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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

James Ellis

Defendant-Appellant.

MSC No.

COA No. 363845

Berrien County Circuit Court
Case No. 21-016148 FH

James Ellis's
Application for Leave to Appeal

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Date: March 1, 2024

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Judgment Appealed From and Relief Sought

Mr. Ellis was convicted of committing a sex offense in 1983 in Illinois. Because he stole food from Wal-Mart in Michigan and pled to attempted unarmed robbery, he is forced to register as a sex offender based on that 40-year-old conviction. This violates the plain language of the Sex Offenders Registration Act, forces him to register for a non-sexual offense, and is cruel or unusual punishment. SORA's recapture provision, MCL 28.723(1)(e),[1] is unconstitutional.

The Court of Appeals has now erred twice in holding that the recapture provision of SORA does not violate the ex post facto clause because the consequences attach not to the prior sex offense, but rather to the new felony. See *People v Klinesmith*, 342 Mich App 39 (2022); *People v Tucker*, 312 Mich App 645 (2015). This Court had previously granted leave in *Tucker* to address this very question. *People v Tucker*, 501 Mich 1077 (2018). However, prior to argument, Mr. Tucker withdrew his appeal because he was removed from the registry based on federal litigation. See *People v Tucker*, 503 Mich 854 (2018).

This Court should hear argument on the constitutionality of the recapture provision of SORA and hold that Mr. Ellis should not have to register as a sex offender for the rest of his life for committing the non-sexual offense of stealing an $18 steak from Wal-Mart, because he committed a sex offense over four decades ago.

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1 "(1) Subject to subsection (2), the following individuals who are domiciled or temporarily reside in this state or who work with or without compensation or are students in this state are required to be registered under this act: . . . (e) An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011."

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Statement of the Questions Presented

First Question

Does the plain language of SORA prohibit Mr. Ellis from having to register under SORA because he does not reside in Michigan?

Mr. Ellis answers: Yes.

The trial court answered: No.

Second Question

Is it unconstitutional ex post facto punishment to require Mr. Ellis to register under SORA because the requirement to register stems from conduct decades before the enactment of 2021 SORA?

Mr. Ellis answers: Yes.

The trial court answered: No.

Third Question

Is requiring Mr. Ellis to register as a sex offender for life based on a non-sexual offense cruel or unusual punishment in violation of Michigan's constitution?

Mr. Ellis answers: Yes.

The trial court answered: No.

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Statement of Facts

Mr. Ellis admitted to trying to take food from a Wal-Mart without paying for it and that on his way out, he bumped a person who was trying to stop him. PT, 16-17.[2] Mr. Ellis pled guilty to one count of attempted unarmed robbery and agreed to pay restitution on two files and in exchange, the prosecutor dismissed a misdemeanor count of retail fraud second degree and did not seek a habitual offender enhancement. PT, 4-5, 12.

At sentencing, there was a lengthy discussion about whether Mr. Ellis was required to register under the Michigan Sex Offenders Registration Act (SORA) recapture provision because of a 1983 offense in Illinois. ST, 4-15. Trial counsel argued that applying the recapture provision to Mr. Ellis would violate ex post facto laws. ST, 9-10. The trial court acknowledged that "requiring a registration for lifetime in particular, or any registration for any period of years, is some form of a restraint." ST, 10. But, the court stated: "I don't have a choice but to order that the recapture provision applies, in my opinion, and so he does have to register as a Tier 3 sex offender." ST, 21. The court sentenced Mr. Ellis to 12 months to 60 months in the Michigan Department of Corrections, with credit for two days, and ordered that he pay $766.87 in restitution. ST, 20-21. Mr. Ellis is now required to be on the sex offender registry for the rest of his life.

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[2] Transcript references are as follows: PT: December 8, 2021 Plea Hearing; ST: January 24, 2022 Sentencing Hearing; MH: October 6, 2022 post-conviction motion hearing.

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Arguments

I. The plain language of SORA prohibits Mr. Ellis from having to register under SORA because he does not reside in Michigan.

Standard of Review

Question of statutory interpretation are reviewed de novo. *People v Hall*, 499 Mich 446, 452 (2016).

Issue Preservation

Mr. Ellis preserved this issue by filing a timely motion to correct invalid sentence and for resentencing in the trial court under MCR 6.429(B) and (C).

Discussion

MCL 28.723(1) provides that "individuals who are domiciled or temporarily reside in this state or who work with or without compensation" are required to be registered under this act and then lists people who are required to register. The recapture provision is one way someone can be required to register:

> An individual who was previously convicted of a listed offense for which he or she was not required to register under this act, but who is convicted of any other felony on or after July 1, 2011. MCL 28.723(1)(e).

The recapture provision only applies to the enumerated group of people in the statute: those "who are domiciled or temporarily reside in the state." At the time of the offense, Mr. Ellis was living in Indiana, where he had been residing for 15 years. See December 1, 2021 Arraignment Transcript, 7-8. Mr. Ellis is not, nor has he ever been, a

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Michigan resident.[3] Mr. Ellis is not, nor was he upon the commission of the crime, temporarily residing in Michigan. Mr. Ellis is not currently a registrant on any state's sex offender registry, including his home state of Indiana. The recapture provision does not apply to Mr. Ellis.

The Court of Appeals agreed that Mr. Ellis will only need to register if he "domiciles or temporarily resides in Michigan in the future." *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), attached at 2.

Similarly, the Court of Appeals that MCL 28.723(3)[4] does not apply to Mr. Ellis because he did not commit a listed offense, but rather was required to register solely under the recapture provision. *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), attached at 3.

The plain language of SORA does not require registration unless Mr. Ellis remains in Michigan upon parole.

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[3] He is currently incarcerated in Michigan at Parnall Correctional Facility.

[4] (3) A nonresident who is convicted in this state on or after July 1, 2011 of committing a listed offense who is not otherwise described in subsection (1) shall nevertheless register under this act. However, the continued reporting requirements of this act do not apply to the individual while he or she remains a nonresident and is not otherwise required to report under this act. The individual shall have his or her photograph taken under section 5a.

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II. 2021 SORA is punishment. It is unconstitutional ex post facto punishment to require Mr. Ellis to register under SORA because the requirement to register stems from conduct decades before the enactment of 2021 SORA.

Standard of Review

Constitutional questions are reviewed de novo. *People v Hall*, 499 Mich 446, 452 (2016).

Issue Preservation

Mr. Ellis preserved this issue by filing a timely motion to correct invalid sentence and for resentencing in the trial court under MCR 6.429(B) and (C).

Discussion

The 2021 Sex Offenders Registration Act (SORA) is punishment, and it is cruel or unusual punishment for a crime that is not sexual in nature. *People v Lymon*, 342 Mich App 46, 88-89 (2022).

The same day this Court issued *Lymon*, it issued an opinion dealing with the recapture provision. *People v Klinesmith*, 342 Mich App 39 (2022). There, this Court held that "nothing in *Betts*[5] . . . disturbs the conclusion in *Tucker*[6] that the recapture provision of SORA attached legal consequences to the subsequent conviction, not the original conviction." *Klinesmith*, 342 Mich App at 44. *Klinesmith* involved 2011

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5 *People v Betts*, 507 Mich 527 (2021)

6 *People v Tucker*, 312 Mich App 645 (2015)

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SORA and the recapture provision that was part of the 2011 statute. *Id.* at 41-43.

This Court erred in deciding *Klinesmith* because in *Betts*, the Supreme Court struck down 2011 SORA as a whole. This Court's reasoning that the holding was narrow in *Betts* was incorrect. *Id.* at 43. The Michigan Supreme Court did not sever the statute to retain certain provisions, but rather invalidated the entire statute as ex post facto punishment. *Betts*, 507 Mich at 573-574. Rather than being narrow, it was a sweeping holding.

Here, the trial judge stated at the motion hearing that it was bound by *Klinesmith*, even if he disagreed. MH, 6-7. Because *Klinesmith* addressed the 2011 SORA, this Court does not have to follow it, given Mr. Ellis is challenging 2021 SORA. The Court of Appeals erred in reasoning it was bound by *Klinesmith*. *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), attached at 3-4.

2021 SORA, as a whole, is punishment. *Lymon*, 342 Mich App at 81. No part of it can be applied to Mr. Ellis retroactively, including the recapture provision, because the 2021 SORA "may not be retroactively applied to registrants whose criminal acts subjecting them to registration occurred before the enactment" of 2021 SORA. *Betts*, 507 Mich at 573-574. While the attempted armed robbery conviction triggered registration now, he would not have to register but for the 1983 Illinois sex offense. Therefore, Mr. Ellis should not be required to register because 2021 SORA is ex post facto punishment.

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III. Requiring Mr. Ellis to register as a sex offender for life based on a non-sexual offense is cruel or unusual punishment in violation of Michigan's constitution.

Standard of Review

Constitutional questions are reviewed de novo. *People v Hall*, 499 Mich 446, 452 (2016).

Issue Preservation

Mr. Ellis preserved this issue by filing a timely motion to correct invalid sentence and for resentencing in the trial court under MCR 6.429(B) and (C).

Discussion

Although Mr. Ellis believes it was wrongly decided, this court in *Klinesmith* held that when addressing SORA's recapture provision, legal consequences attach to "the subsequent conviction, not to his original conviction." *Klinesmith*, 342 Mich App at 44. Mr. Ellis must register based on his non-sexual subsequent offense: attempted unarmed robbery. For the reasons outlined by this Court in *Lymon*, it is cruel or unusual punishment to require a person to register based on a non-sexual offense. *People v Lymon*, 342 Mich App 46, 81-89 (2022).

Here, the Court of Appeals erred in reasoning that Mr. Ellis was different from Mr. Lymon because unlike Mr. Lymon where the Court reasoned that Mr. Lymon "was not a sexual predator, and that there was nothing to suggest that [Mr. Lymon] would commit a sexual offense in the future," Mr. Ellis's 40+ year old conviction was a fact that suggested he may commit a sexual offense in the future. *People v Ellis*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2024 (Docket No. 363845), attached at 5.

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This rationale ignores the plain holding of *Lymon* that a person cannot register as a sex offender if they did not commit a sex offense. Mr. Ellis did not commit a sex offense. And, 40 years without another sex offense is good evidence to suggest that like Mr. Lymon, Mr. Ellis is not at risk for committing a sex offense.

The Michigan Constitution's protection from "cruel *or* unusual punishment" is broader than the United States Constitution's protection from "cruel *and* unusual punishment." *People v Bullock*, 440 Mich 15, 30 (1992); *People v Lorentzen,* 387 Mich 167, 172 n 3 (1972). This continues to be true despite contrary United States Supreme Court decisions on the Eighth Amendment question. For example, the United States Supreme Court held in *Harmelin v Michigan,* 501 US 957, 994 (1991), that a mandatory sentence of life imprisonment without the possibility of parole for possessing more than 650 grams of cocaine was not cruel and unusual punishment. The Michigan Supreme Court declined to follow, holding less than a year later that the same sentence under the same statute for the same crime violated the Michigan constitution. *Bullock*, 440 Mich at 30. The weight of caselaw within Michigan provided a "compelling reason not to reflexively follow the . . . United States Supreme Court's Eighth Amendment analysis." *Id.* at 35.

Michigan has developed a four-prong test to determine if a sentence is cruel or unusual: "(1) the severity of the sentence imposed compared to the gravity of the offense, (2) the penalty imposed for the offense compared to penalties imposed on other offenders in the same jurisdiction, (3) the penalty imposed for the same offense in other states, and (4) whether the penalty imposed advances the penological goal of rehabilitation." *People v Carp*, 496 Mich 440, 502 (2014). Under this test, a long sentence of public registration without an individualized

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assessment of risk for a non-sex offense violates the Michigan Constitution.

A. Public registration with in-person reporting requirements and no individualized assessment of risk is an excessively harsh penalty.

The first prong weighs the gravity of the offense against the severity of the sentence.

Here, like in *Lymon*, the penalty is severe. *Lymon*, 342 Mich App at 85-86 ("For a period of time equal to the maximum length of his incarceration of the underlying offense, Lymon must meet the onerous reporting requirements, he must suffer the social stigma of being placed on a sex offenders registry despite having not committed an offense with a sexual component, and he is subject to additional convictions and incarceration should he fail to comply.")

So too for Mr. Ellis. First, Mr. Ellis must register for the rest of his life, a substantially longer period than Mr. Lymon. MCL 28.725(13). Mr. Ellis will "suffer the social stigma of being placed on a sex offenders registry despite having not committed an offense with a sexual component, and he is subject to additional convictions and incarceration should he fail to comply." *Lymon*, 342 Mich App at 86. There was no assessment as to Mr. Ellis's risk of committing another sex offense. He cannot petition for removal, even if he could show he is not at risk of reoffending sexually. MCL 28.728c. Any validated risk assessment would likely score Mr. Ellis at a very low risk of reoffending sexually, given his age and the near 40 years that have passed since his Illinois sex offense, with no other sex offenses committed in those four decades.

Mr. Ellis's risk was never analyzed by the trial court because registration was mandatory. This Court has struck down mandatory

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penalties for non-violent offenses where the circumstances of the offender and the offense were not able to be considered. *Bullock*, 440 Mich at 37-38; *Lorentzen*, 387 Mich at 176.

The principle of individualized sentencing is best explained in *People v McFarlin*, 389 Mich 557, 574 (1973):

> The modern view of sentencing is that the sentence should be tailored to the particular circumstances of the case and the offender in an effort to balance both society's need for protection and its interest in maximizing the offender's rehabilitative potential. While the resources allocated for rehabilitation may be inadequate and some persons question whether rehabilitation can be achieved in the prison setting, this view of sentencing is the present policy of the state. A judge needs complete information to set a proper individualized sentence.

This Court continues to recognize the necessity of individualized sentencing, finding that the advisory guideline regime "maintain[s] flexibility sufficient to individualize sentences when necessary." *People v Lockridge*, 498 Mich 358, 391 (2015).

But SORA ignores these principles. It does not tailor the punishment to the particular circumstances of the case or the person, and places society's need for protection (regardless of whether there is any need for protection in that specific case) above its interest in maximizing a person's rehabilitative potential. SORA's punishment on its face, and as applied to Mr. Ellis because it was imposed without individualization, i.e. with no regard for the risk, if any, emanating from his non-sexual offense.

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B. Lifetime and long periods of public registration with no individualized assessment of risk for non-sexual offenses are disproportionate sentences in Michigan.

The second prong compares the sentence with other sentences in the same jurisdiction. "It is axiomatic that the majority of offenses that do not have a sexual component do not result in the offender being placed on the sexual offender registry." *Lymon*, 342 Mich App at 86.

There are no other post-incarceration sentences in Michigan that last for the life of the offender. There is no provision in Michigan law for lifetime probation or parole. Even in cases of commutation, where a life-in-prison sentence has been commuted, the parolee serves a four-year term of parole (in contrast with the more typical parole term of two years). MCL 791.234(8)(d); Michigan Department of Corrections Policy Directive 06.05.104.EE. Additionally, for the paroled lifer, there are no other attendant responsibilities for reporting or otherwise being monitored by law enforcement, except for those imposed at the discretion of the Parole Board and the parole agent, which would only last the length of the parole term. This can include parole for murder. This is a unique punishment and one rarely applied in Michigan.

Mr. Ellis must register as a sex offender for a non-sexual offense until he dies. There is no other punishment in Michigan that continues for life and beyond a person's termination of state supervision.

C. Lifetime and long periods of public registration with no individualized assessment of risk for a non-sexual offense are disproportionate sentences compared to other jurisdictions.

The third prong compares the sentence with the sentences for the same crime in other jurisdictions. In *Lymon*, this Court did not find this

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factor to be compelling one way or the other. *Lymon*, 342 Mich App at 86-87.

Only 18 states have substantially implemented the federal Sex Offenders Registration and Notification Act (SORNA), 42 USC § 16901, *et seq* through their own state registries. https://smart.ojp.gov/sorna/substantially-implemented (last accessed February 16, 2020); see also Stephanie Buntin, *The High Price of Misguided Legislation: Nevada's Need for Practical Sex Offender Laws*, 11 Nev L J 770 (2011), n 10. There is not a uniform consensus that registries work to increase public safety, let alone one as burdensome as Michigan's. This Court acknowledged in *Betts* that a growing body of research has shown that "the dangerousness of sex offenders has been historically overblown," and "at a minimum" that SORA's efficacy in decreasing recidivism "is unclear." *Betts*, 507 Mich at 560.[7]

But, regardless of whether other states have complied with SORNA, Michigan falls within an even smaller subset because registration is a

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[7] *See, e.g.*, United States Department of Justice, Alper & Durose, *Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-2014)* (May 2019), available at https://www.bjs.gov/content/pub/pdf/rsorsp9yfu0514.pdf (accessed November 13, 2022) (concluding that sex offenders are less likely than other offenders to be rearrested for any crime); Huebner et al, *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (July 1, 2013), p 72, available at https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf accessed June 4, 2021) concluding that residency restrictions "are unlikely to mitigate or reduce the risk of recidivism among sex offenders"); Prescott & Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J L & Econ 161, 192 (2011) (concluding that notification requirements in a typical sex-offender registry "effectively increases the number of sex offenses by more than 1.57 percent," likely "because of the social and financial costs associated with the public release of their criminal history and personal information").

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mandatory condition, even though Mr. Ellis has never been assessed as posing a future risk to children. In some states, obligations are discretionary based on a registrant's risk. See, e.g., *Moe v Sex Offender Registry Board*, 467 Mass 598 (2014); *Doe v Pataki*, 120 F3d 1263 (CA 2, 1997); *Weems v Little Rock Police Dept*, 453 F3d 1010 (CA 8, 2006).

Because of the mandatory nature of Michigan's SORA and the number of obligations under the statute, all without an individualized assessment of risk or means of petitioning for removal, it is different than the sentences in other states.

D. Lifetime and long periods of public registration do not serve any penological goal, and particularly not that of rehabilitation.

The fourth factor is the relationship to the penological goals of punishment, with a focus on the goal of rehabilitation. *Lorentzen*, 387 Mich at 179; *Bullock*, 440 Mich at 34. In Michigan the general sentencing goals are disciplining the offender, rehabilitation, protection of society, and deterrence. *People v Coles,* 417 Mich 523 (1983). The mandatory nature of the registration does not allow for any assessment of how public safety is served by registering Mr. Ellis. There is no assessment as to how dangerous he—or any registrant—might be or what level of registration is required to ensure public safety. The Court of Appeals found that registration does not advance the goal of rehabilitation. *Lymon*, 342 Mich App at 87-88.

Registration requirements run contrary to rehabilitation. As a result of being on the public registry, registrants have incredibly difficult times finding housing and employment, and often suffer a unique stigma and can be the victims of vigilantism. See Catherine Wagner, *The Good Left Undone: How to Stop Sex Offender Laws from Causing Unnecessary*

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Harm at the Expense of Effectiveness, 38 Am J Crim L 263, 267-274 (2011). Such effects can work against rehabilitation if a person cannot find a place to live or work because of SORA registration.

This Court has held that "even the most compelling interests underlying the 'public policy that decries the scourge of drugs' should not be permitted to overwhelm 'the equally important belief that only the rarest individual is wholly bereft of the capacity for redemption." *Bullock,* 440 Mich at 39-40, n23, quoting *People v Schultz,* 435 Mich 517, 533-534 (1990). The Court of Appeals noted the importance of rehabilitation in *Dipiazza*:

> [I]t is abundantly clear that there is no goal of rehabilitation in this case. Defendant never posed a danger to the public or a danger of reoffending. Defendant is not a sexual predator, nor did the trial court deem him to be. Further, even if defendant needed rehabilitation, SORA's labeling him to be a convicted sex offender works at an opposite purpose, preventing defendant from securing employment and otherwise moving forward with his life plans. [*People v Dipiazza*, 286 Mich App 137, 156 (2009)].

For Mr. Ellis, as in *Dipiazza,* the penalty is harsh – mandatory, public registration, without any individual assessment of risk, based on the commission of a non-sexual offense. Registration for one who is not shown to be a danger to the public will work in opposition to rehabilitation by preventing employment, preventing travel and the pursuit of happiness. *Id.* All these restraints on liberty are imposed without judicial discretion or a feasible mechanism to petition for removal.

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This factor was persuasive for the court in *Lymon*, which also relied on *Dipiazza*, to hold that "there is nothing to suggest that the danger Lymon poses to the public is related to a sexual offense, nor is there anything to suggest that he will commit a sexual offense in the future. He is not a sexual predator. And, to the extent that he needs rehabilitation, labeling him as a sex offender, does not serve any rehabilitation goals related to his actual offense." *Lymon*, 342 Mich App at 88.

The same is true for Mr. Ellis. He has not committed a sex offense in over 40 years. But, for the rest of his life, he will be labeled a sex offender, on a public registry, suffering all the attendant obstacles because he tried to steal food from Wal-Mart.

The mandatory and arbitrary statutory scheme mandating public registration violates the Michigan Constitution's greater protections against "cruel *or* unusual punishment" than those offered by the United States Constitution. *Lorentzen*, 387 Mich at 172; *Bullock*, 440 Mich at 30. This Court must apply these greater protections of the Michigan Constitution to evaluate a categorical ban on mandatory registration under SORA. The lack of an individualized assessment of risk, the unique lifetime and long periods of public registration, and the lack of a penological justification all describe a disproportionate and excessive sentencing scheme, which violates the Michigan constitution.

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Conclusion and Relief Requested

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

Respectfully submitted,

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This Application contains 3,702 countable words.

Date: March 1, 2024