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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Gary J. Shaver

Defendant-Appellant.

MSC No. 167736

COA No. 361488

Tuscola County Circuit Court
Case No. 15-13521 FH

Gary J. Shaver's
Supplemental Brief

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Statement of the Questions Presented

First Question

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

Mr. Shaver answers: Yes.

The trial court vacated Mr. Shaver's conviction under Betts, but provided no rationale on which grounds it did so.

Second Question

Under *Teague v Lane*, must the *Betts* rule must be retroactively applied because it is a new, substantive rule of constitutional law?

Mr. Shaver answers: Yes.

T The trial court vacated Mr. Shaver's conviction under Betts, but provided no rationale on which grounds it did so.

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Introduction

A person's constitutional rights are violated if they are required to register under an unconstitutional, punitive Sex Offenders Registration Act (SORA).

That is the new, substantive rule of law that this Court announced in *People v Betts*, 507 Mich 527, 573-574 (2021). Because it is a substantive rule, it must be applied retroactively. See *People v Poole*, __ Mich __ (2025) (Docket No. 166813); *People v Gay*, 407 Mich 681 (1980); *People v Hampton*, 394 Mich 669 (1971).

The Court of Appeals opinion here, if it stands, will send Gary Shaver back to prison for failing to register under SORA. 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 him for violating an unconstitutional statute.[1]

If an ex post facto violation is not a substantive rule, this Court would be hard pressed to find one. *Betts* must be retroactively applied.

[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.

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Statement of Facts

When he was a child in 2004, Gary Shaver pleaded to three counts of third-degree criminal sexual conduct. The offenses occurred between 2000 and 2003, when Mr. Shaver was between 12 and 15 years old. See PSIR, Juvenile Adjudications. 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 twenties. *Id*. Regardless of being sentenced as a juvenile, Mr. Shaver was required to register under the Sex Offenders Registration Act (SORA) for the rest of his life. MCL 28.722(v)(iv); MCL 28.725(13).

In 2015, Mr. Shaver reported as required by SORA. He registered an address where he believed he would be living soon. 11/23/2015 Plea, 10-12, *Shaver Appendix* 34-36. But because he had not yet moved, the prosecutor charged him with a felony and Mr. Shaver pled guilty to failing to register under SORA. *Id.*

For pre-registering his anticipated new address, he received a felony conviction. The trial court sentenced Mr. Shaver to six months in jail, with credit for 174 days. He was placed on probation for five years. 3/21/16 Sentencing, 10-11, *Shaver Appendix* 53-54. Later, Mr. Shaver pleaded guilty to violating his probation. 10/5/16 Probation Violation, 7-8, *Shaver Appendix* 64-65. 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 PV Sentencing, 7, *Shaver Appendix* 76.

After this Court's decision in *Betts*, the State Appellate Defender Office created The SORA Project to pursue relief for people who were entitled to relief under *Betts*. SADO was appointed to represent Mr. Shaver and in 2022, counsel filed a motion for relief from judgment, pursuant to MCR 6.500 et seq., asking the Tuscola County Circuit Court

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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 solely because he violated probation for 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, *Shaver Appendix* 4. After the order was entered and Mr. Shaver was 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.[2] The trial court denied the motion. April 29, 2022 Order, attached, *Shaver Appendix* 6.

The Court of Appeals granted leave to appeal and reversed the trial court, holding that *Betts* is not retroactive under either the federal or state retroactivity tests. *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op attached, *Shaver Appendix* 8-17.

On April 1, 2025, this Court issued a unanimous opinion in *People v Poole*, addressing Michigan's retroactivity principles. Shortly thereafter, this Court granted Mr. Shaver's Application to determine whether *Betts* applies retroactively. *People v Shaver*, __ Mich __; 19 NW3d 135 (2025).

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[2] The prosecutor argued that the trial court should not have granted the Motion for Relief from Judgment without ordering a response from the prosecutor. *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op at 2-3, *Shaver Appendix* 9-10. Mr. Shaver agrees that was an error, but as the Court of Appeals acknowledged, it was "immaterial" to the outcome on appeal. *Id.* at __; slip op at 3, *Shaver Appendix* 10.

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Argument

I. 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, which this Court reviews 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

The rule from *Betts* is simple: 2011 SORA is punishment and cannot be applied retroactively. *Betts*, 507 Mich at 574. To do so would violate the Ex Post Facto clauses of the Michigan and United States Constitutions. *Id.*

The first question when analyzing 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). It is new, because no Michigan court had previously held that 2011 SORA was punishment and was an ex post facto violation. See *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op at 6, *Shaver Appendix* 13.

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 on the administration of

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justice." *People v Hampton*, 384 Mich 669, 674 (1971), citing *Linkletter v Walker*, 381 US 618 (1965).

However, the *Hampton-Linkletter* factors usually only apply if the new rule is procedural, rather than substantive. See *People v Poole*, __ Mich __, __ (2024) (Docket No. 166813), slip op at 2, quoting *People v Gay*, 407 Mich 681, 706 (1980) ("[W]hen non-procedural or substantive rights of a fundamental nature are affected, they are normally to be accorded retrospective application.")

The violation of a person's ex post facto rights is, by its very nature, constitutional and substantive. This Court recently held that the holding in *Parks* was substantive because it involved a "punishment that the law cannot impose" on a person. *Id.* at __; slip op at 6, quoting *Montgomery v Louisiana*, 577 US 190, 208-209 (2016). Therefore, this Court applied *Parks* retroactively, to "assure the fair distribution of a fundamental right." *Id.*, quoting *Gay*, 407 Mich at 709.

So too here. After *Betts*, it is unconstitutional for a person to be punished for violating an unconstitutional statute. Specifically, if a person's registrable offense occurred before July 1, 2011, and their violation occurred after that same date, punishing the violation is ex post facto punishment. Mr. Shaver is in that group of people, and he cannot be punished for violating an unconstitutional statute. Being free from ex post facto punishment is a fundamental right, just like being free from cruel or unusual punishment is.

This should end the inquiry, because when "substantive rules…are implicated…retroactive application is favored." *Poole*, __ Mich at __; slip op at 3. But, "a substantive rule might not be applied retroactively if the *Hampton-Linkletter* factors strongly indicate otherwise." *Id.* Here, these factors confirm that *Betts* must be applied retroactively.

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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*.

The first *Hampton-Linkletter* factor does not favor retroactive application *only* in cases where a person's guilt or innocence is at issue. *Poole*, __ Mich at __; slip op at 7. After that clarification, this Court held:

> Given that the purpose of *Miller* was to declare that a certain sentence was unconstitutional for an entire class, with rare exceptions where the burden of proof is on the prosecution to establish otherwise during individualized sentencing proceedings, it is clear that the *Carp* opinion incorrectly held that the first *Linkletter-Hampton* factor did not favor retroactive application. [*Id.*]

Like in *Poole*, the *Betts* rule prohibits punishment for an entire class of people – people whose registerable offense occurred before July 1, 2011, and who were convicted of failing to register after that same date. A person cannot be prosecuted—or found guilty or punished—if those two facts are met.

The Court of Appeals' analysis cannot stand. The Court 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." *People v Shaver*, __ Mich App __, __ (2024) (Docket No. 361488); slip op at 7-8, *Shaver Appendix* 14-15, 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

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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 of Appeals specifically said that the *Betts* rule was not a rule of procedure. *Shaver*, __ Mich App at __ ; slip op at 7, *Shaver Appendix* 14. 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 Appeals opinion was poorly reasoned and erroneous. As discussed above, *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. See *Poole*, __ Mich at __; slip op at 6-7. In any event, an unconstitutional conviction is wrongful.

Because an entire class of people cannot be prosecuted under an unconstitutional statute, the first *Linkletter-Hampton* factor confirms that *Betts* should be applied retroactively.

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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.

While the first *Hampton-Linkletter* factor and this Court's opinion in *Poole* are dispositive, consistent with the approach of the Court of Appeals, Mr. Shaver now addresses the second and third *Hampton-Linkletter* factors together. See *Shaver*, __ Mich App at __; slip op at 8-9, *Shaver Appendix* 15-16. Those are: (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice. *Hampton*, 384 Mich at 674.

1. Because the constitutionality of SORA was unsettled at the time of Betts*, there was reduced reliance on the rule.*

Prior to this Court deciding *Betts*, the Court of Appeals had consistently held that 2011 SORA was not punishment. See, e.g., *People v Tucker*, 312 Mich App 645 (2015); *Shaver*, __ Mich App at __; slip op at 6, *Shaver Appendix* 13. The Sixth Circuit Court of Appeals, on the other hand, held that SORA 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 prior to *Betts*, the reliance interest is minimal. Since the decision in *Does*, the State has not had the authority to prosecute people for violating 2011 SORA, or to require certain people to register.[3]

[3] Even given this holding by the Sixth Circuit, the State continued to prosecute people for violating 2011 SORA while the federal civil litigation continued. See ACLU of Michigan, *Legal Challenges to SORA:*

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The low reliance is also evidenced by the fact that nearly every prosecutor in the State—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]

2. The effect on the administration of justice is minimal.

There will be an effect on the administration of justice, because many people will be entitled to have constitutional convictions vacated. However, the effect is minimal. As evidenced in the counties where the prosecutors stipulated to relief, there is already a process in place, and it is initiated by the defense. See n 7, *infra*. It would be a simple stipulation and order to vacate the unconstitutional conviction. *Id.* There would be little stress to the system: no substantive pleadings, no hearings in the trial court, etc. Even in *Poole*, where multi-day, multi-witness resentencing hearings would "require precious judicial resources," this Court reasoned that this factor was "outweighed by the consideration of the other two factors" and "[m]ore importantly, this burden is further outweighed by the conclusion that *Parks* is a substantive rule." *Poole*, __ Mich at __; slip op at 8.

Case History <https://www.aclumich.org/en/legal-challenges-sora-case-history> (accessed August 13, 2025).

[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, *Shaver Appendix* 19-23. All other counties approached under the SORA Project stipulated to relief under *Betts*. Those counties included Barry, Eaton, Ingham, Lapeer, Macomb, Saginaw, Schoolcraft, Shiawassee.

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Applying *Betts* retroactively will impact a limited class. 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.[5] Given these limitations, a narrow set of people whose cases are now final will be impacted by retroactive application of *Betts*.[6] *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. Plaintiff-Appellant's Brief on Appeal, p 26.[7]

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[5] Effective March 24, 2021.

[6] 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.

[7] The Court of Appeals 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, *Shaver Appendix* 16. The Court 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

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The Court of Appeals seemingly required Mr. Shaver to "provide evidence regarding the number of people who would be affected." *Id.* at __ ; slip op at 9, *Shaver Appendix* 16. That is not, nor has it ever been, a requirement. See *Poole*, __ Mich at __; slip op at 2-3.

Any burden to the system is far less than that contemplated in *Poole* and is similarly outweighed by the other two *Hampton-Linkletter* factors and the substantive nature of the *Betts* rule.

***

Betts prohibited people like Mr. Shaver from being punished retroactively under the Ex Post Facto clause of the Michigan constitution. This is a new, substantive rule that should be applied retroactively, and the *Hampton-Linkletter* factors support this.

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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 4, *supra*.

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II. Under *Teague v Lane*, the *Betts* rule must be retroactively applied because it is a new, 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

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 v Lane*, 489 US 288, 301 (1989), modified by *Edwards v Vannoy*, 593 US 255 (2021).[8]

This Court issued a new rule in *Betts*, that 2011 SORA was punishment and its imposition was an ex post facto violation for certain people. *Betts*, 507 Mich at 574. The *Betts* decision was not compelled by any prior Michigan precedent—for the first time this Court held that 2011 SORA in its entirety was punishment when applied to people convicted of registerable offenses before 2011. This Court's decision was

[8] The federal test is the floor, not the ceiling, for determining retroactive application of a new rule. See *Poole*, __ Mich at __; slip op at 6.

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based on both the federal and state prohibitions on ex post facto laws. *Betts*, 507 Mich at 533, 542.

The *Betts* rule is a substantive rule of constitutional law. The federal 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). A decision is substantive if it "alters the range of conduct of the class of persons that the law punishes." *Schriro v Summerlin*, 542 US 348, 353 (2004). "This includes 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.*

A procedural rule "regulate[s] only the *manner of determining* the defendant's culpability." *Id.* (emphasis in original). 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 2011 SORA beyond the power of the State to criminalize or punish. Therefore, under *Teague*, *Betts* must be applied 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

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requires a registrant to report their address. *Shaver*, __ Mich App at __ ; slip op at 7, *Shaver Appendix* 14. However, the *Betts* rule was not about the requirements of a statute. The *Betts* rule was that 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 never should have been penalized for failure to register under an unconstitutional statute.[9]

This rationale applies 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,[10] because such an application violates the Ex Post Facto Clauses. A specific class of people can no longer be punished for violating 2011 SORA after *Betts*. Because the *Betts* rule is a substantive rule of constitutional law, it must apply retroactively to cases that are final and Mr. Shaver's conviction for failing to register must be vacated.

[9] 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, *Shaver Appendix* 14. However, the Court failed to acknowledge that the watershed exception no longer exists. See *Edwards v Vannoy*, 593 US 255, 270-272 (2021).

[10] July 1, 2011.

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Conclusion and Relief Requested

For the reasons stated above, Gary J. Shaver requests that this Honorable Court hold that *Betts* is retroactive and affirm the trial court's order vacating Mr. Shaver's failure to register conviction.

Respectfully submitted,

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