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,	Supreme Court No. 148981
Plaintiff-Appellee,	Court of Appeals No. 319642
v	Muskegon Circuit Court No. 12-62665 FH
PAUL J. BETTS,	
Defendant-Appellant, _____/	

GRATIOT COUNTY PROSECUTOR'S SUPPLEMENTAL AMICUS BRIEF RESPONDING TO THE ACLU'S ADDITIONAL ARGUMENTS

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QUESTIONS PRESENTED

In its September 2, 2020 amicus brief that was accepted for filing on September 11, 2020, the American Civil Liberties Union raised two additional procedural questions, one based on res judicata from the federal district court's February 14, 2020 opinion in *Doe v Snyder* (No. 16-13137) and the other based on collateral estoppel regarding the Sixth Circuit's 2016 opinion, *Does #1-5 v Snyder (Does I)*, 834 F3d 696 (CA 6, 2016). The Gratiot County Prosecutor addresses these points as three questions:

I.A A party cannot properly raise an issue for the first time in a reply brief and preserve that claim. In this case, Paul Betts did not raise one of these claims in his briefing at all and only raised the other for the first time in his reply brief. And the amicus brief for the ACLU advances an argument on this point that Betts did not advance. Are these new arguments preserved for this Court's review?

I.B Regarding res judicata, a federal final judgment that governs the same party as a state judgment takes precedence unless the federal judgment expresses otherwise. For Paul Betts, the federal district court has not yet entered a final judgment and has expressly anticipated that it "can modify its judgment to conform" to this Court's ruling on the state law issue of severability. Does that yet-entered final judgment bar this Court from issuing a ruling here?

I.C Regarding collateral estoppel and the issue of retroactivity, the preclusive rules of the first jurisdiction that issues a final judgment are controlling. The state court here reached a final judgment on the issue of retroactivity for Paul Betts in 2013, and the Sixth Circuit only ruled against the State on this issue years later, in 2016. Does collateral estoppel bar this Court from reviewing the 2013 judgment and addressing the issue of the constitutionality of Michigan law?

INTRODUCTION

In its amicus briefing, the American Civil Liberties Union advances two new arguments, one based on res judicata and the other on collateral estoppel. Both arguments are based on the rulings in the related cases, *Does v Snyder* (Nos. 12-11194, 16-13137), i.e., the February 14, 2020 opinion and order in No. 16-13137 (*Does II*), and the Sixth Circuit's decision in No. 12-11194, *Does #1-5 v Snyder (Does I)*, 834 F3d 696 (CA 6, 2016). Neither procedural claim bars this Court's review.

As an initial matter, Betts did not raise either of these arguments in his principal briefing, and he raised only one in his reply brief (and that is predicated on the entrance of a final judgment in the federal case). The additional ACLU arguments raised here are waived. If examined, this Court should reject each in any event.

First, the federal district court has not entered a final judgment in the class action case on the issues of retroactivity and severance and, for that reason alone, it does not bar any action by this Court. But the opinion and order – which is an interim one – fully anticipates that this Court will move forward with this appeal, as it expressly provides that if this Court reaches a different resolution on severance the federal court may "modify its judgment to conform with *Betts*."

Second, the federal rules do not operate to impinge a prior state judgment, because they do not apply where the federal judgment was later in time. The Sixth Circuit first ruled against the State defendants on the constitutional issue in 2016, but the state court ruled against Betts on this same question in 2013. The subsequent federal judgment does not preclude this Court from reviewing the earlier state court judgment.

ARGUMENT

I. This Court is not barred as a matter of res judicata or collateral estoppel from answering the questions in this appeal.

The ACLU raises two arguments in its recent filing – res judicata and collateral estoppel – one of which Paul Betts did not raise and the other was not raised until his reply brief. For that reason, there has been only briefing by Betts on the Sixth Circuit decision, but even with regard to that claim the ACLU advances a new argument. This Court should decline to reach these issues because they are not properly before this Court. But if it does, the Gratiot County Prosecutor addresses them for the convenience of the Court.

A. A party cannot preserve an issue by raising it for the first time in a reply brief, and the new ACLU arguments are not preserved.

The ACLU raises two arguments in its amicus brief: (1) "the People are bound by *Does II* because it is a class action," ACLU Amicus, pp 15–20, and (2) " the people are bound by *Does I* through collateral estoppel," pp 20–26. Paul Betts did not raise the *Does I* issue in his principal brief or his reply brief, and he only raised the *Does II* issue in his reply brief. See Betts' Reply, pp 6–11.

For the first claim regarding *Does II* (the February 14, 2020 opinion), the fact that it was only raised in the reply does not ordinarily preserve it. See, e.g., *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252 (2003). And while the Amicus acknowledges that the reply was the first opportunity for Betts to raise the argument (since the federal district court released its opinion after he filed his principal brief), the ACLU advances an additional argument on that issue that Betts did not. That argument on *Does II*, at least, is not preserved for this Court's review.

For the second claim regarding *Does I* (Sixth Circuit 2016 opinion), this Court should not reach it because Betts did not raise it. See, e.g., *Macomb Cty Prosecutor v Murphy*, 464 Mich 149, 158 (2001) ("This issue is not properly preserved because defendant first raised it in her application for leave to appeal to this Court.").

B. The February 14, 2020 order is not a final judgment and does not bar this Court from reaching the issue of severance.

Under the black letter law on federal rules of preclusion, "[t]he general rule of claim preclusion, or true res judicata, is that a valid and final judgment on a claim precludes a second action on that claim or any part of it." *J.Z.G. Res, Inc v Shelby Ins Co*, 84 F3d 211, 214 (CA 6, 1996).[1] There is no dispute that the opinion and order of the federal district court in *Does v Snyder* (No. 16-13137) is not a final one, see Betts Reply, p 9 ("While the Eastern District's order is not yet final, Mr. Betts raises this claim now to preserve it"), ACLU Amicus, p 18 ("Concededly, the decision in *Does II* is not final"), and thus the rules of res judicata do not apply.

But Amicus further suggests that some of the arguments advanced by the State defendants in the federal action are contrary to those advanced here. ACLU Amicus, p 18 ("But the State—having repeatedly argued prior to the *Does II* decision that registrants cannot litigate individual cases to protect themselves from prosecution because that issue was the subject of the *Does II* litigation—cannot now argue that *Does II* does not protect registrants from prosecution."). This is a new argument and is not advanced or preserved by Betts. But it is wrong in any event.

[1] While the federal courts now use the terms claim preclusion and issue preclusion, the Amicus uses the traditional phrases of res judicata and collateral estoppel.

The ACLU's contention overlooks the different posture of Paul Betts – as well as David Snyder – from all other registrants. The district court, however, understood this point in its February 14 opinion and order. In specific, the federal district court expressly identified the *Betts* case pending in this Court and explained that it was not going to certify the question of severance, which is a question of state law, because the district court could "conform" its decision to the one from this Court if this Court reached that issue and ruled otherwise on the claim:

> 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. See Fed. R. Civ. Pro. 60(b). When the court raised with Defendants at the hearing the feasibility of amending the judgment in this case to conform with a possible, adverse judgment from the Betts' court, Defendants asserted that amending the judgment would require the expenditure of additional judicial resources. Near the eight-year mark in this combined litigation, the court is not much daunted by the prospect of expending additional judicial resources . . . as the court put it at argument, that horse has left the barn. . . . [Betts Supp, *Does v Snyder,* No. 16-13137, opinion, p 16, n 6 (emphasis added).]

The district court recognized that this Court had a threshold issue to evaluate before it reached the severance question. *Id.* at 15–16 (referring to "threshold issues of state constitutional law").

The district court February 14 opinion on its face contemplates that this Court's review of the substance of the claims presented to it would move forward and that the federal court would have the opportunity to revise its decision on severance if this Court reached that issue and ruled differently. That is consistent with the legal arguments that the prosecution is presenting here. The federal district court opinion does not bar this Court from reaching the questions presented.

C. The 2016 decision of the Sixth Circuit in *Does I* is the second in time and thus the federal rules of collateral estoppel do not apply.

For this argument by the ACLU, there is no briefing from the parties. The claim attempts to bar this Court's review of the threshold question about whether Michigan's SORA violates ex post facto because it constitutes punishment. The ACLU contends that the Sixth Circuit decision "collaterally estop[s] [the State] from relitigating the issues it lost in [*Does I*, 834 F3d 696 (CA 6, 2016)]." ACLU Amicus, p 20. Not so.

For attempting to give effect to a federal judgment, "[t]he state courts must apply federal claim-preclusion law in determining the preclusive effect of a prior federal judgment." *Pierson Sand v Keeler*, 460 Mich 372, 380–381 (1999). Under federal law, there are four requirements for collateral estoppel (issue preclusion) to apply:

> (1) the precise issue must have been raised and actually litigated in *the prior proceedings*;
>
> (2) the determination of the issue must have been necessary to the outcome of *the prior proceedings*;
>
> (3) *the prior proceedings* must have resulted in a final judgment on the merits; and
>
> (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. [*Arkansas Coals, Inc v Lawson*, 739 F3d 309, 320–321 (CA 6, 2014) (emphasis added).]

The rub here is that the decision for Paul Betts on the constitutional question reached finality in state court *years* before the Sixth Circuit ruled. In other words, the state court ruling is the "prior" judgment.

The order Betts has appealed entered on August 22, 2013. He raised the argument himself. See Motion Hearing, April 13, 2013, p 11 ("the sex offender registry has evolved into . . . cruel and unusual punishment"). The trial court ruled against him. Thus, the decision here preceded the 2106 Sixth Circuit decision.[2]

In this way, the federal rules do not operate to impinge a prior state judgment, because they do not apply where the federal judgment was later in time. See *Nationwide Mut Ins Co v Liberatore*, 408 F3d 1158, 1162 (CA 9, 2005) ("a district court judgment carries preclusive effect going forward, it cannot operate to bar direct review of an extant judgment"; "To permit [it] . . . would be to invert the doctrine's precepts."), citing *Federated Dep't Stores v Moitie*, 452 US 394, 398 (1981). The federal courts have ruled that under federal and state law, the appeal by Betts (and Snyder) did not deprive the state judgment of its finality. See *Rayfield v Am Reliable Ins Co*, 641 F Appx 533, 536 (CA 6, 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 (WD Mich 2000) aff'd, 288 F3d 895, 905 (CA 6, 2002) ("Michigan law permits preclusion of issues decided by a judge as part of a summary disposition").[3]

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[2] The same is true of David Snyder, whose judgment entered on December 15, 2014.

[3] See also *In re Kramer*, 543 BR 551, 554 (Bankr ED 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"). But see *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 716 (2014) (" 'A decision is final when all appeals have been exhausted or when the time available for an appeal has passed' "), quoting *Leahy v Orion Twp*, 269 Mich App 527, 530 (2006). These intermediate state court decisions do not bind this Court.

In brief, the 2016 Sixth Circuit opinion does not bind the State in this case because Betts was not a party to that case, and the decision does not have preclusive effect against the State because the federal judgment was the later in time.[4] This is consistent with Michigan's rules of collateral estoppel. See *Monat v State Farm Ins Co*, 469 Mich 679, 691–692 (2004). The State is not precluded from asking this Court to affirm the 2013 judgment against Betts.

CONCLUSION AND RELIEF REQUESTED

This Court should reject the arguments that ask this Court to decline to review the merits of the questions it requested addressed.

Respectfully submitted,

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[4] The Court need not reach the issue under the federal rules of collateral estoppel that recognize exceptions for unmixed questions of law and for questions that involve the government as a party. See *Doe v Dep't of Corrections,* 312 Mich App 97; 878 NW2d 293, 310–313 (2015) (vacated 499 Mich 886 (2016)), citing *Montana v United States*, 440 US 147, 162 (1979) and *United States v Mendoza*, 464 US 154, 158, 162 (1984).