RECEIVED by MSC 10/30/2024 10:43:16 AM

State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Gary J. Shaver

Defendant-Appellant.

MSC No.

COA No. 361488

Tuscola County Circuit Court
Case No. 15-13521 FH

Gary J. Shaver's
Application for Leave to Appeal

Jessica L. Zimbelman (P72042)
Managing Attorney

Counsel for Gary J. Shaver

State Appellate Defender Office
200 N. Washington, Suite 250
Lansing, MI 48913
Phone: (313) 256-9833
jzimbelman@sado.org

Date: October 30, 2024

RECEIVED by MSC 10/30/2024 10:43:16 AM

Table of Contents

Index of Authorities 3

Judgment Appealed From and Relief Sought 5

Statement of the Questions Presented 10

Statement of Facts 11

Arguments 13

I. Under the federal retroactivity analysis, the rule announced in *Betts*—that 2011 SORA was ex post facto punishment for people like Mr. Shaver—must be retroactively applied because it is a substantive rule of constitutional law. 13

II. Under the state retroactivity test, the purpose of the *Betts* rule—prohibiting ex post facto punishment--compels retroactive application. 19

A. The purpose of the new rule, that a person cannot be punished for violating a statute that was not in effect at the time of their conviction, favors retroactive application of *Betts*. 20

B. The constitutionality of SORA was unsettled at the time *Betts* was decided and the impact of *Betts* is limited in scope to a specific group of people. 22

Conclusion and Relief Requested 26

RECEIVED by MSC 10/30/2024 10:43:16 AM

Index of Authorities

Cases

Chase v MacCauley, 971 F3d 582 (2019) 18

Danforth v Minnesota, 552 US 264 (2008) 14

Does #1-5 v Snyder, 834 F3d 696 (2016) 22

Edwards v Vannoy, 593 US 255 (2021) 8, 16

Johnson v United States, 576 US 591 (2015) 17

Lafler v Cooper, 566 US 156 (2012) 7

Montgomery v Louisiana, 577 US 190 (2016) 8, 9, 14, 15

People v Barnes, 502 Mich 265 (2018) 13, 23

People v Beck, 504 Mich 605 (2019) 6, 7

People v Betts, 507 Mich 527 (2021) .....passim

People v Carpentier, 446 Mich 19 (1994) 18

People v Fleck, 969 NW2d 14 (2022) 15

People v Gay, 407 Mich 681 (1980) 19

People v Guy, 84 Mich App 610 (1978) 18

People v Hampton, 384 Mich 669 (1971) 19, 21

People v Johnson, 396 Mich 424 (1976) 18

People v Maxson, 482 Mich 385 (2008) 9, 13, 20

People v Parks, 510 Mich 225 (2022) 6

People v Peeler, 509 Mich 381 (2022) 6

People v Pohly, 969 NW2d 330 (2022) 15

People v Sexton, 458 Mich 43 (1998) 13, 19, 22

People v Smith, 969 NW2d 15 (2022) 15

People v Tucker, 312 Mich App 645 (2015) 22

People v Walker, 328 Mich App 429 (2019) 7

People v Werner, 969 NW2d 330 (2022) 16

People v Woods, 416 Mich 581 (1982) 20

Schriro v Summerlin, 542 US 348 (2004) 15

Teague v Lane, 489 US 288 (1989) 13

Welch v United States, 578 US 120 (2016) 17

Statutes

18 USC 924(e)(2)(B) 17

Rules

MCR 6.500 ..... passim

MCR 6.502(G)(2) 7

MCR 6.508(D)(3) 18

MCR 6.508(D)(3)(b)(iii) 18

RECEIVED by MSC 10/30/2024 10:43:16 AM

RECEIVED by MSC 10/30/2024 10:43:16 AM

Judgment Appealed From and Relief Sought

In its opinion below, the Court of Appeals held that this Court's decision in *People v Betts*, 507 Mich 527 (2021), was not retroactive. In 2024 alone, the Court of Appeals has issued five opinions deciding whether rulings by this Court apply retroactively. The various Court of Appeals opinions on retroactivity are inconsistent and unclear.

The Court of Appeals opinion here, if it stands, will send Gary Shaver back to prison for a failure to register under SORA conviction. Mr. Shaver was between 12 and 15 years old at the time of the conduct that led to mandatory registration, which adds to the injustice of incarcerating Mr. Shaver for violating an unconstitutional statute.[1]

The rule from *Betts* is simple: "We hold that the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws." *Betts*, 507 Mich at 574. *Betts* declared a substantive rule of constitutional law.

The retroactivity of the rule is just as simple, as it is included in the holding: "we are constrained to hold that the 2011 SORA *may not be retroactively applied* to registrants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments." *Id.* at 573-574.

---

[1] See pending Applications for Leave to Appeal in *People v Malone* (Docket No. 166375) and *People v Dantzler* (Docket No. 167537) regarding the specific cruelty of requiring children to register and abide by the numerous, burdensome, and public requirements of SORA for long periods of time up to life.

RECEIVED by MSC 10/30/2024 10:43:16 AM

However, over the last year, the Court of Appeals has been inconsistent in their retroactivity analyses, which resulted in an erroneous opinion that *Betts* was not a substantive rule.

1) December 14, 2023: The Court of Appeals held in *People v Kennedy*, __ Mich App __ (2023) (Docket No. 363575), that *People v Peeler*, 509 Mich 381 (2022), applies retroactively under Michigan's retroactivity analysis. The Court of Appeals held that *Peeler* did not establish a new rule but, even if it had, it would still apply retroactively. *Kennedy*, __ Mich App at __; slip op at 3-5. However, this Court vacated the Court of Appeals opinion in *People v Kennedy*, __ Mich __ (2024) (Docket No. 166594), and remanded for reconsideration based on the Court of Appeals mistake in reviewing the record.

2) January 18, 2024: The Court of Appeals issued its opinion in *People v Poole*, __ Mich App __ (2024) (Docket No. 352569). Under a state retroactivity analysis, the Court reasoned that the rule from *People v Parks*, 510 Mich 225 (2022), applied retroactively as it was a new, substantive rule, and the rule's purpose—individualized sentencing to avoid unconstitutional cruel or unusual sentences—demanded retroactive application. *Poole*, __ Mich App at __; slip op at 10-13.

3) April 18, 2024: The Court of Appeals issued its opinion in *People v Motten*, __ Mich App __ (2024) (Docket No. 363044). The Court held that *People v Beck*, 504 Mich 605 (2019), announced a new rule of law. *People v Motten*, __ Mich App at __; slip op at 4. However, the Court held that *Beck* was not a substantive rule and was not retroactive under the federal test because *Beck* involved "an issue applicable during the

RECEIVED by MSC 10/30/2024 10:43:16 AM

sentencing process only." *Id.* at __; slip op at 4-5. The Court similarly found the *Beck* rule not retroactive under the state retroactivity analysis. *Id.* at __; slip op at 5.

4) June 13, 2024: In *People v Robinson*, __ Mich App __ (2024) (Docket No. 365226), the Court of Appeals again considered whether to apply *Peeler* retroactively. This time, given that *Kennedy* had been vacated, the Court of Appeals held that *Peeler* did not apply retroactively. The Court again held that *Peeler* was not a new rule, *Robinson*, __ Mich App at __; slip op at 5-6. The analysis should have stopped there, and *Peeler* should have been applied retroactively.[2] However, the Court of Appeals conflated the retroactivity analyses with the rules in MCR 6.500, *et seq*., and held that because it was not a new rule, there was no "retroactive *change in the law*" to allow for relief under MCR 6.502(G)(2). *Robinson*, __ Mich App at __; slip op at 6 (emphasis in original).

5) September 5, 2024: Then came the opinion in this case, *People v Shaver*, __ Mich App __ (2024) (Docket No. 361488), where the Court of Appeals repeatedly erred in its analysis and held that *Betts* was not retroactive.

[2] See *People v Walker*, 328 Mich App 429, 449 (2019) (holding that the rule from *Lafler v Cooper*, 566 US 156 (2012) "did not create a new rule and . . . therefore applies retroactively to this case.").

RECEIVED by MSC 10/30/2024 10:43:16 AM

Adding to the inconsistency, nearly every prosecutor in the State[3]—when approached for a stipulation by SADO attorneys—has conceded that *Betts* is retroactive, save for the Attorney General's office here and Kent County.[4]

The opinion below relied on a truncated retroactivity analysis. The Court of Appeals was correct that the *Betts* rule was a new rule. *Shaver*, __ Mich App at __; slip op at 6. But then, in two conclusory sentences, the Court reasoned that *Betts* did not announce a substantive rule of constitutional law because it "did not narrow the range of conduct SORA punishes" since Mr. Shaver has always been required to register his address. *Id*. at __; slip op at 7. But the new rule at issue is the rule in *Betts*, not what a statute may or may not require.[5] *Betts* prevented the government from punishing people like Mr. Shaver for violating 2011 SORA. Since *Betts* put certain conduct beyond the power of the government to punish, it must apply retroactively. *Montgomery v Louisiana*, 577 US 190, 198 (2016) (quotation marks and citation omitted).

---

[3] Those counties included Barry, Eaton, Ingham, Lapeer, Macomb, Saginaw, Schoolcraft, Shiawassee. As a result, people's unconstitutional convictions were vacated and they were discharged from prison.

[4] The *Betts* retroactivity question was litigated in Kent County, the trial court held it to be retroactive, and the county prosecutor did not appeal that decision. October 11, 2023 *McMahan* trial court opinion, attached.

[5] The Court then erroneously cited to watershed rules of criminal procedure, ignoring that this exception does not exist after *Edwards v Vannoy*, 593 US 255, 270-272 (2021).

RECEIVED by MSC 10/30/2024 10:43:16 AM

As to the state retroactivity analysis, the Court succinctly stated that "*Betts* has no bearing on 'the integrity of the fact-finding process' and does not create a rule of procedure," and will not "impact the chances of a wrongful conviction." *Id*. at __, __; slip op at 7-8, quoting *People v Maxson*, 482 Mich 385, 393 (2008). This was the wrong standard by which to measure the purpose of the *Betts* rule, which was to prohibit ex post facto punishment to an identifiable class of people.

If an ex post facto violation is not a substantive rule, this Court would be hard pressed to find one. This Court should hear Mr. Shaver's appeal and provide guidance to the Court of Appeals to ensure lower courts are faithfully opining on the retroactive application of this Court's constitutional decisions.[6]

[6] This Court could join Mr. Shaver's appeal with *People v Poole* (Docket No. 166813), and *People v Langston* (Docket No. 163968), both of which involve questions of retroactivity.

RECEIVED by MSC 10/30/2024 10:43:16 AM

Statement of the Questions Presented

First Question

Under the federal retroactivity analysis, must the rule announced in *Betts*—that 2011 SORA was ex post facto punishment for people like Mr. Shaver—be retroactively applied because it is a substantive rule of constitutional law?

Mr. Shaver answers: Yes.

The trial court answered: Yes.

Second Question

Under the state retroactivity test, does the purpose of the *Betts* rule—prohibiting ex post facto punishment—compel retroactive application?

Mr. Shaver answers: Yes.

The trial court answered: Yes.

RECEIVED by MSC 10/30/2024 10:43:16 AM

Statement of Facts

Gary Shaver pled to three counts of third-degree criminal sexual conduct in 2004, for offenses committed between 2000 and 2003. See PSIR, Juvenile Adjudications. Mr. Shaver was between 12 and 15 years old during the time of the offenses. *Id.* Mr. Shaver was convicted as an adult but sentenced as a juvenile, and spent six years in various detention facilities before discharging from Maxey Boys Training School in his early 20's. *Id.*

In 2015, Mr. Shaver registered an address with SORA where he was not yet living, but was expecting to move to in the near future. 11/23/2015 Plea, 10-12. But because he had not yet moved, the prosecutor charged him with a felony and Mr. Shaver pled guilty to failing to register pursuant to the Sex Offenders Registration Act (SORA).

For pre-registering his anticipated new address, he received a felony conviction. Prior to sentencing, Mr. Shaver spent 174 days in jail, incarcerated for this offense; he was sentenced to 6 months in jail, an additional deferred 6-month jail sentence, and probation. 3/21/16 Sentencing Hearing, 10-11. Later, Mr. Shaver pled guilty to violating his probation. 10/5/16, 7-8. The trial court sentenced Mr. Shaver to a minimum term of 40 months in prison, with a maximum sentence of 15 years. 11/2/16 Sentencing Hearing, 7.

In 2022, Mr. Shaver filed a motion for relief from judgment, pursuant to MCR 6.500 et seq, asking the Tuscola County Circuit Court to apply *Betts* and vacate his 2015 conviction for failing to register. At the time of the motion, Mr. Shaver was still incarcerated in prison because of the failure to register conviction. The trial court granted Mr. Shaver's motion and vacated his failure to register conviction. April 4, 2022

Order, attached. After the order had been entered and Mr. Shaver had been discharged from prison on April 7, 2022, the state filed a motion for reconsideration asking the circuit court to reverse itself and reinstate Mr. Shaver's conviction and send him back to prison. The trial court denied the motion. April 29, 2022 Order, attached.

The Court of Appeals granted leave to appeal, and reversed the trial court, holding that *Betts* is not retroactive under either the federal of state retroactivity tests. *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op attached.

RECEIVED by MSC 10/30/2024 10:43:16 AM

RECEIVED by MSC 10/30/2024 10:43:16 AM

Arguments

I. Under the federal retroactivity analysis, the rule announced in *Betts*—that 2011 SORA was ex post facto punishment for people like Mr. Shaver—must be retroactively applied because it is a substantive rule of constitutional law.

Standard of Review

The retroactivity of an opinion of this Court is reviewed de novo. *People v Sexton*, 458 Mich 43, 52 (1998).

Issue Preservation

Mr. Shaver filed a proper Motion for Relief from Judgment in the trial court, pursuant to MCR 6.500, et seq, raising this issue. The trial court granted the motion.

Discussion

Judicial decisions that "express new rules normally are not applied retroactively to other cases that have become final." *People v Barnes*, 502 Mich 265, 268 (2018). Thus, the first question when analyzing federal retroactivity is whether the rule is a new rule. *People v Maxson*, 482 Mich 385, 388 (2008), citing *Teague v Lane*, 489 US 288 (1989). A new rule is announced "when it breaks new ground or imposes a new obligation on the States or the Federal Government," i.e. "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 US at 301.

This Court issued a new rule in *Betts*: "We hold that the 2011 SORA, when applied to registrants whose criminal acts predated the enactment of the 2011 SORA amendments, violates the constitutional prohibition on ex post facto laws." *Betts*, 507 Mich at 574. The *Betts* decision was not

RECEIVED by MSC 10/30/2024 10:43:16 AM

compelled by any prior precedent—for the first time this Court held that the 2011 SORA *in full* was punishment when applied to people convicted of registerable offenses before 2011. This Court's decision was based on both the federal and state prohibitions on ex post facto laws. *Betts*, 507 Mich at 533, 542. Therefore, as the Court of Appeals did below, the retroactive application of *Betts* will be analyzed under both the federal and state retroactivity tests.[7]

The *Betts* rule is a substantive rule of constitutional law. The ban on retroactive application of new rules on collateral review does not apply if the new rule is substantive:

> [C]ourts must give retroactive effect to new substantive rules of constitutional law. Substantive rules include rules forbidding criminal punishment of certain primary conduct, as well as rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.

Montgomery v Louisiana, 577 US 190, 198 (2016) (quotation marks and citation omitted).

---

[7] The federal test is the floor, not the ceiling, for determining retroactive application of a new rule. See *Poole*, __ Mich App __ (2024) (Docket No. 352569), slip op at 11 n 8, citing *Danforth v Minnesota*, 552 US 264 (2008) ("A state may have a different retroactivity rule for state constitutional decisions and may even have a retroactivity rule more favorable for defendants for new federal constitutional rules than does the United States Supreme Court.")

RECEIVED by MSC 10/30/2024 10:43:16 AM

The United States Supreme Court explained that a procedural rule "regulate[s] only the *manner of determining* the defendant's culpability." *Id.* at 206, quoting *Schriro v Summerlin*, 542 US 348, 353 (2004). This is not what the *Betts* rule regulates. There is no "manner" in which Mr. Shaver can be guilty of violating 2011 SORA. Rather, *Betts* placed Mr. Shaver's failure to abide by the 2011 SORA beyond the power of the State to criminalize or punish. Therefore, under *Teague*, it must be applied retroactively.

This Court appears to agree. This Court has ordered relief in several cases on collateral review after *Betts*, vacating a conviction for violating 2011 SORA and ordering removals from the registry:

- *People v Fleck*, 969 NW2d 14 (2022): This Court vacated the failure to register conviction in lieu of granting leave to appeal. Below, in *People v Fleck*, unpublished order of the Court of Appeals, entered February 2, 2017 (Docket No. 334563), the Court of Appeals had denied leave to appeal for failure to establish the trial court erred by denying relief from judgment.

- *People v Smith*, 969 NW2d 15 (2022): This Court ordered removal from the registry in lieu of granting leave to appeal. Below, in *People v Smith*, unpublished order of the Court of Appeals, entered June 26, 2017 (Docket No. 336751), the Court of Appeals had denied leave to appeal for failure to establish the trial court erred by denying relief from judgment.

- *People v Pohly*, 969 NW2d 330 (2022): This Court ordered removal from the registry in lieu of granting leave to appeal. Below, in *People v Pohly*, unpublished order of the Court of Appeals, entered October 14, 2016 (Docket No. 333262), the

RECEIVED by MSC 10/30/2024 10:43:16 AM

Court of Appeals had denied leave to appeal for failure to establish the trial court erred by denying relief from judgment.

- *People v Werner*, 969 NW2d 330 (2022): This Court ordered removal from the registry in lieu of granting leave to appeal. Below, in *People v Werner*, unpublished order of the Court of Appeals, entered December 21, 2016 (Docket No. 334915), the Court of Appeals had denied leave to appeal for failure to establish the trial court erred by denying relief from judgment.

Through its pattern of granting relief under *Betts* in cases on collateral review, this Court has recognized that the *Betts* rule applies retroactively.

Here, the prosecutor argued, and the Court of Appeals held, that *Betts* was not a new substantive rule because *Betts* "did not narrow the range of conduct SORA punishes" and that any iteration of SORA requires a registrant to report their address. *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op at 7. However, the *Betts* rule was not about the requirements of a statute. The *Betts* rule was that the 2011 SORA, as a whole, was unconstitutional ex post facto punishment. Mr. Shaver's substantive constitutional right to be free from ex post facto punishment is the rule. He should not ever have been penalized for failure to register under an unconstitutional statute.[8]

[8] The Court of Appeals also held that the *Betts* rule was not a watershed rule of criminal procedure, so retroactivity was not warranted. *Shaver*, __ Mich App at __; slip op at 7. However, the Court failed to acknowledge that the watershed exception no longer exists. See *Edwards v Vannoy*, 593 US 255, 270-272 (2021).

RECEIVED by MSC 10/30/2024 10:43:16 AM

The United States Supreme Court has provided a helpful illustration of retroactivity of a criminal rule. In *Johnson v United States*, 576 US 591 (2015), the Court addressed the constitutionality of 18 USC 924(e)(2)(B). This provision of the Armed Career Criminal Act increased the minimum and maximum prison term for the federal felon-in-possession offense if the person had three or more prior convictions for a "serious drug offense" or a "violent felony." *Johnson*, 576 US at 593. That part of the statute, referred to as the residual clause, was void for vagueness under the Due Process Clause. *Id.* at 597.

The Court held that *Johnson* should be applied retroactively. *Welch v United States*, 578 US 120, 130 (2016). A decision is substantive if it "alters the range of conduct of the class of persons that the law punishes," including decisions that "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 129 (quotation marks and internal citations omitted). The *Johnson* rule satisfied this test because "*Johnson* changed the substantive reach of the Armed Career Criminal Act, altering the range of conduct or the class of persons that the [Act] punishes." *Id.* (quotation marks and internal citation omitted).

This applies equally to the *Betts* rule. 2011 SORA cannot be imposed and alleged violations of 2011 SORA cannot be prosecuted if a person's listed offense was committed prior to the enactment date of SORA,[9] because such an application violates the Ex Post Facto Clauses. In other words, a certain class of people can no longer be punished for violating 2011 SORA after *Betts*. Because the *Betts* rule is a substantive rule of

[9] July 1, 2011

RECEIVED by MSC 10/30/2024 10:43:16 AM

constitutional law, it must apply retroactively to cases that are final and Mr. Shaver's conviction for failing to register must be vacated. [10]

[10] While the Court of Appeals below did not address the requirements of MCR 6.500, in his Motion for Relief from Judgment, Mr. Shaver demonstrated good cause for failing to raise this claim on direct appeal and actual prejudice as a result. MCR 6.508(D)(3). The good cause is the ineffective assistance of prior appellate counsel who should have raised these issues but did not. See *Chase v MacCauley*, 971 F3d 582 (2019). Mr. Shaver was suffering actual prejudice by serving time in prison based on an unconstitutional conviction and sentence, an "irregularity . . . so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand. . . ." MCR 6.508(D)(3)(b)(iii). In addition, Mr. Shaver was incarcerated pursuant to an unconstitutional statute and the state had no power to sustain a prosecution based on an unconstitutional statute. See *People v Guy*, 84 Mich App 610 (1978). This jurisdictional defect entitled Mr. Shaver to challenge his conviction and sentence in a postconviction motion for relief from judgment without first establishing good cause and prejudice. *People v Carpentier*, 446 Mich 19, 27 (1994), citing *People v Johnson*, 396 Mich 424 (1976) (A person "may always challenge whether the state had a right to bring the prosecution in the first place").

RECEIVED by MSC 10/30/2024 10:43:16 AM

II. Under the state retroactivity test, the purpose of the *Betts* rule—prohibiting ex post facto punishment--compels retroactive application.

Standard of Review

The retroactivity of a decision is a question of law, reviewing de novo. *People v Sexton*, 458 Mich 43, 52 (1998).

Issue Preservation

Mr. Shaver filed a proper Motion for Relief from Judgment in the trial court, pursuant to MCR 6.500, et seq, raising this issue. The trial court granted the motion.

Discussion

To determine whether a new rule is retroactive under Michigan law, this Court considers: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice. *Sexton*, 458 Mich at 60–61, citing *People v Hampton*, 384 Mich 669, 674 (1971). However, these factors usually only apply if the new rule is procedural, rather than substantive. See *People v Poole*, __ Mich App __ , __ (2024) (Docket No. 352569), slip op at 12. "[W]hen non-procedural or substantive rights of a fundamental nature are affected, they are normally to be accorded retrospective application." *Id.*, quoting *People v Gay*, 407 Mich 681, 706 (1980). The violation of a person's ex post facto rights is, by its very nature, constitutional and substantive. This should end the inquiry. Retroactive application of *Betts* "is required to assure the fair distribution of a fundamental right." *Gay*, 407 Mich at 709—that is, the right to be free from ex post facto punishments. However, because the

RECEIVED by MSC 10/30/2024 10:43:16 AM

Court of Appeals below held differently, each factor for the state retroactivity test will be addressed in turn.

A. The purpose of the new rule, that a person cannot be punished for violating a statute that was not in effect at the time of their conviction, favors retroactive application of *Betts*.

As the Court of Appeals acknowledged, the purpose of the new rule is the most important factor in the state retroactivity analysis. *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op at 7, quoting *People v Woods*, 416 Mich 581 (1982). Yet, the opinion below analyzed this prong in two sentences. It reasoned the *Betts* rule has "no bearing on 'the integrity of the fact-finding process' and does not create a rule of procedure" and the rule "is not going to impact the chances of a wrongful conviction." *Id.* at __; slip op at 7-8, quoting *Maxson*, 482 Mich at 393.

There are several problems with this short analysis.

- "[H]as no bearing on 'the integrity of the fact-finding process'": Consideration of whether a rule has an impact on the integrity of the fact-finding process is limited to a new rule of procedure. See *Maxson*, 482 Mich at 393. The Court in *Shaver* specifically said that the *Betts* rule was not a rule of procedure. *Shaver*, __ Mich App at __ ; slip op at 7. Therefore, the Court erred in considering whether the *Betts* rule affected the integrity of the fact-finding process.

- "[D]oes not create a rule of procedure": The Court of Appeals acknowledged that *Betts* announced a new rule, but simultaneously declared it was neither a substantive rule nor a rule of procedure. This alone demonstrates that the Court of

RECEIVED by MSC 10/30/2024 10:43:16 AM

Appeals opinion was poorly reasoned and erroneous. As discussed above in Section I of this Application, *Betts* was a substantive rule.

- "[A]pplication of this rule is not going to impact the chances of a wrongful conviction": The Court of Appeals appeared to create this requirement out of thin air. While it is true that a rule should be applied retroactively if it concerns the guilt or innocence of a person, *Hampton*, 384 Mich at 676, that is not the only scenario in which the purpose of the rule favors retroactive application. For example, in *Poole*, the Court of Appeals held the *Parks* rule[11] was required to be applied retroactively, even though it solely addressed sentencing. *Poole*, __ Mich App at __; slip op at 12-13.[12]

Even if it was proper for the Court of Appeals to focus on the chances of a wrongful conviction, Mr. Shaver's conviction is, in fact, wrongful. First, the *Betts* rule applies to a class of people – people whose registerable offense occurred before July 1, 2011, and who were convicted of failing to register after that same date. This Court has acknowledged that a substantive rule would apply to "primary conduct"

---

[11] The purpose of the *Parks* rule was to: "ensure individualized sentencing in order to avoid imposition of an unconstitutionally cruel or unusual sentence of mandatory life without parole sentence." *People v Poole*, __ Mich App __ (2024) (Docket No. 352569), slip op at 12.

[12] Contrast the holding in *Poole* with the holding in *People v Motten*, __ Mich App __ (2024) (Docket No. 363044), where the Court of Appeals held that the *Beck* rule was not substantive because it was "an issue applicable during the sentencing process only." *Id.* at __; slip op at 4-5.

RECEIVED by MSC 10/30/2024 10:43:16 AM

or a "particular class of" people. *Barnes*, 502 Mich at 271. Second, under *Betts*, a person cannot be prosecuted—or found guilty or punished—if those two facts are met. Mr. Shaver was wrongfully convicted of violating an unconstitutional statute.

In *Poole*, after finding *Parks* was a substantive rule of law, the Court of Appeals dispensed with the second two prongs of the state retroactivity analysis in a footnote. *Poole*, __ Mich App at __; slip op at 13 n 11 ("Although there was reliance on the mandatory life-without-parole sentences on 18-year-olds convicted of first-degree murder, the impact on the administration of justice should be short-lived given the limited class of defendants that will have to be resentenced after consideration of the Miller factors.") This was appropriate, given that the purpose of the new rule is controlling. *Betts* should also be applied retroactively based on its purpose alone.

B. The constitutionality of SORA was unsettled at the time *Betts* was decided and the impact of *Betts* is limited in scope to a specific group of people.

The second and third factors are often addressed together, as the Court of Appeals did below. *Shaver*, __ Mich App at __; slip op at 8-9.

The constitutionality of SORA has been litigated for decades and was unsettled. At the time this Court decided *Betts*, the Court of Appeals had held that 2011 SORA was not punishment. *People v Tucker*, 312 Mich App 645 (2015). The Sixth Circuit Court of Appeals, on the other hand, had held that it was punishment. *Does #1-5 v Snyder*, 834 F3d 696 (2016). "When a decision overrules settled law, more reliance is likely to have been placed in the old rule than in cases in which the law was unsettled or unknown." *Sexton*, 458 Mich at 63–64. Because the law was unsettled, the reliance interest is minimal. Since at least 2016, the State

RECEIVED by MSC 10/30/2024 10:43:16 AM

has not had the authority under *Does* to prosecute people for violating 2011 SORA, or to require people to register.

While the *Betts* rule is constitutionally significant, its reach is limited to people whose registerable offenses were committed before July 1, 2011, and whose failure to register convictions occurred after that date and before the effective date of 2021 SORA.[13] Given these limitations, a narrow set of people whose cases are now final will be impacted by retroactive application of *Betts*.[14]

Here, *Betts* only applies to 2011 SORA, which has been replaced with the 2021 version. *Betts*, 507 Mich at 573-574. *Betts* protects a discrete, known number of people from the imposition of unconstitutional ex post facto punishment. As the prosecutor pointed out, the universe of affected

---

[13] Effective March 24, 2021.

[14] In contrast, this Court determined the rule in *People v Lockridge*, which rendered the sentencing guidelines advisory rather than mandatory, would apply only prospectively. *People v Barnes*, 502 Mich 265 (2018). This Court cited the "widespread" reliance on the mandatory sentencing guidelines scheme. *Id.* at 274. This Court described the "incalculable" effect on the administration of justice that would result from retroactive application of *Lockridge*: "every criminal defendant sentenced in at least the last 19 years [would be] eligible for relief." *Id.* The limited applicability of the *Betts* rule stands in stark contrast.

RECEIVED by MSC 10/30/2024 10:43:16 AM

people is knowable, and numbers in the hundreds. Plaintiff-Appellant's Brief on Appeal, p 26.[15]

When analyzing the second and third factors, the Court of Appeals cited *Kennedy*, an opinion that this Court vacated. *Shaver*, __ Mich App at __ ; slip op at 8; *People v Kennedy*, __ Mich __ (2024) (Docket No. 166594). Yet, the Court of Appeals relied on it and speculated that "there was greater reliance upon the 2011 SORA than on one-person grand juries." *Shaver*, __ Mich App at __; slip op at 8.

The Court of Appeals also seemed to create a requirement that a person asserting a new rule is retroactive "provide evidence regarding the number of people who would be affected." *Id.* at __ ; slip op at 9. That is not, nor has it ever been, a requirement. In any event, the population impacted by the retroactive application of *Betts* can be easily identifiable based on the date of their registerable offense and the date of their violation of 2011 SORA. See note 15, *supra*; see also *People v Poole*, __ Mich App __ (2024) (Docket No. 352569), slip op at 13 n 11 ("…the impact on the administration of justice should be short-lived given the limited

[15] The Court of Appeals below cited the prosecutor's number that approximately 300 people were on probation or parole for failure to register convictions. *Shaver*, __ Mich App at __; slip op at 9. The Court then adopted the prosecutor's speculation that there could be "thousands" of other people who were convicted of failure to register but were not under any form of state supervision, besides registration under SORA. *Id.* The point here is that this would not affect every sentence in Michigan, nor would it affect every failure to register conviction. The prosecutor would not be required to initiate any proceedings. The process to vacate these convictions would be a simple stipulation and order entered in the trial court. See n 15, *infra*.

RECEIVED by MSC 10/30/2024 10:43:16 AM

class of defendants what will have to be resentenced after consideration of the *Miller* factors). The effect on the administration of justice will be especially short-lived here, given the number of prosecutors who have already agreed to relief under *Betts*.[16]

The Court of Appeals erred in holding that an ex post facto violation was not a substantive rule of law, under both the federal and state retroactivity analyses. This Court should grant argument on the application or grant leave to bring clarity to the Court of Appeals on when to give retractive effect to new rules.

[16] After *Betts*, Appellate Defender Commission approved the creation of the SORA Project, to seek relief for those who were incarcerated in prison because of a failure to register under 2011 SORA. All counties approached, except Kent and the Attorney General here, stipulated to relief under *Betts*. Those counties included Barry, Eaton, Ingham, Lapeer, Macomb, Saginaw, Schoolcraft, Shiawassee. And Kent County did not appeal the trial court's determination that *Betts* was retroactive. October 11, 2023 *McMahan* trial court opinion, attached. There is already a process in place—stipulations and orders initiated by the defense—to vacate these constitutional convictions with little stress to the system at large.

RECEIVED by MSC 10/30/2024 10:43:16 AM

Conclusion and Relief Requested

For the reasons stated above, Gary J. Shaver respectfully requests that this Honorable Court grant leave to appeal or any other peremptory relief the Court deems just and appropriate.

Respectfully submitted,

State Appellate Defender Office

/s/ Jessica L. Zimbelman

Jessica L. Zimbelman (P72042)
Managing Attorney

Counsel for Gary J. Shaver

State Appellate Defender Office
200 N. Washington, Suite 250
Lansing, MI 48913
Phone: (313) 256-9833
jzimbelman@sado.org

This Application contains 3,899 countable words.

Date: October 30, 2024