AMELIORATIVE OR MITIGATING EFFECTS OF RECENTLY ENACTED 2020 PA 295 UNDER MCL 8.4A.

A. *Standard of review*

"Questions of constitutional and statutory interpretation present questions of law reviewed de novo." *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016) (footnote omitted).

B. *Analysis of the issue*

Leading up to now, the issue before the Court has been whether SORA is a penal or criminal law. This requires an interpretation of SORA to determine "whether the legislature meant the statute to establish 'civil' proceedings." *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140, 1146-1147; 155 L Ed 2d 164 (2003), quoting *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072, 2081-2082; 138 L.Ed.2d 501 (1997). "Although … a 'civil label is not always dispositive,"… [the Court] will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil[.]'" *Hendricks*, 521 US at 361; 117 S Ct at 2082. The Legislature meant to establish civil proceedings as evidenced by its declaration of purpose. See MCL 28.721a. Thus, the question remaining is whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil[.]'" This involves application of the five to seven factors outlined as "useful guideposts" in *Smith*, 538 US at 97; 123 S Ct at 1149.

Before the foregoing questions have been answered by this Court, the Legislature has been on the sidelines watching how its legislation has been poked and prodded by the judiciary vis-à-vis the *Ex Post Facto* Clause. It certainly has been aware of the issues involving SORA given, for example, the Sixth Circuit's decision in *Does #1-5 v Snyder*, 834 F3d 696, 700-701 (CA 6, 2016), cert denied sub nom *Snyder v John Does #1-5*, ___ US ___; 138 S Ct 55; 199 L Ed 2d 18 (2017), and, of course, this Court's consideration of the issue in the instant case.

On March 17, 2020, House Bill 5679 was introduced and the initial Legislative Analysis was completed May 6, 2020. (Appendix B.) This Legislative Analysis noted the judicial history, stating in part:

> **Brief description of related court cases and orders**
> Michigan's sex offender registry was created by 1994 PA 295. The registry has been amended numerous times since, most notably in 2006 (addition of geographic exclusion zones restricting where registrants could live, work, or visit) and 2011 (establishment of tier classification system, increased registration periods). In 2015, in what is referred to as *Does I*, a federal district court held that certain provisions of SORA were unconstitutional and therefore unenforceable (e.g., the exclusion zones). The state appealed, and in 2016 the federal Sixth Circuit Court ruled that the 2006 and 2011 amendments were punishment and could not be applied retroactively, meaning that the amendments made to SORA by that legislation only applied to those placed on the registry after the statutory changes took effect.[1] An appeal by the state to the U.S. Supreme Court was denied.
>
> *Does II*, a class action civil suit brought on behalf of all current registrants and individuals who will be required to register to ensure that the *Does I* decision is applied to all registrants, was subsequently filed.[2]
>
> On May 23, 2019, a federal district court for the Eastern District issued an order setting a 90-day deadline (August 21, 2019) for the registry law to be revised in line with the previous court decisions. Under the declaratory judgment, the court could enter an injunction that would bar (or prohibit) enforcement of parts or all of SORA against many of the current registrants until such time as the legislature revises or replaces the act to address the issues raised by the court.
>
> Further, on April 6, 2020, an interim order was issued by Judge Cleland of the federal district court of the Eastern District.[3] The order stops law enforcement from enforcing registration, verification, and school zone and fee violations

> connected with Michigan's sex offender registry law from February 14, 2020, through the end of the COVID-19 crisis. The order does not prohibit maintenance of, or voluntary compliance with, the registry.[4]

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[1] #1-5 *Does v Snyder*, 834 F3rd 696 (6th Cir 2016)

[2] *Does # 1-6 v Snyder*, No. 16-cv-13137 E.D. Mich.

[3] https://www.michigan.gov/documents/msp/SORA_Does_II-_4-6-2020_Interim_Order_and_Preliminary_Injunction_686125_7.pdf

[4] See https://www.michigan.gov/msp/0,4643,7-123--524592--,00.html [Appendix B, pp 5-6.]

A proposed substitute (H-2) for House Bill 5679 was introduced and the Legislative Analysis of this substitute was completed to December 1, 2020. (Appendix C.) It parroted the foregoing information about the judicial history on SORA. (*Id.*, pp 5-6.)

After House Bill 5679 passed in the House, it went to the Senate. The Bill Analysis in the Senate (Substitute H-5 as passed in the House), was completed on December 9, 2020 (Appendix D), and discussed the background for the Bill as follows:

> The Michigan Sex Offender Registry (SOR) was created under the Sex Offender Registration Act in 1994. Since its creation, the Legislature has been amended the Act several times, including in 2006 (prohibiting certain individuals required to be registered under the Act from living, working, or loitering within a "school safety zone" (within 1,000 feet of school property), subject to exceptions),[1] and in 2011 (aligning the Act with the Federal Sex Offender Registration and Notification Act by categorizing offenses subject to the Act's registration and reporting requirements in a tier classification system).[2]
>
> In 2015, a US Federal District Judge ruled that, among other things, the prohibitions on living, working, and loitering within a school safety zone were unconstitutionally vague in violation of the Due Process Clause and that the requirements to report all telephone numbers, electronic mail addresses, and instant message addresses routinely used by an individual required to be registered under the Act were unconstitutionally vague in violation of the Due Process Clause and First Amendment of the US Constitution. *Does v. Snyder*, opinion of the US District Court for the Eastern District of Michigan, Case No. 12-11194 (*Does I*). The plaintiffs (the individuals required to be registered under the Act) and defendants (the Snyder Administration) appealed the case to the Sixth Circuit Court of Appeals, which held that the Act imposes punishment and that the retroactive application of the 2006 and 2011 amendments was unconstitutional. *Does #1-5 v. Snyder*, 834 F3d 696 (US Court of Appeals for the

Sixth Circuit) (2016). The Sixth Circuit remanded the case and the District Court entered a final judgment declaring the retroactive application of the Act's 2006 and 2011 amendments violated the Ex Post Facto Clause of the US Constitution and enjoined the Defendants from enforcing the 2006 and 2011 amendments against the plaintiffs. The Snyder Administration appealed to the US Supreme Court, but the Court refused to hear the case.

Shortly after the Sixth Circuit's decision in *Does I*, six plaintiffs filed a class action complaint challenging the constitutionality of the Act. Specifically, the plaintiffs challenged the retroactive application of the 2006 and 2011 amendments; that electronic mail and instant message address reporting requirements violated the First Amendment; that the prohibitions on living, working, and loitering within a school safety zone and the requirements to report all telephone numbers, electronic mail addresses, and instant message addresses were unconstitutionally vague; and that the imposition of a strict liability scheme for violations of the Act violated the Due Process Clause. A Federal District Judge certified a primary class that included all individuals required to be registered under the Act and two ex post facto subclasses.

In May 2019, the district court entered a stipulated order granting declaratory relief for the plaintiffs, holding that the 2006 and 2011 amendments were unconstitutional as applied to the ex post facto subclasses. The district court also deferred ruling on the issues of injunctive relief and the severability of the 2006 and 2011 amendment for 90 days to allow the Legislature to revise the Act to comply the *Does I* decision and address the Act's constitutional deficiencies.

In February 2020, the district court declared the Act null and void as applied to members of the ex post facto subclasses (any individual required to be registered under the Act who[se] offense required registration prior to April 12, 2011) and prohibited the Defendants from enforcing any of the Act's provisions against members of the ex post facto subclasses. *Doe v. Snyder*, opinion of the US District Court for the Eastern District of Michigan, Case No. 16- 13137 (*Does II*). The court prohibited the enforcement of the prohibitions on living, working, and loitering within a student safety zone; the requirements to report telephone numbers, electronic mail addresses, and instant message addresses routinely used by the individual required to be registered under the Act; and the requirement to report license plate and registration numbers of any motor vehicle, aircraft, or vessel regularly operated by the individual required to be registered under the Act. The district court also delayed the effective date of its decision until 60 days after entry of the final judgment to allow the Legislature to enact a new statute and to ensure that individuals required to be registered under the Act, prosecutors' offices, and law enforcement would receive notice of the order before relief took effect.

In April 2020, the district court issued an interim order delaying entry of final judgment in *Does II* because of the COVID-19 pandemic. The order prohibits the

> Defendants from enforcing regulation, verification, school zone, and fee violations that occurred after February 14, 2020, until the end of the COVID-19 pandemic. The court also ordered the parties to report every 30 days on their progress in completing the tasks set out in the court's February opinion.

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[1] PA 121 and 127 of 2005.

[2] PA 17 of 2011. [Appendix D, pp 7-8.]

On December 16, 2020, the House and Senate concurred on the final version of House Bill 5679. (Appendix F.) 2020 PA 295 was approved by the Governor on December 29, 2020, filed with the Secretary of State on December 29, 2020, and is effective March 24, 2021. (Appendix E.)

Accordingly, the Legislature was fully informed about the judicial consideration of SORA and clearly understood that the *ex post facto* issue turned on the school-safety-zone provision[4]; the three-day in-person reporting requirement for temporary residence, electronic mail, or any vehicle[5]; and the public nature of tier classifications[6]. It took its legislative scalpel to those provisions, surgically removing them in order to cease the debate over whether SORA constitutes punishment. (Appendix E and Appendix F.) The Legislature's "civil label" found in MCL 28.721a, is now supported by the Legislature's separate effort to address the *ex post facto* problems with SORA head-on. Thus, the "useful guideposts" in *Smith* are no longer needed. The Legislature has saved SORA from *ex post facto* challenge by enacting 2020 PA 295.

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[4] See 2005 PA 121, §§ 33-36, MCL 28.733, MCL 28.734, MCL 28.735, and MCL 28.736.

[5] See, respectively, 2011 PA 17, § 5(1)(e), MCL 28.725(1)(e) ("[t]he individual intends to temporarily reside at any place other than his or her residence for more than 7 days"), 2011 PA 17, § 5(1)(f), MCL 28.725(1)(f) ("[t]he individual establishes any electronic mail or instant message address, or any other designations used in internet communications or postings"), and 2011 PA 17, § 5(1)(g), MCL 28.725(1)(g) ("[t]he individual purchases or begins to regularly operate any vehicle, and when ownership or operation of the vehicle is discontinued").

[6] See 2011 PA 18, § 8(2)(*l*), MCL 28.728(2)(*l*).

"Statutes must be construed in a constitutional manner if possible, and the burden of proving that a statute is unconstitutional is on the party challenging it." *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000).

Again, Defendant's theory is that SORA constitutes punishment because of the school safety zone provision; the three-day, in-person reporting requirement for temporary residence, electronic mail, or any vehicle; and the public nature of tier classifications.

In Defendant's case, he was convicted under a single-count Information that alleged that he violated SORA by failing to report in person within three days of changing his residence/domicile, securing electronic mail, or owning/using a vehicle. Also, his Tier III classification had to be published. He was not convicted of violating the school safety zone requirements, but, of course, he was bound by that provision—i.e., he was not allowed to "[w]ork within a student safety zone", "[l]oiter within a school safety zone", or "reside within a student safety zone." MCL 28.734(1)(a), (b), and MCL 28.735(1).

As noted, every provision Defendant framed as punishment in order to declare the entire statute as punishment has been removed by 2020 PA 295. The question is whether the ameliorative effect of 2020 PA 295 can be applied retroactively to Defendant's *ex post facto* challenge to SORA. The People answer yes.

MCL 8.4a provides:

> The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

There should be no serious debate as to the Legislature's purpose in enacting 2020 PA 295. It wanted to save SORA from *ex post facto* challenges such as occurred in *Snyder* and is

occurring in this case. By expressly repealing the claimed offending provisions, the Legislature manifests its intent to apply the statute retroactively to pending and future cases.

Furthermore, in *People v Schultz*, 435 Mich 517, 528-533; 460 NW2d 505 (1990)—a plurality opinion—this Court interpreted MCL 8.4a to hold that the ameliorative effects of punishment found in an amended statute apply retroactively to a case still pending. In other words, where the amendatory act continues to proscribe the same conduct, but ameliorates the punishment, the punishment as amended applies:

> By enacting § 8.4a, the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability either is repealed outright or reenacted with modification, even though a specific saving clause has not been adopted.[15] While § 8.4a does indicate that conduct remains subject to punishment, it does not indicate that the Legislature intended the statute prior to amendment to provide the terms of punishment where an amendatory act mitigates the authorized terms of punishment but continues to proscribe the same conduct. Although the dissent correctly notes that other jurisdictions have rejected this view, at 516-517, to conclude that the Michigan general saving statute also requires the defendants to be sentenced under the terms of punishment authorized in the statutes prior to amendment would be to gloss over the historical and philosophical underpinnings of § 8.4a.
>
> The decisions of our Court of Appeals also support the view that the Legislature intended § 8.4a to prevent technical abatements from barring actions to enforce criminal liability and thereby excusing offenders from punishment. While the cases do illustrate the instances in which the Legislature did not intend to excuse criminal defendants from prosecution, they do not support the proposition that the Legislature enacted § 8.4a to save the terms of punishment in effect on the date of offense when an ameliorative amendment was subsequently enacted and the case had not yet reached final disposition before our Court. Thus, in *People v McDonald, supra,* where an ameliorative amendment eliminated the distinction between nighttime and daytime breaking and entering and reduced the maximum authorized term of punishment, the Court properly rejected the defendant's argument that prosecution was precluded under the statute as it existed prior to amendment. In light of § 8.4a and the amendatory act, which also proscribed the same conduct as the statute prior to amendment, the Court correctly reasoned that the Legislature did not intend to excuse the defendant from criminal prosecution. Likewise, this analysis was also properly followed in *People v Gravedoni*, 172 Mich App 195; 431 NW2d 221 (1988), where the Court of Appeals correctly held that the defendant's conduct was still subject to punishment notwithstanding an ameliorative amendment enacted subsequent to

the date of offense. See also *People v Ulysee Gibson*, 71 Mich App 220; 247 NW2d 357 (1976). Cf. *People v Dalby*, 181 Mich App 673; 451 NW2d 201 (1989).

The same statutes at issue in *McDonald, supra*, were also the subject of the litigation in *People v Poole*, 7 Mich App 237; 151 NW2d 365 (1967). In that case, however, the defendant did not claim that the prosecution was barred because his conduct was no longer subject to punishment. Rather, the defendant argued that he should be sentenced under the terms of the amended statute, which reduced the maximum term of punishment. Since the defendant's judgment of conviction was no longer subject to direct appellate review and had become final when he moved to be resentenced, the Court correctly held that the defendant was properly sentenced under the statute as it existed prior to amendment because the common-law abatement doctrine did not affect completed prosecutions. See also *People v Dickerson*, 17 Mich App 201; 169 NW2d 336 (1969).

The courts of other states that have adopted general saving statutes also hold that, in the absence of a contrary statement of legislative intent, criminal defendants are to be sentenced under an ameliorative amendatory act that is enacted subsequent to the date of offense and becomes effective during the pendency of the prosecution.[16] This rule recognizes that the constitutional authority to determine sentencing policies rests exclusively with the Legislature and not the courts. It should likewise be the rule in Michigan since there is every reason to conclude that the Legislature intended the amended Public Health Code to apply to defendants before our Court. Both 1987 PA 275 and 1988 PA 47 reduce the mandatory minimum terms of imprisonment and provide a departure policy. Although in 1989 PA 143 the Legislature restored the mandatory minimum terms, the departure policy was retained.[17] Thus, the legislative mandate is clear: The sentencing courts of this state are authorized to exercise discretion and, in appropriate cases presenting substantial and compelling circumstances, to depart from the Public Health Code's mandatory minimum terms.

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[15] Prosecutions completed prior to the repeal of a criminal liability statute remained unaffected by the common law abatement doctrine. *In re Jerry*, 294 Mich 689, 691; 293 NW 909 (1940); *People v McDonald*, 13 Mich App 226, 229-230; 163 NW2d 796 (1968).

[16] See, e.g., *In re Estrada*, 63 Cal 2d 740; 48 Cal Rptr 172; 408 P2d 948 (1965); *State v Coolidge*, 282 NW2d 511 (Minn, 1979); *People v Oliver*, 1 NY2d 152; 151 NYS2d 367; 134 NE2d 197 (1956); *People v Festo*, 96 AD2d 765; 463 NYS2d 444 (1983).

[17] 1989 PA 143, amending MCL 333.7401(4) … and MCL 333.7403(3) …. [*Schultz*, 435 Mich at 528-533.]

The Court of Appeals followed *Schultz* in *People v Scarborough*, 189 Mich App 341; 471 NW2d 567 (1991), lv denied 439 Mich 950; 482 NW2d 753 (1992), and this Court has applied *Schultz* several times, suggesting that it should be viewed as binding precedent. See, e.g., *People v Leighty*, 437 Mich 953; 467 NW2d 591 (1991); *People v Arnold*, 437 Mich 901; 465 NW2d 560 (1991); *People v Rubante*, 437 Mich 901; 465 NW2d 560 (1991); *People v Manos*, 437 Mich 901; 465 NW2d 559 (1991); *People v Rodriguez*, 437 Mich 902; 465 NW2d 559 (1991); *People v Sparks*, 437 Mich 902; 465 NW2d 282 (1991); *People v Layne*, 437 Mich 927; 467 NW2d 26 (1991); *People v Tucker*, 437 Mich 976; 468 NW2d 50 (1991); *People v Marshall*, 437 Mich 897; 465 NW2d 325 (1991); *People v Robbs*, 437 Mich 1026; 470 NW2d 652 (1991); *People v Saleh*, 437 Mich 898; 465 NW2d 325 (1991); *People v Orlick*, 439 Mich 1009; 485 NW2d 502 (1992).

The question is whether MCL 8.4a supports the retroactive application of 2020 PA 295 to alleviate or remedy any *ex post facto* challenge to SORA.

Again, Defendant was convicted of violating three provisions of SORA, to wit: He failed to report in person three days after he changed his residence/domicile, his email, and his vehicle. These violations were alleged in a single count and he pled to all three violations.

Although 2020 PA 295 proscribes the same conduct of failing to report "any change in vehicle information, electronic mail addresses, internet identifiers, or telephone numbers registered to or used by the individual[,]"[7] to circumvent any debate over whether the *procedural* change of not reporting *in person* should be viewed as *not* proscribing the same conduct, the

[7] 2020 PA 295 has changed, procedurally, the method and scope of reporting "any change in vehicle information, electronic mail addresses, internet identifiers, or telephone numbers registered to or used by the individual" to "the manner prescribed by the department to the registering authority having jurisdiction where his or her residence or domicile is located not more than 3 business days after" either occurs. 2020 PA 295, § 5(2)(a).

Muskegon County Prosecutor will amend the Information to remove the allegations involving electronic mail or any vehicle.[8] Defendant would then only be convicted of failing to report the change of his residence/domicile, which without question is the same conduct proscribed by 2020 PA 295, § 5(1)(a).

The question then is whether the changes to SORA in 2020 PA 295 can be applied retroactively to Defendant.

First, MCL 8.4a supports this retroactive application of 2020 PA 295 because the Legislature expressly provided for it by repealing the very provisions that have been challenged. Second, *Schultz* teaches that, under MCL 8.4a, new legislation that proscribes the same conduct is retroactive to pending cases if the effect of the new legislation ameliorates or mitigates the *punishment*.

The "punishment" at issue in *Schultz* was the prison term authorized by the conviction. The "punishment" at issue here is not a term of imprisonment, but rather, it involves Defendant's claim that SORA's school safety zone provision; the three-day, in-person reporting requirement for temporary residence, electronic mail, or any vehicle; and the public nature of tier classifications constitute punishment.

The Court in *Schultz* was interpreting MCL 8.4a, which applies to "any penalty, forfeiture, or liability incurred under such statute or any part thereof[.]"[9] Thus, although the

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[8] An amendment is allowed at any time under MCR 6.112(H), which provides: "The court before, during, or after trial may permit the prosecutor to amend the information or the notice of intent to seek enhanced sentence unless the proposed amendment would unfairly surprise or prejudice the defendant. On motion, the court must strike unnecessary allegations from the information."

[9] The term "any" is an indefinite article, which, according to *The Random House College Dictionary* (rev'd ed 1984), p 61, means, "**1**. one, a, an, or some; one or more without specification … **3**. every; all …." And, according to *Merriam-Webster's Collegiate Dictionary* (11th ed), p 56, means, "**1:** one or some indiscriminately of whatever kind: **a.** one or another

statute applies to, *inter alia*, "any penalty," it does not actually use the term "punishment". "[A]ny penalty" encompasses "punishment" as well as "a[ny] disagreeable consequence of a person's actions or conduct …." Thus, if Defendant's complained-of provisions constitute "punishment", they certainly fit within the meaning of "any penalty". Hence, when an amendment to a statute ameliorates "any penalty" in a law, the amended ameliorative or mitigating provisions should apply retroactively to remedy any *ex post facto* challenge to the law. If such amended law removes those provisions that are considered punishment, it follows that, because those provisions no longer apply, the law is not an *ex post facto* law. This rule applies to cases on appeal under *Schultz*.

The foregoing interpretation of MCL 8.4a on the ameliorative effects of these SORA provisions adheres to the principle that "[s]tatutes must be construed in a constitutional manner if possible, and the burden of proving that a statute is unconstitutional is on the party challenging it." *In re Trejo*, 462 Mich at 355.

The *Ex Post Facto* Clause, of course, does not declare what *punishment* is. When the Legislature passes a law that is not penal or criminal, the Supreme Court has established a test for determining whether a law constitutes punishment. See *Smith*, *supra*. This is the test Defendant uses to argue that the foregoing provisions turn SORA into punishment. 2020 PA

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taken at random … **b:** EVERY—used to indicate one selected without restriction … **2:** one, some, or all indiscriminately of whatever quantity: **a:** one or more—used to indicate an undetermined number or amount … **b:** ALL—used to indicate a maximum or whole … c: a or some without reference to quantity or extent … **3a:** unmeasured or unlimited in amount, number, or extent … **b:** appreciably large or extended ….". See also *In re Forfeiture of $5,264*, 432 Mich 242, 249-250; 439 NW2d 246 (1989).

The term "penalty" according to *Random House College Dictionary*, p 981, means, "**1**. a punishment imposed or incurred for a violation of law, rule, or agreement. **2**. something that is forfeited, …. **3**. a disagreeable consequence of a person's actions or conduct …." And, according to *Merriam-Webster's Collegiate Dictionary*, p 915, means, "1: the suffering in person, rights, or property that is annexed by law or judicial decision to the commission of a crime or public offense …. 3a: disadvantage, loss, or hardship due to some action …."

295, however, has truncated the need to apply this test because the claimed offending provisions have been removed.

Schultz discussed "punishment" rather than the form of punishment. Thus, although at issue in *Schultz* was whether the changes in prison terms would be applied retroactively, there should be no reason to distinguish *Schultz* on this ground. "[A]ny penalty" that is ameliorated by new legislation should be applied retroactively no matter its form. This should especially be true if such application would avoid declaring a statute unconstitutional. *In re Trejo*, 462 Mich at 355.

The changes to SORA in 2020 PA 295 are ameliorative as to those provisions declared by Defendant to be punishment. In other words, 2020 PA 295 has repealed the student safety zone provisions; has removed the three-day, in-person reporting requirement for temporary residence, electronic mail, or any vehicle; and has removed the public nature of tier classifications. Thus, Defendant is no longer disadvantaged by SORA as he has claimed if these changes apply retroactively and he is no longer being punished for failing to report his electronic mail and vehicle and his tier classification is no longer published.

As to Defendant's conviction of failing to report in person his change of residence/domicile within three days, 2020 PA 295 proscribes the same conduct. Thus, under *Schultz*, the ameliorative effects of 2020 PA 295 on punishment should apply to him. This means that, as to his argument that he is disadvantaged by SORA because of the provisions he claimed were punishment, because none of those claimed provisions survive the enactment of 2020 PA 295, Defendant can no longer claim he is disadvantaged by SORA.[10]

[10] The Muskegon County Prosecutor also adopts the Gratiot County Prosecutor's position as advanced by B. Eric Restuccia's January 6, 2021, supplemental authority letter to this Court

RELIEF REQUESTED

For the foregoing reasons, Defendant's appeal should be dismissed.

Respectfully submitted,

D.J. HILSON
Muskegon County Prosecuting Attorney
Attorney for Plaintiff-Appellee

/s/ Charles F. Justian

Dated: February 19, 2021

By: CHARLES F. JUSTIAN (P35428)
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(Appendix G) and adopts any supplemental brief the Gratiot County Prosecutor files in answer to this Court's directive.

EXHIBIT 2

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
[Kristen Frank Kelly, PJ, Cynthia Diane Stephens and Michael Riordan]

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL J. BETTS,

Defendant-Appellant,
_____/

Supreme Court No. 148981

Court of Appeals No. 319642

Muskegon Circuit Court
No. 12-62665 FH

AMICUS GRATIOT COUNTY PROSECUTOR'S SECOND SUPPLEMENTAL AMICUS BRIEF

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Dated: February 26, 2021

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Rules

QUESTIONS PRESENTED

In its January 29, 2021 order, this Court asked the parties to address the following three questions "if this Court finds that the retroactive application of the Sex Offenders Registration Act (SORA) *et seq.*, is unconstitutional":

I. Whether the constitutional infirmity may be remedied through the application of the recently enacted 2020 PA 295.

II. If not, whether 2020 PA 295 has any effect on the potential remedy.

III. What effect the answers to these questions have upon defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.

INTRODUCTION

The passage of Public Act 295 of 2020 resolves this case definitively, as explained by the Muskegon County Prosecutor. If the full measure of the reporting obligations and student safety zone restrictions under the Sex Offenders Registration Act constitute punishment, then the Legislature's act in reducing some of these duties –allowing for a method of reporting other than in-person for certain minor changes and eliminating the student safety zones in total– is ameliorative and operate retroactively for pending cases. Thus, Paul Betts' SORA conviction for failing to update his address is and remains valid. This Court should affirm.

The Gratiot County Prosecutor as amicus shall not reiterate the arguments of Muskegon other than to make a few points consistent with these arguments. But if this Court does not accept this resolution, which is the answer to the first question, the Gratiot County Prosecutor offers a second basis on which to affirm Betts' conviction if the Court finds that Michigan's SORA law (before its 2020 revision) violated ex post facto for those offenders before 2011. And that is severance. The Legislature has provided the roadmap to severance.

Just like the federal Sex Offender Registration and Notification Act (SORNA), Michigan's SORA no longer contains student safety zones, no longer makes public the tiering of the registrants, and no longer requires registrants to report in person for certain minor changes to their status, i.e., temporary residence, change in vehicle, or internet identifier. It is clear the Legislature of 2011 would have preferred the elimination of these provisions than to allow the registry to go dark for all pre-2011 offenders, as confirmed by the actions of the 2020 Legislature.

ARGUMENT

I. The Gratiot County Prosecutor concurs in the Muskegon County Prosecutor's argument that revisions to Michigan's SORA in Public Act 295 of 2020 apply retroactively to pending prosecutions.

The Muskegon County Prosecutor has fully briefed this issue under Michigan law, MCL 8.4a, and under the seminal case law, see *People v Schultz,* 435 Mich 517 (1990). See Musk Co Br, pp 2–13. The Gratiot County Prosecutor agrees with this analysis, and will not repeat the arguments here, other than to make three points.

First, in construing Michigan law, the plurality opinion in *Schultz* stated with regard to the same conduct that "in the absence of a contrary statement of legislative intent, criminal defendants are to be sentenced under an ameliorative amendatory act that is enacted subsequent to the date of offense and becomes effective during the pendency of the prosecution." 435 Mich at 530–531 (Archer, J., plurality). Given that the Court of Appeals adopted this analysis in a published decision in 1991, this principle has been the controlling one in Michigan courts for almost thirty years. *People v Doxey*, 263 Mich App 115, 120 (2004) (noting that the Court in *People v Scarborough*, 189 Mich App 341 (1991) "adopt[ed] the holding and reasoning of *Schultz*, having been decided after November 1, 1990, is binding on this panel under MCR 7.215(J)(1).").

Second, this retroactivity only applies to the few pending cases that remain open on direct review. Thus, it applies here and to the pending case from Gratiot County, David Snyder. It also applies to "subsequent" or any new cases, but it does not apply to cases final on direct review. *Schultz,* 435 Mich at 527, 530 ("the common-law abatement doctrine did not affect completed prosecutions").

Third, this principle of retroactivity applies to not just the cases pending at issue here and in David Snyder's case, i.e., the failure to update a new address (Betts) and a new employer (Snyder), see MCL 28.725(1) (PA 2020, No. 295), but to any new case that a prosecutor might wish to bring before the effective date of the revised Act that involved the failure to report minor changes, such as a new electronic mail address or temporary residence, see MCL 28.725(2)(a), (2)(b) (2020 PA 295). For these later changes under § 5(2), the same conduct – consistent with the analysis in *Schultz* – is still subject to the same requirement, i.e., the duty to update information with the proper jurisdiction. The only change is procedural for these obligations in § 5(2), which provides three business days in which to update the information in a manner other than appearing in person. See MCL 28.725(2) (2020 PA 295) ("An individual required to be registered under this act who is a resident of this state shall report *in the manner prescribed by the department*") (emphasis added); compare MCL 28.725(1) (2020 PA 295) ("An individual required to be registered under this act who is a resident of this state ***shall report in person****, or in another manner as prescribed by the department*") (emphasis added). This change in the manner of reporting is a procedural change, not a substantive one. See *United States v Pertuset*, 160 F Supp 3d 926, 933 (SD W Va, 2016) ("Subsection (c) of [§] 16913 [of SORNA], which is titled 'Keeping the registration current,' *addresses the* ***procedure*** when an offender, who has registered, later changes his name, residence, employment, or student status.") (internal quotes, brackets omitted; emphasis added). Thus, all the obligations to report under § 5, as revised in Public Act 295 of 2020, apply retroactively for pending and future cases.

The same is true for the elimination of the student safety zones in that this change applies retroactively. The predicate of this question from the Court is based on the assumption that the unrevised SORA constitutes punishment. See Jan 29, 2021 order ("if"). Accepting that premise, the primary punitive elements were the student safety zones, which the Sixth Circuit concluded were in important respects akin to banishment. See *Does #1-5 v Snyder*, 834 F3d 696, 701 (CA 6, 2016) ("More specifically, SORA resembles, in some respects at least, the ancient punishment of banishment"). It is as if the SORA law no longer allows for banishment. In this way, under *Schultz* their elimination would operate as an amelioration, i.e., an elimination of the SORA elements that made it punitive. See *id.,* 435 Mich at 532 (giving effect to the reduced punishment for a crime that occurred before its effective date). The revised SORA is now – just as SORNA – fully regulatory and non-punitive. (The SORA laws do, of course, punish those who violate their duties.)

As a result, Michigan's new and old SORA laws have collapsed into one set of requirements for all pending and future cases as reflected in Michigan's revised law, Public Act 295 of 2020. Part of the genius of the Muskegon County Prosecutor's argument is in its simplicity. Michigan's registrants are governed by one metric for their conduct after March 24, 2021, which is the effective date of Public Act 295, but the same obtains for any conduct that occurred before.[1] The student safety zones are gone for all pending and future cases.

[1] The only arguable exceptions to this point are the other small revisions to SORA, such as the ones addressing the use of vehicles, e.g., see MCL 28.727(1)(j), but these changes were merely clarifying to rectify language found to be vague.

To break-down this argument, here are the four categories of those who violate Michigan's SORA and the timing of these offenses:

Violations that occur before March 24, 2021 and are ***final on direct review***

The unrevised SORA applies and there is no retroactivity.

Violations that occur before March 24, 2021 and are ***pending on direct review***

The revised SORA as reflected in Public Act 295 of 2020 applies and there is retroactive application of the revisions:

Section 5(1)'s reporting obligations from Public Act 295 apply;

Section 5(2)'s reporting obligations as revised from Public Act 295 apply; and

The student safety zones are eliminated and do not apply.

Violations that occur before March 24, 2021 and ***have not been charged***

The revised SORA as reflected in Public Act 295 of 2020 applies and there is retroactive application of revisions just as for those cases pending on direct review.[2]

Violations that occur on or after March 24, 2021

The revised SORA applies.

And it is clear that Michigan's revised SORA may apply retroactively as a matter of ex post facto law, where as here it is a regulatory, and not a punitive, scheme. Cf. *People v Golba*, 273 Mich App 603, 616 (2007) (reviewing an earlier version of Michigan's SORA and finding it regulatory). Public Act 295 applies here.

[2] It is worth noting that the federal district court in *Doe v Snyder* (Case No. 16-13137) issued an injunction on April 6, 2020, in which the court enjoined *any* prosecution for violations of Michigan's unrevised SORA for conduct that occurred after February 14, 2020. (See Appx B, p 4) ("It is further ordered that Defendants and their agents are preliminary enjoined from enforcing registration, verification, school zone, and fee violations of SORA that occurred or may occur from February 14, 2020, until the current crisis has ended, and thereafter until registrants are notified of what duties they have under SORA going forward.")

There is one final caveat to this point. This brief acknowledges that *Schultz* only applies by analogy here. The SORA is not a criminal law, and the amicus and the Muskegon County Prosecutor have argued that it is not punitive. The federal courts have ruled to the contrary, and this Court asks its question based on the premise that these rulings are right, i.e., there is an ex post facto violation. If so, the unrevised SORA is a regulatory scheme with some elements that have made it punitive. In that setting, the Legislature has pruned those punitive elements, consistent with the arguments of Betts here and the reasoning of the Sixth Circuit in *Does,* 834 F3d at 701, leaving a true regulatory scheme.

This Court in *Schultz* was examining a criminal law, which was designed to be punitive, and the amelioration left a lesser punishment in place. This application is different, because once pruned, there is nothing punitive left in the regulatory provisions of the revised SORA, which is designed to "protect[] against the commission of future criminal sexual acts." MCL 28.721a. That is why it is applied generally to sex offenders who are convicted on October 1, 1995 or after, among others. MCL 28.723(1)(a). Even so, regarding the principle honoring the Legislature's authority, see *Schultz,* 435 Mich at 524 (Archer, J.) ("the people have vested in the Legislature the exclusive authority to determine the terms of punishment imposed for violations of the criminal law"), it should also be honored here when it eliminates the punitive elements of a regulatory statute. For the same reason, MCL 8.4a supports the retroactive elimination of these elements. See Musk Co Br, p 11. Without these punitive elements, the same conduct is otherwise subject to regulation under SORA, and thus Public Act 295 applies here.

II. The 2020 Legislature's act of severing the three significant ways identified by Betts that Michigan extends beyond SORNA strongly supports the inference that the 2011 Legislature would support it.

As an argument separate from Muskegon's, there is a second, independent basis on which to affirm the convictions of Betts and Snyder. That is severance. It dovetails the same points above, but it does not extend as far as the retroactivity argument. For retroactivity, the landscape becomes clear as Public Act 295 governs all the offenders for any SORA violation regardless of when it occurred. For the severance argument, the conclusion would create two categories offenders for any violations that occurred before March 24, 2021: (1) the pre-2011 offenders who would not be subject to the student safety zones and the in-person reporting obligations for minor changes, and (2) the post-2011 offenders who would. Even so, the action by the Legislature here powerfully supports the arguments advanced by Gratiot County as amicus, and supported by Muskegon County, for severance. See Gratiot County amicus br, pp 5–23. This brief does not repeat those arguments here.

But the legislative action in December 2020 now provides additional support for the severance argument. In arguing that Michigan's unrevised SORA was punitive, Betts emphasized the three central features of Michigan's SORA that extended Michigan law beyond SORNA:

- The student safety zones, (Betts' merits brief, pp 24, 28, 32–35);
- the public nature of the tiering, (Bett's merits brief, pp 14, 16, 23, 25–26, 29–30, 32, 33, 34, 35–37); and
- the in-person reporting obligations even if Betts did not identify whether this obligation arises a temporary residence, new email address, or a new vehicle, or one of the other obligations in Michigan's SORA for the sex offender to register that corresponds to the SORNA. (Betts' merits brief, pp 14, 15–20, 21, 22–23, 29).

As the Muskegon County Prosecutor noted, the Legislature's revisions were in response to the federal decisions and designed to bring Michigan in line with SORNA. See Muskegon County Prosecutor Br, pp 3–6, quoting from the legislative analysis for Public Act 295 of 2020 (which were attached as Appendices B, C, and D.) In short, Public Act 295 "would align the registry with the federal Sex Offender Registration and Notification Act (SORNA)." (See Muskegon, App C, House Fiscal Legislative Analysis, p 6.) If this Court accepts the view of the federal appellate courts, such an action ensures the constitutionality of Michigan law. See, e.g., *Willman v Attorney General of United States,* 972 F3d 819, 824 (CA 6, 2020) ("plaintiff alleges that SORNA is unconstitutional under the Ex Post Facto Clause. In *United States v Felts*, however, we considered and rejected the argument that SORNA violates that provision of the Constitution").

And it is unmistakable that the Legislature in Public Act 295 intentionally revised the three areas of law that Betts emphasized for the very purpose of ensuring that Michigan law meets constitutional standards. See Appx A, HB 5679, as passed by both state houses (with strike outs and bolded additions); compare Gratiot County merits amicus, Ex C (proposed redlined severed version) (reattached).

And, in the end, this is the best evidence that the Legislature in 2011 would have wanted the same basic thing to happen rather than to allow the SORA to fall for the pre-2011 offenders:

> [W]hile the views of a subsequent legislature cannot override the unmistakable intent of the enacting one, such views may be entitled to significant weight, particularly when the precise intent of the legislature is obscure.

> [Sutherland Statutory Construction, Vol 2A, § 48.20, pp 641–642 (7th ed 2014).]

In the view of this amicus, the Legislature's intent was clear (and not obscure) when it passed the 2011 revisions to bring Michigan law in line with SORNA and that it would have intended for the law shorn of the offending provisions to be given effect. See MCL 8.5; *In re Request for Advisory Opinion Re Constitutionality of 2011 PA 38*, 490 Mich 295, 346 (2011) ("the Legislature would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act.") Any doubt about this point has been erased by the Legislature's action here. If this Court somehow elects not to find the revisions retroactive as ameliorative, the proper action then would be for this Court to sever these provisions consistent with the Legislature's changes to the law.

III. In applying either the retroactivity doctrine for pending (and future) cases or the severance doctrine, this Court should affirm the convictions of Paul Betts and David Snyder.

Finally, under either the retroactivity analysis or the severance analysis, the convictions for Paul Betts and David Snyder would then be sustained. Betts' remaining theory of guilt as amended is his violation of SORA for failing to register his new address, see MCL 28.725(1)(a) (295 PA 2020), and Snyder for failing to register his new employment, see *id* at 725.(1)(b). These convictions are proper under Michigan's SORA, either as revised by Public Act 295 of 2020 or as severed consistent with these revisions. This Court should affirm their convictions.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the convictions of Paul Betts and David Snyder based on the arguments advanced here.

Respectfully submitted,

Keith Kushion
Gratiot County Prosecutor

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Dated: February 26, 2021

EXHIBIT 3

Order

Michigan Supreme Court
Lansing, Michigan

January 29, 2021

148981

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 148981
COA: 319642
Muskegon CC: 12-062665-FH

PAUL J. BETTS, JR.,
Defendant-Appellant.

_____/

On order of the Court, leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we DIRECT the parties to file supplemental briefs within 28 days of the date of this order addressing the following issues: if this Court finds that the retroactive application of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, is unconstitutional, (1) whether the constitutional infirmity may be remedied through the application of the recently enacted 2020 PA 295; (2) if not, whether 2020 PA 295 has any effect on the potential remedy; and (3) what effect the answers to these questions have upon defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.

WELCH, J., did not participate because the Court considered this order before she assumed office.

t0126

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 29, 2021

Clerk