STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE
OF MICHIGAN,

Plaintiff-Appellee,

vs

RONALD LEE EARL,

Defendant-Appellant.

_____/

Supreme Court
No. 145677

Court of Appeals
No. 302945

Oakland County Circuit
Court No. 2010-232176-FC

BRIEF OF PROSECUTING ATTORNEYS ASSOCIATION

OF MICHIGAN AS AMICUS CURIAE

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STATEMENT OF APPELLATE JURISDICTION

Amicus curiae relies on the parties to set forth the appellate jurisdiction of this matter.

STATEMENT OF QUESTION PRESENTED

THE FEE ASSESSMENT UNDER THE CRIME VICTIMS RIGHTS ACT IS DESIGNED TO CREATE A FUNDING SOURCE FOR CRIME VICTIMS, AND NOT AS PUNISHMENT. IS AN INCREASED FEE AS APPLIED TO THOSE WHO COMMITTED THEIR CRIME AT A TIME THAT THE LOWER FEE WAS IN EFFECT THEREFORE VALID AND NOT AN EX POST FACTO VIOLATION?

The trial court did not address this question as stated, since it was not raised in the trial court.

Defendant-Appellant answers No.

Plaintiff-Appellee answers Yes.

Amicus Curiae answers Yes.

STATEMENT OF FACTS

Amicus curiae relies on the parties to set forth the facts of this case. We do note from our observation that the issue involved, whether application of an increased Crime Victims Rights Fee (CVRF) to cases which arose before the increase in the fee constitutes a violation of the Ex Post Facto Clauses of either the United States Constitution or the Michigan Constitution, is an issue of law.

ARGUMENT

THE FEE ASSESSMENT UNDER THE CRIME VICTIMS RIGHTS ACT IS DESIGNED TO CREATE A FUNDING SOURCE FOR CRIME VICTIMS, AND NOT AS PUNISHMENT. AN INCREASED FEE AS APPLIED TO THOSE WHO COMMITTED THEIR CRIME AT A TIME THAT THE LOWER FEE WAS IN EFFECT THEREFORE IS VALID AND DOES NOT CONSTITUTE AN EX POST FACTO VIOLATION.

Standard of Review. Amicus curiae accepts the standard of review set forth in the brief on Plaintiff-Appellee.

Discussion. Amicus curiae agrees with the positions stated in the brief of Plaintiff-Appellee. We wish to add a few comments for this Court's consideration.

The Ex Post Facto clauses of both the Michigan Constitution, Const 1963, art 1, § 10, and United States Constitution, art 1, § 9.3, provide several protections, including one against the imposition of a punishment greater than that provided at the time a crime was committed. See generally *People v Callon*, 256 Mich App 312, 316-317; 662 NW2d 501 (2003). For example, if the maximum sentence for criminal sexual conduct third degree, the crime of conviction, which is currently 15 years, were increased to 20 years after the crime but before sentencing, sentencing the defendant to a 20 year maximum would be an ex post facto violation.

MCL 780.905 is part of the Crime Victim Services Commission Act, MCL 780.901 *et seq*. The Act creates a crime victims rights fund. That fund is created as a separate fund in the state treasury, MCL 780.904. The clerk of the trial court transmits 90% of the assessments received to the department of treasury, and may retain 10% "to provide funding for costs incurred . . . and for providing crime victim's rights services." MCL 780.905(7)(a). The fund is used to pay for crime victim's rights services, MCL 780.907. In short, the monies raised through this

assessment go to the implementation of crime victims rights, and are not imposed as a specific punishment for a defendant convicted of a specific criminal act. Imposition of the CVRF is, as Plaintiff-Appellee has shown, simply not a punishment.

Prior to the case at bar, this issue had an occasionally confusing history in the Court of Appeals. At least two prior opinions from the Court of Appeals held that an increase in the CVRF assessment was an ex post facto violation. In *People v Payne*, Court of Appeals Docket No. 176477, unpublished opinion of September 15, 1995, the Court of Appeals agreed with the defendant's position and reduced the assessed CRVF fee from $40.00, to $30.00, the fee in effect when the crime was committed. In *People v Crocker*, Court of Appeals Docket No. 201100, unpublished opinion of January 13, 1998, the Court of Appeals accepted the ex post facto argument and reduced the CVRF from $60.00 to $30.00.

In contrast, in *People v Willmot*, Court of Appeals Docket No. 197486, unpublished opinion of October 10, 1997, the Court of Appeals held that imposition of a CVRF and HIV testing fee was not an ex post facto violation. The Court said that the HIV testing fee for sex offenders "is both a public health measure and may contribute to creation of a DNA data bank to assist in the identification, arrest and prosecution of future offenders." Specifically referring to the CVRF, the Court said that the fee "is a fractional reimbursement to the State for the costs engendered in providing services to crime victims, not necessarily to the victim of the particular crime and more likely to the victims of future crimes. It is less a punishment than a tax on offenders whose wrongful conduct engenders extensive outlays not only for crime victims' services, but for police, prosecutors, and the judiciary, none of which defendant has been asked to defray." *Id*, par 2. As noted in *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993), cited by the Court in *Willmot* and by the Court in the case at bar, "the assessment is not

intended to be a form of restitution dependent upon the injury suffered by any individual victim. Instead, the Legislature, pursuant to the authority granted it under Const 1963, art 1, § 24(2) and (3), has provided for the assessment against certain defendants for the benefit of all victims."

Payne and *Crocker* simply accepted the ex post facto argument with no analysis, and engaged in a cursory review which led them down an incorrect path. In contrast, *Willmot* and *Earl* engaged the issue, and made the key observation that the imposition of the CVRF was not a punishment for a crime, but part of a larger general funding scheme, properly applied to all defendants regardless of the crime of conviction or the specific amount of loss caused by the individual defendant, and not an ex post facto violation.

Plaintiff-Appellee has made a good analogy to registration under the Sex Offender Registration Act (SORA). While SORA unquestionably affects those who are forced to register, it is not per se a punishment and ordering those convicted of a sex offense prior to the adoption of SORA to register is not an ex post facto violation. *People v Golba*, 273 Mich App 603, 616; 729 NW2d 916 (2007); *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000).

Out of state authority supports the position adopted by the Court of Appeals in the case at bar. In *People v Knightbent*, 186 Cal App 4th 1105; 112 Cal Rptr 884 (2010), the California Court of Appeals held that a "court facilities" assessment, $2.00 at the time the defendant committed a crime but $30.00 at the time of sentencing, should have been the $30.00 figure. Rejecting the defendant's ex post facto argument, the Court held the statute's purpose was to maintain adequate funding for court security, was nonpunitive, part of a broader legislative scheme that also raised civil fees, was relatively small, and not dependant on the seriousness of the offense.

In *Police Department of Salem v Sullivan*, 460 Mass 637; 953 NE2d 188 (2011), the Massachusetts Supreme Court rejected the argument that an increase in a fee required to challenge a traffic citation, which increase occurred after the ticket was issued but before the recipient of the ticket filed his challenge, was an ex post facto violation. The purpose of the fee was not punitive, but instead was "intended to reduce the strain on the court system and offset adjudicatory costs, rather than increase the punishment for motor vehicle infractions." 953 NE2d at 194.

In *People v Foster*, 87 AD 3d 299; 927 NYS2d 92 (2011), the Court held that an amendment increasing the maximum duration of final orders of protection issued in favor of victims of felony family offenses was valid and not an ex post factor violation, since it was enacted to enhance protection available to victim of domestic violence, rather than to increase punishment for those convicted of felony family offenses.

Could a fine be increased simply because labeled an assessment for other purposes? Of course not. In *People v Carreon*, 355 Ill Dec 783; 960 NE2d 665 (2011), the Court held that imposition of a $50.00 "performance enhancing substance fine" not in effect at the time of the crime was an ex post facto violation. That makes sense; the assessment was clearly a fine, not just because labeled as such, but because it was imposed only on those convicted of certain controlled substance offenses.

The CVRF involved in the case at bar is not an individual punishment imposed on a defendant for conviction of a specific crime. It is part of a broader scheme to provide victim services throughout the state. It is legitimately imposed on all defendants, with a specific flat fee, and is not imposed as a specific punishment for the commission of a specific crime. As such, it does not constitute an ex post facto law, and passes constitutional muster. The Court of Appeals

in the case at bar properly analyzed this issue. Amicus curiae therefore joins in Plaintiff-Appellee's request to uphold the decision of the Court of Appeals.

RELIEF REQUESTED

WHEREFORE, amicus curiae, the Prosecuting Attorneys Association of Michigan, joins Plaintiff-Appellee in respectfully praying that the decision of the Court of Appeals, affirming the conviction and sentence of Defendant-Appellant, including the $130 CRVF assessment, be affirmed.

Respectfully submitted,

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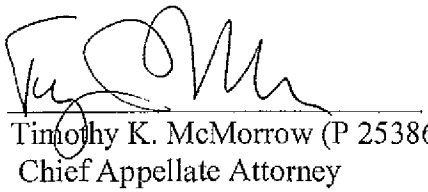
Dated: September 14, 2013

By: 

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