STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

DAVID ALLEN SNYDER,

Defendant-Appellee.
_____/

Supreme Court No. 153696

Court of Appeals No. 325449

Circuit Court No. 14-7061 FH

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Defendant-Appellant's Supplemental Brief

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Trial court answers**,** "No"

Court of Appeals answers, "No".

Plaintiff-Appellee answers, "No".

Defendant-Appellant answers, "Yes".

II. Does retroactive imposition of SORA on Mr. Snyder violate his right to Due Process?

Trial court answers, "No".

Court of Appeals answers, "No".

Plaintiff-Appellee answers, "No".

Defendant-Appellant answers, "Yes".

SUMMARY OF THE ARGUMENT

Michigan's Sex Offender Registration Act (SORA), MCL 28.721 *et seq*., is a byzantine code that governs nearly every aspect of David Snyder's life. When Mr. Snyder pled to criminal sexual conduct in the fourth degree in 1995, at the age of 21, there was no discussion of sex offender registration. Had he known that registration would be a direct and automatic consequence of his plea, he would not have pled. SORA did not go into effect until after Mr. Snyder's plea and sentence. Yet, SORA has been retroactively imposed on him. Every time SORA has been amended, placing new affirmative disabilities, obligations, or restraints on registrants, those changes have applied retroactively to Mr. Snyder.

At first SORA was a private law enforcement database. But since its inception it has been amended nineteen times. First, the registry was made public, disseminating Mr. Snyder's personal information on the internet. Then it was amended to prevent him from living, working, or loitering within 1,000 feet of a school. And in 2011 he was retroactively classified as a tier II registrant and extensive immediate in person reporting requirements were imposed on him. The most recent amendment requires him to pay a $50 annual fee. His compliance with all these provisions is monitored by law enforcement. Most violations lead to a felony conviction and a prison term of up to 10 years. What was once a list of convictions in a police database has become a punitive system of monitoring and control that prevents Mr. Snyder from being a productive member of his community.

In 2014 Mr. Snyder applied to work at Chippewa Cab and was hired. After less than two and a half days of work, Mr. Snyder was fired because a Michigan State Trooper told Chippewa Cab he was on the sex offender registry. Mr. Snyder was then prosecuted, convicted, and sent to prison for failure to immediately report in person to local law enforcement regarding his change in employment.

The Ex Post Facto Clause prohibits retroactive punishment. Over the last 20 years, the increasingly harsh amendments to SORA have transformed what was once a regulatory law into a punitive one. Because SORA is punishment it cannot be retroactively imposed on Mr. Snyder.

Due Process protects fundamental fairness, including fair notice and warning. Because Mr. Snyder was not informed that his plea would result in registration, and he would not have pled had he known, retroactive imposition of SORA on him violates his right to Due Process.

This Court should vacate his conviction for failure to register and remand to the trial court with instructions to remove Mr. Snyder from the sex offender registry.[1]

[1] The legal arguments in Part I and Part II of this brief are substantially similar to the arguments in the supplemental brief in *People v Betts*, 502 Mich 880; 912 NW2d 858 (2018). The questions presented by this Court are the same.

STATEMENT OF FACTS

In August of 1995 David Snyder pled no contest to criminal sexual conduct in the fourth degree.[2] Mr. Snyder pled because at the age of 21, while heavily intoxicated, he groped his 15 year old cousin.[3] At the time of Mr. Snyder's plea and subsequent sentence, the Michigan Sex Offender Registry, MCL 28.721 *et seq*., (SORA) was not yet in effect.

Because there was no registry at the time of Mr. Snyder's plea, he was not advised that registration would be a direct and mandatory consequence of his plea.[4] Mr. Snyder is adamant that he would not have pled had he known that he would be required to register as a sex offender.[5]

Mr. Snyder was sentenced in August of 1995 to 16 to 24 months in prison for the groping incident.[6] During his incarceration SORA became effective. Upon parole he was informed he had to register as a sex offender.[7] Based solely on the offense of conviction, Mr. Snyder has been retroactively classified as a Tier II registrant following the 2011 amendments to SORA.[8] In the 23 years since his plea, Mr. Snyder has not been charged or convicted of a sex crime.

Trial for Failure to Register

On March 27, 2014 Mr. Snyder applied to be a cab driver for Chippewa Cab in Alma, MI.[9] Following a driving record screen he was hired.[10] On either March 31 or April 1, 2014 Mr. Snyder completed training.[11] On April 1, 2, and 3 of 2014 Mr. Snyder drove for Chippewa cab.[12] On April 3, 2014 Michigan State Police Trooper Normandin went to Chippewa Cab and advised the company

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[2] MCL 750.520e.
[3] 1995 Plea Transcript, Appendix 33a; 1995 Sentencing Transcript, Appendix 46a.
[4] 2014 Preliminary Exam Transcript, Appendix 193a; 2014 Failure to Register Trial Transcript, Appendix 123a-124a.
[5] 2014 Preliminary Exam Transcript, Appendix 193a.
[6] 1995 Sentencing Transcript, Appendix 47a.
[7] 2014 Preliminary Exam Transcript, Appendix 193a.
[8] MCL 28.722(t); MCL 28.725(11).
[9] 2014 Failure to Register Trial Transcript, Appendix 89a.
[10] Id. at 91a-92a.
[11] *Id.* at 95a-96a, 114a.
[12] *Id.* at 103a-104a.

that Mr. Snyder was on the sex offender registry.[13] As a result, Mr. Snyder was immediately terminated.[14] Mr. Snyder drove for Chippewa Cab for two and a half days before being fired for being on the sex offender registry.

The public internet registry has a "submit a tip" function that allows anyone to leave an anonymous tip regarding any registrant.[15] As part of his duties with the Sex Offender Coordinator Unit of the Michigan State Police, Trooper Normandin is required to check these tips regularly.[16] Trooper Normandin received a tip through the sex offender registry website that Mr. Snyder was working at Chippewa Cab.[17] Trooper Normandin then confirmed Mr. Snyder's employment, and established that Mr. Snyder had not yet registered that employment with law enforcement.[18] Following Trooper Normandin's investigation, a warrant was issued for Mr. Snyder for failure to immediately (within three business days) register his employment in person with local law enforcement.[19] Following a jury trial, Mr. Snyder was convicted.[20] He was sentenced to 24 to 180 months in prison.[21]

Procedural History

Mr. Snyder has completed his prison sentence for failure to register.[22] Following his conviction he took an appeal of right, representing himself. On February 18, 2016 the Court of Appeals issued an unpublished opinion holding that SORA did not constitute punishment and Mr. Snyder's due process rights were not violated.[23] Mr. Snyder, again pro per, filed an application for

[13] *Id.* at 105a.
[14] *Id.* at 106a.
[15] *Id.* at 120a; SORA Offender Detail for Mr. Snyder, Appendix 221a.
[16] 2014 Failure to Register Trial Transcript, Appendix 133a.
[17] *Id.* at 120a.
[18] *Id.* at 122a; MCL 28.725(1)(b).
[19] 2014 Failure to Register Trial Transcript, Appendix 130a, 135a; MCL 28.729.
[20] 2014 Failure to Register Trial Transcript, Appendix 164a.
[21] 2015 Sentencing Transcript, Appendix 218a.
[22] MCL 28.729.
[23] Court of Appeals Opinion, Appendix 12a-13a.

leave to appeal in this Court. On May 25, 2018 this Court directed the trial court to appoint the State Appellate Defender Office to this case and directed oral argument on the application.

Argument

I. SORA's numerous obligations, disabilities, and restraints amount to punishment. Requiring Mr. Snyder to register as a sex offender as a consequence of a plea entered before SORA was enacted violates the Ex Post Facto Clause.

Issue Preservation and Standard of Review

Mr. Snyder challenged the application of SORA to him on Ex Post Facto grounds in the trial court and the Court of Appeals.[24]

This Court reviews constitutional issues de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). "Whether a statutory scheme is civil or criminal is ... a question of statutory construction." *Smith v Doe,* 538 US 84, 92; 123 S Ct 1140; 15 L Ed 2d 164 (2003) (citation and quotation marks omitted). Statutory interpretation is a question of law that this Court also reviews de novo. *Hall*, 499 Mich at 452.

Discussion

The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the legislature from retroactively inflicting greater punishment than that allowed at the time of the crime. US Const, art I, § 10, cl 1; Const. 1963, Art. I[25], § 10; *Collins v Youngblood*, 497 US 37, 42-43; 110 S Ct 2715; 111 L Ed 2d 30 (1990); *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014). The Michigan Sex Offender Registration Act ("SORA") violates this rule for those convicted prior to its enactment.

The Ex Post Facto Clause seeks to prevent two things: (1) lack of fair notice and interference with settled expectations and (2) vindictive legislation. *Landgraf v USI Film Products*, 511

[24] Motion for Declaratory Order, Appendix 24a-28a; Court of Appeals Opinion, Appendix 12a-13a.
[25] The language contained in Michigan's Constitution's Ex Post Facto Clause is very similar to that contained in the United States' Constitution, and the Court of Appeals has held that Michigan's Ex Post Facto Clause is not more expansive than the federal Ex Post Facto Clause. *In re Contempt of Henry*, 282 Mich App 656, 682, 765 NW2d 44 (2009).

US 244, 266; 114 S Ct 1483; 128 L Ed 2d 229 (1994); W*eaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981). The framers wrote about the dangers of retroactive punishment: Alexander Hamilton explained that Ex Post Facto laws were "'the favorite and most formidable instruments of tyranny,' The Federalist No. 84, p. 512." *Carmell v Texas*, 529 US 513, 532; 120 S Ct 1620; 146 L Ed 2d 577 (2000).

The harm caused by retroactive imposition of SORA is precisely the kind of harm that the Ex Post Facto Clause was adopted to prevent. As the Sixth Circuit recently recognized, in finding that Michigan's SORA was punishment, "the fact that sex offenders are so widely feared and disdained by the general public implicates the core counter-majoritarian principle embodied in the Ex Post Facto clause." *Does #1-5 v Snyder*, 834 F3d 696, 706 (CA 6, 2016), reh den (Sept. 15, 2016), *cert den Snyder v John Does* #1-5, 138 S Ct 55 (2017).[26]

A. History and Development of the Sex Offenders Registration Act

SORA, MCL 28.721 et seq, took effect October 1, 1995, after Mr. Snyder pled no contest to criminal sexual conduct in the fourth degree. When the registry was first created it was a private law enforcement database of convictions.[27] *People v Dipiazza,* 286 Mich App 137, 142-143; 778 NW2d 264 (2009). Over the last two decades SORA has been amended nineteen times[28], transforming registration from a confidential law enforcement database to a complex and public regime of reporting, monitoring, and control.

[26] The United States Supreme Court denied certiorari and thus, regardless of how this Court decides this case, the holding in *Does #1-5* is binding on the State of Michigan. It is also persuasive authority for this Court to consider.
[27] 1994 PA 286, 287, 294, and 355.
[28]1995 PA 10; 1996 PA 494; 1999 PA 85; 2002 PA 542; 2004 PA 237; 2004 PA 238; 2004 PA 240; 2005 PA 121; 2005 PA 123; 2005 PA 127; 2005 PA 132; 2005 PA 301; 2005 PA 322; 2006 PA 46; 2006 PA 402; 2011 PA 17; 2011 PA 18; 2013 PA 2; 2013 PA 149.

Initially, registration was confidential, except for "law enforcement purposes," and was not subject to the Freedom of Information Act.[29] At the time of passage, there was opposition to the registry remaining confidential but a consensus emerged that "[a] sex offender registry should be used as a law enforcement tool, not as a mechanism to brand or ostracize particular members of a community."[30] Subsequent amendments have transformed the character of SORA and dramatically increased the law's punitive effects.

In 1999, the registry became available to the public online. This led to a great of deal of Mr. Snyder's personal information being published on the internet including his address, license plate number, and date of birth.[31] SORA was transformed from a law enforcement tool to a means of publically branding registrants.[32] There was objection to the 1999 amendments, based on the societal ostracism registrants were sure to face:

> It seems that the law is rapidly increasing in its coverage and no longer includes just those offenders who, because of recidivism rates, pose a potential threat to the public.…The sex offender registry should be used as a law enforcement tool, not as a mechanism to brand or ostracize particular members of the community. The more details about the persons included in the registry, the more the act becomes a modern form of the stocks – more about harassing and continuing to punish the offender even after he or she has successfully completed a term of probation or parole and paid his or her debt to society.[33]

In 2002, the legislature amended SORA to include a statement of intent:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the

[29] SORA Legislative History, Appendix 223a-226a
[30] *Id* at 225a.
[31] 1999 PA 85; SORA Offender Detail for Mr. Snyder, Appendix 221a-222a.
[32] SORA Legislative History, Appendix 227a-232a.
[33] *Id* at 232a.

> people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.[34]

In 2004, the Legislature amended SORA to require that the public internet registry include a photograph of the registrant. Again, there was opposition:

> House Bill 5195 would do little in reality to increase public safety but much to increase vigilantism and harassment against registrants. . . . The bill as introduced targeted pedophiles, but the bill as enrolled would apply to every registered sex offender, many of whom pose no risk of reoffending and probably shouldn't be on the list to begin with….In addition, many people on the PSOR have a difficult time arranging appropriate housing and obtaining employment. Placing their pictures on the Internet may do little more than doom them to homelessness and unemployment – two factors known to greatly increase the likelihood of reoffending.[35]

In 2006, "school safety zones" went into effect, retroactively imposing restrictions on where Mr. Snyder could live, work, and travel.[36] Registrants were barred from loitering, working, or living within 1,000 feet of a school.[37] Loitering was defined as "to remain for a period of time and under circumstances that a reasonable person would determine is for the primary purpose of observing or contacting minors."[38] SORA's definition of loitering encompasses basic parenting activities such as picking one's children up from school or watching them play soccer.

In 2011, the Legislature rewrote SORA. Extensive immediate in person reporting requirements were retroactively imposed.[39] SORA was amended to categorize registrants into one of three tiers based solely on their offense of conviction: Tier I, Tier II, or Tier III.[40] The new tier classifications were published on the online registry, ostensibly corresponding to dangerousness, but they are not actually based on any kind of individualized risk assessment.[41] There are now regular in

[34] MCL 28.721a; PA 542 of 2002.
[35] SORA Legislative History, Appendix 235a-236a.
[36] 2005 PA 121, 123, 127, 132, 301, and 322.
[37] MCL 28.734-735.
[38] MCL 28.733(b).
[39] 2011 PA 17 and 18; MCL 28.725.
[40] MCL 28.722.
[41] MCL 28.722(r)-(w).

person reporting requirements to verify residence and other information: once a year for Tier I (registration period-15 years), twice a year for Tier II (registration period-25 years) and four times a year for Tier III (registration period-life).[42]

The 2011 amendments also imposed immediate in person reporting requirements when a registrant changes the following information: address, changing or discontinuing employment, enrolling or discontinuing in higher education, name changes, temporarily residing at other than registered address for more than seven days, email address change, and purchase or regular operation of any vehicle.[43] Any change in this listed information requires in person reporting within three business days; there is no exception to this requirement.[44] Yet again, there was opposition to amending SORA.[45] Most recently, in 2013 the initial registration fee was retroactively increased from $25 to $50, and an annual $50 fee was retroactively imposed.[46]

Despite repeatedly amending the statute to impose increasingly onerous requirements and restraints on registrants and publically branding them as dangerous predators, there are very limited provisions for removal.[47] Just a small minority of registrants are eligible to petition for removal.[48] Mr. Snyder is not eligible to petition for removal from SORA.

Even if the Legislature originally enacted SORA to aid law enforcement in protecting the public, the frequent and sweeping amendments transformed SORA into a statute that punishes Mr. Snyder. Mr. Snyder cannot live, work, or loiter in large portions of the State.[49] Registrants must register for life or for specified lengthy time periods, 25 year for Mr. Snyder, regardless of their risk

[42] MCL 28.725(10); MCL 28.725a(3).
[43] MCL 28.725(1)(a)-(h).
[44] MCL 28.725(1)(a); MCL 28.722(g).
[45] SORA Legislative History, Appendix 245a-247a.
[46] 2013 PA 2 and 149; MCL 28.724a; MCL 28.725a(6).
[47] See MCL 28.728c.
[48] *Id.*
[49] MCL 28.733-28.735 ("school safety zone" provisions).

of reoffending.[50] Mr. Snyder must report in person at specified intervals and immediately following routine life events such as creating a new screenname.[51] And, Mr. Snyder is financially burdened by increased registration fees.[52] The penalties for violating SORA include felony charges, as is evidenced by Mr. Snyder's recent conviction.[53] These affirmative obligations, disabilities, and restraints touch nearly every aspect of Mr. Snyder's life. A comprehensive summary of these obligations, disabilities, and restraints is attached.[54]

As a result, the current version of Michigan's SORA violates the Ex Post Facto Clause of both the federal and state constitutions. US Const, Ams V, XIV; Mich Const 1963, art 1, § 17. SORA imposes retroactive sanctions for conduct committed before its enactment. The current requirements under the law are too numerous and onerous to be purely remedial. Many of Michigan's amendments were enacted between 2005 and 2011, subsequent to the United States Supreme Court's decision in *Smith v Doe*, which upheld a much more limited, first generation registration statute.

In 2003, the United States Supreme Court rejected an Ex Post Facto challenge to Alaska's sex offender registry stating the act imposed "no physical restraint[.]" *Smith*, 538 US at 100. Since then, Michigan's SORA has transformed from a registry similar to what was at issue in *Smith* into what scholars call a "super registry."[55] While United States Supreme Court has not yet ruled on the constitutionality of such an expansive registry, many lower courts have found them unconstitutional. *See e.g. Does #1-5, surpa*; *United States v Juvenile Male*, 590 F3d 924, 932 (CA 9, 2009), *vacated as moot*, 131 S Ct 2860 (2011); *Commonwealth v Muniz*, 640 Pa 699; 164 A3d 1189 (2017), *cert den Pennsylvania v*

[50] MCL 28.725.
[51] MCL 28.725; MCL 28.725a.
[52] MCL 28.725a.
[53] MCL 28.729.
[54] Summary of SORA's Obligations, Disabilities, and Restraints, Appendix 248a-261a.
[55] Catherine L. Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L Rev 101 (2011).

Muniz, 138 S Ct 925; 200 L Ed 2d 213 (2018); *Doe v State*, 167 NH 382; 111 A3d 1077 (2015); *State v Williams*, 129 Ohio St 3d 344; 952 NE 2d 1108 (Ohio 2011); *State v Letalien*, 985 A2d 4 (Me 2009); *Starkey v Oklahoma Dep't of Corr*, 305 P3d 1004 (Okla 2013); *Commonwealth v Baker*, 295 SW3d 437 (Ky 2009); *Wallace v State*, 905 NE2d 371384 (Ind 2009); *Doe v State*, 189 P3d 999 (Alaska 2008); *Doe v Dep't of Pub. Safety and Corr. Servs.*, 430 Md 535; 62 A3d 123 (Md Ct App 2013).

The Sixth Circuit recently held that Michigan's SORA is punishment, and that retroactive application of SORA violates the Ex Post Facto clause. *Does* #1-5, 834 F3d at 705. The Sixth Circuit differentiated SORA from the statute at issue in *Smith v Doe*:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins…It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
> We conclude that Michigan's SORA imposes punishment.
> *Id.*

The Supreme Court of Ohio traced amendments to its sex offender registry, which were similar to Michigan's, and found that while the registry was not initially intended as punishment, the amendments transformed the statute into punishment and, therefore, violated the Ex Post Facto Clause. *Williams*, 129 Ohio St 3d at 350. The transformative amendments included: in person reporting, residency restrictions, and expanded public notification resulting in stigma, ostracism and harassment of registrants, all of which applied without any individualized assessment of risk. *Id.* at 347-349. The court explained that all the changes in the aggregate made the registry punitive. *Id.* at 349.

The same reasoning applies to Michigan's SORA. The immediate in person reporting requirements alone may not violate the Ex Post Facto Clause. The annual fee alone may not violate the Ex Post Facto Clause. But the geographic restrictions on work, residency, and travel, the immediate in person reporting requirements, police monitoring, and the public branding of registrants regardless of their likelihood of reoffending has a cumulative effect that is punitive. See *Does #1-5*, 834 F3d at 705.[56]

B. SORA's Accumulative Effect is Punitive

A court must examine whether "the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Kansas v Hendricks,* 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997) (internal quotations and formatting omitted); *People v Earl*, 495 Mich 33, 43; 845 NW2d 721 (2014).[57] To determine if the effects of a statute are punitive, courts look to seven factors outlined in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963):

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

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[56] Recently, the Michigan Court of Appeals, relying on *Smith v Doe*, found that SORA's requirement that registrants report their telephone numbers and email addresses was not an Ex Post Facto violation. *People v Patton*, __Mich App__ ; __ NW2d __ (2018) (Docket No. 341105). Mr. Patton, unlike Mr. Snyder, was convicted of a listed offense once SORA was in effect and after institution of the student safety zones. Unlike Mr. Snyder who is challenging the registry as a whole, Mr. Patton limited his challenge to the reporting requirements in MCL 28.727(1)(h) and (i). *Patton*, slip opinion at 8. So while Mr. Snyder contends that *Patton* was wrongly decided, his case is nonetheless distinguishable.

[57] Although the legislative history of SORA indicates there may be reason to doubt the legislative intent was truly civil, given that the statute contains an express provision claiming a non-punitive intent, Mr. Snyder does not argue here that the Legislature's professed intent was punitive.

In *Smith*, the United States Supreme Court concluded that the most relevant factors in examining sex offender registry laws are: affirmative disability or restraint, history and tradition, traditional aims of punishment, rational relation to a non-punitive purpose, and excessiveness. *Smith*, 538 US at 97. These five factors are addressed below.

1. **SORA's multiple requirements and obligations, including immediate in-person reporting requirements and geographic restrictions on residency, work, and travel, create an affirmative disability and restraint.**

This factor considers how the effects of the Act are felt by those subject to it. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 US at 100. The *Smith* Court reasoned that the 2002 Alaska SORA did not impose a disability or restraint, primarily because there was no restriction of movement: "The Act imposes no physical restraint. . . . the Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Smith*, 538 US at 100. The Court noted there was no evidence that Alaska's SORA "led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks" and registrants "are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 100-101. There was no disability imposed as a result of reporting requirements, because registrants did not have to report in person. *Id.* at 101.

In contrast, Michigan's SORA requires and prohibits much more than the Alaska registry at issue in *Smith* as the below table shows. The Michigan Court of Appeals recognized that the student safety zones and the onerous in-person reporting requirements differentiated SORA from the statute at issue in *Smith* and that SORA did "amount to an affirmative disability or restraint." *People v Tucker*, 213 Mich App 645, 668-672; 879 NW2d 906 (2015).

Alaska Registry at issue in *Smith v Doe*	**Michigan SORA**
No limitations on movement	Barred from "loitering" within 1,000 feet of a school
No limitations on work; no evidence of occupational disadvantage	Barred from working within 1,000 feet of a school; evidence of severe occupational consequences
No limitations on housing; no evidence of housing disadvantages	Barred from living within 1,000 feet of a school; evidence of severe housing consequences
No in person reporting	Extensive immediate in person reporting requirements
No state assertion of dangerousness	Classification into tiers that appear to reflect dangerousness despite lack of individualized assessment of dangerousness
No limitations on travel	Must report travel in person in advance
No "submit a tip" function	Encourages public vigilantism via "submit a tip" function on sex offender registry website
No fees	$50 annual fee

Mr. Snyder's experience is illustrative of these differences. Mr. Snyder was able to secure employment at Chippewa Cab despite his criminal record, but upon learning of his status as a registrant he was terminated.[58] Mr. Snyder's compliance with SORA was monitored by law enforcement.[59] Mr. Snyder was imprisoned because he did not comply with SORA's immediate in person reporting requirements.[60]

Mr. Snyder, like all registrants, is not free to move, live, or work as other citizens. Michigan registrants are prohibited from living, working, or loitering within 1,000 feet of a school.[61] In many urban areas, this may result in a registrant being barred from living or working in most of the city. *Does #1-5*, 834 F3d at 702-703 (a map of Grand Rapids, MI showing the portions of the city off limits to registrants). The Sixth Circuit described SORA's in-person reporting requirements and

[58] 2014 Failure to Register Trial Transcript, Appendix 91a-92a, 106a.
[59] *Id.* at 133a.
[60] 2015 Sentencing Transcript, Appendix 218a.
[61] MCL 28.734; MCL 28.735.

student safety zones as "direct restraints on personal conduct." *Does #1-5*, 834 F3d at 703. As Mr. Snyder experienced, inability or failure to comply with these restraints can result in imprisonment.[62]

The Supreme Court of Kentucky noted that it was "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint." *Baker*, 295 SW3d at 445. And Kentucky's residency restrictions did not include limits on where registrants can loiter or work like those in place under SORA. *Id.* at 440-441. The Supreme Court of Indiana found an Ex Post Facto violation when a defendant, who had been convicted in 1997 for a sex offense, was charged with violating Indiana's residency restriction statute. *State v Pollard,* 908 NE2d 1145, 1147-1148 (Ind 2009). The court held that "[t]he disability or restraint imposed by the residency restriction statute is neither minor nor indirect." *Id.* at 1150.

Michigan's SORA also includes reporting requirements, both immediate in person reporting for numerous life events, and bi-annual in person reporting for Tier II registrants like Mr. Snyder.[63] These in person reporting requirements were not present in the Alaska scheme at issue in *Smith*, and the lack of in person reporting was one of the reasons the Court found there was no disability or restraint. *Smith*, 538 US at 101.

Other jurisdictions have recognized that in person reporting requirements impose a direct restraint on registrants. See *Muniz*, 640 Pa at 735-736. The Oklahoma Supreme Court, in finding that Oklahoma's SORA violated the Ex Post Facto Clause, held that "the affirmative 'in person' registration and verification requirements alone cannot be said to be 'minor and indirect' especially when failure to comply is a felony." *Starkey*, 305 P3d at 1022.

The Supreme Court of Maine held similarly: "[Q]uarterly, in-person verification of identity and location of home, school, and employment at a local police station, including fingerprinting and the submission of a photograph, for the remainder of one's life, is undoubtedly a form of significant

[62] MCL 28.729.
[63] MCL 28.725; MCL 28.725a.

supervision by the state . . . that is neither minor nor indirect." *Letalien*, 985 A2d at 18. "These provisions, which require lifetime registrants, under threat of prosecution, to physically appear at their local law enforcement agencies within five days of receiving a notice by mail, place substantial restrictions on the movements of lifetime registrants and may work an 'impractical impediment that amounts to an affirmative disability.'" *Id.*, quoting *Doe v District Attorney*, 932 A2d 552, 562 (Me 2009). The New Hampshire Supreme noted that the frequent reporting and checks by law enforcement "exceed simply burdening or disadvantaging" the registrant. *Doe v State*, 167 NH at 405.

Considering the effect registration may have on a person's ability to obtain employment, the Court in *Smith* noted that employers could discover the same information that was on the public registry through a "routine background check." *Smith*, 538 US at 100. This is not true in Michigan. People without a criminal record can remain on the registry. For example, some individuals assigned Holmes Youthful Trainee Act status are required to register.[64] Individuals who have had their convictions expunged are also required to register.[65] Further, the registry brands people as dangerous sexual predators and encourages the public to monitor registrants in a ways that a criminal record alone does not.[66] For example, Chippewa Cab's hiring procedures did not prevent Mr. Snyder from gaining employment, but SORA facilitated public vigilantism resulted in his termination.[67]

SORA's immediate in person reporting requirements and restrictions on where residents can live, work, and loiter impose affirmative disabilities and restraints.

[64] MCL 28.722(b).
[65] MCL 28.722(b).
[66] 2014 Failure to Register Trial Transcript, Appendix 120a.
[67] *Id.* at 91a-92a, 106a.

2. SORA is similar to probation and parole and to the historical punishments of shaming and banishment.

In person reporting requirements and law enforcement monitoring imposed by SORA strongly resemble probation and parole. The Alaska Supreme Court, in a decision post-*Smith*, held that Alaska's updated registry violated the Ex Post Facto Clause, in part because its "registration reporting provisions are comparable to supervised release or parole." *Doe v State*, 189 P3d at 1019. The United States Supreme Court had previously rejected this argument because unlike parolees, registrants under Alaska's 2002 registry were "free to move where they wish and live and work as other citizens, with no supervision." 538 US at 101. Mr. Snyder is not free to move, live, or work where he wishes. And as his case proves, registrants are closely monitored by law enforcement for SORA compliance. His failure to immediately report a change in his employment in person resulted in a near instantaneous police investigation, felony conviction, and imprisonment. The Pennsylvania Supreme Court likened registration to probation, given the mandatory requirements placed upon registrants. *Muniz*, 640 Pa at 738-740.

SORA imposes duties comparable to Michigan probation and parole. Like registrants, parolees and probationers, for the life of their supervision term, are given conditions that must be followed.[68] Like registrants, parolees and probationers must pay supervision fees.[69] Like registrants, parolees and probationers are subject to penalties for violating each term of probation or parole.[70] Like registrants, parolees or probationers generally must report regularly in person.[71] *Does #1-5*, 834 F3d at 703. The Michigan Court of Appeals recognized that the in person reporting requirements were similar to probation or parole. *Tucker*, 213 Mich App at 674.

[68] See MCL 791.236; MCL 771.2.
[69] See MCL 791.236a; MCL 771.1.
[70] MCL 791.236; MCL 771.1 et seq.
[71] MCL 28.725; MCL 28.725a.

In several ways SORA is even more onerous than parole and probation. For example, probationary terms cannot exceed five years.[72] Parole terms are generally two years, but rarely, if ever exceed four years.[73] By contrast, SORA registration can last for a lifetime, and Mr. Snyder is required to register for 25 years. Conditions for parole and probation are imposed based on an individualized assessment.[74] SORA's requirements are based solely on the offense of conviction, with no room for individualization or a personalized risk assessment. The length of registration, coupled with uniform requirements and no individualization, make SORA harsher than parole and probation—two well established forms of punishment.

SORA is also comparable to the historical punishments of banishment and public shaming.[75] The Sixth Circuit explained how SORA's student safety zones achieve social banishment by forcing registrants to "tailor much of the lives around these school zones...[creating] difficulty in finding a place where they may legally live or work. Some jobs that require traveling from jobsite to jobsite are rendered basically unavailable…." *Does #1-5*, 834 F3d at 702. The Michigan Court of Appeals also noted that "the restrictions imposed by the student safety zones have historically been regarded as punishment." *Tucker*, 213 Mich App at 673.

Because of SORA there are large swaths of the state where Mr. Snyder cannot live, work, or loiter. Even when he is able to secure employment, law enforcement may be dispatched to check on his SORA compliance resulting in his termination. The Kentucky Supreme Court compared residency restrictions to banishment, holding: "[I]t does prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes." *Baker,* 295 SW3d at 444.

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[72] MCL 771.2a.
[73] MCL 791.234(7)(d); MDOC Policy Directive 06.05.104DD, https://www.michigan.gov/documents/corrections/06_05_104_Final_618816_7.pdf (accessed October 22, 2018).
[74] MCL 791.236; MCL 771.2.
[75] Kari White, W*here Will They Go? Sex Offender Residency Restrictions as Modern-Day Banishment*, 59 Case W Res L Rev 161 (2008).

The court defined banishment as "'punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life.'" *Id.* at 444, quoting *United States v Ju Toy*, 198 US 253, 269–70; 25 S Ct 644; 49 L Ed 1040 (1905).

Registration is also similar to the historical punishment of shaming. The Maryland Supreme Court held that disseminating personal information via the internet "is tantamount to the historical punishment of shaming." *Doe v Dep't of Pub Safety and Corr Servs.*, 430 Md at 564. The Pennsylvania Supreme Court held likewise. *Muniz*, 640 Pa at 738-740. The New Hampshire Supreme Court noted that "the internet is our town square," and that registries are like the historical punishment of shaming, because "[p]lacing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame and shun." *Doe v State*, 167 NH at 406.

Michigan's registry is not only publicly available online, it also classifies registrants into tiers that purport to reflect their level of dangerousness, distinguishing it from the dissemination of accurate publicly available information concerning convictions at issue in *Smith*, 538 US at 98. SORA's tier classification system is not based on empirical research or an individualized assessment of dangerous or likelihood of reoffending. Despite having the ability to analyze recidivism among registrants, Michigan has never done so. *Does #1-5*, 834 F3d at704.

The Pennsylvania Supreme Court noted that the information its state's registry allowed on the internet went "beyond otherwise publicly accessible conviction data and includes: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description of vehicles." *Muniz*, 640 Pa at 744. The legislative history of SORA repeatedly indicates that making the registry public was a concern. See Part I.A., *supra*. Every amendment that expanded the types of private information about registrations made publically available online faced opposition in the Legislature. See Part I.A., *supra.*

In addition to making otherwise private information publically available online, the internet registry encourages the public to monitor and report registrant non-compliance through the submit a tip function.[76] Mr. Snyder was prosecuted for a registry violation because someone submitted an anonymous tip through the online registry nearly immediately after he started a new job.[77]

SORA mirrors established forms of punishment: probation, parole, banishment, and public shaming.

3. SORA advances the traditional aims of punishment.

The Sixth Circuit held that Michigan's "SORA advances all the traditional aims of punishment: incapacitation, retribution, and specific and general deterrence." *Does #1-5*, 834 F3d at 704. The court explained that SORA's "very goal is incapacitation insofar as it seeks to keep sex offenders away from opportunities to reoffend. It is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community." *Id.* Similarly, the Michigan Court of Appeals held that "the foremost purpose of the student safety zones is deterrence." *Tucker*, 213 Mich App at 676.

The Alaska Supreme Court reasoned post-*Smith* that its registry was retributive and served as a deterrent, based primarily on the lack of distinction between the risk posed by certain registrants:

> [A]pplication to a broad spectrum of crimes regardless of their inherent or comparative seriousness refutes the state's argument and suggest that such retributive and deterrent effects are not merely incidental to the statute's regulatory purpose. Every person convicted of a sex offense must provide the same information, and the state publishes that information in the same manner, whether the person was convicted of a class A misdemeanor or an unclassified felony. ASORA's only differentiation is in the frequency and duration of a person's duty to register and disclose.
> *Doe v State*, 189 P3d at 1013-1014.

Similarly, the Oklahoma Supreme Court held that Oklahoma's SORA "promotes deterrence through the threat of negative consequences, for example, eviction, living restrictions, and

[76] 2014 Trial Transcript, Appendix 120a.
[77] *Id.*

humiliation." *Starkey*, 305 P3d at 1027. The court found the "retributive portion" most compelling, based on the lengthened registration periods, the lack of an individualized determination of risk, and the inability to petition for removal from the registry. *Id.* at 1027-1028. See also *Baker*, 295 SW3d at 444 (holding there was a retributive effect based on the lack of an "individualized determination of the dangerousness of a particular registrant.") The Pennsylvania Supreme Court reasoned that "the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect." *Muniz*, 640 Pa at 742.

Retribution is also served by SORA, as noted by the Pennsylvania Supreme Court, based on increases to the "length of registration . . . mandatory in-person reporting requirements, and . . . more private information . . . displayed online." *Muniz*, 640 Pa at 744. The court found it to be much more retributive than the statute at issue in *Smith v Doe*. *Id.*. The New Hampshire Supreme Court reasoned that because offenders are required to register based only upon their offense, and "not on any individualized assessment of current risk or level of dangerousness," the registration law appeared like retribution. *Doe v State*, 184 NH at 407-408.

For these reasons, Michigan's sex offender registry is also punitive in nature. The 2011 amendments increased the reporting period for many individuals. These extended periods are not related to negative conduct or a triggering event attributable to the registrant. SORA's tier designations, and corresponding length of registration, are not related to anything other than a registrant's underlying conviction. There is no individualized risk assessment. There is no opportunity to petition for removal based on one's diminished risk. Mr. Snyder has not committed a sex offense in 23 years, yet he is still publicly branded as a dangerous sex offender by SORA.

4. SORA's obligations, disabilities, and restraints are not rationally connected to its purported non-punitive purpose.

This Court must consider whether SORA has a rational connection to a non-punitive purpose. *Smith*, 538 US at 102. Public safety is a legitimate legislative purpose. But SORA's restrictions are not rationally related to public safety, as SORA does not decrease recidivism.

As the Sixth Circuit concluded, "the record before us provides scant support for the position that SORA in fact accomplishes it professed goals." *Does #1-5*, 834 F3d at 704. While the United States Supreme Court in *Smith* cited the "frightening and high" recidivism rate of sex offenders, the Sixth Circuit noted the "significant doubt cast by recent empirical studies" on this statement. *Id.* The Court's statement in *Smith* has been traced back to an unsubstantiated assertion in the mass market magazine *Psychology Today*.[78] The Sixth Circuit also noted that sex offenders are "*less* likely to recidivate than other sorts of criminals," that registration has "no impact on recidivism," and that registration may "actually *increase* the risk of recidivism." *Id.* (emphasis in original).

Empirical research demonstrates that SORA is counterproductive to public safety because it exacerbates risk factors for recidivism such as employment and housing instability, and it impedes successful reintegration into society.[79] A study of Michigan's residency restrictions, funded by the Department of Justice, found that, if anything, student safety zones have increased rather than decreased recidivism.[80] The Supreme Court of Kentucky found there was no rational connection between residency restrictions and the registery's non-punitive purpose of promoting public safety. *Baker*, 295 SW3d at 445-446.

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[78] "*Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const'l Commentary 495 (2015), Appendix 264a-265a.
[79] J.J. Prescott & Johan E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 54 JL & Econ 161 (2011).
[80] Beth M. Huebner, et al., *An Evaluation of Sex Offender Residency Restrictions in Michigan and Missouri* (2013), https://www.ncjrs.gov/pdffiles1/nij/grants/242952.pdf (accessed October 22, 2018).

SORA's counter productivity may be because it is premised on misconceptions about people who have been convicted of sex offenses. Despite often repeated myths, people who have committed sex offenses do not reoffend at higher rates than other groups of offenders. Rather, they recidivate at a much lower rates than those convicted of other types of crimes.[81] And, like all people who commit crimes, their risk of recidivism decreases over time, much quicker than the lengthy registration periods imposed by SORA.[82]

Mr. Snyder is emblematic of the research regarding young people who commit sexual transgressions. The vast majority of people who have committed a sex offense, and remain sex offense free in the community as Mr. Snyder has, pose no greater risk of committing a new sex offense than someone who has never committed of a sex offense.[83] At 21 years old while black out drunk, Mr. Snyder acted in an inappropriate fashion. He took responsibility. He was punished. Since then he has not reoffended sexually. Now 23 years later, at the age of 44, he is no more likely to commit a sex offense than someone who has never committed a sex offense.[84] Yet, he is subject to continuous punishment by SORA. He is publicly labeled by the state as a Tier II offender and his ability to meet his basic needs, such as housing and employment, is severely restricted.

SORA does not advance is professed non-punitive purpose.

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[81] Levenson & D'Amora, *Social Policies Designed to Prevent Sexual Violence: The Emperor's New Clothes?,* 18 Criminal Justice Policy Review 168 (2007); Caleb Durling, *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J Crim L & Criminology 317, 331 (2006).
[82] Karl Hanson Declaration and Graph, Appendix 278a-293a.
[83] Karl Hanson et al, *Reductions in Risk Based on Time Offense-Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, 24 Psychol Pub Pol'y & L 48 (2018), Appendix 306a; Rachel E. Kahn et al, *Release from the Sex Offender Label*, 46 Archives Sexual Behav. 861, 862 (2017).
[84] *Id.*; Karl Hanson, et al., *High-Risk Sex Offenders May Not Be High Risk Forever*, 29 J of Interpersonal Violence 2792, (2014), Appendix 325a.

5. SORA is excessive in relation to its purported non-punitive purpose.

The Supreme Court in *Smith* held that Alaska's first generation sex offender registry was not "excessive in relation to its regulatory purpose." *Smith*, 538 US at 103. In analyzing Michigan's super registry the Sixth Circuit came to a different conclusion:

> [W]hile the statute's efficacy is at best unclear, its negative effects are plain on the law's face….SORA puts significant restrictions on where registrants can live, work, and "loiter," but the parties point to no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects….The requirement that registrants make frequent, in-person appearances before law enforcement, moreover, appears to have no relationship to public safety at all. The punitive effects of these blanket restrictions thus far exceed even a generous assessment of their salutary effects. *Does #1-5*, 834 F3d at 705.

This Court should reach the same conclusion.

Many jurisdictions have found residency restrictions to be excessive, mainly based on the fact that the registries did not include an individualized assessment of risk. The Supreme Court of Kentucky held that its state's residency restrictions were excessive, based primarily on the lack of an "individualized assessment as to whether a particular offender is a threat to public safety." *Baker*, 295 SW3d at 446. The court noted the regulations were 'more onerous" than those at issue in *Smith*. Michigan's SORA is even more restrictive than that of Kentucky—not only are registrants barred from living within 1,000 feet of a school, they cannot work or "loiter" there.

The Supreme Court of Oklahoma detailed its state's SORA obligations that were excessive: a longer registration period than originally imposed; the elimination of the ability to petition for removal; in-person reporting; public dissemination of personal information and the lack of an individualized determination of risk. *Starkey,* 305 3Pd at 1029. *See also Doe v State*, 189 P3d at 1016-1017 (holding for similar reasons that "the statute's chosen means are excessive in relation to the statute's purpose"). SORA possess all the same features that rendered Oklahoma's registry excessive.

The Indiana Supreme Court specifically addressed residency restrictions as being excessive: "The statute does not consider the seriousness of the crime. . . . Restricting the residence of offenders based on conduct that may have nothing to do with crimes against children, and without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes." *Pollard*, 908 NE2d at 1153.

The New Hampshire Supreme Court found its registry's excessive, based primarily on the fact that most offenders had to register for their entire lives, "without regard to whether they pose a current risk to the public." *Doe v State*, 167 NH at 410.

Michigan's SORA requirements are similarly excessive. SORA has no individualized assessment to determine length of registration, whether student safety zones should apply, or if in person reporting is necessary. These extreme requirements are imposed with absolutely no showing of particularized risk. There is no mechanism for rebutting the registration requirements or for petitioning for removal based on diminished risk for most offenders.[85] Mr. Snyder's crime represents the lowest degree of criminal sexual conduct. He has gone 23 years without committing another sex offense, demonstrating that he is no longer a sexual danger to the public. Requiring Mr. Snyder to register as a sex offender is excessive.

Because of its lack of individualization and most registrants' inability to petition for removal, SORA is excessive in relation to its professed regulatory purpose.

C. The 2011 amendments are not severable, and therefore SORA cannot be applied to people required to register prior to 2011.

In 2011, the Legislature completely rewrote SORA retroactively imposing the tier based classification system and imposing numerous immediate in person reporting requirements. Key definitional terms, used throughout SORA and triggering its obligations, were added and rewritten.[86]

[85] See MCL 28.728c.
[86] 2011 PA 17; See Part I.A., *supra*.

The 2011 amendments cannot be excised and still leave a functioning statute. If tier language added in 2011 was removed, the statute would not specify who has to register, for how long, and at what intervals.

There is a general preference for severability, over deeming an entire statute unconstitutional. *Blank v Dep't of Corr*, 462 Mich 103, 122; 611 NW2d 530 (2000); MCL 8.5. This Court uses a two-step process to determine whether an unconstitutional portion of a statute can be severed: "first, whether the Legislature expressed that the provisions at issue were not to be severed from the remainder of the act. If it did not, then . . . whether the unconstitutional portions are so entangled with the others that they cannot be removed without adversely affecting the operation of the act." *Blank*, 462 Mich at 123.

As to the first step, SORA does not include a severability clause, absent MCL 28.728(8), which requires the Michigan State Police to remove information from the public registry if any court determines the public nature of the registry is unconstitutional.

As to the second step, if this Court found the 2011 amendments alone to be unconstitutional punishment, removing those amendments would not leave a functioning statute. The remaining statute would be an unintelligible series of procedural provisions referencing excised portions. Absent the 2011 amendments, SORA would be an unenforceable law, incomprehensible to law enforcement and registrants. The statute would simply be inoperable. Therefore, severability is not possible. The only way to remedy the Ex Post Facto violation is to remove Mr. Snyder from the registry.[87]

Conclusion

The *Kennedy* factors lead to the inescapable conclusion that SORA is punishment. If SORA is punishment, it necessarily violates the Ex Post Facto Clause and cannot be retroactively applied to

[87] If this Court grants leave to appeal, Mr. Snyder welcomes the opportunity to brief the severability issue further.

Mr. Snyder. This Court should hold, in accordance with the high courts of Pennsylvania, New Hampshire, Alaska, Indiana, Kentucky, Maine, Maryland, Ohio, and Oklahoma and the Ninth and Sixth Circuit Courts, that Michigan's super registry is unconstitutional Ex Post Facto punishment. The burden in Michigan of increased in person reporting requirements, geographic restrictions, longer registration periods, increased fees, the public nature of the registry, and no mechanism to petition for removal from the registry meet the "clearest proof" test of *Smith v Doe, supra.*

II. Retroactive imposition of SORA on Mr. Snyder violates this right to Due Process.

Issue Preservation and Standard of Review

This Court reviews constitutional issues de novo. *People v Hall*, 499 Mich 446, 452; 884 NW2d 561 (2016). Mr. Snyder challenged the application of SORA to him on Due Process grounds in the trial court and the Court of Appeals.[88]

Discussion

Since SORA was not in effect at the time Mr. Snyder pled guilty, he was denied fair notice of a direct and automatic consequence of his plea.[89] Had he known that he would be required to register as a sex offender, he would not have pled guilty.[90] Because Mr. Snyder was not advised that SORA would apply to him before his plea, he was denied fair warning of the consequences of his plea. *People v Hall*, 499 Mich 446, 461; 884 NW2d 561 (2016). His plea was premised on the advisement that the only direct consequences would be a felony conviction and a potential prison sentence.

Due Process prevents disruption of settled expectations and protects against retroactive legislation as a "means of retribution against unpopular groups or individuals." *Landgraf v USI Film Products*, 511 US 244, 265-66; 114 S Ct 1483; 128 L Ed 2d 229 (1994). "[W]hen addressing ex post facto-type due process concerns, questions of notice, foreseeability, and fair warning are paramount." *United States v Barton*, 455 F3d 649, 654-55 (CA 6, 2006).

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[88] Motion for Declaratory Order, Appendix 20a-21a; Court of Appeals Opinion, Appendix 12a.
[89] It is undisputed that Mr. Snyder was not advised by counsel or the Court that he would be required to register as a sex offender as a result of his plea. 2014 Preliminary Exam Transcript, Appendix 193a; Court of Appeals Opinion, Appendix 11a. However, it was foreseeable by both counsel and the Court at the time of his plea that registration would be required as SORA had been passed, but not yet effective. *Id.*
[90] 2014 Preliminary Exam Transcript, Appendix 193a.

The United States Supreme Court has recognized that criminal defendants must be informed of certain and severe consequences that flow from criminal convictions before entering a plea. *Padilla v Kentucky*, 559 US 356, 365–66; 130 S Ct 1473, 1481 (2010).[91] This Court has explained that a defendant cannot knowingly waive his Constitutional right to a trial unless he is fully aware of all the direct consequences of his plea. *People v Cole*, 491 Mich 325, 332-33, 338; 817 NW2d 497 (2012) (trial courts are required to inform a defendant if he or she would be subject to lifetime electronic monitoring). SORA is no less of a direct and automatic consequence than lifetime electronic monitoring.

Sex offender registration under SORA, like deportation or electronic monitoring, is a "severe penalty" that is "intimately related to the criminal process." *Padilla*, 559 US at 365. For these reasons, this Court has held that sex offender registration is a direct consequence of a plea to a listed offense. *People v Fonville*, 291 Mich App 363, 394; 804 NW2d 878 (2011).[92] In *People v Temelkoski*, examining a Due Process challenge to the retroactive application of SORA, this Court wrote, "when retroactive application of a statute disturbs settled expectations based on the state of the law upon which a party relied at the time an action was taken such that 'manifest injustice' would result, the Due Process Clause prohibits retroactive application of the law." *People v Temelkoski*, 501 Mich 960; 905 NW2d 593 (2018), *quoting Jideonwo v Immigration & Naturalization Serv.*, 224 F3d 692, 700 n 7 (CA 7, 2000).

Applying the same reasoning, the United States Supreme Court has explained the dangers of retroactively applying changes in the immigration consequences of a criminal conviction: because defendants "rely[] upon settled practice, the advice of counsel, and perhaps even the assurance in

[91] The United States Supreme Court's ruling in *Padilla* does not have retroactive effect with respect to ineffective assistance of counsel claims concerning failure to advise regarding the immigration consequences of a conviction. *Chaidez v US*, 568 US 342, 344, 133 S Ct 1103; 185 LEd2d 149 (2013).
[92] While not at issue in *Fonville*, Mr. Snyder acknowledges that this Court "caution[ed] that the validity of guilty pleas not be called into question when entered under the law applicable on the day the plea is taken." *Id.* at 393. SORA was not applicable on the date of Mr. Snyder's plea, however, SORA had been passed and its application to Mr. Snyder was certain. 1994 PA 286, 287, 294, and 355.

open court" regarding the consequences of a plea, the "potential for unfairness in the retroactive application … is significant and manifest." *INS v St Cyr*, 533 US 289, 323; 121 S Ct 2271; 150 L Ed 2d 347 (2001). Once a plea is entered "it would surely be contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations" to impose more severe consequences than those understood by the defendant at the time of the plea. *Id.*

By retroactively imposing SORA on Mr. Snyder the state upset his settled expectations and failed to provide him with fair notice of a direct and automatic consequence of his plea, resulting in a manifest injustice. It is fundamentally unfair to require Mr. Snyder to be subject to SORA when no notice of this consequence was given at the time of his plea. Retroactive application of SORA upon Mr. Snyder violates Due Process.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Mr. Snyder asks that this Honorable Court grant leave, vacate his conviction for failure to register, and remand to the trial court with instructions to remove Mr. Snyder from the sex offender registry, or grant any other relief which it deems appropriate.

Respectfully submitted,

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