

**STATE OF MICHIGAN  
IN THE COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

COA Case No. 374873  
Wayne County CC No. 94-004832-02-FH  
94-009379-01-FH

v

BM,  
Defendant-Appellant.

**BRIEF OF AMICI CURIAE SAFE & JUST MICHIGAN, THE LEGAL SERVICES  
ASSOCIATION OF MICHIGAN, AND MICHIGAN STATE PLANNING BODY**

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## INTERESTS OF AMICI<sup>1</sup>

### **Safe & Just Michigan**

Safe & Just Michigan (“SJM”) is a statewide nonpartisan, nonprofit criminal justice policy organization with a focus on advocating for a more just criminal justice system that balances the rights of crime victims with the rights of justice-impacted individuals to receive equitable treatment under the law. Our organization believes that creating a viable pathway for justice-impacted individuals to re-enter society without having their past criminal history being used against them, ultimately benefits society as a whole.

The case before this court is of particular interest to our organization, as SJM was directly involved in advocating for the passage of Michigan’s new Setting Aside Convictions Act (SACA or “Clean Slate”) in 2020.<sup>2</sup> Furthermore, in the four years since the passage of the new law, SJM has partnered with various state and local community organizations across the state to host over 100 expungement clinics which have served over 10,000 people. These clinics have been geared towards raising public awareness surrounding Michigan’s new clean slate law and providing pro bono expungement services to those in need of such services.

### **Legal Services Association of Michigan**

The Legal Services Association of Michigan (“LSAM”) is a Michigan nonprofit organization incorporated in 1982. LSAM’s members are twelve of the largest civil legal services organizations in Michigan<sup>3</sup>. LSAM members collectively provide legal services to low-income individuals and families in more than 50,000 cases per year.

Of particular relevance to this case, LSAM members have broad experience in assisting low-income clients to set aside their convictions under Michigan’s Clean Slate laws. Since the implementation of the Clean Slate Act, the Michigan Advocacy Program alone has opened over 3,400 cases to assist individuals with their set-aside matters. In addition, almost all LSAM

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<sup>1</sup> No counsel for a party has authored the brief in whole or in part, nor has such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief. MCR 7.212(H)(4).

<sup>2</sup> MCL 780.621

<sup>3</sup> LSAM’s members include the Center for Civil Justice, Lakeshore Legal Aid, Legal Aid and Defender, Legal Aid of Western Michigan, Legal Services of Eastern Michigan, Legal Services of Northern Michigan, Michigan Advocacy Program, Michigan Indian Legal Services, Michigan Migrant Legal Assistance Program, Michigan Legal Services, the Michigan Poverty Law Program, and the University of Michigan Clinical Law Program.

members work daily—e.g., in public benefits, family law, and housing cases— with low-income individuals that are impacted by the collateral effects of having a criminal record. LSAM members are institutionally interested in and committed to providing fair and equal access to employment, education, housing, and governmental benefits programs for these individuals and their families.

### **Michigan State Planning Body**

The Michigan State Planning Body (“MSPB”) is an unincorporated association of about 35 individuals who are leaders in the judiciary, the State Bar, state and regional advocacy programs, and community organizations who are interested in Michigan’s civil legal aid and indigent defense systems. MSPB acts as a forum for planning and coordinating the state’s efforts to deliver civil and criminal legal services to the poor. Its mission is to plan, organize, and coordinate an effective legal services delivery system for low income persons in the State of Michigan.

MSPB members and the civil, indigent criminal, pro bono, and court programs that they work with are deeply involved in expungement work across the state. In July 2024, the Planning Body created a committee to coordinate this work across programs. The Planning Body was one of the amici in *People v Butka*, 514 Mich 366; \_\_ NW3d\_\_ (2024). Based on its members’ deep involvement in the administration of expungement programs and their advocacy for individual expungement applicants, the Planning Body understands how court policies, practices, and interpretations can either further or frustrate the legislative goals of the Clean Slate Act. The case at bar provides an opportunity for this court to clarify the law; the Planning Body (and the other amici joining in this brief) have a perspective – based on the law’s impact on low income families and communities – which we believe will be helpful to the Court in interpreting the Act.

### **INTRODUCTION**

Amici comprises a number of organizations that advocated for the passage of the SACA in 2020, and are uniquely positioned to provide this court with some insight into the overall intent behind the law and the rationale for the creation of a separate automated expungement system. At the time of the passage of law, roughly 1 in 3 adults in Michigan had a criminal record, which impacted their employability and their ability to find better housing for themselves and their family. Research conducted by the University of Michigan found that individuals who

received an expungement were 11 percent more likely to be employed and are earning 22 percent higher wages one year after their record was expunged.<sup>4</sup>

This created the impetus needed for a petition based expungement expansion bill that would allow an applicant with up to three felony offenses to apply for all of their felony offenses and an unlimited number of misdemeanors to be expunged subject to meeting additional criteria under the law.<sup>5</sup> Additionally, the law led to the creation of a separate automated expungement process that would focus on expunging low-level offenses.<sup>6</sup> The legislature recognized that certain low-level offenses did not necessarily require judicial review before being expunged and sought to streamline the process.<sup>7</sup> As a result, the law allowed for automatic expungement - that is, expungement of convictions that meet statutory criteria *by operation of law* - of an unlimited number of non-assaultive and “92-day or less” misdemeanors after 7 years, and up to 2 low level felonies after 10 years.<sup>8</sup>

While the expansion of the petition-based expungement law went into effect in April of 2021, the legislature tasked the Department of Technology Management and Budget (DTMB) with the creation of an automated expungement system within two years after the effective date. In keeping with its obligations under the law and based on the statutory criteria set forth under MCL 780.621g, DTMB created a computer algorithm (otherwise referred to as a “rules engine”) that was coded to expunge eligible offenses which were already recorded within Michigan State Police’s (MSP) criminal history database.<sup>9</sup> Recognizing the limitations of the rules engine to set aside convictions that were not reported or maintained in MSP’s database, the legislature also tasked convicting courts with expunging “92-day or less” misdemeanor convictions that are not already in MSP’s criminal history database.<sup>10</sup>

In effect, the legislature essentially created a multi-layered expungement network, with each layer operating independent of each other pursuant its own established statutory criteria. Petition-based expungements would continue to be processed by the courts after judicial

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<sup>4</sup> J.J. Prescott & Sonja B. Starr, *Expungement of Criminal Convictions: An Empirical Study*, 133 Harv. L. Rev. 2460 (2020).

<sup>5</sup> MCL 780.621(1)(a)

<sup>6</sup> MCL 780.621g

<sup>7</sup> *Id.*

<sup>8</sup> MCL 780.621g(2)

<sup>9</sup> MCL 780.621g(11)

<sup>10</sup> MCL 780.621g(1)

review.<sup>11</sup> While convicting courts would be solely responsible for processing automatic expungements for “92-day or less” misdemeanors, and Michigan State Police’s rules engine would be primarily responsible for processing automated expungements for all other eligible offenses already on MSP’s database.<sup>12</sup> According to Michigan State Police, its rules engine is responsible for the expungement of over 1.3 million misdemeanors and 128,000 felonies. The appellant in this case is one of over 923,000 individuals who have had one or more convictions on their record expunged by the rules engine.

The fact that the legislature intended these independent layers of expungement is reflected in the structure of the statute.<sup>13</sup> The legislature created the broad petition-based expungement process through MCL 780.621, but created a separate automatic expungement process that would come into effect two years later and only if certain contingencies (e.g., funding and the creation of the rules engine) were met, MCL 780.621g. The result, after the implementation of the automated set-aside program, is a two-step process. Certain convictions are expunged automatically under MCL 780.621g.<sup>14</sup> If there are additional felonies and those convictions meet the criteria of the statute; the individual may seek to have those convictions set aside by application<sup>15</sup>.

It is worth noting that the three-felony limitation applies solely to “an applicant” seeking relief through the MCL 780.621 process.<sup>16</sup> In contrast, MCL 780.621g specifically states that its convictions are set aside “without filing an application.” Once a conviction is set aside under either process the individual “is considered not to have been previously convicted.”<sup>17</sup> Thus, convictions automatically set aside under MCL 780.621g are not counted against the three-felony maximum in the application process under MCL 780.621.<sup>18</sup>

The outcome of this case may have negative ramifications for many of those who have already had one or more of their convictions automatically expunged from their record and are now seeking to have the remaining convictions expunged through the petition process. Amici

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<sup>11</sup> MCL 780.621d(13)

<sup>12</sup> MCL 780.621g

<sup>13</sup> MCL 780.621

<sup>14</sup> MCL 780.621g

<sup>15</sup> MCL 780.621

<sup>16</sup> *Id.*

<sup>17</sup> MCL 780.622

<sup>18</sup> MCL 780.621

contend that in keeping with this Court’s decision in *Koert* and the plain language of the SACA, appellants’ 1997 felony firearm offense that was expunged through the automated process should no longer be considered a conviction for purposes of determining his eligibility under MCL 780.621(1)(a).<sup>19</sup>

## ARGUMENT

### I. The trial court’s decision to count appellant’s previously expunged felony firearm offense runs counter to the plain language of SACA.

At issue is the trial court’s decision to count appellant’s 1997 felony firearm conviction, which had already been automatically set aside by the rules engine,<sup>20</sup> against the three felony maximum contained in MCL 780.621(1)(a).<sup>21</sup> The trial court seemingly reasoned that even with one of appellant’s four felony convictions being automatically set aside, appellant was still in violation of MCL 780.621(1)(a), which imposes a three-felony limit on individuals applying through the petition-based expungement process.<sup>22</sup> However, the trial court’s interpretation of MCL 780.621(1)(a), overlooks the plain language of the statute which reads:

(1) Except as otherwise provided in this act, a person who is convicted of 1 or more criminal offenses may file an application with the convicting court for the entry of an order setting aside 1 or more convictions as follows:

(a) Except as provided in subdivisions (b) and (c), a person **convicted** of 1 or more criminal offenses, **but not more than a total of 3 felony offenses**, in this state, may apply to have all of the applicant's convictions from this state set aside.

When determining the effect of an expungement, SACA states in relevant part that:

(1) Upon the entry of an order under section 1 or 1e, or **upon the automatic setting aside of a conviction under section 1g**, the applicant, for purposes of the law, **is considered not to have been previously convicted**, except as provided in this section and section 3.<sup>23</sup>

With issues of statutory construction, “[u]nless defined in the statute, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in

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<sup>19</sup> MCL 780.621(1)(a).

<sup>20</sup> MCL 780.621g(2).

<sup>21</sup> MCL 780.621(1)(a).

<sup>22</sup> MCL 780.621(1)(a).

<sup>23</sup> MCL 780.622(1)

which the words are used.”<sup>24</sup> In addition, “the language must be applied as written and nothing should be read into a statute that is not within the manifest intent of the Legislature as indicated by the act itself.”<sup>25</sup>

Applying the standard established in *Wolfe*, this Court should apply the “plain and ordinary meaning” of the law when determining the effect of the appellant’s previously expunged offense.<sup>26</sup> While MCL 780.621(1)(a) establishes a numerical limitation on the number of felony convictions an applicant may have, in order to remain eligible for expungement of their convictions.<sup>27</sup> This must also be read in conjunction with the plain language of MCL 780.622, which essentially creates an exception to this rule when an applicant has had a felony conviction previously expunged.<sup>28</sup> Moreover, none of the exceptions carved out by the legislature that allow for previously expunged convictions to be considered by a convicting court, are applicable in this case.<sup>29</sup>

For example, the court can consider a previously expunged offense when sentencing an individual for a subsequent offense. MCL 780.622(9) reads:

(9) A conviction that is set aside under section 1, 1e, or 1g may be considered a prior conviction by court, law enforcement agency, prosecuting attorney, or the attorney general, as applicable, for purposes of charging a crime as a second or subsequent offense or for sentencing under sections 10, 11, and 12 of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.10, 769.11, and 769.12.<sup>30</sup>

Additionally, courts may also consider previously expunged convictions that are set aside through a deferral program. MCL 780.621(2) states in relevant part:

(2) A conviction that was deferred and dismissed under any of the following, whether a misdemeanor or a felony, **is considered a misdemeanor conviction under subsection (1) for purposes of determining whether a person is eligible to have any conviction set aside under this act:**

(a) Section 703 of the Michigan liquor control code of 1998, 1998 PA 58, MCL 436.1703.

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<sup>24</sup> *People v Wolfe*, 251 Mich App 239, 242; 651 NW2d 72, 74 (2002) (citing *Phillips v Jordan*, 241 Mich App 17, 24, 614 NW2d 183, 188 n.1 (2000)).

<sup>25</sup> *Id.* at 242 (citing *Camden v Kaufman*, 240 Mich App 389, 613 NW2d 335 (2000); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 597 NW2d 858 (1999)).

<sup>26</sup> *Id.*

<sup>27</sup> MCL 780.621(1)(a)

<sup>28</sup> 780.622(1)

<sup>29</sup> 780.622(2)-(9)

<sup>30</sup> MCL 780.622(9)

(b) Section 1070(1)(b)(i) or 1209 of the revised judicature act of 1961, 1961 PA 236, MCL 600.1070 and 600.1209.

(c) Section 13 of chapter II or section 4a of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 762.13 and 769.4a.

(d) Section 7411 of the public health code, 1978 PA 368, MCL 333.7411.

(e) Section 350a or 430 of the Michigan penal code, 1931 PA 328, MCL 750.350a and 750.430.

(f) Any other law or laws of this state or of a political subdivision of this state similar in nature and applicability to those listed in this subsection that provide for the deferral and dismissal of a felony or misdemeanor charge.<sup>31</sup>

Thus, if the legislature intended to allow courts to consider previously expunged convictions for purposes of determining eligibility under MCL 780.621(1)(a), such an exception would have been included in SACA. This court made note of this fact as recently as last year, when faced with this issue in the *Koert* case.<sup>32</sup>

**II. This court’s previous decision in *Koert* is applicable in this case because Appellant’s 1997 felony firearm conviction was expunged under MCL 780.621g and should no longer be considered a conviction for expungement purposes.**

Ultimately, this court need not look to anything but the plain language of SACA, and its own ruling in *Koert*. This Court’s decision in *Koert* only serves to further reinforce the plain language of SACA and provides this Court with guidance when determining whether previously expunged offenses should be considered as convictions for eligibility purposes for subsequent petition-based expungements.<sup>33</sup>

**A. The *Koert* decision requires this Court to harmonize MCL 780.621(1)(a) with MCL 780.622(1) in order to “effectuate legislative intent.”**

In *Koert*, the appellant sought to set aside a CSC 4 conviction under MCL 780.621(1)(d), however the existence of two additional marijuana-related offenses served as a bar to expungement of his CSC 4 conviction.<sup>34</sup> Yet, this Court in *Koert* reasoned that different sections of SACA should be harmonized in a manner that would “effectuate legislative intent.”<sup>35</sup> The

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<sup>31</sup> MCL 780.621(2)

<sup>32</sup> *People v Koert*, \_\_\_ Mich App \_\_\_ (2024) (Docket No. 363169).

<sup>33</sup> *Id* at \_\_\_.

<sup>34</sup> *Id* at \_\_\_.

<sup>35</sup> *Id* at \_\_\_.

*Koert* decision harmonized MCL 780.621(1)(d) with MCL 780.622(1), and in so doing, concluded that a conviction set aside under MCL 780.622(1) did not preclude the setting aside of a conviction under MCL 780.621(1)(d).<sup>36</sup>

Similarly, the case before this Court also calls for a harmonization of MCL 780.621(1)(a) with that of MCL 780.622(1), in order to “effectuate legislative intent.”<sup>37</sup> Much like in *Koert*, where the existence of appellant’s two prior marijuana-related convictions would have otherwise served as a bar for expungement of his CSC 4 conviction. In this case, the existence of appellant’s felony firearm offense (his fourth felony) before it was automatically set aside, barred the expungement of his 1996 unlawful driving away of a vehicle and 1995 carrying a concealed weapon convictions under MCL 780.621(1)(a).<sup>38</sup>

Yet the *Koert* decision requires this Court to not look at MCL 780.621(1)(a) in a vacuum, but rather as one component of a larger statutory scheme which also includes MCL 780.621g and 780.622(1).<sup>39</sup> The effect of the expungement of appellant’s 1997 felony firearm under MCL 780.622(1), is such that it is no longer considered a conviction, and when read in concert with MCL 780.621(1)(a) also means that appellant is only considered to have been convicted of three felonies as opposed to four.

**B. If the legislature intended to carve out an exception under MCL 780.622 that would have allowed for previously expunged convictions to be considered for eligibility purposes, it would have done so.**

While appellant’s conviction was expunged through operation of law rather than the petition process in *Koert*, the effect of the expungement remains the same and none of the exceptions under MCL 780.622 are applicable in this case.<sup>40</sup> As noted by this Court in *Koert*, the legislature created a series of exceptions under MCL 780.622 that would allow for consideration of previously expunged convictions.<sup>41</sup> However, none of the exceptions under MCL 780.622 included counting previously expunged convictions for purposes of determining an applicant’s eligibility.

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<sup>36</sup> *Id* at \_\_\_.

<sup>37</sup> *Id*.

<sup>38</sup> MCL 780.621(1)(a)

<sup>39</sup> *People v Koert*, \_\_\_ Mich App \_\_\_ (2024) (Docket No. 363169) (citing *Burkhardt v Bailey*, 260 Mich App 636, 651; 680 NW2d 453 (2004)).

<sup>40</sup> MCL 780.622 (2)-(9)

<sup>41</sup> *Id*.

Thus, this Court is essentially faced with the same issue it was faced with in *Koert*. Yet, having already established in *Koert* that the legislature did not intend to create an exception under MCL 780.622, this Court should harmonize MCL 780.621(1)(a) with MCL 780.621g and 780.622(1) to mean that appellant's previously expunged felony firearm offense should not have been counted for eligibility purposes under MCL 780.621(1)(a).<sup>42</sup>

### CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, this Court should (1) reverse the Wayne County Circuit Court's denial of appellant's Application to Set Aside his 1996 Unlawful Driving Away of a Vehicle and 1995 Carrying a Concealed Weapon convictions, and (2) remand for entry granting appellant's Application to Set Aside.

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<sup>42</sup> MCL 780.621(1)(a).

**CERTIFICATE OF COMPLIANCE**

Pursuant to MCR 7.212(H)(2)(d),(f), Amici certify that they are not required to motion this court for leave to file this amicus curiae brief because the Michigan State Planning body is exempt from filing such a motion. Furthermore, Safe and Just Michigan and the Legal Services Association of Michigan are tax exempt organizations. This amicus curiae brief contains 3,038 words.

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