

STATE OF MICHIGAN  
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN  
Plaintiff-Appellant,

v

DAVID CHARLES ROARK,  
Defendant-Appellee.

No.

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L.C. No. 08-9312-01  
Court of Appeals No. 316467

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APPLICATION FOR LEAVE TO APPEAL

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**Statement of Jurisdiction**

The People timely seek leave from the opinion on the merits of the Court of Appeals.

**Statement of the Question**

**I.**

**In 2012 this Court held that defendants subject to lifetime electronic monitoring must be so advised when pleading guilty. Here, the plea was taken in 2008, and, while the defendant was not advised of electronic monitoring at the plea, the trial judge so informed him at sentencing and received no objection. Should *People v Cole* be applied retroactively to cases on collateral review, and, in any event, should defendant receive relief under the circumstances here?**

**Defendant answers: YES**

**The People answer: NO**

### Statement of Facts

Defendant appealed on this Court's direction that the Court of Appeals consider his appeal as on leave granted from the denial of a motion for relief from judgment.<sup>1</sup> Defendant's plea agreement included significant concessions. The People agreed to dismiss 2 additional counts of child sexually abusive activity, one count of kidnapping, and all of the charges against the defendant in three other cases: No. 08-009311-FC, which charged kidnapping, 2 counts of child sexually abusive activity, and one count of criminal sexual conduct in the second degree; No. 08-9313-FH, which charged 3 counts of child sexually abusive activity; and No. 08-9315-FH, which charged two counts of child sexually abusive activity and unlawful imprisonment. The prosecution also agreed not to bring charges with regard to distribution of child pornography concerning four other victims.

At the plea taking, the trial court inquired as to whether the full agreement had been stated, and the prosecutor answered "Yes, Judge. Other than sex offender registration is required by statute, which I also put on the form." The trial judge asked the defendant "You understand?" and defendant answered "yeah." The trial judge asked "is that your full and complete understanding of the agreement?" and defendant answered "Yes."<sup>2</sup> At sentencing, when the court reporter asked if the judge had said "SORA" in imposing sentence, the court said "That includes lifetime electronic monitoring." The court then inquired of defendant "*You also*

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<sup>1</sup> *People v Roark*, 497 Mich 895 (2014).

<sup>2</sup> PT, 14.

*understand that includes lifetime electronic monitoring?”* and the transcript indicates “No verbal response—indicating.”<sup>3</sup>

On defendant’s motion for relief from judgment, after noting these facts, the circuit judge held that “Contrary to the defendant’s current contention, both the written plea form and defendant’s plea on the record reveal the defendant was subject to the mandatory electronic tethering specifically required by statute . . . . The defendant specifically indicated on the record he understood the requirements.”<sup>4</sup>

The Court of Appeals reversed. The court held:

- In *Cole*, our Supreme Court held that mandatory lifetime electronic monitoring, required pursuant to MCL 750.520n(1), is not only a direct consequence of a defendant’s guilty plea, but part of the sentence itself. *Cole*, 491 Mich at 335-337. Therefore:
  - [W]hen the governing criminal statute mandates that a trial court sentence a defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring, due process requires the trial court to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring. And because MCR 6.302 is premised on constitutional due-process requirements, a defendant who will be subject to mandatory lifetime electronic monitoring must be so advised by the trial court at the time of the plea hearing in order to satisfy the court rule’s requirement that the plea be understanding and voluntary.
- There was no record evidence that defendant was informed of the impending imposition of lifetime electronic monitoring prior to entering

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<sup>3</sup> ST, 16. It is plain that the court reporters transcription “indicating” is a shorthand for “indicated assent,” likely by nodding. Otherwise, further questions would have been posed by the judge.

<sup>4</sup> Opinion, p. 4-5.

his guilty plea. . . . we are not convinced that the trial court's belated and fleeting mention of lifetime electronic monitoring after the sentencing proceeding concluded rendered defendant's guilty plea knowing and voluntary.

- Contrary to the prosecutor's assertion on appeal, the fact that defendant's involuntary plea entered in 2008, several years prior to the 2012 *Cole* decision, does not render *Cole*'s holding inapplicable to the present case. . . . *Brady*'s constitutional requirement that defendant be apprised of the "direct consequences" of his guilty plea before his plea could be considered knowing and voluntary had been a rule for decades by the time defendant entered his plea . . . and the *Cole* decision did nothing to change *Brady*'s constitutional mandate.
- A rule is "new" when it "breaks new ground, imposes a new obligation on the States or the Federal Government, or was not dictated by precedent existing at the time the defendant's conviction became final." . . . The *Cole* Court's decision did not present a new rule because a reasonable jurist considering defendant's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the same holding reached in *Cole* was required by the Constitution. . . . Because *Cole*'s holding represented an application of an existing rule, and not the creation of a new rule, it is "applied retroactively even to cases that became final for purposes of direct appellate review before the case on which defendant relied for the rule was decided."
- The defect in defendant's plea proceedings was such that it rendered the plea an involuntary one, and it would be manifestly unjust to allow the convictions to stand. This holding is mandated by due process and the severity of lifetime electronic monitoring as a sentencing requirement.<sup>5</sup>

The People seek leave.

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<sup>5</sup> Slip opinion, 3-4. Though the first case holding *Cole* retroactive on collateral attack, the opinion is, remarkably, unpublished.

## Argument

### I.

In 2012 this Court held that defendants subject to lifetime electronic monitoring must be so advised when pleading guilty. Here, the plea was taken in 2008, and, while the defendant was not advised of electronic monitoring at the plea, the trial judge so informed him at sentencing and received no objection. *People v Cole* ought not be applied retroactively to cases on collateral review, and in any event defendant should not receive relief under the circumstances here.

### Standard of Review

The question presented is a question of law which is reviewed de novo.<sup>6</sup>

### Discussion

#### A. *People v Coles* should not be applied retroactively on collateral attack

At the time of defendant's plea, MCR 6.302(B)(2), concerning an "understanding" plea, required that defendant be informed of "the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law." In 2012—defendant's plea having been taken in 2008—this Court held that:

a plain reading of the relevant statutory text compels our conclusion that the Legislature intended mandatory lifetime electronic monitoring to be an additional punishment and part of the sentence itself when required by the CSC–I or CSC–II statutes.

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We hold, therefore, that mandatory lifetime electronic monitoring is a direct consequence of a plea. Accordingly, when the governing criminal statute mandates that a trial court sentence a defendant to lifetime electronic monitoring, due process requires the trial court

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<sup>6</sup> See *People v. Carpentier*, 446 Mich. 19 (1994); *Cardinal Mooney High School v. Michigan High School Athletic Ass'n*, 437 Mich. 75, 80 (1991).

to inform the defendant entering the plea that he or she will be subject to mandatory lifetime electronic monitoring. And because MCR 6.302 is premised on constitutional due-process requirements, a defendant who will be subject to mandatory lifetime electronic monitoring must be so advised by the trial court at the time of the plea hearing in order to satisfy the court rule's requirement that the plea be understanding and voluntary.<sup>7</sup>

This Court then *amended* MCR 6.302(B)(2) to provide that the defendant is to be advised of “the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c.”<sup>8</sup>

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<sup>7</sup> *People v. Cole*, 491 Mich. 325, 336-337 (2012).

<sup>8</sup> The Court did not hold that MCR 6.302(B)(2) as it then read required this advice. The Court noted in footnote 5 that:

The prosecution reasonably argues that the use in MCR 6.302(B)(2) of the term “maximum possible prison sentence” means that “any mandatory minimum sentence required by law” refers only to a mandatory minimum prison sentence. *Although it is not necessary to conclusively opine on the prosecution's argument*, the mandatory lifetime electronic monitoring requirement of the CSC–I and CSC–II statutes could also reasonably be encompassed by the term “mandatory minimum sentence required by law.” As explained further in this opinion, lifetime electronic monitoring is a “sentence” because the Legislature intended it to be an additional punishment. And because a trial court sentencing a defendant to prison has no discretion and must impose lifetime monitoring when required by the CSC–I or CSC–II statutes, it is also “mandatory” and “required by law.” Finally, by requiring that defendants be subject to electronic monitoring for the rest of their lives, the electronic monitoring provisions include a durational component consistent with the use in MCR 6.302(B)(2) of the term “minimum.”

The Court did not settle this question, but instead, as indicated, amended the court rule. The People believe it safe to say that advice on electronic monitoring was not routinely given before *Cole*, and that many, many pleas were taken that involved lifetime electronic monitoring that conformed to MCR 6.302(B)(2) at it existed before amendment.

The concern of the Court in *Cole* was that in pleading guilty, a defendant is “giving up trial rights in exchange for some perceived benefit,” so that “[i]n order for a defendant to accurately assess the benefits of the bargain being considered, the defendant must be aware of the immediate consequences that will flow directly from his or her decision. Without information about a consequence of a sentence deemed by our Legislature to be punishment, which here entails having to wear a device and be electronically tracked from the time the individual is released on parole or from prison until the time of the individual's death . . . it cannot be said that a defendant *was aware of the critical information necessary to assess the bargain being considered.*”<sup>9</sup>

Though an ineffective-assistance-of-counsel case, *Padilla v. Kentucky*<sup>10</sup> is based on the same concern, and is instructive. There the Court said the counsel was ineffective—that is to say, performed deficiently, the question of prejudice being left to remand—for failing to inform his client of the virtually certain deportation consequences that would arise from his guilty plea. Because of the “severity of deportation—‘the equivalent of banishment or exile’” the Court said that it was critical “for counsel to inform her noncitizen client that he faces a risk of deportation.”<sup>11</sup> Counsel could only have performed deficiently, of course, if advice on deportation was *necessary* to adequate performance, and that advice could only be necessary to adequate performance if necessary to the defendant’s ability to make an *informed decision* whether to plead, with awareness of consequences so severe as removal from the country.

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<sup>9</sup> *People v. Cole*, 491 Mich. at 337-338.

<sup>10</sup> *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

<sup>11</sup> *Padilla v. Kentucky*, 130 S.Ct. at 1486.

It is instructive, then, that the United States Supreme Court later held in *Chaidez v. United States*<sup>12</sup> that *Padilla* is *not* retroactive on collateral attack. The Court found that the rule of *Padilla* was a new rule: “‘a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final.’ . . . And a holding is not so dictated, . . . unless it would have been ‘apparent to all reasonable jurists.’”<sup>13</sup> And so those noncitizen defendants who pled guilty without being informed of the deportation consequences that would flow from their pleas receive no relief under *Padilla* where the direct appeal was over when *Padilla* was decided. The question, then, is the level of generality to be applied. *Padilla* is an ineffective-assistance-of-counsel case, and yet in *Chaidez* the United States Supreme Court did not simply say that *Padilla* did not constitute a new rule because it was but an application of *Strickland*,<sup>14</sup> and yet the Court of Appeals analogously did precisely that here with regard to the voluntariness of guilty pleas.

Michigan has applied both *Teague v. Lane*<sup>15</sup> and a separate Michigan test for retroactivity under *People v. Sexton*<sup>16</sup>: “(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of

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<sup>12</sup> *Chaidez v. United States*, —U.S. —, 133 S.Ct. 1103, 1107, 185 L.Ed.2d 149 (2013).

<sup>13</sup> *Chaidez v. United States*, 133 S.Ct. at 1107.

<sup>14</sup> *Strickland v. Washington*, 466 U.S. 668, 104 S Ct 2052, 80 L.Ed.2d 674 (1984).

<sup>15</sup> *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

<sup>16</sup> *People v. Sexton*, 458 Mich. 43 (1998).

justice.”<sup>17</sup> The requirement that defendant be informed of electronic-monitoring consequences of his or her plea is a new rule. This advice was not contained in MCR 6.302(B)(2) at the time of the plea here, and *Cole* recognizes that the view that “the use in MCR 6.302(B)(2) of the term ‘maximum possible prison sentence’ means that ‘any mandatory minimum sentence required by law’ refers only to a mandatory minimum prison sentence” is a reasonable one. It is safe to say that judges, before *Cole*, did not regularly advise defendants regarding electronic monitoring. That advice on electronic monitoring was required would not have been “apparent to all reasonable jurists” under the rule as it then existed.<sup>18</sup>

While the purpose of the new rule is to insure knowing assessments of the value of a plea, in that there is a consequence—lifetime electronic monitoring—mandated by statute, that consequence hardly compares to the severe consequence of removal from the country. And *Padilla* was held not to apply to collateral attacks in *Chaidez*. Further, there was general reliance by the bench and bar on MCR 6.302(B)(2) as referring to sentences of incarceration, so that the effect of retroactive application of the *Cole* rule on collateral attack could be severe. *Cole* should not apply retroactively. This Court should grant leave to appeal to consider this question.

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<sup>17</sup> *People v. Carp*, 496 Mich. 440, 497 (2014).

<sup>18</sup> The Court in *Cole* held that given the particular nature of the electronic-monitoring statutory requirement in Michigan—as part of the sentence—the legislature intended it to be punitive. In other jurisdictions, electronic monitoring has been found not to be punitive, and so indeed retroactive application of a statutory requirement is permitted, the monitoring not being a part of the sentence in those jurisdictions. See e.g. *Doe v. Bredesen*, 507 F.3d 998 (CA 6, 2007); *State v. Nation*, 759 S.E.2d 428 (S.C., 2014); *Burgess v. State*, 455 S.W.3d 21 (Mo.App. E.D., 2014); *In re Justin B.*, 747 S.E.2d 774 (2013).

**B. Defendant cannot show prejudice under MCR 6.508(D)(3)(b)(ii)**

Under MCR 6.508(D)(3)(b)(ii), defendant must show prejudice. The standard is not the same as a direct appeal; in a guilty plea case, this means that defendant must show that “the defect in the proceedings was such that it renders the plea an involuntary one *to a degree that it would be manifestly unjust to allow the conviction to stand.*” Defendant cannot meet this standard, particularly given the very generous bargain he received. One federal case, reviewing a Michigan decision on habeas corpus review, considered a similar case. The court found that:

[Petitioner] avers no prejudice resulting from the trial court's failure to advise him about lifetime electronic monitoring at the time of his plea. Under *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993), a habeas petitioner is not entitled to collateral relief unless he or she demonstrates the existence of an error of constitutional magnitude which “had substantial and injurious effect or influence” on the proceedings. . . . Petitioner must demonstrate that he would not have pleaded guilty if he had known about the lifetime electronic monitoring requirement. . . . *Petitioner does not claim, let alone show, that he would have rejected the plea and proceeded to trial if he had known that he would be subject to lifetime electronic monitoring.* Indeed, according to Petitioner, the prosecution dropped several of the charges against him in exchange for his plea. If he had chosen not to plead guilty, then presumably he would have had to defend against those additional charges. Moreover, if awareness of the electronic monitoring requirement would have altered his decision to plead guilty, then one would expect that he would have raised the issue immediately after sentencing, in a motion to withdraw the plea or on appeal. Instead, it appears that he did not raise the issue until after *Cole* was decided. In sum, there is no indication whatsoever that Petitioner was prejudiced by lack of notice of the electronic monitoring requirement at the time that he entered his plea. Thus, he does not state a meritorious claim.<sup>19</sup>

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<sup>19</sup> *Noonan v. Hoffner*, 2014 WL 5542745, 9 (W.D.Mich., 2014) (emphasis supplied).

So here. And here, at sentencing, when the court reporter asked if the judge had said “SORA” in imposing sentence, the court said “That includes lifetime electronic monitoring.” The court then inquired of defendant “*You also understand that includes lifetime electronic monitoring?*” and the transcript indicates “No verbal response—indicating.”<sup>20</sup> Defendant cannot show the prejudice required by the court rule.

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<sup>20</sup> ST, 16. It is plain that the court reporters transcription “indicating” is a shorthand for “indicated assent,” likely by nodding. Otherwise, further questions would have been posed by the judge.

**Relief**

WHEREFORE, the People request that this Honorable Court grant leave to appeal.

Respectfully submitted,

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