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STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Maldonado, J., Cavanagh and Jansen, JJ.

PEOPLE OF THE STATE OF MICHIGAN,	Supreme Court No. 167736
Plaintiff-Appellee,	Court of Appeals No. 361488
v	Tuscola County Circuit Court No. 15-13521-FH
GARY SHAVER,	
Defendant-Appellant. /	

RESPONSE OF THE PEOPLE OF THE STATE OF MICHIGAN TO THE CDAM AMICUS BRIEF

Erica Walle
Tuscola County Prosecutor

B. Eric Restuccia (P49550)
Deputy Solicitor General
Attorneys for the People
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

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INTRODUCTION

The amicus for Criminal Defense Attorneys of Michigan (CDAM) advances arguments that align with those that Gary Shaver advances, but CDAM's analysis demonstrates two basic misunderstandings of law that merit a response here.

First, CDAM argues that because this Court's decision in *People v Betts,* 507 Mich 527 (2021) struck the application of Michigan's Sex Offenders Registration Act (SORA) for all the pre-2011 offenders, that it is a necessarily a substantive rule that must be applied retroactively to all cases on collateral review. But CDAM misunderstands the nature of the federal precedent. Its citations to *Johnson v United States,* 576 US 591 (2015) and *Welch v United States*, 578 US 120, 128 (2016) here rather than support CDAM's point only confirms the People's argument. This is not a situation in which Gary Shaver's conduct – the willful failure to update his address – is beyond the power of the State to require or that he was not placed on notice that the conduct in which he engaged was criminal. Rather, the Court in *Betts* ruled that those plainly regulatory provisions in the 2011 SORA were not enforceable against the pre-2011 offenders based on its severance analysis, not based on the substantive point that such duties cannot, in principle, be applied to sexual offenders after they have committed their sexual offense. That is the key. The People provide an illustration in this response that makes this point clear. See page 3 below.

Second, there is nothing unfair to Gary Shaver in denying him relief on collateral review. That he would have received relief if his case were pending on direct review does not answer the point. His willful failure to update his address was a crime then, and it is a crime now. *Betts* did not remove the State's power to require it.

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ARGUMENT

I. The decision in *Betts* did not change the fact that the duty to update one's address is a regulatory provision that may be required of a criminal defendant after committing a sexual offense.

As noted by the CDAM brief (p 3), the two paradigmatic types of substantive rules that federal precedent requires to be applied retroactively to cases final on direct review are "defined as [1] a rule forbidding certain primary conduct or [2] a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *People v Barnes*, 502 Mich 265, 271 (2018) (numbered brackets added), citing *Montgomery v Louisiana*, 577 US 190, 198 (2016). But neither of these definitions are applicable here.

Underlying these two types of substantive rules is the principle, consistent with this Court's analysis in *People v Poole,* that "[s]ubstantive 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 WL 978646, at *5 (2025) (emphasis added; cleaned up), quoting *Montgomery,* 577 US at 201. But the decision in *Betts* does not foreclose the ability of the Legislature to require sexual offenders to update their address as a part of a regulatory system. It is not "beyond the State's power to impose." It is noteworthy that CDAM does not argue to the contrary.

Rather, CDAM presses the argument that the system of duties that this Court in *Betts* found to be punishment were examined in the aggregate or "as a whole" (see CDAM Amicus, p 9), but this argument supports the People's position. The illustration from the People's merits brief demonstrates the point.

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Consider the example of a hypothetical statute to illustrate the difference:

MCL 750.AAA – Regulatory Law for Certain Convictions

Sec. 1. Under law, if any offender was convicted of a certain crime on or before January 1, 2025, the offender will have the following duties:

(A) Regulatory reporting duty;

(B) Punitive duty that significantly burdens the offender.

The finding that the 1(B) cannot be severed from 1(A) does not mean that the State was unable to impose this regulatory duty in 1(A), merely that the Court found that it did not have the authority to engage in a legislative task. See *Betts*, 507 Mich at 568–569 ("It is not altogether clear whether the Legislature would still advocate for the removal of the three provisions identified earlier [i.e., [1] the removal of the student-safety zones; [2] the removal of the retrospective application of in-person reporting requirements for vehicle information, electronic mail addresses, Internet identifiers, and telephone numbers, MCL 28.725(2)(a); and [3] the removal of registrants' tier-classification information from the public website] without the addition of the several other amendments that were introduced in 2020 PA 295.") But that decision on severance does not invalidate the authority of the Legislature in principle to require sex offenders to update their address. And the breadth of the law in place was clear that Gary Shaver was on notice that he had this duty in 2015 when he willfully failed to do so. These features distinguish this case from the cases that CDAM relies on regarding the Armed Career Criminal Act, which was evaluated in *Johnson v United States*, 576 US 591 (2015). (CDAM Amicus, pp 4–6.) The differences between that case and this one confirm why the ruling here was not a substantive one for Shaver in relation to his crime here.

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In *Johnson,* the U.S. Supreme Court ruled that the federal Armed Career Criminal Act of 1984 was unconstitutionally vague, because it did not place defendants on notice under its "residual clause" about what would constitute a "violent felony" for the purposes of the Act. *Johnson v United States*, 576 US 591, 606 (2015). The Act increased a sentence if a defendant was convicted of being a felon in possession of a firearm if that offender had three or more previous convictions for a "violent felony." *Id.* at 593. The Court examined the residual clause, which defined violent felony to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." *Id.* The Court then held that this clause did not provide offenders with "fair notice" of what that clause encompassed because of "the indeterminacy of the wide-ranging inquiry required" by the clause that resulted in "arbitrary enforcement by judges." *Id.* at 597. The subsequent question was whether this decision was a substantive one that applied retroactively to cases on collateral review.

Later in *Welch*, the Court clarified that the limitations on the substantive powers were not the only kind of substantive decisions that applied retroactively. *Welch,* 578 US at 133 (rejecting the contention that "the *Teague* inquiry turns only on whether the decision at issue holds that Congress lacks some substantive power"). Rather, the Court explained that "if a new rule changes the scope of the underlying criminal proscription, the balance is different" because in that circumstance it will "necessarily carry a significant risk that a defendant stands convicted of *an act that the law does not make criminal*." *Id.* at 131 (emphasis added), citing *Bousley v United States*, 523 US 614, 620 (1998). But the 2011 SORA *did* require Shaver to update his address.

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That is the key distinction.

In *Welch*, the Supreme Court ruled that the Armed Career Criminal Act did not place an offender on notice whether that offender's conduct fell within the purview of the law that would subject him to an increased sentence. It thus affected the breadth of the statute and was substantive in nature. *Id.* at 130 ("*Johnson* affected the reach of the underlying statute rather than the judicial procedures by which the statute is applied.") But that is not true here. The conduct at issue – Shaver's failure to update his address – was criminal at the time he committed it, and he knew of the law. There was no failure of notice in the law, and its breadth encompassed the conduct that the law governed here, i.e., the willful failure to update his address.

CDAM argues otherwise, quoting *Welch* for the proposition that "*Johnson* affected the reach of the underlying statute." (CDAM Amicus, p 5, quoting *Welch,* 578 US at 129.) It is true that all of the pre-2011 registrants, like Shaver, could not be punished for willful violations under the 2011 SORA after *Betts*. In that sense, the breadth of the law's enforceability was narrowed.

But that is not the sense in which *Welch* applies it. The narrowing of the enforceability does not implicate the value *Welch* seeks to vindicate, which is to ensure that a person is not convicted of "an act that the law does not make criminal." *Welch*, 578 US at 131. That is not the case here. The law was not narrowed to exclude Shaver's conduct, but rather this Court in *Betts* found the civil regulatory elements of SORA were non-enforceable when combined with the punitive elements based on its severance ruling.

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Unlike in *Welch,* there was no risk of ensnaring a potentially innocent person ("an act that the law does not make criminal") for the conduct at issue here. See also *People v Poole,* ___ Mich ___; 2025 WL 978646, at *5 (applying retroactively where constitution places "laws and punishment altogether beyond the State's power to impose.") The duty to update one's address is not altogether beyond the State's power to impose and the former prosecution of Shaver did not ensnare a possibly innocent person. As Shaver knew, his conduct was criminal then, and it remains so now. There is no risk of the conviction of a person who was innocent. The rule was not substantive for him.

CDAM's argument from *Welch* that the central focus is on "the function of the rule" and "not its underlying constitutional source" (p 7) further confirms the conclusion that *Betts* does not apply retroactively here. The Court in *Betts* ruled that the 2011 SORA had increased the punishment for the pre-2011 offenders based on some of the additional obligations the Legislature imposed on them, primarily some of the duties from the 2006 and 2011 amendments. See *Betts,* 507 Mich at 561–562, 564 ("[A] majority of the former SORA provisions underlying our conclusion that the 2011 SORA constitutes punishment were added by its 2006 and 2011 amendments."). In the main, the 2006 and 2011 amendments added the student safety zones, the in-person reporting duties for minor life changes, and the tiering of offenders, which the registry made public. See *id.* at 564. But the duty to update one's address has been in SORA since 1999. See MCL 28.725(1) (1999); 1999 PA 85. And because the problematic duties could not be severed (even though repealed or revised in 2021), the entire 2011 SORA could not be enforced against pre-2011 offenders. See *id.* at 562–574.

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In that way, the ruling in *Betts* was not a substantive decision about a class of persons that the 2011 SORA governed based on its analysis of the duty to update one's address. The "function of the rule" from *Betts* was not to change "the scope of the underlying criminal proscription" to prevent the "significant risk that a defendant stands convicted" for an act that "the law does not make criminal." See *Welch,* 578 US at 131, citing *Bousley,* 523 US at 620. Shaver had a duty to update his address that was itself constitutionally firm, and he knew of the duty. While it is true that Shaver would have been entitled to relief on direct review because *Betts* invalidated the 2011 SORA for all pre-2011 offenders (including the duty to update one's address), this case is analogous to the circumstance in *Welch* in describing the possibility of the striking down of a "procedural statute." *Welch,* 578 US at 135 ("not every decision striking down a statute is ipso facto a substantive decision").

For the regulatory duty to update one's address, the ruling in *Betts* on ex post facto grounds was based on its severance analysis, which is an issue about legislative process and judicial authority, not a finding that there was a constitutional infirmity in requiring sex offenders to update their address. The refusal to allow this provision to remain for the pre-2011 offenders was not a substantive ruling about the validity of the duty to update a registrant's address. In other words, striking a statutory provision based on vagueness is substantive. But striking a regulatory provision – that would otherwise be valid – based on a severance analysis is not.

Returning to the two "essential forms of a substantive rule" (CDAM Amicus, p 3), neither is then applicable here.

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For altering the range of conduct that the law punishes, *Betts* did not narrow the range of conduct that would be subject to prosecution if a sex offender failed to meet his duties under the 2011 SORA. It is not like *Johnson* and *Welch* because the breadth of the SORA was not placed in issue. Its parameters were clear, and Shaver knew of his duties.

For the class of persons that that the law punishes, while the pre-2011 offenders could not be subject to the 2011 SORA under the decision in *Betts,*[1] the decision did not rule that the Legislature was without power to "place certain criminal laws and punishment altogether beyond the State's power to impose" in relation to the 2011 SORA's requirement for a registrant to update one's address.

The contrast to this Court's ruling in *Poole* and the U.S. Supreme Court's ruling in *Montgomery* is illustrative. They are unlike the situation here.

The issue in *Poole* was whether the decision in *People v Parks,* 510 Mich 225 (2022) that an 18-year-old offender could not be subject to an automatic life-without parole sentence should apply retroactively as a substantive ruling. *Poole,* at *1. Relying on *Montgomery,* this Court ruled that it was a substantive decision because the holding in *Parks* "necessarily carries a significant risk that a defendant . . . faces a punishment that the law cannot impose upon him." *Poole,* at *5, quoting *Montgomery*, 577 U.S. at 208–209 (decision that juveniles cannot be subject to automatic LWOP was substantive ruling).

[1] See *id.* at 573–574 ("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.")

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That is not true here. The duty to update one's address is the prototypical example of the kind of regulatory duty that the law may require of a sexual offender. See *Doe v Smith,* 538 US 84, 90 (2003) (noting that for aggravated offenses an offender in Alaska must verify his address quarterly and "must notify his local police department if he moves"). There is no significant risk that Shaver is facing a requirement that the law cannot impose on him.

As noted, the ultimate basis for the fact that Shaver would be entitled to relief on direct review relates to this Court's severance ruling that the duty to update's one address could not be enforced. That is the insight that the People are pressing in the hypothetical statute above. See p 3. But there is nothing in principle that is constitutionally infirm in requiring the updating of one's address.

II. The application of the traditional *Hampton* factors confirms that denying Gary Shaver relief on collateral review is proper and consistent with longstanding retroactivity doctrine.

In *Poole,* this Court reiterated the three-factor test for retroactivity under state law:

> (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.
>
> [*Poole,* at *2, citing *People v Hampton*, 384 Mich 669, 674 (1971).]

The People will not reiterate the arguments from their merits brief. (People's Br, pp 26–33.) But the People do offer one point in response to CDAM's claim that it would be "fundamentally unfair" (p 11) to refuse to grant Shaver relief. The cases that CDAM relies on from the U.S. Supreme Court support the People's position

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CDAM identifies Justice Harlan's concurrence from *Mackey v United States,* 401 US 667 (1971) in the development of the doctrine of retroactivity. (CDAM Amicus, pp 12–13.) But the analysis from Justice Harlan shows that there is nothing "fundamentally unfair" about leaving Shaver's conviction in place on collateral review.

The central holding from this Court's analysis in *Poole* is derived from the definition of "substantive" taken from this concurrence. The U.S. Supreme Court noted that the *Teague* standard "originated in Justice Harlan's approach to retroactivity" and "adopted [his] reasoning." *Montgomery*, 577 US 190, 200–201 (2016), citing *Mackey*, 401 US at 692 (Harlan, J., concurrence). This is where this Court derived the language that a rule is substantive where it "place[s] certain criminal laws and punishments altogether beyond the State's power to impose." *Poole,* *5, citing *Montgomery,* 577 US at 201, which in turn quoted *Mackey,* 401 US at 692. The context in which Justice Harlan makes this statement explains that it is where defendant is innocent, i.e., those punished for "[in]valid societal prescriptions," is the circumstance in which finality must yield:

> [N]ew "procedural due process" rules in mind, that is, those applications of *the Constitution that forbid the Government to utilize certain techniques or processes in enforcing concededly valid societal proscriptions on individual behavior*. New "substantive due process" rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct *beyond the power of the criminal law-making authority to proscribe,* must, in my view, be placed on a different footing. As I noted above, the writ has historically been available for attacking convictions on such grounds. This, I believe, is because it represents the clearest instance *where finality interests should yield*. There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.
>
> [*Mackey*, 401 US at 692–693 (emphasis added).]

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Again, the contrast to this Court's analysis in *Poole* illustrates why Justice Harlan's analysis supports the decision of the Court of Appeals below.

As noted, the rule in *Betts* does not place the ability of the Legislature to require a registrant to update one's address beyond "the State's power to impose," *Poole,* at *5, as the same conduct remains criminal under Michigan law. But this regulatory provision could no longer be applied by this Court's decision because it could not be enforced apart from the 2006 and 2011 amendments, which included some provisions that this Court ruled made the 2011 SORA punitive. See *id.* at 561–562, 564.

In other words, using the language of Justice Harlan, the decision in *Betts* on ex post facto only "forbid[s] the Government to utilize certain techniques or processes," *Mackey,* 401 US 692–693, because *Betts* found this Court could not supplant the role of the Legislature in allowing a regulatory provision such as here to remain effective. In rejecting severance, this Court reasoned that it was "not altogether clear whether the Legislature" would have severed the three problematic provisions. *Betts,* 507 Mich at 568–569. Nonetheless, the duty to update one's address for a registrant – taken in isolation – would be valid, and thus the People in 2015 merely "enforc[ed] concededly valid societal proscriptions" on Shaver's "individual behavior." See *Mackey,* 401 US 692–693. The proscription at issue was not itself invalid.

In contrast, the automatic life-without-parole sentence imposed on Poole was invalid. *Poole*, at *6 ("providing relief to everyone serving a sentence that has later been found to be invalidated"). CDAM (and Shaver) do not appear to challenge the validity of the prescription here as invalid by itself, just that it could not be enforced.

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Accordingly, the point applies here that this prescription – the duty to update one's address – remained within the State's power to impose. His conduct fell within the breadth of the 2011 SORA, and he was on notice of his duty and thus he was not convicted of an act that the law did not make criminal. Shaver's conviction should remain on collateral review.

CONCLUSION AND RELIEF REQUESTED

This Court should affirm the decision below that *People v Betts* does not apply retroactively to cases that are final on direct review where, as here, the same conduct at issue – a registrant's failure to update one's address – was criminal then and now.

Respectfully submitted,

Erica Walle
Tuscola County Prosecutor

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General
Attorneys for the People
P.O. Box 30212
Lansing, Michigan 48909
(517) 335-7628

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WORD COUNT STATEMENT

This document complies with the type-volume limitation of Michigan Court Rules 7.312(A) and 7.212(B) because, excluding the part of the document exempted, this **Response of the People of the State of Michigan to the CDAM Amicus Brief** contains no more than 16,000 words. This document contains 3,385 words.

/s/ B. Eric Restuccia

B. Eric Restuccia (P49550)
Deputy Solicitor General
Attorneys for the People
P.O. Box 30212, Lansing, MI 48909
(517) 335-7628