

**STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

ROY JOHN KLINESMITH,

Defendant-Appellant.

Michigan Supreme
Docket No.: 164649

Court of Appeals
Docket No.: 340938

Tuscola County Circuit
Court No.: 16-013834-FH

TUSCOLA COUNTY PROSECUTOR

Attorney for the Plaintiff-Appellee

Tuscola County Courthouse

440 N. State Street

Caro, Michigan 48723

Telephone: (989) 672-3900

MICHAEL A. FARAONE (P-45332)

Attorney for the Defendant-Appellant

3105 S. Martin Luther King Blvd., No. 315

Lansing Michigan 48910

Telephone: (517) 484-5515

**DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
PURSUANT TO THE DECEMBER 6, 2024, ORDER
OF THIS HONORABLE COURT**

(Counsel's Word Count Certification)

(Filed and served via trufiling.com)

MICHAEL A. FARAONE P.C. (P45332)

Attorney for the Defendant-Appellant

3105 S. Martin Luther King Blvd. No. 315

Lansing, Michigan 48910

Telephone: (517) 484-5515

attorneyfaraone@faraonelegal.com

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ORDER APPEALED AND JURISDICTION

On November 6, 2017, Mr. Klinessmith sought leave to appeal the SORA requirement in the plea based convictions in this matter. On November 15, 2018, the Court of Appeals issued an unpublished per curiam opinion affirming. 57-59a. On February 2, 2022, this Court vacated said opinion and remanded for reconsideration in light of *People v. Betts*, 507 Mich 527; 968 NW2d 497 (2021).

On June 16, 2022, in a published opinion authored by Judge Sawyer, the Court of Appeals again affirmed. 60a-63a. Mr. Klinessmith sought leave to appeal before this Honorable Court.

On December 6, 2024, this Court issued an order stating in relevant part:

The parties shall file supplemental briefs in accordance with MCR 7.312(E), addressing: (1) whether MCL 28.723(1)(e), the “recapture” provision of the Sex Offenders Registration Act (SORA), MCL 28.721 et seq., constitutes ex post facto punishment under the United States or Michigan Constitutions, U.S. Const., art. I, § 9; Const. 1963, art. 1, § 10, see *People v. Betts*, 507 Mich. 527, 968 N.W.2d 497 (2021); (2) whether requiring the defendant to register as a sex offender under MCL 28.723(1)(e) and MCL 28.721 et seq., constitutes cruel or unusual punishment under Const. 1963, art. 1, § 16, or U.S. Const., Am. VIII, see *Lymon*, and *People v. Kardasz*, 513 Mich 1118 (2024) (ordering oral argument on the application for leave to appeal in Docket No. 165008); (3) for ex post facto purposes, whether the Court of Appeals correctly concluded that the later, nonsexual offense triggered SORA registration rather than the earlier sexual offense; (4) how, if at all, the sexual nature of the prior unregistered sex offense affects the determination whether recapture is cruel or unusual punishment, or punishment at all; and (5) assuming arguendo that the focus of the recapture inquiry is properly on the earlier sex offense, whether the defendant's entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*. [67a-68a].

Under MCR 7.305(B), the issues presented involve principles of major significance to the state’s jurisprudence. This Court has jurisdiction. Const. 1963, Art 1, § 20; MCL 600.215(3); MCL 770.3(6); MCR 7.303(B)(1).

THE FIVE QUESTIONS

QUESTION ONE

WHETHER MCL 28.723(1)(E), THE “RECAPTURE” PROVISION OF THE SEX OFFENDER REGISTRATION ACT, CONSTITUTES EX POST FACTO PUNISHMENT UNDER THE UNITED STATES OR MICHIGAN CONSTITUTIONS, U.S. CONST., ART. I, § 9; CONST. 1963, ART. 1, §10.

The Trial-Court answered: No.

Court of Appeals answered: No.

Defendant-Appellant answers: Yes.

QUESTION TWO

WHETHER REQUIRING THE DEFENDANT TO REGISTER AS A SEX OFFENDER UNDER MCL 28.723(1)(E) AND MCL 28.721 ET SEQ., CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT UNDER CONST. 1963, ART. 1, § 16, OR U.S. CONST., AM. VIII.

The Trial-Court did not answer.

The Court of Appeals did not answer.

Defendant-Appellant answers: Yes.

QUESTION THREE

FOR EX POST FACTO PURPOSES, DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE LATER, NONSEXUAL OFFENSE TRIGGERED SORA REGISTRATION RATHER THAN THE EARLIER SEXUAL OFFENSE.

The Trial-Court answered: Yes
(when citing *People v. Tucker*).

The Court of Appeals answered: Yes.

Defendant-Appellant answers: No.

QUESTION FOUR

HOW, IF AT ALL, THE SEXUAL NATURE OF THE PRIOR UNREGISTERED SEX OFFENSE AFFECTS THE DETERMINATION WHETHER RECAPTURE IS CRUEL OR UNUSUAL PUNISHMENT, OR PUNISHMENT AT ALL.

The Trial-Court did not answer.

The Court of Appeals did not answer.

Defendant-Appellant answers below.

QUESTION FIVE

ASSUMING ARGUENDO THAT THE FOCUS OF THE RECAPTURE INQUIRY IS PROPERLY ON THE EARLIER SEX OFFENSE WHETHER THE DEFENDANT'S ENTITLEMENT TO RELIEF ON EX POST FACTO GROUNDS DEPENDS ON THIS COURT'S DECISION IN *KARDASZ*.

The Trial-Court did not answer.

The Court of Appeals did not answer.

Defendant-Appellant answers: No.

INTRODUCTION

Stigmatizing Mr. Klinessmith as a sex offender 42 years after his only sexual offense violates the prohibition against ex post facto punishments and is a cruel and/or unusual punishment. The two questions are related as our Court of Appeals has recognized in a recent published opinion (discussed below).

If the punitive aspects of SORA registration, as described by this Court in *Betts* and *Lymon*, attach to the prior *sex* offense, incurred before SORA was enacted, and not the “new felony,” then a plain ex post facto punishment occurred. The Court of Appeals, in their published opinion in this matter, reached that same conclusion.

The Court of Appeals, however, reasoned that the punishment attached to the new *triggering* offense based on their decisions in *Tucker* and *Callon* (discussed below at 34-35). But said two decisions involved drunk driving *habitual offender* statutes – not recapture provisions – and their reasoning does not fit onto recapture provisions. Imagine a hypothetical defendant incurs a drunk driving conviction in 1983. In 1991, our Legislature creates a ‘drunk driving public registry,’ not unlike SORA, and includes a recapture provision like SORA’s. Said defendant then incurs a felony larceny conviction in 2017 and is placed on the drunk driving registry. No one would argue that the focus of that punishment is the larceny. But that is the logic the Court of Appeals applied in *this* matter – that the punishment is on the triggering offense and therefore no ex post facto violation occurred.

Even if the reasoning of the Court of Appeals were correct, stigmatizing someone as a sex offender at age 61, when the intervening four decades is devoid of any sexual misconduct recidivism, is cruel and/or unusual.

STATEMENT OF FACTS

On November 28, 1983, Mr. Klinesmith was sentenced to two to five years on a plea based conviction for attempted second-degree criminal sexual conduct. The internet as we know it did not exist. The Space Shuttle Challenger launched on its maiden voyage that year. The Billboard top albums were Michael Jackson's *Thriller* and *Synchronicity* by The Police. Klinesmith was only 20 years of age. His youth was troubled. His father was a physically abusive alcoholic. PSIR CFJ-284 at 13.¹ His parents divorced when he was age five and he lived in and out of foster care until beginning to live on his own at age 15. *Id.*

On July 25, 2017, Mr. Klinesmith appeared before the Tuscola County Circuit Court for sentencing on new drunk driving² and possession of under 25 grams of a controlled substance³ convictions. During the intervening 34-years, Mr. Klinesmith had incurred no sexual offense charges and no returns to prison.

Applying the 2011 recapture provision, MCL 28.723(1)(e), the trial court, over an objection, ordered Klinesmith to register under SORA due to said 1983 conviction. 32a-44a. In its written opinion, the circuit court cited a Court of Appeals opinion, *People v. Tucker*, and noted that *Tucker* was then pending before this Court. 43a-44a.

On November 6, 2017, the defense filed an application for leave to appeal in the Court of Appeals. The application challenged the SORA registration on grounds that the 2011 recapture provision violated the prohibition against Ex Post Facto punishment. On January 24, 2018, the Court of Appeals granted leave. 56a. On November 15, 2018, the Court of Appeals, applying *People v. Tucker*, affirmed the imposition of SORA registration. 57a-59a.

¹ Mr. Klinesmith's Presentence Report in this matter was filed in the Court of Appeals.

² MCL 257.6251 and MCL 257.6256

³ MCL 333.7403

At that time, a challenge to the entire 2011 SORA amendatory act was pending before this Court in *People v. Betts*, 873 NW2d 553 (2016). So, on December 10, 2018, Klinesmith filed an application for leave to appeal with this Court which challenged his SORA registration on ex post facto grounds. On July 29, 2019, this Court placed the application in abeyance pending the outcome in *Betts*. 64a.

On July 27, 2021, this Court issued *People v. Betts*, 507 Mich 527 (2021), holding that the 2011 SORA was punishment and therefore unconstitutional when applied to crimes committed before the act went into effect in 2011.

On February 2, 2022, this Court vacated the Court of Appeals' decision in this matter and remanded back to the Court of Appeals:

...for reconsideration in light of *Betts*. The Court of Appeals shall specifically address whether the rationale of *People v. Tucker*, 312 Mich App 645, 879 NW2d 906 (2015), regarding the "recapture" provision of MCL 28.723(1)(e) remains valid in light of *Betts*. [65a].

On June 16, 2022, the Court of Appeals issued a published opinion which affirmed the circuit court's imposition of SORA registration under the rationale set forth in *Tucker*. 60a-63a. On July 31, 2022, Klinesmith again sought leave before this Court. On March 29, 2023, the matter was placed in abeyance pending a decision in *People v. Lymon* (Docket No. 164685). 66a. On July 29, 2024, the Court issued its opinion *Lymon*, ___ Mich ___ (2024).

On December 6, 2024, this Court issued an order granting Klinesmith a mini-oral argument on the application, directing supplemental briefing on the five questions addressed in this filing, some of which are being considered in a separate case pending before this Cour, and mentioned in said order, *People v. Kardasz*. 67a-68a.

LAW AND ARGUMENT

QUESTION ONE

WHETHER MCL 28.723(1)(E), THE “RECAPTURE” PROVISION OF THE SEX OFFENDER REGISTRATION ACT, CONSTITUTES EX POST FACTO PUNISHMENT UNDER THE UNITED STATES OR MICHIGAN CONSTITUTIONS, U.S. CONST., ART. I, § 9; CONST. 1963, ART. 1, §10.

I. Standard of Review and Issue Preservation

This Court reviews constitutional questions de novo. *People v. Harris*, 499 Mich 332, 342 (2016). Mr. Klinesmith preserved this issue at both his sentencing and in a written objection. 23a-24a and 32a-33a.

II. Introduction

The Legislature’s stated purpose in enacting SORA was to prevent future *sexual* crimes. As we will return to under “Question Three,” SORA’s text indicates that the registration penalty attaches to the “listed” sexual offense. And unlike habitual offender statutes, which increase the punishment on the *new* felony, the recapture provisions increase consequences to *prior* felonies. The word “*recapture*” itself indicates a look back to the earlier offense. Sentencing on the new offense is not impacted.

III. Discussion

Mr. Klinesmith’s sexual misconduct was in 1983 when he was age 20. He discharged from that sentence in 1986. Eleven years later, our Legislature enacted the Sex Offender Registration Act (“SORA”). About 23 years after that event, the Legislature enacted 2011 PA 17 with the recapture provision codified at MCL 28.723(1)(e):

(1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act:

* * *

(e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

About 34 years after Mr. Klinesmith discharged from sentencing, he incurred drunk driving and drug convictions. As a result, he is required to register under the recapture provision – with all of its punitive components.

A. General Ex Post Facto Standards

The United States Constitution, through the Fourteenth Amendment, prohibits states from enacting ex post facto laws. U.S. Const., art. I, § 10 (“No State shall ... pass any ... ex post facto law.”) Our Michigan Constitution contains the same prohibition. Const. 1963, art. 1, §10 (“No ... ex post facto law ... shall be enacted.”). The ex post facto clauses of our Michigan and federal constitutions are interpreted to provide the same protections. See *People v. Betts*, 507 Mich 527 at 542 n 12 (2021), citing *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 777 n 13 (1994).

“The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence.” *People v. Earl*, 495 Mich 33, 37 (2014). At issue here is the third concern—whether the 2011 recapture amendment increased the punishment for a crime already adjudicated.

In determining whether a sanction, like those triggered by the 2011 recapture provision, qualifies as criminal *punishment* for constitutional purposes, the *Mendoza-Martinez* factors are considered:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [*Kennedy v. Mendoza-Martinez*, 372 US 144, 168-169 (1963) (citations omitted).]

In the context of sex offender registries, both this Court and the United States Supreme Court have identified the following five factors *Mendoza-Martinez* factors as particularly relevant: (1) whether the statute has historically been regarded as punishment; (2) whether the statute imposes an affirmative disability or restraint; (3) whether the statute promotes the traditional aims of punishment; (4) whether the statute has a rational connection to a nonpunitive purpose; and (5) whether the statute is excessive with respect to its nonpunitive purpose.” *People v. Lymon*, __ Mich __ , (2024); slip op. at 11.

B. A Short History of SORA

Michigan's SORA went into effect in 1995. This first version of SORA created a confidential database accessible only to law enforcement; it required those convicted of certain sex offenses to register and notify law enforcement of address changes. Major amendments to SORA have occurred. The 1997 amendments made the registry available for in-person public inspection during business hours. The 1999 amendments required computerization of the registry and gave law enforcement the authority to make the database open to the public online. The 2002 amendments required reporting if a registrant was going to be involved with a college, and the 2004 amendments required “an updated photograph” for the database. The 2006 amendments created “student-safety zones” and e-mail alerts to subscribing members of the public.

In 2011, the Legislature overhauled SORA, including the addition of the recapture provision, MCL 28.723(1)(e). Indeed, “The 2011 amendments completely restructured SORA through the imposition of a tiered classification system, and the duties and requirements of each registrant were based on that registrant's tier classification.” *Betts*, 507 Mich at 564. Registrants needed to report in person to law enforcement a certain number of times each year based on their tier, the tier was described in the online database, and the process “lengthened registration periods, including a lifetime registration requirement for tier III offenders.” *Id.* at 535-536. The 2011

SORA also added events, like changes in employment and internet addresses, “triggering an in-person reporting requirement and decreasing the reporting period [from ten days] to three days.” *Betts*, 507 Mich at 534-535, 564.

In *Betts*, the 2011 SORA was successfully challenged on ex post facto and other grounds. *Id.* at 567. By the time *Betts* was published, the Legislature had passed 2020 PA 295 (“2021 SORA”) as discussed below.

C. The 2011 SORA Is Punishment in Violation of the Ex Post Facto Doctrine

In *Betts*, this Court held that retroactive application of the 2011 SORA violated the ex post facto doctrine. 507 Mich at 533. The Court first had to decide whether SORA was punishment. The Court found that the Legislature stated that its intent in passing SORA was to promote the nonpunitive goal of public safety, but other aspects of the statute “suggest a punitive intent.” *Id.* at 548-549. Nonetheless, this Court concluded that the Legislature likely intended SORA as a civil regulation. *Betts*, 507 Mich. at 548-549.

This Court then analyzed the *Mendoza-Martinez* factors, *Id.* at 549-562, determined that the punitive effect of the statute outweighed the legislative intent, and held that 2011 SORA was punitive. *Id.* at 548, 562.

D. The Recapture Provision Was Not Severed from the 2011 SORA

The defendant in *Betts* was convicted in 1993⁴ and SORA took effect two years later. *Betts*, 507 Mich 536–537. This Court wrote that, in determining whether *Betts* satisfied his burden to establish an ex post facto violation it “do[es] not examine individual provisions of SORA *in isolation* but instead assess[es] SORA’s punitive effect in light of all the act’s provisions when *viewed as a whole*.” *Id.*, at 549 (emphasis added). As this Court analyzed the *Mendoza-Martinez* factors, the entire Act was at issue.

⁴ Again, here the sexual misconduct offense dates to 1983.

After finding an ex post facto violation, the majority opinion in *Betts* turned to the remedy. *Id.*, 507 Mich at 562–574. The option of severability turned on two factors: (1) the remaining parts of the statute must be consistent with the intent of the Legislature; and (2) the remaining portions must be operable, i.e., “otherwise complete in itself and capable of being carried out without reference to the unconstitutional sentence or provision.” *Id.* The Court concluded that the “significant structural amendments of SORA in 2011” made severance impossible. *Id.*, at 562-563.

Therein rests one flaw in the Court of Appeals analysis in the present matter – which we will return to under the third question presented: How can the 2011 recapture provision not violate the ex post facto prohibition when the rest of the statute *does*? Stated differently, did the Court of Appeals provide a persuasive explanation for why an ex post facto violation occurred in *Betts* but not here? The dissent in *Betts* understood that the entire 2011 Act was struck as it wrote that there was no need to “strike down *the entire statute...*” *Id.*, 507 Mich at 574–586 (emphasis added). But even if Klinesmith is wrong on that point, it should not change the result of any ex post facto analysis.

E. Klinesmith Plead in 1983 Unaware of the Yet to be Enacted SORA and SORA Recapture Provisions

For defendants found guilty *after* the recapture provision was enacted and took effect, no ex post facto concern can exist. But Mr. Klinesmith’s punishment was enhanced 34 years after his guilty plea to a sex offense, based on a change in law which occurred 28 years after that guilty plea was entered.⁵

Due process principles require a plea-taking court to advise the defendant of a consequence of a guilty plea if that consequence constitutes “punishment.” *People v. Cole*, 491 Mich 325,

⁵ Klinesmith’s PSIR does not indicate how he was convicted. The MDOC website states that it was by plea. <https://mdocweb.state.mi.us/OTIS2/otis2profile.aspx?mdocNumber=174293>

332-334 (2012). And this Honorable Court held, in *People v. Betts* and *People v. Lymon*, that imposition of SORA's registration requirements, and its attendant obligations and restrictions, constitutes punishment.

The reasoning in *Cole* applies here. *Cole* involved a statutory requirement subjecting certain sex offenders to lifetime electronic monitoring. This Court held that, because lifetime electronic monitoring was a “direct consequence” of Mr. Cole’s guilty plea, due process required the trial court to inform Mr. Cole, as he entered his guilty plea, that he would be subject to mandatory lifetime electronic monitoring. *Cole*, 491 Mich at 337. Without that information, defendant Cole’s guilty plea was not understanding and voluntary.

The Court explained:

When a defendant agrees to plead guilty, he or she is making a bargain, giving up trial rights in exchange for some perceived benefit. In order for a defendant to accurately assess the benefits of the bargain being considered, the defendant must be aware of the immediate consequences that will flow directly from his or her decision. Without information about a consequence of a sentence deemed by our Legislature to be punishment, which here entails having to wear a device and be electronically tracked “from the time the individual is released on parole or from prison until the time of the individual's death,” MCL 791.285(1)(a), it cannot be said that a defendant was aware of the critical information necessary to assess the bargain being considered. [*Cole* at 337-338]

This Court remanded the matter back to the plea-taking court in *Cole* in order to allow Cole to decide whether to withdraw his guilty plea. *Id.* at 338.

The same principles would apply here. In both *Betts* and *Lymon*, this Court found that SORA requirements do indeed constitute *punishment* and the most obvious ‘direct consequence’ of a conviction is the penalty to be imposed. It is, the Court held in *Cole*, “well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction.” *Cole*, 491 Mich at 334 quoting *Blankenship v. State*, 858 SW2d 897, 905 (Tenn. 1993).

Mr. Klinesmith was not informed in 1983 that, based on his guilty plea, he could be required

to register as a sex offender if he incurred a new felony, regardless of whether that new felony involved sexual misconduct. Nor is there evidence in this record that he was told that in 2017 when he entered his guilty pleas to the new felonies. See *People v. Nunez*, 342 Mich App 322, 325–35 (2022).

F. The Recapture Provision Is an Ex Post Facto Punishment

All the new felony conviction does, under SORA’s recapture provision, is give the trial court an opportunity to add a consequence to the *earlier* sexual offense. The nature of the new felony is irrelevant, *any* felony will serve. That is how irrelevant the new felony is to what is occurring. The recapture provision does not add a consequence to the new felony, it adds one to the earlier sexual misconduct.

SORA’s recapture provision, “makes more burdensome the punishment for a crime, after its commission.” *Dobbert v. Florida*, 432 US 282, 292 (1977). What occurred is a classic ex post facto violation; the change in law “increases the penalty by which a crime is punishable.” See *California Dep’t of Corrections v. Morales*, 514 US 499, 506, n 3 (1995). The SORA recapture provision did not increase punishment for drunk driving or drug use. The recapture provision increased the punishment for the earlier sexual offense. The triggering offense merely allowed the state to sweep Mr. Klimesmith into the registry, for his prior 1983 sexual offense, in violation of ex post facto protections.

G. The SORA Requirements Remain Punishments After the 2021 Amendments

In *Lymon*, this Court found that its previous analysis in *Betts* was “largely unaffected by the recent changes to SORA.” *Lymon*, supra., slip op. at 13. The changes had done away with those which resembled the traditional punishment of “banishment” but kept those resembling the traditional punishment of public shaming. *Lymon*, supra., slip op. at 7.

Ultimately, this Court held that the 2021 SORA was “cruel or unusual punishment” (an ex

post facto analysis requires only “punishment”) but, in doing so, the Court considered the non-sexual nature of the offense at issue. Slip op. at 17-30. It concluded “that the 2021 SORA constitutes punishment as applied to non-sexual offenders,” and “[e]ft for another day and case whether the 2021 SORA constitutes punishment – and, more specifically, cruel or unusual punishment – when applied to other offenders.” *Id.*, slip op at 8 n 6.

In the present case, the sexual offense occurred decades earlier and registration was triggered by a non-sexual offense. But the 2021 SORA *is* criminal punishment subject to ex post facto rules. We read *Lymon* as stating that the 2021 SORA constitutes *punishment* and left for another day how it might constitute *cruel or unusual* punishment – an issue addressed later in this brief as the second question presented.

1. The Traditional Aims of Punishment

This Court has ruled that “2021 SORA also continues to resemble the traditional punishment of shaming.” *Lymon*, slip op at 16-17. The “breadth of information available to the public” and “the option for subscription-based notification of the movement of registrants” meant that a registrant may face “social ostracism based on registration.” *Id.* Indeed, the Legislature’s stated intent was to provide the public, not just law enforcement, with the means to monitor persons with sex-offense convictions.

The 2021 SORA “continues to impose significant obligations on registrants.” *Lymon*, slip op at 20-21. This Court cited to the reporting requirements, finding “a considerable sacrifice of privacy and a permanent system of state surveillance.” *Lymon*, slip op at 19.⁶ The *Lymon* opinion held that “...the 2021 SORA continues to resemble the traditional punishments of

⁶ These in-person reporting requirements were not present in the Alaska scheme at issue in *Smith v. Doe*, 538 US 84, 97 (2003), and the lack of in-person reporting was one of the reasons the United States Supreme Court found there was no disability or restraint. See Appellant Kardasz’s December 12, 2024, Michigan Supreme Court *Supplemental Brief* at 29-30.

parole and shaming.” Slip op. at 14. This factor weighed in favor finding the 2021 SORA to be punishment. Slip op. at 17-18.

2. Whether The Sanction Involves An Affirmative Disability Or Restraint

The *Lymon* opinion found that, despite the 2021 amendments removing or modifying some of the main features the *Betts* Court found most troubling in the 2011 SORA – the 1,000-foot school boundary (eliminated) and mandatory in-person reporting (modified) – the 2021 SORA still imposes disabilities or restraints on registrants that weigh toward the 2021 SORA being a punishment. *Lymon*, slip op. at 18-21.

3. The Rational Connection to a Non-Punitive Purpose

With regard to whether the 2021 SORA has a rational connection to a nonpunitive purpose, this *Mendoza-Martinez* factor is considered to be the most important. See *Smith v. Doe*, 538 US 84, 102 (2003)(“The Act’s rational connection to a nonpunitive purpose is a ‘[m]ost significant’ factor in our determination that the statute’s effects are not punitive.”)

The recapture provision, triggered by a non-sexual offense, is not rationally connected to a non-punitive purpose. Any connection to a non-punitive purpose is a loose one at most. Applied to Mr. Klinesmith, who did not incur a sexual offense charge during the next four decades, the recapture provision is not “prevent[ing] future criminal sexual acts” or “ensur[ing] public safety from [a] particularly dangerous individual[.]”

Again, if the recapture provision had existed at the time of Klinesmith’s conviction in 1983, there would be no ex post facto issue to consider. The issue only exists because SORA did not exist at the time of Mr. Klinesmith’s 1983 plea. Mr. Klinesmith does acknowledge that in both *Betts* and *Lymon* this Court held that a rational connection did exist between SORA and the stated goal of SORA to prevent sexual offenses – if not specifically the recapture provision. But this Court still found SORA to be punitive.

4. Whether the Provision is Excessive Compared to the Purpose

With regard to whether the 2021 SORA recapture provision is excessive as compared to its purpose, the same reasoning as set forth above applies. A man who went over 40 years without recidivating as a sexual offender will now be publicly registered and publicly shamed as a sex offender and compelled by law to comply with the act for 25 years. As an applied challenge or as a facial challenge, the impact of the recapture provision is excessive compared to the purpose it attempts to achieve.

In *Lymon*, this Court examined whether the 2021 SORA was excessive as compared to its goal of protecting the public from future sex crimes committed by *non-sexual* offenders. *Lymon*, slip op. at 24-28. In doing so, this Court declined to endorse a position regarding the efficacy of sex-offender registries or recidivism rates but acknowledged “a robust scientific debate and no universally accepted conclusion on the matters.” Slip op. at 26.

This Court in *Lymon* found the 2021 SORA excessive vis-à-vis non-sexual offenders. Slip op. at 26. Such offenders were “branded [as] dangerous sex offenders even though their crimes contained no sexual component and even though there has been no determination that they pose such a risk of harm to the community.” Slip op. at 27-28.

Something similar is occurring here, where Mr. Klinesmith has never recidivated as a sexual offender for over four over decades, but rather will now be compelled to publicly register. Where the efficacy of deterrence is unclear, then the punitive measures of the 2021 SORA *remain* a form of punishment. Indeed, a federal district court in Michigan recently came to this conclusion. See *Does et al. v Whitmer, et al.*, ___F Supp 3d ___, 2024 WL 4340707 (ED Mich, September 27, 2024).

IV. Conclusion

The 2021 SORA is punishment. The intense state supervision for long periods of time, the

onerous reporting requirements, and the public shaming nature of the registry makes SORA registration a form of punishment. The offense-based nature of the tier registration, rather than individualized assessments of risk, contributes to the finding of punishment.

This is especially true when the recapture provision is applied to a man who has gone four decades without recidivating as a sexual offender and will now be publicly registered and shamed as a sexual offender. The situation is not so different from *Lymon*, where a defendant was branded as a dangerous sex offender even though his crimes contained no sexual component. Klinesmith has not recidivated as a sex offender in four decades, so the prevention and protection against the commission of future criminal sexual acts by convicted sex offenders is not being advanced or furthered.

Stigmatizing Klinesmith as a sex offender violates the constitutional prohibition against ex post facto punishment. If the punitive aspects of SORA, described in *Betts* and *Lymon*, attached to the *prior* offense, then a plain ex post facto violation occurred: Punishment for the past 1983 crime was increased. The Court of Appeals acknowledged that as true but reasoned that the punishment attached to the *new* offenses. As discussed below, respectfully, that reasoning does not withstand scrutiny. After all, it is a *recapture* provision – not a habitual offender provision – that is at issue.

QUESTION TWO

WHETHER REQUIRING THE DEFENDANT TO REGISTER AS A SEX OFFENDER UNDER MCL 28.723(1)(E) AND MCL 28.721 ET SEQ., CONSTITUTES CRUEL OR UNUSUAL PUNISHMENT UNDER CONST. 1963, ART. 1, § 16, OR U.S. CONST., AM. VIII.

I. Standard of Review / Issue Preservation

This Court reviews questions of constitutional law de novo. See *People v. Parks*, 510 Mich 225, 245 (2022). This Court alone is “the ultimate authority with regard to the meaning and application of Michigan law.” *Id.*, quoting *People v. Bullock*, 440 Mich 15, 27 (1992).

The objection made in the circuit court to the SORA registration requirement was that “for an offense that occurred more than 30 years ago, which preceded Michigan's SORA, [doing so] imposes a harsh punishment on the defendant which amounts to *ex post facto* punishment...” 23a-24a and 32a-33a.

But as our Michigan Court of Appeals recently recognized, *ex post facto* and cruel or unusual punishment objections overlap:

[I]n determining whether a statute imposes a criminal punishment, which is all either clause prohibits, the standard is the same. See *Smith v. Doe*, 538 US 84, 97 (2003) (“the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts”); *Does 1-7 v. Abbott*, 945 F.3d 307, 313 n 9 (5th Cir. 2019). To that point, the analysis of whether the statute contained a punishment in *Lymon* exactly matched the factors considered in *Betts*, with both opinions using the *Mendoza-Martinez* factors. *Lymon* [*People v. Kiczenski*, __ Mich App __; No. 364957, slip opinion at FN 4 (MCOA Oct. 28, 2024)(Opinion Authored by Judge Murray) (cleaned up)].

II. Introduction

Is it cruel *or* unusual to place on the *sex offender* registry, 23 years after it was created, a man who plead to an attempted sexual offense in 1983, was discharged from his sentencing in 1986, and went the rest of his life without committing another sexual offense, all because he was found drunk driving with a small quantity of drugs about 34 years later? The year 1983 was long ago. The final episode of the TV series M*A*S*H aired in 1983 and the Soviet Union

admitted to shooting down Korean Air Lines Flight 007 when it violated Soviet airspace. There was no SORA registry. In fact, 1983 is considered by some to be the year in which the internet was born.⁷

III. The Legal Standards

The United States Constitution prohibits “cruel *and* unusual punishment,” U.S. Const., Am. VIII (emphasis added), and the Michigan Constitution prohibits “cruel *or* unusual punishment,” Const. 1963, art. 1, § 16 (emphasis added). The protection against cruel or unusual punishment in the Michigan Constitution is broader than the protection found in the Eighth Amendment; consequently, if a penalty “passes muster under the state constitution, then it necessarily passes muster under the federal constitution.” *People v. Benton*, 294 Mich App 191, 204 (2011) (quotation marks and citation omitted).

1. “Punishment”

Before determining whether cruel or unusual punishment has been shown, the Court is first required to resolve whether the penalty is a criminal punishment or merely a civil regulation. Appellant addressed this subject under “Question One,” arguing that SORA – applied through its recapture clause – is a criminal punishment. In *Lymon*, this Court found that, at least when applied to non-sexual offenders, “Despite the recent amendments ...the 2021 SORA continues to resemble the traditional punishments of parole and shaming.” See *Lymon*, slip opinion at 4–17. After a *Mendoza-Martinez* inquiry, this Court concluded that the defense demonstrated by “the clearest proof” that the 2021 SORA “is so punitive either in purpose or effect as to negate the State's intention to deem it civil” and constituted punishment, at least as applied to non-sexual offenders. *Id.*

⁷ “A Closer Look at the Controversy Over the Internet’s Birthday.” Retrieved Jan. 25, 2025, https://circleid.com/posts/a_closer_look_at_the_controversy_over_the_internets_birthday_you_decide

2. The Standards for Finding “Cruel or Unusual” Punishment

In *People v. Parks*, 510 Mich 225, 243 (2022), this Court discussed why our state Constitution’s ban on “cruel or unusual” punishment offers broader protection than its federal counterpart. First, there is the textual difference noted above. *Id.* Second, by 1963, the words “cruel” and “unusual” had been understood “for more than half a century to include a prohibition on grossly disproportionate sentences,” indicating the framers and adopters of the Constitution of 1963 intended a broader view of the state constitutional protection. *Id.* Third, there is long-standing Michigan precedent to support said broader view. *Id.*

The *Parks* opinion noted that Michigan courts, evaluating the proportionality of sentences under the “cruel or unusual punishment” clause, are required to consider: (1) the severity of the sentence relative to the gravity of the offense; (2) sentences imposed in the same jurisdiction for other offenses; (3) sentences imposed in other jurisdictions for the same offense; and (4) the goal of rehabilitation, which is a criterion specifically “rooted in Michigan's legal traditions.” *Id.*, 510 Mich at 242, citing *People v. Lorentzen*, 387 Mich 167, 170-172 (1972) (invalidating a mandatory minimum of 20 years for selling any amount of marijuana).

In *People v. Bullock*, 440 Mich 15 (1992) (invalidating life-without-parole for possession of 650 grams of cocaine) this Court found the *Lorentzen* analysis was “firmly and sufficiently rooted in Const. 1963, art. 1, §16.” *Id.* Then the Court added:

The proportionality principle inherent in Const. 1963, art. 1, § 16, is not a simple, “brightline” test, and *the application of that test may, concededly, be analytically difficult and politically unpopular, especially where application of that principle requires us to override a democratically expressed judgment of the Legislature.* The fact is, however, the people of Michigan, speaking through their constitution, have forbidden the imposition of cruel or unusual punishments, and we are duty-bound to devise a principled test by which to enforce that prohibition, and to apply that test to the cases that are brought before us. The very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution, the enforcement of which is entrusted to our judgment. [*People v. Bullock*, 440 Mich at 40-41 (emphasis added).]

Therefore, in addition to those protections guaranteed to every citizen of this country under the Eighth Amendment, our state Constitution has afforded greater bulwarks against cruel or unusual punishments. Specifically, a “grossly disproportionate” standard which has no exact federal counterpart. *People v. Parks*, 510 Mich 225, 242–243 (2022) citing *People v. Bullock*, 440 Mich 15, 35 (1992).

IV. Application of the Legal Standards

The imposition of sex offender registration years after SORA was enacted and 34 years after the only sexual offense (longer than Klinesmith would have to register as a tier II offender) because the defendant was found driving drunk with a small amount of drugs, even though the defendant never recidivated as a sex offender, is both cruel and unusual. Under an as applied challenge or under a facial challenge, the SORA recapture provision fails the four *Bullock* factors.

1. Harshness of the Penalty Compared to the Gravity of the Offense

The first *Bullock* factor asks this Court to consider the harshness of the penalty compared to the gravity of the offense. Because this case arises from the recapture provision, there is the original “listed offense” of attempted second-degree criminal sexual conduct, then there is the passage of over 30 years, and then the “triggering” offenses of drunk driving and possession of less than 25 grams of a drug.

a. The Harshness of the Penalty

As discussed above, this Court in *Lymon* found 2021 SORA penalties to be a significant criminal punishment, and they are quite harsh, particularly when imposed four decades after the fact. They include:

- The public disclosure of the registrant’s listed offense, but also what would otherwise be personal information, like the registrant’s home address, place of employment, and

photo and physical appearance.

- When SORA’s notification provision is used, members of the public are alerted to this information without active effort on their behalf. MCL 28.724. Members of the public may choose to be notified whenever any registrant moves into a particular zip code. MCL 28.730(3).
- Registrants are required to report in person to law enforcement one to four times per year, depending on their tier classification. MCL 28.725a(3).
- Registrants must report to law enforcement various changes in their information within three business days, including but not limited to changes of domicile, employment, e-mail and internet identifiers, and telephone numbers. MCL 28.725(1) and (2).
- Registrants must pay yearly fees. MCL 28.725a(6).
- As with parole, law enforcement may at any time investigate a registrant’s status based on an anonymous tip. *Betts*, 507 Mich at 553.
- MCL 28.721a – the Legislature's statement of its intent – refers to the public, not just law enforcement, monitoring registrants, engaging with the registry, and furthering the stigma of registration.
- Registrants must adhere to these requirements for at least 15 years, in Mr. Klinesmith’s case 25 years, and sometimes for life. MCL 28.725(11) through (13).
- These requirements are based solely on the conviction and not on any individualized assessment of the risk a specific registrant poses to the public.
- Compliance with these requirements is enforced through the threat of imprisonment. MCL 28.729(1).

The *Lymon* opinion also found that SORA registration results in housing discrimination, lost employment opportunities, threats, and violence. *Id.* In its briefing in *People v. Kardasz*, 513

Mich 1118 (2024), cited in this Court’s December 6, 2024, order in the case sub judice, the State Appellate Defender’s Office cites studies in support of those findings, and studies showing increased level of mental illness and suicidal thoughts. See Appellant Kardasz’s December 12, 2024, Michigan Supreme Court *Supplemental Brief* at 84, 86.

b. The Gravity of the Offense (and its Remoteness)

In short, the SORA penalties in general are significant, criminal punishment in nature, and harsh. But when applied four decades after the fact, triggered by non-sexual crimes, with no intervening sexual offense, the harshness increases exponentially. And the very reason for the registration – to protect the public against *future* acts of sexual misconduct – is lost. If it has not occurred in the past four decades, for a defendant who has spent much of that time monitored on probation, it is unlikely to reoccur at age 54 at sentencing.

In fact, sex offenders are not an exception to the curvilinear relationship between age and crime, the “Age-Crime Curve,” one of the most consistent findings in criminology. It has been called a “resilient empirical regularity”⁸ and one of the “brute facts of criminology.”⁹ In aggregate studies, the curve is unimodal, with crime rates rising in adolescence, peaking in the late teens and declining rapidly through adulthood.¹⁰

And the age-crime curve exists for sex offenders, as seen on the graph on the next page.¹¹ Three histograms are presented, one for rapists, one for extra-familial child molesters, and one for incest offenders. All three begin to decline well before age 50.

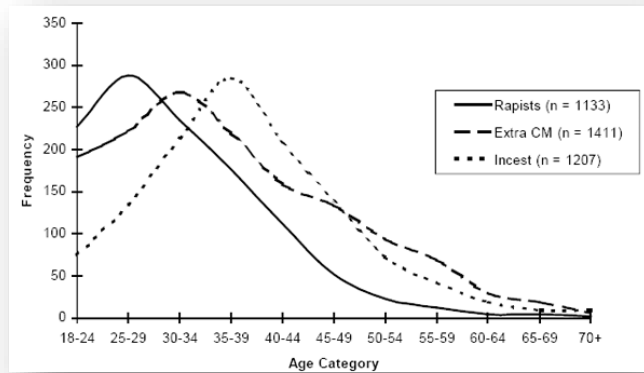
⁸ Brame, R., & Piquero, A. R. (2003). *Selective Attrition and The Age– Crime Relationship*. *Journal of Quantitative Criminology* 19 at 107 (2003)

⁹ Hirschi, T., & Gottfredson, M. *Age and The Explanation Of Crime*. *American Journal of Sociology*, 89 at 552 (1983)

¹⁰ Steffensmeier, D. J., Allan, E. A., Harer, M. D., & Streifel, C. *Age and the Distribution of Crime*. *American Journal of Sociology*, 94, at 803 (1989)

¹¹ *Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters*, by R. Karl Hanson <https://www.securitepublique.gc.ca/cnt/rsrscs/pblctns/sxl-rcdvsm-cmprsn/index-en.aspx>

Then there is the non-sexual nature of the triggering offenses. This Court wrote in *Lymon*, “Moreover, as applied to offenders like defendant whose crimes—while heinous—did not include a sexual component, the 2021 SORA provides an additional element



of shaming by branding these registrants with the label of ‘sex offender.’” *People v. Lymon*, Slip Opinion at 8.

Mr. Klinessmith’s ancient conviction was sexual in nature, but is he still a sex offender? The passage of time from Klinessmith’s 1983 offense powerfully indicates that he poses no risk of sexual recidivism. The remoteness of the sexual offense (age 20) to the sentencing date in the present matter (age 54) is striking.

As the remoteness of the prior offense increases, SORA penalties become less reasonable. Persuasive non-Michigan authority advises that the remoteness of the sexual offense should play an important role in this Court’s analysis.

***United States v. Dougan* (10th Cir. 2012)**

In *United States v. Dougan*, a defendant plead guilty to post office robbery. 684 F.3d 1030, 1031 (10th Cir. 2012). Sixteen years earlier, he sustained a conviction for sexual battery. *Id.* at 1031-34. At sentencing, the district court imposed a special condition of supervised release requiring sex offender treatment. *Id.* at 1032. On appeal, the Tenth Circuit reversed, holding that defendant’s “seventeen-year-old conviction for a sexual battery was too remote in time to be reasonably related to the imposition of special sex-offender-related conditions of supervised release where the crime of conviction was robbery of a post office.” *Id.* at 1037.

The Tenth Circuit noted that no case considered by the other circuits had upheld a sentencing court's reliance on offenses as old as 17 years to impose sex offender conditions of probation. The Sixth Circuit held that seventeen years was too remote. *United States v. Carter*, 463 F.3d 526, 531 (6th Cir.2006). The Eighth Circuit found a thirteen year period too remote, *United States v. Kent*, 209 F.3d 1073, 1077 (8th Cir. 2000), but upheld special sex-offender conditions after a 12 year period where a failure-to-register conviction occurred as an intervening event, *United States v. Smith*, 655 F.3d 839, 847 (8th Cir.2011).

***United States v. Carter* (6th Cir. 2006)**

In *United States v. Carter*, a defendant plead guilty to felon-in-possession-of-a-firearm in 2001, thirteen years after his 1988 conviction for a sex crime. 463 F.3d 526, 527 (6th Cir. 2006). The district court imposed a special condition requiring sex offender treatment. *Id.* On appeal, the Sixth Circuit reversed because, in part, the defendant's prior conviction was "too remote" to support the condition. *Id.* The *Carter* decision was cited with approval in *United States v. Childress*, 874 F.3d 523, 527 (6th Cir. 2017) and by the Seventh Circuit in *United States v. Johnson*, 756 F.3d 532, 541 (7th Cir. 2014).

***United States v. T.M.* (9th Cir. 2003)**

In *United States v. T.M.*, a defendant was convicted of conspiracy to distribute marijuana. 330 F.3d 1235, 1237 (9th Cir. 2003). The trial court imposed a special condition of supervised release on its belief that the defendant was a sex offender due to two events – one forty years old and the other twenty. Largely due to remoteness, the Ninth Circuit vacated the conditions as not reasonably related to the characteristics of the defendant. *Id.* at 1243.

These cases support the position that the remoteness of Klinesmith's only sex offense weighs in favor of finding the *harshness* of the penalty outweighs the gravity of the offense. In candor, there are opinions which treat remoteness as nondispositive to whether sex offender conditions

are reasonable, such as *Sealed Appellee v. Sealed Appellant*, 937 F.3d 392, 404 (5th Cir. 2019). But while treating remoteness as nondispositive, they do not hold that the remoteness of the prior offense is irrelevant.

2. Penalty Imposed for the Offense Compared to Other Offenses

Attempted second-degree criminal sexual conduct is one of many Michigan offenses which can result in placement on the sex-offender registry. That is *not* what we are considering in this appeal. This appeal involves the recapture provision and putting defendant on the registry four decades after the fact, based on non-sexual offenses. That is unusual and, we would submit, in addition, cruel.

Appellant has found nothing comparable in Michigan. The recidivist statutes we have found (discussed below) involve people who recidivated for the *same* conduct, drunk driving. And although the facts were different, in that Mr. Klinesmith does have his ancient sex offense, not unlike in *Lymon*, placement on the SORA registry occurred due to a non-sexual offense. At least in *Lymon* that offense was assaultive, recent in time (it was the sentencing offense), and loosely associated with sexual offenders.

3. Penalty Imposed for the Offense Compared to Other States

This prong compares the sentence with sentences for the same crime in other jurisdictions. Here, this Court must determine whether there are other jurisdictions with the same registry recapture provision found in Michigan's SORA which would apply an over 30 year old offense with no intervening sexual misconduct.

Using Westlaw and searching the terms "sex offender" and "registry OR register" alongside and in the alternative, "recapture," "reactivation provision," "reinstatement rule," "triggering event provision," "renewal obligation," or "subsequent conviction clause," nothing comparable to our SORA recapture provision is found.

In its briefing in *Kardasz*, the State Appellate Defender’s Office found that only 18 states have substantially implemented the minimum standards from the federal SORNA Act. But even if every state had a registry exactly like Michigan’s, that would not be dispositive because even if “Michigan is not as overwhelming of a national outlier in this case as it was in *Bullock*, the fact remains that our Constitution does not allow for excessively harsh punishment.” *Parks*, 510 Mich at 263-264.”

4. Whether the Penalty Imposed Advances the Goals of Rehabilitation

Finally, the application of the SORA recapture clause to an over 30 year old offense, without any intervening sexual misconduct, does not advance the goal of rehabilitation. The express intent of SORA was to address recidivism among sex offenders. Therefore, to publicly brand Klinesmith as a sex offender, with the attendant social stigma and law-enforcement supervision, when the past four decades show *no evidence of recidivism* is not only cruel and/or unusual but it bears no connection to the goal of rehabilitation.

Branding the 54-year-old Klinesmith as a sex offender, for something he was involved in at age 20, does not further his integration into society. The imposition of SORA could instead “work[] at an opposite purpose [to rehabilitation], [by] preventing defendant from securing employment and otherwise moving forward with his life plans.” *People v. Dipiazza*, 286 Mich App 137, 156 (2009). It is not even clear that SORA is effective in suppressing recidivism among actual sex offenders. *Lymon*, slip op. at 26.

“[T]he substantiality of the risk every registrant poses is suggested [to the public] by the government’s initiative in establishing the registration,” *Id.* citing *State v. Letalien*, 985 A.2d 4, 23 (2009) and “We can hardly conceive of a state’s action bearing more ‘stigmatizing consequences’ than the labeling of a [person] as a sex offender,” *Id.* citing *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997). Anyone who finds Klinesmith’s name on the Registry is unlikely to

notice that his sex offense occurred over four decades ago. This Court in *Lymon* found the 2021 SORA excessive vis-à-vis non-sexual offenders and Mr. Klinessmith has more in common with that population than with the sex offender population.

It is not irrelevant that Klinessmith was only 20 years of age when he incurred that conviction. Michigan has long recognized 21 years as a demarcation line for adult responsibility. See Michigan's Holmes Youthful Trainee Act, MCL 762.11 et seq. More recently, science has recognized that a late adolescent brain is similar to the juvenile brain for purposes of criminal sentencing. This Court has found that "late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead." *Parks*, 510 Mich at 250.

The *Parks* Court relied on a consensus study report published by the National Academies of Sciences, Engineering, and Medicine. *Parks*, 510 Mich at 250. That report explains, "The unique period of brain development and heightened brain plasticity . . . continues into the mid-20s."¹² So it seems especially cruel to stigmatize the 54-year-old Klinessmith for something he was involved in at age 20.

The PSIR states that Klinessmith was born in Michigan, his parents divorced when he was five years of age, and he lived with his mother after the divorce. CFJ-284 at 13. He denied any drug and or alcohol abuse in the home and denied any mental, physical and or sexual abuse. But the agent noted that, in an earlier report, he was more forthcoming, acknowledging that his father was an alcoholic who was physically abusive. *Id.* He stated that not all of his needs were always met growing up. At age eight he was placed into foster care. At ten, he was allowed to move back with his mother. However, at age 12 he was placed into foster care until age 15

¹² National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing opportunity for all youth—A Consensus Study Report* (Washington, DC: The National Academies Press, 2019), at 22.

when he was placed into independent living. *Id.* His father committed suicide in 2013 and his mother passed away in 2015. *Id.*

It is clear that Mr. Klinessmith had a difficult upbringing and, if he made a terrible mistake at age 20 – again it’s unclear what occurred with any detail – it is to his credit that he spent the next over four decades not recidivating as a sex offender or in committing any conduct that sent him back to prison.

Mr. Klinessmith continued to have problems in life. After a one night stand in 1985 he became a father. He married, Donna Klinessmith, in 1992 and they had a child and a good relationship until she was murdered in 2007. He describes that event in some detail. CFJ-284 at 13. He has contact with his children. *Id.* He had a significant employment history and he obtained his GED. *Id.*, at 14. He has been drinking since age 15 and has attempted treatment. *Id.* He denies any mental health problems. *Id.*, at 15.

Punishing the 54 year-old Klinessmith for a conviction obtained at age 20 is unusual, cruel, and unconnected to rehabilitation. A leading expert on brain development writes:

The decisions made in *Roper*¹³ and *Miller* were based largely on behavioral evidence of differences between youths and adults, with little knowledge or appreciation of the functionally significant and legally relevant brain changes throughout adolescence and into young adulthood. That evidence is now available and further confirms the behavioral science. Not only do these findings apply to *Roper*, *Miller*, and *Montgomery*¹⁴ but they also inform the extension of these decisions beyond 18 years.¹⁵

Distinguishing the cognitive capacity of a 17-year-old from a 20-year-old is impossible for

¹³ *Roper v. Simmons*, 543 US 551 (2005).

¹⁴ *Montgomery v. Louisiana*, 577 US 190 (2016).

¹⁵ Casey et al., *Making the Sentencing Case: Psychological and neuroscientific evidence for expanding the age of youthful offenders*, 5 Ann Rev Criminal 321, 337 (2022). See also American Bar Association, *ABA Resolution 111*, at 6 (“[R]esearch has consistently shown that [brain] development actually continues beyond the age of 18” and that “the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development.”).

a single individual or group of individuals, “but this distinction in performance becomes more obvious by the mid-twenties.” *Making the Sentencing Case*, supra., at 327-328. There exists “a transient pattern in criminal behavior that peaks during adolescence and subsides by the mid-twenties.” *Id.* at 332. Punishment schemes must keep pace with society’s evolving standards of decency and, “[I]t would be profoundly unfair to impute full personal responsibility and moral guilt to those who are likely to be biologically incapable of full culpability.” *Parks*, 510 Mich at 259 (cleaned up); *Lorentzen*, 387 Mich at 178-179.

As SADO argues in *Kardasz*, with citations to academic studies, SORA harms job prospects financial security, housing stability, physical safety, mental health, and human connections, all while failing to reduce recidivism. It can paradoxically increase recidivism “by producing stress that leads to emotional dysregulation.” See *Kardasz*’s December 12, 2024, *Supplemental Brief* at 71.

V. Conclusion

Punishing someone as a sex offender for drunk driving and drug use is cruel and/or unusual. But even if the penalties are imposed for the prior sexual offense, branding Mr. Klinesmith as a sex offender at age 54, for a Tier II offense incurred four decades ago, when the intervening years show no evidence of the sexual misconduct recidivism which SORA is expressly intended to suppress, is also cruel and unusual.

SORA’s mandate that Mr. Klinesmith register as a sex offender for 25 years, four decades after the sexual offense, without an individualized assessment of risk or any means for him to petition for removal, violates the Michigan prohibition against cruel or unusual punishment. The punishment appears to be unusual in Michigan and among the other states.

Under the federal constitution, the United States Supreme Court frequently employs an “as applied” analysis. The “right not to be subject to excessive sanctions” necessarily “flows from

the basic ‘precept of justice that punishment for crime should be graduated and proportioned’ to both the offender and the offense.” *Roper v. Simmons*, 543 US 551, 560 (2005).

Certain punishments may not violate the Eighth Amendment per se but are found to be a violation when applied to a certain class of people or when applied in a mandatory fashion. See, e.g., *Kennedy v. Louisiana*, 554 US 407 (2008) and *Atkins v. Virginia*, 536 US 304 (2002) (the death penalty is not cruel and unusual punishment per se, but is when applied to individuals who have committed non-homicide crimes or to intellectually challenged people); *Roper*, supra (Eighth Amendment bars the death penalty when applied to children); *Graham v. Florida*, 560 US 48 (2010) (life without possibility of parole is not cruel and unusual per se, but is when applied to juveniles who have committed non-homicide offenses).

At its heart, the Eighth Amendment prohibition against cruel and unusual punishment is one of proportionality. *Weems v. United States*, 217 US 349, 367 (1910). As such, Mr. Klinessmith’s sentence under SORA is “grossly disproportionate” and unconstitutional under the Eighth Amendment and is cruel and unusual punishment, in violation of the Eighth Amendment to the United States Constitution. US Const, Am VIII.

QUESTION THREE

FOR EX POST FACTO PURPOSES, DID THE COURT OF APPEALS CORRECTLY CONCLUDE THAT THE LATER, NONSEXUAL OFFENSE TRIGGERED SORA REGISTRATION RATHER THAN THE EARLIER SEXUAL OFFENSE.

I. Standard of Review and Issue Preservation

This Court reviews constitutional questions and issues of statutory interpretation de novo. *People v. Harris*, 499 Mich 332, 342 (2016). Mr. Klinesmith preserved this at sentencing. 23a-24a and 32a-33a.

II. Discussion

SORA's text indicates that the penalty of registration attaches to the listed felony, not the new felonies Klinesmith incurred. And SORA is a *sexual offender* statute aimed at suppressing *sexual* offenses, not drunk driving or drug offenses. Even the word "recapture" indicates a look back to the earlier offense. The Court of Appeals held that the recapture caused Klinesmith to face additional punishment (SORA registration per *Betts*) on the *new* non-sexual felonies. That is not true. Unlike with habitual offender statutes, the *sentencing* on the new offense is not impacted beyond a clerical notation on the judgment to tell the State Police to place the offender of the sex offender registry.

A. The Text of the Statute

Statutes are interpreted in accordance with legislative intent. *People v. Rea*, 500 Mich 422, 427–28 (2017). "[T]he most reliable evidence" of that intent is the plain language of the statute. *Id.* When interpreting a statute, "we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id.* Nontechnical words and phrases should be interpreted "according to the common and approved usage of the language." *Id.*

The statement of legislative intent found at Section 1a of SORA 2021 plainly states that the

statutes were enacted to assist law enforcement and the public in preventing and protecting against “the commission of future *criminal sexual acts by convicted sex offenders*” and refers to those “convicted of committing an offense covered by this act”:

Sec. 1a. The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger. [Mich. Comp. Laws Ann. § 28.721a (West)].

As will be seen below, the term “convicted” is repeatedly used throughout the SORA 2021 to refer to and focus on the listed *sex offense*, not the subsequent offense which “triggers” the recapture provision. In other words, the intent of SORA, is aimed at the prior sex offense. That makes SORA’s recapture provision different from Michigan’s habitual offender statutes which focus on the sentencing offense. Michigan’s general habitual offender act expressly increases the punishment on the new offense.

Section 2(a) of the act defines the word “convicted” as the listed *sex or prior offense*. Section 2(q) for example states “‘Tier I offender’ means an individual *convicted* of a tier I offense who is not a tier II or tier III offender.” (emphasis added). The conviction is the listed offense and “tier II” and “tier III” offenders are defined similarly.

Section 3 of the act uses the word “convicted” in the same manner. Section 3(1)(a), for example, refers to “An individual who is convicted of a listed offense after October 1, 1995,” and the term ‘conviction’ is used in that manner throughout the section to refer to the listed offense – the sexual offense.

Section 3(1)(e) of the act, the recapture provision, uses the word “convicted” to refer to both

the prior listed offense and the new felony, but continues to focus on the listed sexual offense as the reason for the act:

(e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011.

Section 4(1) continues to refer to individuals “convicted of a listed offense” – it is the reason for the restrictions and obligations under the act. The term ‘conviction’ is used in that manner throughout the section to refer to the listed offense – the sexual offense.

Section 8 describes the contents of the SORA data base, including Section 8(n):

A brief summary of the individual’s *convictions for listed offenses* regardless of when the conviction occurred, including where the offense occurred and the original charge if the conviction was for a lesser offense. (emphasis added)

Again, the focus in SORA is on the listed offense, nearly always a sexual offense. Sexual offenses are the express reason for the database. For ex post facto purposes, the punitive aspects of SORA are focused on the sexual offense even if the trigger is a later, nonsexual offense. It is true that Section 8(w) places “[t]he individual’s complete criminal history record” into the data base. But as if to re-focus on the sexual offenses, Section 8(g) returns to describe “A brief summary of the individual’s convictions for *listed offenses* regardless of when the conviction occurred.” (emphasis added).

B. Michigan Case Law

The nonsexual offense (new felony) may be the “trigger” for the SORA recapture provision. That does not answer the question posed in this appeal. The term “trigger” has no independent meaning in our criminal law. The Court of Appeals cited the United States Supreme Court’s use of the term when finding California’s three-strikes law constitutional. The Ex Post Facto doctrine was not involved and neither was any sex offender registration. *People v. Burkett*, 337 Mich App 631, 640–41 (2021) citing *Ewing v. California*, 538 US 11, 29-31 (2003) (opinion

by O’Connor, J.). Earlier, in *People v. Sickmiller*, 87 Mich App 332, 334 (1978), the Court had referred to the “final or triggering offense in a habitual offender information.”

Ultimately, under ex post facto law, the punitive aspects of SORA and its recapture provision are focused on the sexual offense even if triggered by a later, nonsexual offense. It is, after all, a recapture provision, which looks backwards in time to increase the consequences of the earlier offense. The listed sexual offense is the focus of SORA and the necessary condition precedent for its application.

The Court of Appeals Decision

The Court of Appeals, in an opinion by Judge Sawyer, asked whether the rationale of *People v. Tucker*, 312 Mich App 645 (2015), which addressed the SORA recapture provision, remained valid in light of *Betts*. The Court concluded, in error, that it did. *People v. Klinesmith*, 342 Mich App 39, 39–45 (2022).

In *Tucker*, the Court concluded that the recapture provision, Section 3(1)(e), was not an ex post facto law. The Court found that, in *Betts*, every aspect of SORA “constituted punishment rather than civil regulation and, therefore, were subject to the limitations on ex post facto laws” except the recapture provision. The Court focused on a specific sentence in *Betts*, where this Court limited its holding to those “whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments.” The Court reasoned that this language meant the entire 2011 SORA was not overturned.¹⁶

Appellant respectfully questions that logic because any ex post facto holding is going to define *when* retroactivity began. Here, that date sensibly occurs when the registrant subjects themselves to SORA. But why would it follow – from an ex post facto analysis properly focused

¹⁶ The conclusion of the Court of Appeals that the entire 2011 act was not struck down contradicts the finding of the partial dissent that, “It is, therefore, rather astounding that the majority would strike down *the entire statute* . . .” *Id.*, 507 Mich at 574–586 (emphasis added).

on the punitive impact of SORA – that the recapture provision was adding punishment (SORA registration per *Betts*) on the new felony rather than the listed old felony – the sexual misconduct offense?

As shown above, the *text* of SORA indicates that the penalty is attached to the listed felony (the “conviction”), not the new drunk driving or drug use convictions. SORA is a “sex offender” statute aimed at suppressing sexual offenses, not drunk driving or drug use. Even the word “recapture” indicates a look backward to the earlier offense – that is the nature of a recapture.

The Court of Appeals concluded that the answer was found in *Tucker* where, as in this case, the defendant was convicted of a listed offense, discharged from the sentencing on that offense, and then committed a new felony after SORA was enacted. In *Tucker*, contra *Betts*, the Court found that SORA was not even punishment.

The *Tucker* opinion went on to address whether it was defendant’s listed sex offense or his new 2013 OWI conviction that subjected him to SORA. The Court concluded that it was the latter. It did so by simply *declaring* that the recapture provision “...did not change the legal consequences of defendant's 1990 conviction. Rather, it attached legal consequences to his 2013 felony conviction.” But why would that be?

The *text* of SORA was not discussed. That SORA is a *sex offender* statute, whose express aim is to suppress *sexual* offenses, was not addressed. Neither was the fact that the sentencing on the new offense was not impacted; that all that occurs is a *recapture* of the old offense on a registry operated by the State Police.

There is a problem with the reasoning of the Court of Appeals, and it involves a decision *Tucker* is premised upon that went unmentioned in *Klinesmith*. That is, *People v. Callon*, 256 Mich App 312, 316–317 (2003). *Callon* involved a defendant convicted of impaired driving in 1993. In 1999, he was arrested for OUIL/UBAL. During the intervening period, our Legislature

amended the drunk driving statutes to allow previous impaired-driving convictions to be used to enhance a subsequent OUIL/UBAL conviction. The Court in *Callon* rejected an ex post facto challenge.

In other words, *Callon* did not involve a *recapture* provision – where the Legislature allows the prosecution to recapture and increase the consequences of the *previous* offense, as occurred here. Rather, in *Callon*, the Legislature had expanded the definition of “prior conviction” for a *habitual* drunk driver. Before the October 1, 1999, amendment in question in *Callon*, a prior impaired drunk driving conviction could not be used to enhance a subsequent OUIL/UBAL conviction. *Id.*, at 316.

The difference between *Callon* and the issue at bar is obvious. In *Callon*, the Legislature had increased the punishment on the *new felony* – to punish a habitual drunk driver. As such, there could be no ex post facto violation. In contrast, here the SORA recapture provision ex post facto increased punishment on the *prior* felony.

Again, *Callon* fits habitual offender statutes, not recapture provisions. That is apparent when its logic is applied to a hypothetical *drunk driving* recapture provision. Imagine a defendant who incurs a drunk driving offense in 1983. Then, in 1991, our Legislature creates a “drunk driving public registry” to protect the public from drunk drivers. Imagine our hypothetical statutes contain a “recapture” provision which requires that anyone previously convicted of drunk driving be put on the registry if they incur a “new felony.” Our defendant incurs a new larceny conviction in 2017 and is put on the drunk driving registry.

No one would argue that the “focus of the punishment” in this hypothetical is on the larceny; it is on the drunk driving. But that is the logic of the Court of Appeals in *Tucker*, which rests on *Callon*, applied here to a recapture provision – that the punishment in our hypothetical is on the larceny and no ex post facto violation has occurred.

And *Callon* is the case *Tucker* rests on. But in *Callon*, the prior impaired driving conviction was not recaptured. It was a habitual offender punishment, and the prior impaired conviction was used to enhance punishment on the *new* drunk driving offense. That is far afield from the SORA recapture provision. Klinesmith's sentencing on his drunk driving and drug convictions was the same as it would have been if SORA did not exist.

Callon involved a recidivist statute addressing the *same type* of repeated criminal conduct (drunk driving) not a recapture provision triggered by *any* new felony conviction even absent any repeated sexual misconduct. All the new felony conviction does, under SORA's recapture provision, is give the trial court an opportunity to add a consequence to the earlier offense. And *any* felony will serve, from Class A through Class H felony.

SORA's recapture provision "makes more burdensome the punishment for a crime, after its commission." *Dobbert v. Florida*, 432 US 282, 292 (1977) (emphasis added). The ex post facto inquiry focuses on whether the change in law "increases the penalty *by which a crime is punishable*." See *California Dep't of Corrections v. Morales*, 514 US 499, 506, n 3 (1995) (emphasis added). The SORA recapture provision did not increase the punishment for drunk driving or drug charges – it addresses neither. The recapture provision increased the punishment for the earlier sexual offense.

III. Conclusion

The Court of Appeals erred in concluding that the 2011 SORA recapture provision punished the new "triggering offense." Rather, the triggering offense caused the recapture provision to sweep Mr. Klinesmith up into the registry for his prior sexual offense. Accordingly, the SORA recapture provision increased punishment on the earlier offense in violation of ex post facto protections.

QUESTION FOUR

HOW, IF AT ALL, THE SEXUAL NATURE OF THE PRIOR UNREGISTERED SEX OFFENSE AFFECTS THE DETERMINATION WHETHER RECAPTURE IS CRUEL OR UNUSUAL PUNISHMENT, OR PUNISHMENT AT ALL.

I. Standard of Review / Issue Preservation

This Court reviews questions of constitutional law de novo. See *People v. Parks*, 510 Mich 225, 245 (2022). The objection made in the circuit court was that imposition of SORA in this matter “imposes a harsh punishment...which amounts to *ex post facto* punishment...” 32a-33a. Our Court of Appeals, however, has recently recognized that both *ex post facto* and cruel and/or unusual punishment objections overlap and depend on similar factors. See *People v. Kiczenski*, *supra.*, slip opinion at FN 4.

II. Discussion

The recapture provision caused an increased punishment to occur many years after the sexual offense. That is established in *Betts* and *Lymon*. Under the *Mendoza-Martinez* factors, SORA registration is a form of criminal punishment, not a mere civil regulation. The sexual nature of the prior unregistered offense is not irrelevant to the cruel or unusual nature of that punishment, but neither is it determinative. The penalty flowing from the recapture provision remains cruel or unusual facially and certainly as applied.

A. The Recapture Provision Effectuated a “Punishment”

In *Betts*, this Court considered whether retroactive application of the 2011 SORA violated the *ex post facto* prohibition. But the Court first had to decide the broader question of whether SORA amounted to punishment at all. As discussed earlier in this brief, this Court found that, in enacting SORA, the Legislature intended to promote the nonpunitive goal of public safety. But the Court went on to conclude that other aspects of the statute “suggest a punitive intent” and that, under the *Mendoza-Martinez* factors, the effect of the statute was punitive. *Betts*, 507

Mich at 548-562. Indeed, the punitive effect outweighed the legislative intent described in the SORA statutes. *Id.* at 548, 562.

While the recapture provision does not impose an independent penalty, it effectuates those penalties found elsewhere in SORA. The recapture provision effectuates the punitive aspects of SORA. It “makes more burdensome the punishment for a crime, after its commission.” *Dobbert v. Florida*, 432 US 282, 292 (1977) (cleaned up). And the SORA requirements remain punishment after the 2021 Amendments. In *Lymon*, this Court found that “Although the present case concerns the 2021 SORA and not the 2011 SORA that was at issue in *Betts*, our previous analysis is largely unaffected by the recent changes to SORA.” *Lymon*, supra., slip op. at 13.

This Court found that the 2021 SORA “continues to resemble the traditional punishment of shaming.” *Lymon*, slip op at 16-17. And while the 2021 SORA eliminated geographic exclusion zones and some in-person reporting requirements, it “continues to impose significant obligations on registrants.” *Id.*, at 19-21. This Court cited among other things the “considerable sacrifice of privacy and a permanent system of state surveillance,” *Id.*

With regard to whether the 2021 SORA has a rational connection to a nonpunitive purpose, this *Mendoza-Martinez* factor is considered to be the most important factor of the group in the overall punishment evaluation. See *Smith v. Doe*, supra., 538 US at 102. The facts in the present case – arising from the recapture provision – are more strongly indicative of punishment than those found in *Lymon* which did not involve the recapture provision.

The Legislature’s intent in enacting the 2021 SORA was to “prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders.” *Lymon*, slip op. at 22-23; MCL 28.721a. But applying SORA requirement to a man who went four decades with no additional sexual offense is not reasonably likely to serve the cause of “prevent[ing] future criminal sexual acts” or “ensur[ing] public safety from [a] particularly dangerous individual[.]”

In fact, if Mr. Klinesmith had been required to register in 1983, he would have long ago completed the 25 year registration period.

Finally, the 2021 SORA recapture provision is excessive compared to its purpose. A man who went over four decades without recidivating as a sexual offender is now publicly registered and publicly shamed as a sex offender and compelled to comply with the act for another 25 years, including the public shaming, because he was found drunk driving with a small amount of recreational, but illegal drugs.

In short, the SORA recapture provision effectuates punishment.

B. The Recapture Provision Effectuated “Cruel or Unusual” Punishment

In *Lymon*, this Court found the *non-sexual* nature of the offense to be relevant. Therefore, the sexual nature of the prior offense is not irrelevant. But neither is it determinative. It is one fact to consider among a constellation of facts. And here, ultimately, the sexual nature of the prior offense does not alter the reality that the punishment achieved by the recapture provision is cruel and unusual.

To begin, this Court has already acknowledged “...[a] growing body of research supports” that “the dangerousness of sex offenders has been historically overblown and that, in fact, sex offenders are actually less likely to recidivate than other offenders.” *Betts*, 507 Mich at 560. In *Lymon*, this Court found the current scientific research to be so ambiguous that it declined to endorse a position regarding the efficacy of sex-offender registries or the recidivism rates of sexual offenders. slip op. at 26.

Factor in that Mr. Klinesmith has gone over four decades without recidivating as a sexual offender and the only conclusion to reach is that the punishment imposed by the 2021 SORA requirements are excessive.

In *People v. Bullock*, 440 Mich 15 (1992), this Court held that, in addition to the protections

guaranteed under the Eighth Amendment, our state Constitution affords more protection against cruel or unusual punishment. In *People v. Parks*, 510 Mich 225, 242–243 (2022), this Court reaffirmed that our state Constitution offers broader protection than its federal counterpart.

In *Lymon*, this Court found SORA penalties to be significant “criminal punishment.” And the punishment is quite harsh when imposed four decades after the fact, triggered by non-sexual crimes with no intervening sexual offense. Klinesmith’s conviction was sexual in nature, but is he still a sex offender given the four decades which followed?

The passage of four decades indicates that Klinesmith poses no risk of sexual misconduct recidivism. And as the remoteness of the sexual offense increases, SORA penalties become less reasonable. Earlier in this brief, we cited persuasive non-Michigan authority holding that the remoteness of the sexual offense supports a finding that SORA registration is cruel and unusual. See Appellant’s Brief at 26-27 (discussing *United States v. Dougan*, 684 F.3d 1030 (10th Cir. 2012), *United States v. Carter*, 463 F.3d 526 (6th Cir.2006), *United States v. Kent*, 209 F.3d 1073 (8th Cir. 2000), *United States v. Childress*, 874 F.3d 523, (6th Cir. 2017), *United States v. Johnson*, 756 F.3d 532 (7th Cir. 2014), and *United States v. T.M.*, 330 F.3d 1235, 1237 (9th Cir. 2003).

That the punishment is unusual, as well as cruel, is evidenced by the absence of anything comparable in Michigan or other jurisdictions. Unlike habitual offender statutes, which increase the punishment on the *new* felony, the SORA recapture provision increases consequences to the *prior* felony ex post facto. It is a “recapture” which is designed and intended to look back to the earlier offense. Sentencing on the new offense is not impacted beyond a clerical notation on the judgment which simply tells the State Police to put the defendant on the registry for the *past* (“recaptured”) offense. Appellant Klinesmith has found nothing similar in Michigan’s criminal law.

Finally, as discussed above under “Question Two,” to brand Mr. Klinessmith a sex offender, with the attendant social stigma and surveillance, when the past four decades show *no evidence of recidivism*, is cruel and unusual and bears no connection to rehabilitation or the protection of the public against sex offenders. Klinessmith was only 20 years of age when he incurred his conviction. Science has recognized that a late adolescent brain is more similar to the juvenile brain than an adult brain.”¹⁷ This Court has found that “late adolescents are hampered in their ability to make decisions, exercise self-control, appreciate risks or consequences, feel fear, and plan ahead.” *Parks*, 510 Mich at 250.

The PSIR states that Mr. Klinessmith lived with his mother after a divorce. CFJ-284 at 13. His father was a physically abusive alcoholic. *Id.* Between ages eight and 15, he was in and out of foster care. At age 15, he was put into independent living. *Id.* Mr. Klinessmith had a difficult upbringing and, if he made a terrible mistake at age 20 it is to his credit that he spent the next four decades not recidivating as a sex offender.

Punishing the now 61-year-old Klinessmith for a conviction obtained at age 20 is unusual, cruel, and will not further rehabilitation. In fact, SORA registration can frustrate efforts to reintegrate into society and condemn the registrant to live his days as a social pariah. As SADO argued in their briefing in *Kardasz*, with citations to academic studies, the impact of SORA registration can harm job prospects, financial security, housing stability, physical safety, mental health, and erect barriers to human connections, all while failing to reduce recidivism. See *Does et al. v Whitmer, et al.*, ___ F Supp 3d ___, 2024 WL 4340707 (ED Mich, 2024) (amended 2021 SORA remains excessive punishment as compared to what it accomplishes).

¹⁷ National Academies of Sciences, Engineering, and Medicine, *The Promise of Adolescence: Realizing opportunity for all youth—A Consensus Study Report* (Washington, DC: The National Academies Press, 2019), at 22.

III. Conclusion

The recapture provision caused an increased punishment many years after the sexual offense. The sexual nature of the prior unregistered offense is not irrelevant to the cruel or unusual nature of that punishment but neither is it determinative. It does not alter the determination that the penalty brought about by the recapture provision is cruel or unusual. It bears repeating that the very specific purpose of 2021 SORA is to “prevent[] and [protect[] against the commission of future criminal sexual acts by convicted sex offenders.” MCL 28.721a. With no individualized assessment of risk,¹⁸ punishing someone as a sex offender – branding them with that label on a public website – when they have gone over three decades without ever again recidivating as a sex offender – is both cruel and unusual.

¹⁸ As SADO discusses in their brief in *Kardasz*, there are risk assessments that accomplish this task, such as the STATIC-99, but they are not used before SORA registration occurs. See Appellant Kardasz’s December 12, 2024, Michigan Supreme Court *Supplemental Brief* at 109.

QUESTION FIVE

ASSUMING ARGUENDO THAT THE FOCUS OF THE RECAPTURE INQUIRY IS PROPERLY ON THE EARLIER SEX OFFENSE WHETHER THE DEFENDANT'S ENTITLEMENT TO RELIEF ON EX POST FACTO GROUNDS DEPENDS ON THIS COURT'S DECISION IN *KARDASZ*.

I. Standard of Review / Issue Preservation

This Court reviews questions of constitutional law de novo. See *People v. Parks*, 510 Mich 225, 245 (2022). The objection made in the circuit court preserved the ex post facto argument. 23a-24a and 32a-33a.

II. Discussion

Whether Mr. Klinesmith is entitled to relief on his ex post facto claim does not depend on how this Court decides *Kardasz*. For an ex post facto violation, the defendant is only required to prove that a change in law had ex post facto increased a criminal *punishment*. There is no requirement that said punishment be *cruel or unusual* – it need only be an increased punishment.

Mr. Kardasz was convicted of first-degree criminal sexual conduct. The Court of Appeals, in an unpublished opinion, affirmed his conviction but remanded for resentencing. On remand, the new judgment of sentence indicated that Mr. Kardasz would be subject to lifetime electronic monitoring (LEM) and registration as a sex offender under SORA. The Court of Appeals affirmed the new judgment in another unpublished opinion.

Mr. Kardasz, represented by the State Appellate Defender's Office, has been granted oral argument on the following four issues: (1) whether requiring Kardasz to register under SORA for the rest of his life constitutes cruel or unusual punishment, (2) whether LEM, without an individual risk assessment or a mechanism for removing the requirement, constitutes cruel and/or unusual punishment, (3) whether LEM constitutes cruel and/or unusual punishment as applied in this case, and (4) whether the LEM requirement constitutes an unreasonable and unconstitutional search. That is the status of *Kardasz* as of this writing.

Earlier in this brief, appellant recognized that the standards applicable to ex post facto claims and cruel or unusual punishment claims overlap: “[I]n determining whether a statute imposes a criminal punishment, which is all either clause prohibits, the standard is the same.” *People v. Kiczenski*, supra., slip opinion at FN 4. Therefore, a decision in *Kardasz* might illuminate the question of whether SORA imposes a *punishment*. But that question appears to already be answered in the affirmative *Betts* and *Lymon*.

Also, the holding in *Kardasz*, whatever it ends up being, will not control the present appeal because ex post facto violations – not at issue in *Kardasz* – only require that the punishment increased. There is absolutely no requirement that the increased punishment also be cruel and/or unusual.

The second, third, and fourth questions presented in *Kardasz* concern LEM (lifetime electronic monitoring), and again they are raised in the *cruel and/or unusual punishment* rubric. The answer to those questions is unlikely to illuminate this appeal where the LEM requirement is not presented.

III. Conclusion

A defendant who asserts an ex post facto violation is only required to prove *punishment*, not a *cruel and/or unusual* punishment. The elements of cruel and/or unusual are simply irrelevant to an ex post facto claim. Accordingly, Mr. Klinesmith does not believe that, assuming that the focus of the recapture inquiry is on the earlier sex offense, his entitlement to relief on ex post facto grounds depends on this Court's decision in *Kardasz*.

CONCLUSION AND RELIEF REQUESTED

WHEREFORE, for the reasons stated above, Defendant-Appellant, Roy John Klinessmith, thanks this Court for its time and consideration, and respectfully requests that this Honorable Court find mandatory sex offender registration in this matter to be unconstitutional, and remand for correction of the existing Judgment of Sentence to strike said requirement, and for whatever other relief it deems necessary and just.

Respectfully submitted,
MICHAEL A. FARAONE, P.C.

/s/ Michael A. Faraone

Michael A. Faraone (P45332)
Attorney for Defendant-Appellant
3105 S. Martin Luther King No. 315
Lansing, Michigan 48910
Telephone: (517) 484-5515
attorneyfaraone@faraonelegal.com

Dated: February 8, 2025

CERTIFICATE OF COUNSEL REGARDING WORD COUNT

NOW COMES Michael A. Faraone to certify that he has run the brief section of this filing through word processing software which calculated the total number of words at 13,712 countable words. The margins and font size and other court rule requirement also complied with in this supplemental brief.

CERTIFICATE OF SERVICE

NOW COMES Michael A. Faraone to certify that on February 8, 2025, he served the attached Brief on Appeal on counsel for the plaintiff, the Tuscola County Prosecuting Attorney by serving them via this Honorable Court's truefiling.com system.