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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY J. SHAVER, JR.,

Defendant-Appellant.

MSC Docket No. 167736
COA Docket No. 361488
LC Case No. 15-013521-FH

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Statement of Questions Presented

I. **Since the Ex Post Facto Clauses limit the authority of the State to enforce the law against a certain class of individuals, did *Betts* announce a substantive rule that must apply retroactively under federal law?**

II. **Does the substantive rule in *Betts* apply retroactively under Michigan retroactivity doctrine because of the fundamental unfairness of refusing to retroactively correct the State's violation of an anti-retroactivity rule?**

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Introduction

In *Betts*, this Court held that applying the 2011 version of the Sex Offenders Registration Act (SORA) to registrants whose listed offense occurred before that version became effective violated the constitutional prohibition on ex post facto laws by retroactively increasing the punishment for completed offenses. *People v Betts*, 507 Mich 527, 574 (2021). Accordingly, the Court held 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.

The parties agree that this was a new rule of constitutional law, but they disagree over whether the new rule is substantive. New substantive rules are applied retroactively to convictions that are final under federal law and are usually applied retroactively under Michigan law. There are plenty of variations of what makes a rule substantive, but the simplest definition in the sentencing context is that "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense" are substantive. *Montgomery v Louisiana*, 577 US 190, 201 (2016) (quotation marks and citation omitted).

Given this definition, it is difficult to understand the State's argument, which the Court of Appeals agreed with, that the decision in *Betts* was not substantive. This Court unequivocally "prohibited a certain category of punishment [a retroactive increase in punishment] for a class of defendants because of their status [those whose listed offense was committed before the 2011 SORA amendments were effective]." As a result, *Betts* announced a substantive rule that must be applied retroactively under federal law.

While Michigan law permits the consideration of additional factors, those factors easily favor retroactivity here. The State violated an anti-retroactivity doctrine baked into the constitution, so the State's attempt to invoke a different anti-retroactivity doctrine created by courts is both ironic and unfortunate. The constitutional prohibition on ex post facto laws protects individuals from being retroactively punished for completed conduct. On the flipside, the judicially created doctrine of not applying new rules retroactively

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protects the State from the expense of revisiting final judgments. The State simply should not be permitted to use a non-constitutional doctrine that favors finality to save the State money after it violated a constitutional doctrine that favors finality to protect individuals from arbitrary and vindictive State action.

Finality means Mr. Shaver would not have been subjected to the 2011 SORA, so he also would not have been subjected to, and incarcerated for, the failure to register offense included within that law. This Court should not let the State pick and choose when it is concerned about finality and when it would rather retroactively change the law. To do so would be fundamentally unfair and a violation of the Ex Post Facto Clauses of the United States and Michigan Constitutions.

Statement of Facts

The facts of this case have little effect on the legal question before the Court. But they are indicative of how the State's retroactive application of the 2011 SORA has affected the lives of thousands in violation of a fundamental component of our system of justice.

Mr. Shaver was adjudicated for three listed offenses in 2004. He was sentenced and discharged from that sentence in 2009. Under the earlier version of SORA, he was required to register as a sex offender. In 2011, he was unconstitutionally required to comply with new, more burdensome provisions of SORA. Mr. Shaver violated the 2011 SORA by pre-emptively informing the State Police of a change in address that ultimately did not take place but failing to correct the mistaken change. As a result of this violation, he was sentenced to six months in jail and five years of probation.

On July 27, 2021, this Court issued its decision in *People v Betts*, 507 Mich 527 (2021). In that decision, the Court held "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." *Id.* at 574. Mr. Shaver subsequently moved for relief from judgment based on *Betts*. The trial court granted the motion, albeit without ordering the prosecution to respond first. On appeal, the State convinced the

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Court of Appeals that *Betts* should not be applied retroactively to cases final on direct appeal, protecting the State from the full force of *Betts*.

The State and Court of Appeals are wrong. *Betts* announced a substantive rule of federal and state constitutional law. The bright-line test for federal purposes requires that *Betts* be applied retroactively, as does the more amorphous state test.

Argument

I. Since the Ex Post Facto Clauses limit the authority of the State to enforce the law against a certain class of individuals, *Betts* announced a substantive rule that must apply retroactively under federal law.

New substantive constitutional rules always apply retroactively under federal law and usually apply retroactively under Michigan law. The *Betts* Court applied the Ex Post Facto Clauses to the 2011 SORA. Because the Clauses limit the authority of the State to enforce the law against a certain class of individuals, *Betts* necessarily announced a substantive rule that must be applied retroactively.

A. The straightforward application of precedent demonstrates that *Betts* announced a substantive rule.

Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishment altogether beyond the State's power to impose." *People v Poole*, ___ Mich ___, ___ (2025) (Docket No. 166813); slip op at 10, quoting *Montgomery*, 577 US at 201. While there are many variations of this rule, there are two essential forms of a substantive rule. *People v Barnes*, 502 Mich 265, 271 (2018). The first form "alters the range of conduct or the class of persons that the law punishes." *Schriro v Summerlin*, 542 US 348, 353 (2004). The second form prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Montgomery*, 577 US at 201 (quotation marks and citation omitted). "In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural." *Schriro*, 542 US at 353. "Rules that allocate decisionmaking authority . . . are prototypical procedural rules . . . ." *Id.* The rule in *Betts* did not regulate the manner of determining whether a person is subject to the

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2011 SORA; it struck down the application of the 2011 SORA to an entire class of people. Accordingly, *Betts* announced a substantive rule that applies retroactively.

Two examples are helpful. In *Apprendi*, the Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490 (2000). The Court later held that when the death penalty is only authorized when an aggravating factor is present, that factor must be proved to a jury. *Ring v Arizona*, 536 US 584, 603-609 (2002).

The Supreme Court held that the rule in *Ring* "did not alter the range of conduct Arizona law subjected to the death penalty." *Schriro*, 542 US at 353. Since *Ring* "rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize," it "could not have" altered the range of conduct subjected to the death penalty. *Id.* "Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death . . . ." *Id.* As a result, *Ring* was a procedural rule. *Id.*

Betts prohibited the 2011 SORA from being "retroactively applied to registrants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments." *Betts*, 507 Mich at 573-574. Unlike *Ring*, the *Betts* decision did not "alter[] the range of permissible methods for determining whether a defendant's conduct is punishable by" application of the 2011 SORA. *Schriro*, 542 US at 353. Instead, the Court prohibited application of the amendments to "a class of defendants because of their status." *Montgomery*, 577 US at 201.

In *Johnson v United States*, 576 US 591 (2015), the Supreme 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 defendant had three or more prior convictions for a "serious drug offense" or a "violent felony." *Id.* at 593. The issue was that a violent felony was defined to include

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"any crime punishable by imprisonment for a term exceeding one year . . . that . . . is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*." *Id.* at 594, quoting 18 USC 924(e)(2)(B). The Court held the italicized language, known as the residual clause, to be unconstitutionally vague. *Johnson*, 576 US at 597. Therefore "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Id.* at 606.

The Court later held that *Johnson* applied retroactively. The Court explained that *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." *Welch v United States*, 578 US 120, 129 (2016), quoting *Schriro*, 542 US at 353 (quotation marks omitted; alteration in original). The Court went on:

> Before *Johnson,* the Act applied to any person who possessed a firearm after three violent felony convictions, even if one or more of those convictions fell under only the residual clause. An offender in that situation faced 15 years to life in prison. After *Johnson*, the same person engaging in the same conduct is no longer subject to the Act and faces at most 10 years in prison. [*Welch*, 578 US at 129-130.]

Notably, no procedure could make a sentence based on the invalid residual clause legitimate. *Id.* at 130. "*Johnson* had nothing to do with the range of permissible methods a court might use to determine whether a defendant should be sentenced under the Armed Career Criminal Act." *Id.* Because "*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied," it was a substantive rule. *Id.*

This Court's decision in *Betts*, like the Supreme Court's decision in *Johnson*, "changed the substantive reach" of an act. *Welch*, 578 US at 129. Where *Johnson* struck a portion of the definition of a violent felony, this Court limited the substantive reach of the 2011 SORA by prohibiting its retroactive application. In doing so, this Court did not provide a procedure for determining whether someone could be retroactively subjected to

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the 2011 SORA; the Court completely barred the 2011 SORA from being applied retroactively. Borrowing from the above block quotation from *Welch* and applying it to *Betts*:

> Before *Betts*, the 2011 SORA applied to any person who was convicted of a listed offense, even if that listed offense was committed before the 2011 SORA was effective. An offender in that situation was required to comply with the 2011 SORA and face incarceration for failure to do so. After *Betts*, the same person engaging in the same conduct is no longer subject to the 2011 SORA and faces no registration requirement.

For these reasons, *Betts* announced a substantive rule.

B. The Ex Post Facto Clauses prohibit an entire category of punishment (retroactive) from being applied to a particular group of individuals (those who have already committed their offense), so a judicial decision like *Betts* applying the Clauses to a new factual circumstance will necessarily be a substantive rule.

A holding that a law is ex post facto will *always* be substantive. The federal constitution includes the Ex Post Facto Clause "[t]o prohibit legislative Acts contrary to the first principles of the social compact and to every principle of sound legislation." *Carmell v Texas*, 529 US 513, 521 (2000) (quotation marks and citation omitted). The Framers considered the Clause to be one of the "greater securities to liberty and republicanism" contained in the constitution. *Id.* (quotation marks and citation omitted).

A law is ex post facto if it "imposes a punishment for an act which was not punishable at the time it was committed[] or imposes additional punishment to that then prescribed." *Weaver v Graham*, 450 US 24, 28 (1981). By banning ex post facto laws, "the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 US at 28-29. "The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation" and "uphold[ing] the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Id.* at 29, 29 n 10. In other words, the Ex Post Facto

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Clauses withdraw from the State the authority to retroactively increase the penalty for completed conduct.

In *Welch*, the Supreme Court rejected the argument that it should ask "whether the constitutional right underlying the new rule is substantive or procedural" to determine the nature of the rule. *Welch*, 578 US at 130. The Court held that the proper approach is to consider "the function of the rule, not its underlying constitutional source." *Id.* at 130-131. This holding was supported by the purpose of the retroactivity doctrine: balancing "the need for finality in criminal cases" and "the countervailing imperative to ensure that criminal punishment is imposed only when authorized by law." *Id.* at 131. As the Court recognized:

> That balance turns on the function of the rule at issue, not the constitutional guarantee from which the rule derives. If a new rule regulates only the procedures for determining culpability, the *Teague* balance generally tips in favor of finality. The chance of a more accurate outcome under the new procedure normally does not justify the cost of vacating a conviction whose only flaw is that its procedures conformed to then-existing constitutional standards. On the other hand, if a new rule changes the scope of the underlying criminal proscription, the balance is different. . . . [W]here the conviction or sentence in fact is not authorized by substantive law, then finality interests are at their weakest. As Justice Harlan wrote, "[t]here is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose." [*Id.* (quotation marks and citations omitted; second alteration in original).]

But the *Welch* Court did not face a new rule applying ex post facto protections. The Ex Post Facto Clauses prohibit the State from applying a new or harsher punishment to conduct that was completed before that punishment was authorized. *Weaver*, 450 US at 28. Put another way, the Clauses bar certain punishment from being applied to a class of people because of their status. *Montgomery*, 577 US at 206. An ex post facto punishment, by definition, "is not authorized by substantive law." *Welch*, 578 US at 131. "[W]hen a State enforces a proscription or penalty barred by the Constitution, the resulting conviction or sentence is, by definition, unlawful." *Poole*, ___ Mich at ___; slip op at 10 (citation

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omitted). Thus, a new rule invalidating an entire category of punishment for certain individuals as ex post facto as was decided in *Betts* is always substantive.

C. The State's argument that *Betts* is not substantive misunderstands the Court's holding and ignores the relevant test.

The State itself concedes that "[t]ypically, an ex post facto ruling that a set of offenders had their punishment increased from one punishment to a higher one after their crime would invalidate all of the sentences that were imposed on those offenders and thus would be substantive." (Appellee's Brief on Appeal, p 20.) Yet the State attempts to avoid this conclusion by arguing that *Betts* did not announce a rule that was "substantive for Shaver for his duty to update his address." (Appellee's Brief on Appeal, p 18.) The State asserts that *Betts* is not substantive as to Mr. Shaver because the Court did not strike down the State's authority to require registrants to update their address. To support this argument, the State claims that this Court's decision was premised on "the *additional* obligations that the Legislature imposed" with the 2011 amendments. (Appellee's Brief on Appeal, p 20.) Since the requirement that Mr. Shaver violated was not one of those "additional" obligations, the State argues that *Betts* was not substantive for him.

The State's argument fails for several reasons, but they all boil down to the State's unpersuasive attempt to limit the scope of the Court's holding and inability to show how the function of the holding in *Betts* is not substantive.

There is no difference between the conviction vacated in *Betts* and the conviction at issue here. Mr. Betts was convicted of violating MCL 28.729(1)(a) because he "failed to report his change of residence, his e-mail address, and his purchase of a vehicle within 3 days." *Betts*, 507 Mich at 536-537. This Court held that because the retroactive application of the 2011 SORA to Mr. Betts was unconstitutional, his conviction was invalid and must be vacated. *Id.* at 574. Mr. Shaver was convicted of violating MCL 28.729(1)(b), a second-offense failure to comply with SORA, because he did not update his residence. Thus, other than the fact that he was convicted of a second SORA offense, he is in precisely the same position as Mr. Betts.

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The function of the rule in *Betts* when applied to Mr. Shaver is identical to the function when applied to Mr. Betts: preventing the retroactive increase in punishment imposed by the 2011 SORA. To avoid this conclusion, the State appears to believe the function of the rule in *Betts* is somehow different because "many or most" of the duties imposed by the 2011 SORA "were regulatory," so the Court had to determine the scope of its remedy. (Appellee's Brief on Appeal, p 20). But the State ignores the clear language of the Court's decision: "[W]e we do not examine individual provisions of SORA in isolation but instead assess SORA's punitive effect in light of all the act's provisions when viewed as a whole." *Betts*, 507 Mich at 549. The State also ignores the breadth of the Court's analysis. See *id*. at 548-562 (discussing the five factor *Mendoza-Martinez* test). Contrary to the State's argument (Appellee's Brief on Appeal, pp 19-21), the Court's decision did not just rest on the student-safety zones, frequent in-person reporting requirements, and shortened reporting timeline. *Id*. at 561-562. The Court's decision also included consideration of "the potential for imposition of imprisonment" for violating SORA, *id*. at 554, the increased "likelihood of social ostracism" from the public website, *id*. at 551, the similarities between registration and parole, *id*. at 552-553, the fact that registration promotes retribution and deterrence, *id*. at 556-557, the rational connection between registration and a nonpunitive purpose, *id*. at 558, and the excessiveness of SORA's burdens in light of that nonpunitive purpose and uncertainty of its efficacy, *id*. at 559-562.

The *Betts* opinion did not limit prospective application of the 2011 SORA, although the 2021 SORA was already in effect by that time. But the Court did strike down the 2011 SORA entirely as applied to everyone whose listed offense *predated* the effective date of the 2011 amendments. *Betts*, 507 Mich at 573-574. The Court could not have been clearer: "Having determined that severability and revival are inappropriate tools to remedy the constitutional violation in this case, 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*.

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Accordingly, the State's attempt to separate the "[r]egulatory reporting duty" and "[p]unitive duty that significantly burdens the offender" (Appellee's Brief on Appeal, p 21) is directly contrary to the Court's holding. This makes the State's assertion that *Betts* did not "exclude a class of persons from being subject to the duty at issue here, which is the duty for a registrant to update one's address" simply incorrect—that is precisely what *Betts* did. (Appellee's Brief on Appeal, p 22.)

The State further asserts that the "2011 SORA law was clear in its requirement that Shaver update his address and that he would be subject to prosecution if he willfully failed to do so." (Appellee's Brief on Appeal, p 23.) And one of the State's arguments is that the requirement to update one's address has always been part of the statute and remains part of the statute since the 2021 amendments. (E.g., Appellee's Brief on Appeal, pp 1, 17.) But the State misses the point. The ex post facto violation identified in *Betts* was based on the punitive effect of the 2011 SORA *as a whole* and the lack of notice *at the time of the listed offense* triggering the registration requirement, not a lack of notice of registration requirements *at the time of the registration violation* (or under a subsequent amendment). Thus, it is irrelevant that Mr. Shaver (like Mr. Betts) had notice of the reporting requirements before he failed to update his address or that the reporting requirements likely would have been constitutional if not for the Legislature's other amendments rendering the entire statute punitive. The constitutional defect is that the 2011 SORA increased the punishment for completed offenses, the Ex Post Facto Clauses categorically prohibit this increase, and this Court categorically barred the amended law from being applied to people like Mr. Shaver.

Under the federal test, if a rule is substantive, it automatically applies retroactively. *Montgomery*, 577 US at 198-199. Because the Ex Post Facto Clauses limit the authority of the State to enforce the law against a certain class of individuals, the *Betts* Court's recognition that the Clauses prohibit the retroactive application of the 2011 SORA is necessarily a substantive rule that must be applied retroactively under federal law.

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II. The substantive rule in *Betts* applies retroactively under Michigan retroactivity doctrine because it would be fundamentally unfair to refuse to retroactively correct the State's violation of an anti-retroactivity rule.

Even if the federal test for retroactivity is not met, the *Linkletter*[1] test adopted by the Court for Michigan is satisfied. The *Linkletter* test has three factors: "(1) the purpose of the new rules; (2) the general reliance on the old rule[;] and (3) the effect of retroactive application of the new rule on the administration of justice." *People v Maxson*, 482 Mich 385, 393 (2008). But substantive rules "are normally to be accorded retrospective application." *People v Gay*, 407 Mich 681, 706 (1980). For substantive rules, the factors "may be addressed, but only in the rare instance will they have determinative effect." *Id.* Because *Betts* announced a substantive rule, it should be applied retroactively.

A. The purpose of the rule in *Betts*, the lack of reliance on the old rule, and the effect of retroactively applying *Betts* on the administration of justice favors retroactivity.

The purpose of the new rule is to prevent the State from retroactively increasing the punishment for completed conduct in violation of a fundamental component of the federal and state constitutions. As explained earlier, "[t]he prohibitions on ex post facto laws assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning as well as prevent the government from imposing arbitrary and vindictive legislation." *Betts*, 507 Mich 542. For three decades, the Michigan Legislature has retroactively changed the rules on defendants, turning a loss into an even greater loss with a lifetime of ever-evolving repercussions. It would make a mockery of the courts and perpetuate manifest injustices for the State to retroactively increase a criminal penalty and then preserve that constitutional violation by relying on a judicially created anti-retroactivity doctrine.

[1] *Linkletter v Walker*, 381 US 618 (1965), abrogated *Teague v Lane*, 489 US 288 (1989).

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In assessing the purpose of the new rule, the Court should also consider the purpose of the *Linkletter* test. Retroactivity jurisprudence is not based on constitutional or statutory law. "At common law there was no authority for the proposition that judicial decisions made law only for the future." *Linkletter*, 381 US at 622. This was so because "[t]he judge rather than being the creator of the law was but its discoverer," so overruling a prior decision was not "new law" but the "true discovery" of what the law has always been. *Id.* at 623 (quotation marks and citations omitted). Nevertheless, there were circumstances, generally in the civil realm, where applying a judicial decision retroactively would "work hardship to those who (had) trusted to its existence." *Id.* at 624 (quotation marks and citation omitted). Thus, courts occasionally opted to limit their holdings to prospective application. *Id.* at 624-627. But there was no real doctrine until *Linkletter* in 1965. *Mackey v United States*, 401 US 667, 676 (1971) (Harlan, J., concurring in judgment in part and dissenting in part).

The timing of *Linkletter* is noteworthy. As Justice Harlan later explained:

> That doctrine was the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation in the criminal field. Some members of the Court, and I have come to regret that I was among them, initially grasped this doctrine as a way of limiting the reach of decisions that seemed to them fundamentally unsound. Others rationalized this resort to prospectivity as a "technique" that provided an "impetus . . . for the implementation of long overdue reforms, which otherwise could not be practicably effected." *Jenkins v Delaware*, 395 US 213, 218 (1969). The upshot of this confluence of viewpoints was that the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by a beast of prey in search of its intended victim. [*Mackey*, 401 US at 676.]

In other words, the application of retroactivity doctrine to constitutional criminal law was a response (or perhaps a helpful corollary) to the Warren Court's expansion of individual rights.[2]

[2] It is also worth noting that much of what animated the Court's concerns in this area was the scope of the writ of habeas corpus, federalism, and comity. *Bousley v United States*, 523

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The "problem" that retroactivity doctrine was intended to solve is not present for the Ex Post Facto Clauses. The *Linkletter* Court addressed whether to retroactively apply the decision in *Mapp v Ohio*, 367 US 643 (1961), which held that the exclusionary rule applies in state court proceedings. *Linkletter*, 381 US at 619-620. To even get to this question, the Supreme Court had to (1) create the exclusionary rule, *Weeks v United States*, 232 US 383 (1914); (2) incorporate the Fourth Amendment against the states through the Fourteenth Amendment, *Wolf v Colorado*, 338 US 25, 27-28 (1949); and (3) apply the exclusionary rule against the states, *Mapp*, 367 US at 660. In other words, *Mapp* was the epitome of an *expansion* of constitutional rights that *Linkletter* sought to limit. As the Supreme Court said, its decision to not apply *Mapp* retroactively was "[g]uided by our decisions dealing with the retroactivity of new constitutional interpretations *of the broad language of the Bill of Rights*." *Mackey*, 401 US at 674 (emphasis added).

This Court's decision in *Betts*, by contrast, was not a new interpretation of the broad language of the Bill of Rights. Although *Betts* is a new rule because it applied the Ex Post Facto Clauses to a new circumstance, it did not expand the scope of the Clauses or create a constitutional requirement of which was previously unheard. Since *Betts* does not pose the same concerns to which anti-retroactivity jurisprudence is directed, the purpose of the new rule outweighs the reluctance to apply new rules retroactively.

The second factor also favors retroactivity. While the State no doubt relied on the prior decisions of the Court of Appeals upholding the retroactive application of the 2011 SORA, the State is not in a worse position now by virtue of those decisions nor would it be in a worse position if *Betts* is applied retroactively. For example, in *Pohutski v Allen Park*, 465 Mich 675, 695-699 (2002), the Court declined to give retroactive application to its decision overruling a prior case because of "extensive reliance" on that prior decision. The

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US 614, 620 (1998). See also Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 Ala L Rev 421, 432-437 (1993). Two of these concerns fall away when this Court considers whether to apply a new rule retroactively.

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Court explained that "municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same." *Id.* at 697. And because of an amendment in statute, retroactive application would result in some people becoming "a distinct class of litigants denied relief because of an unfortunate circumstance of timing." *Id.* at 699. By contrast, since the 2011 SORA has already been amended, the State would be in no worse of a position if the invalid convictions were vacated.

The effect of this Court's decision on the administration of justice also favors retroactivity because the burden would be minimal. As with any retroactive change in law, this Court's decision would interrupt the State's interest in finality. *Maxson*, 482 Mich at 397. But finality is meant to avoid "continually forc[ing] the State[] to marshal resources in order to keep in prison defendants whose trials and appeals *conformed to then-existing constitutional standards*." *Id.* at 398 (alteration in original; emphasis added). Here, no such conformity existed; the Court of Appeals simply misapplied the proper constitutional standards. Plus, unlike a procedural rule where the State would have the option of expending resources on a retrial, no amount of resources will render the implicated convictions valid, and retrial is not possible.

This Court has said that the State's interest in finality "also serves the State's goal of rehabilitating those who commit crimes because [rehabilitation] demands that the convicted defendant realize that he is *justly* subject to sanction, that he stands in need of rehabilitation." *Maxson*, 482 Mich at 398 (quotation marks and citation omitted; emphasis added; alteration in original). A person who violated a law that should not have been applied to them does not need to be rehabilitated.

CDAM is also skeptical that awarding finality to the State when the State deprived a defendant of the finality required by the Ex Post Facto Clauses is going to make him "realize that he is *justly* subject to sanction." *Id.* CDAM's members regularly interact with individuals that are incarcerated and believe their incarceration is the product of unfair processes. Telling someone who believes they were convicted or sentenced unfairly that

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there is nothing they can do to correct that unfairness is *the last thing* that convinces them they are being punished "justly." And it certainly does not encourage rehabilitation. If the goal is to encourage people to follow the law, their perception of the fairness of the appellate process is far more beneficial than finality.[3] Favoring finality is one thing, but the Court should not do so under the illogical belief that finality encourages rehabilitation.

The substantive nature of the rule and all three factors of the *Linkletter* test favor retroactive application of the rule in *Betts*.

B. The Court's recent decision in *Poole* is particularly apt and further supports retroactivity.

This Court unanimously held that the decision in *Parks*, requiring an individualized determination of whether life without parole is a proportionate sentence for an 18-year-old convicted of first-degree murder, applied retroactively. *Poole*, ____ Mich at ____; slip op at 17. The Court explained that the first factor favored retroactivity because the purpose of *Parks* "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." *Id.* at 14. Here, *Betts* declared a certain sentence to be unconstitutional for an entire class, and there are *no exceptions* to the rule. The purpose of the rule in *Betts* therefore favors retroactivity even more than in *Poole*.

For the reliance factor, the Court noted that "it is confusing for a court to rely on the good-faith reliance of individual prosecutors when considering the imposition of *mandatory* sentences." *Id.* Like life without parole for a first-degree murder conviction, the application of the 2011 SORA was mandatory. To be sure, prosecutors exercised

[3] Burdziej, Guzik, & Pilitowski, *Fairness at Trial: The Impact of Procedural Justice and Other Experiential Factors on Criminal Defendants' Perceptions of Court Legitimacy in Poland*, 44 L & Social Inquiry 359, 364 (2019) ("[P]erceptions of procedural fairness have also been linked to an increased likelihood that litigants will comply with court orders and follow the law in the future.").

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discretion when determining whether to charge a registrant for violating the 2011 SORA, but the constitutional violation was already ongoing by then.

With respect to the effect of applying *Parks* retroactively on the administration of justice, the Court acknowledged the burden of resentencing hearings on judicial resources, as well as the impact of hearings on those affected by the homicide. *Poole*, ___ Mich at ___; slip op at 15. But the Court concluded these burdens did not outweigh the other two factors, particularly considering *Parks* announced a substantive rule. *Id.*

Here, like in *Poole*, the new rule is substantive, and the other factors favor retroactivity. More importantly, the burden on judicial resources from applying *Betts* retroactively will be far less than the burden from applying *Parks* retroactively. In its most recent annual report, the Juvenile Lifer Unit of the State Appellate Defender Office estimated that it expended an average of $62,004.89 per client resentenced under *Miller* and *Parks* that year.[4] And this does not account for the cost to the trial court, appellate courts, or prosecutor's office in each case. By contrast, once this Court holds *Betts* to apply retroactively, defense attorneys will prepare stipulated orders, prosecutors and judges will sign them, and court clerks and the State Police will ensure the vacatur of convictions is recorded.[5] Nearly all of these cases will be resolved without a single hearing. In comparison to the resentencing of youthful offenders, the cost of applying *Betts* retroactively is nonexistent.

Yet there is more to consider under the "burdens" on the administration of justice that is often left out. By applying *Miller* and *Parks* retroactively, SADO saved MDOC from

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[4] State Appellate Defender Office, *SADO Juvenile Lifer Unit Report: 2024*, https://www.sado.org/content/pub/12182_2024-Juvenile-Lifer-Unit-Appropriations-Report.pdf, p 6.

[5] Unlike the complex process of a *Miller* and resentencing hearing, identifying whether a person is entitled to relief under *Betts* only requires identifying the date on which the listed offense requiring registration was committed and identifying the date on which the SORA violation was committed.

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expending an estimated $94,135,920.83 on detaining reformed defendants.[6] That's 9½ times what SADO spent on resentencing hearings that the State would have had to expend if *Miller* and *Parks* were *not* applied retroactively. In other words, practically speaking, *Poole* more than paid for itself (and *Parks*).

A similar effect is likely here. In addition to the limited costs already discussed, there are collateral costs to *not* applying *Betts* retroactively. The unconstitutional convictions for violating the 2011 SORA will be used to increase the sentencing guidelines for any future convictions. These increased guidelines will lead to longer sentences, and those longer sentences will cost the State. Thus, the burdens on the administration of justice are minimal and likely to be outweighed by the cost of not applying *Betts* retroactively.

Conclusion and Relief Requested

Mr. Shaver never should have been required to comply with the 2011 SORA, and the Court should not pretend otherwise. CDAM respectfully requests that the Court hold *Betts* to apply retroactively to those whose convictions were final on direct appeal before the Court issued that decision.

Respectfully submitted,

Date: November 6, 2025

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[6] *Juvenile Lifer Unit Report: 2024*, p 3.

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Statement of Countable Words

This brief contains 5,997 words countable pursuant to MCR 7.312(A) and MCR 7.212(B).

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