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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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Page No.

Cases

Statutes

INDEX OF AUTHORITIES continued

Page No.

Rules

Constitutional Provisions

Other Authorities

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

[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.