STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS
Kirsten Frank Kelly, P.J., and David H. Sawyer and Amy Ronayne Krause, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

RONALD LEE EARL,

Defendant-Appellant.
_____/

Supreme Court No. 145677

Court of Appeals No. 302945

Circuit Court No. 2010-232176-FC

DEFENDANT-APPELLANT'S BRIEF ON APPEAL

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Oakland County Circuit Court by jury trial, and a Judgment of Sentence was entered on February 15, 2011. A Claim of Appeal was filed on March 9, 2011, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated February 15, 2011, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed in an opinion issued June 19, 2012. SADO filed a timely application for leave to appeal within 56 days of this opinion. This Court granted the application by order entered March 20, 2013. This Court has jurisdiction pursuant to Const 1963, art 1, §§ 4, 20; MCL 600.215(3); MCL 770.3(6); MCR 7.301(A)(2); and MCR 7.302(C)(2)(b).

STATEMENT OF QUESTIONS PRESENTED

I. DID THE RETROACTIVE APPLICATION OF A STATUTE INCREASING THE CRIME VICTIMS' RIGHTS ASSESSMENT VIOLATE THE EX POST FACTO CLAUSES OF US CONST, ART I, § 10, AND CONST 1963, ART 1, § 10?

Trial court made no answer.

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

This appeal stems from a bank robbery committed in Southfield on March 18, 2010. (13a). The police arrested Defendant-Appellant Ronald Lee Earl for that offense six days later, finding heroin and crack cocaine on his person. (13a). The prosecution soon charged him with bank robbery[1] and two counts of possessing less than 25 grams of a controlled substance.[2] (1a). A jury found him guilty of all three offenses following a jury trial held in the Oakland County Circuit Court, the Honorable Leo Bowman presiding. (13a-14a).

At the time these crimes were committed, MCL 780.905 required all defendants found guilty of a felony to pay a $60 crime victim's rights assessment. (16a). By the time of sentencing, however, the Legislature had increased the assessment to $130. (16a); 2010 PA 281 (effective December 16, 2010). On February 15, 2011, the trial court sentenced Mr. Earl to 10 to 40 years in prison for the bank robbery, as well as twin prison terms of two to 15 years for the narcotics offenses. (11a-12a). The trial court also imposed the increased assessment, as well as $377 in restitution to the bank and $204 in state minimum costs. (11a-12a).

Mr. Earl subsequently appealed by right. (13a). Among the issues he raised was an argument that the retroactive application of the enhanced assessment violated the constitutional bar on ex post facto laws. (16a). The Court of Appeals, however, disagreed. (16a-18a).

The Court of Appeals began by noting that the Ex Post Facto Clause applies only to punitive laws. (16a). While the court agreed that "restitution is a form of punishment" subject to the Clause, it declined to characterize the crime victim's rights assessment as a form of

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1 MCL 750.531.

2 MCL 333.7403(2)(a)(v).

restitution. (16a-17a) (quoting *People v Slocum*, 213 Mich App 239, 243-244; 539 NW2d 572 (1995)). As support for this distinction, the court lifted a passage from a previous ruling upholding the assessment against due process and equal protection challenges:

> [T]he 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. [(17a) (quoting *People v Matthews*, 202 Mich App 175, 177; 508 NW2d 173 (1993)) (emphasis supplied by opinion below)].

The Court of Appeals therefore held that the trial court's imposition of the enhanced assessment did not violate the Ex Post Facto Clause, overruling several unpublished opinions to the contrary. (17a, fn 3). This Court granted Mr. Earl leave to appeal that determination. (19a).

SUMMARY OF THE ARGUMENT

Defendant-Appellant Ronald Lee Earl stands convicted of three felonies committed in March of 2010. (13a). At that time, MCL 780.905 required all convicted felons to pay one $60 crime victims' rights assessment per case. As Mr. Earl awaited trial, however, the Legislature amended the statute to provide for an increased assessment of $130. (16a); 2010 PA 281 (effective December 16, 2010). When sentencing was held two months later, the trial court applied the amended statute and ordered Mr. Earl to pay the increased assessment. The question is whether this violated the state and federal Ex Post Facto Clauses, US Const, art I, §10, and Const 1963, art 1, §10.

The answer depends on whether the assessment constitutes punishment. The Ex Post Facto Clause applies only to punitive laws; it does not forbid the retroactive application of civil statutes. *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). Courts apply a two-part "intent-effects" test to determine whether a statute is civil or criminal. *Id.* The first step examines whether the Legislature intended the statute to be punitive. *Id.* If so, the inquiry ends. *Id.* If not, courts must proceed to the second step to examine whether the nominally civil statute resembles punishment to a degree that renders it effectively punitive. *Id.* This step employs the seven-factor test set forth in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963). *Smith*, 538 US at 97.

The Court of Appeals did not apply this analysis. It did not examine the intent of the Legislature in enacting MCL 780.905. Nor did it analyze the statute's effect upon indigent defendants like Mr. Earl. Instead, the Court of Appeals misconstrued dicta from *People v*

Matthews, 202 Mich App 175; 508 NW2d 173 (1993), as evidence that the assessment did not constitute restitution or any other form of punishment.

Application of the correct analysis compels the conclusion that the Legislature intended the crime victims' rights assessment as a criminal punishment. The Legislature placed MCL 780.905 in the Code of Criminal Procedure. Its plain language makes the assessment "part of the sentence itself." *People v Cole,* 491 Mich 325, 336; 817 NW2d 497 (2012). It applies only when the defendant has been adjudicated guilty of wrongdoing. MCL 780.905(1). Once scienter is established, the assessment is mandatory, even for those defendants who cannot afford to pay it. MCL 780.905(1). It is included in the judgment of sentence and becomes a condition of every probationary order and every order of parole. (11a); MCL 780.905(2). *See also* MCL 771.3(1)(f); MCL 791.236(7). Parolees and probationers who fail to make a good faith effort to pay the assessment may find themselves back in custody. MCL 771.3(8); MCL 791.240a.

Several states with similar assessments view them as punitive.[3] These jurisdictions recognize that assessments of this type function as an indirect form of restitution. Similarly, in Michigan, monies collected under MCL 780.905 are deposited in the Crime Victim's Rights Fund or retained by local courts to pay for crime victims' rights services. MCL 780.905(7)(a). Much of this money is used to fund the Crime Victim's Compensation Act, MCL 18.351 *et seq.*, which reimburses victims for certain losses and operates as a sort of insurance pool for those who cannot collect restitution directly from the perpetrator. MCL 780.904(2).

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[3] *See, e.g., Taylor v State*, 586 So 2d 964, 965 (Ala. Crim. App. 1991) (finding ex post facto violation); *Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130*, 677 P2d 943, 947 (Ariz Ct App 1984) (same); *People v Kunitz*, 122 Cal App 4th 652, 657 (2004) (same); *Petition of State*, 603 A2d 814, 815 (Del 1992) (same); *Majors v State*, 658 So 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (same); *People v Sullivan*, 775 NYS2d 696 (2004).

Restitution, whether directly or indirectly imposed, has been historically regarded as a form of punishment. *See, e.g.,* Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA...*, 73 Fordham L Rev 2711, 2717-2718 (2005). It is true that this Court has characterized restitution as more "compensatory" than "[p]urely penal." *People v Peters,* 449 Mich 515, 517, 526; 537 NW2d 160 (1995) (applying a "compensatory" versus "non-compensatory" dichotomy to hold that a restitution order does not abate upon the death of the defendant). But that does not mean that restitution is non-punitive. As the United States Supreme Court has recognized, "Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused." *Kelly v Robinson,* 479 US 36, 49 n 10; 107 S Ct 353; 93 L Ed 2d 216 (1986) (holding that restitution obligations are not dischargeable in Chapter 7 bankruptcy proceedings). Indeed, a majority of jurisdictions consider restitution to be punitive. *United States v Schulte*, 264 F3d 656, 661 (CA 6, 2001); *Eichelberger v State*, 916 SW2d 109, 110-111 (Ark 1996).

Lastly, the Legislature's intent to punish is reflected in the path it took to enact the assessment into law. The assessment did not appear in the original Crime Victims Rights Act. 1985 PA 87. Rather, the Legislature felt compelled to first seek a constitutional amendment giving it the power to "provide for an assessment against convicted defendants to pay for crime victims' rights." 1988 HJR P; Const 1963, art 1, §24(3). The Legislature evidently feared that without the amendment, the assessment would violate Const 1963, art 8, §9, which mandates that all penal fines be used to support public libraries. A recent opinion of the Attorney General supports the notion that Article 1, §24(3) was intended as an exception to Article 8, §9. OAG,

2008, No. 7217, pp 146-148 (July 8, 2008). This, in turn, supports the view that the Legislature considered the crime victims' rights assessment to be penal.

Even if the Legislature did not intend to punish, the assessment is punitive in its effect. All of the *Mendoza-Martinez* factors favor the defendant. *Smith*, 538 US at 97. The assessment functions as an indirect form of restitution, traditionally regarded as punishment. It requires a finding of scienter and applies exclusively to criminal behavior. MCL 780.905(1). Further, the mandatory assessment imposes an affirmative hardship, particularly on defendants who are both indigent and incarcerated. Inmates who are fortunate enough to obtain employment within the prison earn an average wage of only 75 cents per day. Senate Legislative Analysis, HB 4658 (March 21, 2012). Thus, an inmate would have to work seven days per week for three months just to pay off the additional $70 required by the amended statute, leaving nothing for personal care items, food, or his remaining court-ordered debts. This is drastically excessive in relation to any non-punitive purpose (if any) the assessment serves.

In sum, the Legislature intended the crime victims' rights assessment as punishment, and the assessment has a punitive effect. The Ex Post Facto Clause therefore barred the Legislature from retroactively increasing that punishment. As a remedy, this Court should construe 2010 PA 281 as applying prospectively only to crimes committed after it took effect on December 16, 2010. This remedy is consistent with this Court's "duty ... to read the Michigan act to be consistent with the Federal Constitution, if such interpretation can be made without doing violence to the language used by the Legislature." *Larkin v Wayne County Prosecutor*, 389 Mich 533, 541; 208 NW2d 176 (1973). Additionally, this Court should remand for ministerial correction of the judgment of sentence to reflect a $60 assessment, not a $130 assessment.

I. THE RETROACTIVE APPLICATION OF A STATUTE INCREASING THE CRIME VICTIMS' RIGHTS ASSESSMENT VIOLATED THE EX POST FACTO CLAUSES OF US CONST, ART I, § 10, AND CONST 1963, ART 1, § 10.

Issue Preservation

Because this issue is unpreserved, this Court's review is for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Standard of Review

Application of constitutional *ex post facto* provisions is a question of law subject to *de novo* review. *In re Contempt of Henry*, 282 Mich App 656, 681; 765 NW2d 44 (2009).

Analysis

The bank robbery in this case occurred on March 18, 2010; Mr. Earl committed the two narcotics violations on March 24, 2010. (13a). At the time, MCL 780.905 authorized only a $60 assessment for the crime victims' rights assessment. Nine months later, the Legislature amended the statute to provide for an increased assessment of $130. *See* 2010 PA 281 (effective December 16, 2010). When the trial court sentenced Mr. Earl on February 15, 2011, it applied the amended statute and required Mr. Earl to pay $130, rather than $60. (11a).

The imposition of the enhanced assessment for a crime committed before the effective date of the new law violated the constitutional bar on *ex post facto* laws. The United States Constitution states: "No State shall ... pass any ... ex post facto Law." US Const, art I, §10. The Michigan Constitution contains the same prohibition. Const 1963, art 1, §10. The two provisions are textually coextensive and are interpreted identically. *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 776, n 13; 527 NW2d 468 (1994); *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003). Both are designed to protect against

arbitrary and oppressive legislation and to provide fair notice of the consequences of criminal actions. *Miller v Florida*, 482 US 423, 429-430; 107 S Ct 2446; 96 L Ed 2d 351 (1987); *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992); *People v Stevenson*, 416 Mich 383, 396; 331 NW2d 143 (1982).

Neither the United States Constitution nor the Michigan Constitution spells out what constitutes an ex post facto law. It is well-settled, however, that the prohibition applies to four categories of laws identified in Justice Samuel Chase's opinion in *Calder v Bull*, 3 US 386, 390; 1 L Ed 648 (1798). A retroactive law will violate the Ex Post Facto Clause if it: (1) punishes an act that was innocent when done, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence. *Id.* Thus, reviewing courts must examine "whether the law changes the legal consequences of acts completed before its effective date." *Carmell v Texas*, 529 US 513, 520; 120 S Ct 1620; 146 L Ed 2d 577 (2000) (quoting *Weaver v Graham*, 450 US 24, 31; 101 S Ct 960; 67 L Ed 2d 17 (1981).

The threshold question for any ex post facto analysis is whether the legislative enactment constitutes "punishment." *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003). To answer this question, reviewing courts must apply a two-part "intent-effects" test. *Id.* First, courts must determine whether the legislature intended the law as punishment. *Id.* If so, the inquiry is over and the law may not be applied retroactively. *Id.* If not, courts must proceed to the second step and determine whether the law is "so punitive either in purpose or effect as to negate [the State's] intention to deem it 'civil.'" *Id.* (citations and quotations omitted).

The protections of other constitutional provisions also depend upon whether a statute imposes "punishment." *See, e.g., Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct

554; 9 L Ed 2d 644 (1963) (procedural safeguards of the Fifth and Sixth Amendments); *Austin v United States*, 509 US 602, 619; 113 S Ct 2801; 125 L Ed 2d 488 (1993) (Excessive Fines Clause of the Eighth Amendment); *Hudson v United States*, 522 US 93, 105; 118 S Ct 488; 139 L Ed 2d 450 (1997). The Library Clause of the Michigan Constitution, which mandates that all penal fines be used to support public libraries, turns on the same question. Const 1963, art 8, §9. If a fee or assessment is deemed punitive, "it must be applied exclusively for the support of libraries." *Saginaw Public Libraries v Judges of 70th Dist Ct*, 118 Mich App 379, 389; 325 NW2d 777 (1982).

Here, the trial court plainly erred by retroactively applying the increased crime victims' rights assessment. As discussed in Part A, the Legislature intended the assessment to be penal in nature. This is reflected in the assessment's plain language and legislative history, as well as the historical backdrop against it was enacted. Alternatively, for the reasons discussed in Part B, the assessment is punitive in its effect. Its retroactive application therefore violates the constitutional bar on ex post facto laws.

A. The Legislature Intended the Assessment as Punishment

Whether a statutory scheme is civil or criminal is primarily a question of statutory construction. *Smith*, 538 US at 92. Statutes *in pari materia* are to be read together to determine legislative intent; all statutes addressing the same general subject matter must be considered part of a unified system. *Duffy v Michigan Dep't of Natural Res.*, 490 Mich 198, 206; 805 NW2d 399 (2011). When determining how to apply a statute, this Court discerns the Legislature's intent from its plain language. *People v Sobczak-Obetts*, 463 Mich 687, 694-695; 625 NW2d 764 (2001). If that language is unambiguous, this Court presumes that the Legislature intended

the meaning clearly expressed without further judicial construction. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

The Ex Post Facto Clause, however, requires further scrutiny. "[B]y simply labeling a law "procedural," a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause." *Collins v Youngblood*, 497 US 37, 46; 110 S Ct 2715; 111 L Ed 2d 30 (1990). After all, the very purpose of the Ex Post Facto Clause is to protect against legislative vindictiveness. *See, e.g.*, Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am Crim L Rev 1261, 1277 (1998); *Calder*, 3 US (3 Dall) at 389 (opinion of Chase, J.) ("With very few exceptions, the advocates of [retroactive] laws were stimulated by ambition, or personal resentment and vindictive malice."). Achieving this aim requires "assiduous, heightened scrutiny of legislative purpose[,]" rather than uncritical deference to legislative labels. Logan, *supra*, at 1291.

Thus, the plain language of MCL 780.905—while important—cannot be examined in a vacuum. "[T]he import of language depends on its context, which includes the occasion for, and hence the evident purpose of, its utterance." Scalia, *A Matter of Interpretation: Federal Courts and the Law* (New Jersey: Princeton University Press, 1997), p. 144. Here, while the crime victims' rights assessment is of recent vintage, the concepts of restitution, victim compensation, and punishment share a long, interconnected history. For that reason, several jurisdictions have characterized similar assessments as punishment implicating the Ex Post Facto Clause. The Legislature created the assessment against this backdrop, placing it in the Code of Criminal Procedure and applying it only to those convicted of wrongdoing. And by maneuvering around

the Library Clause of Article 8, §9, the Legislature implicitly acknowledged the punitive nature of the assessment.

1. The plain language and structure of the assessment evince the Legislature's intent to punish.

The statute's plain language reflects a punitive intent similar to that analyzed by this Court in *People v Cole*, 491 Mich 325, 336; 817 NW2d 497 (2012). In *Cole*, this Court found that the Legislature intended to impose punishment when it mandated lifetime electronic monitoring for certain sex offenders. *Id.* at 334. A key factor cited by *Cole* was the fact that the relevant statutes provided that "'the court *shall sentence* the defendant to lifetime electronic monitoring....'" *Id.* at 335-336 (quoting MCL 750.520b(2)(d) and MCL 750.520c(2)(b)) (emphasis added by *Cole*). The *Cole* Court reasoned that "[t]he use of the directive 'shall sentence' indicates that the Legislature intended to make lifetime electronic monitoring part of the sentence itself." *Id.* at 336.

Similarly, the plain language used by the Legislature in MCL 780.905 indicates that the assessment was intended to be "part of the sentence itself." *Cole*, 491 Mich at 336. For starters, the statute only authorizes its imposition in cases where the defendant has been adjudicated guilty of wrongdoing. MCL 780.905(1). Acquitted defendants do not have to pay.

The statute further provides that sentencing courts "shall order" defendants who have been convicted of a crime to pay the assessment. MCL 780.905(1). In addition, it requires that "[p]ayment of the assessment shall be a condition of a probation order . . . or a parole order[.]" MCL 780.905(2). *See also* MCL 771.3(1)(f) ("The sentence of probation shall include all of the following conditions . . . an assessment ordered under . . . MCL 780.905); MCL 791.236(7) ("The parole order shall contain a condition requiring the parolee to pay any assessment the

prisoner was ordered to pay under . . . MCL 780.905). Parolees and probationers who fail to make a good faith effort to pay the assessment may find themselves back in custody. MCL 771.3(8); MCL 791.240a. These provisions, even when considered outside of the context in which they were enacted, establish the Legislature's intent to punish.

2. *The Legislature created the assessment as an indirect form of compelled restitution not unlike that which has historically been regarded as punishment.*

As one commenter has explained, the concepts of restitution and victim compensation are distinguished only by who pays:

> Compensation is a responsibility assumed by society; it is civil in character, and thus represents a noncriminal welfare goal. Restitution, on the other hand, allocates responsibility to the offender; a claim for restitution by the criminal is penal in character, and thus manifests a correctional goal in the criminal process.

Schafer, *Victim Compensation and Responsibility*, 43 S Cal L Rev 55, 65 (1970). The Code of Hammurabi, dating back to the Babylon of 1772 BC, is often cited as the earliest system providing both restitution and governmental victim compensation. *Id.* at 57; L. Friedsam, "Legislative Assistance to Victims of Crime: The Florida Crimes Compensation Act," 11 Fla St U L Rev 859 (1984). If the victim was robbed and the perpetrator was not caught, the city and the mayor would replace whatever was lost. Friedsam, *supra*, at 863. "'If [it is a] life [that is lost], the city or the mayor shall pay one maneh of silver to his kinsfolk.'" *Id.* (citation omitted). If, however, the perpetrator was caught, the Code of Hammurabi provided for restitution, among other penalties. Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA...*, 73 Fordham L Rev 2711, 2717 (2005). Subsequent societies developed similar schemes. *Id.*

In medieval England, convicted criminals were required to pay a monetary compensation to both the victim and the feudal lord. *Id.* at 2717-2718. Over time, however, payments between individuals were largely removed from criminal law and associated with tort or civil law. *Id.* at 2718. The English common law, however, continued to require restitution as part of criminal sentences. *Id.* An early American statute did the same, authorizing restitution as a punishment for robbery, larceny, or trespass on tribal land. *Id.* (citing 2 Stat 139 (1802)).

For the most part, however, crime victims seeking compensation had to resort to the civil tort system. *Id.* Dissatisfied with this remedy, a number of jurisdictions began to focus on the needs of crime victims. Friedsam, *supra*, at 863. In 1964, New Zealand became the first modern jurisdiction to adopt a victim compensation program. *Id.* California followed suit one year later, becoming the first U.S. state to do so. *Id.*

Today, every state (and the District of Columbia) has enacted a victim compensation program.[4] "Of the fifty states with a compensation program, thirty-four are able to maintain self-sufficiency through funding from compensation fees, fines, penalties, civil recoveries, and restitution. They are not dependent on state appropriations to fund their compensation and operating costs." *State v Sequeira*, 995 P2d 335, 339 (Haw. 2000). Michigan's scheme

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[4] *See Jerome v Crime Victims Comp. Bd.*, 419 Mich 161, 166; 350 NW2d 239 (1984) (collecting statutes from 34 states, including Michigan). In the three decades since *Jerome*, the remaining 16 states have followed suit, as has the District of Columbia. *See* Ala Code of Crim Pro §§15-23-1 to 15-23-23; Ark Code §§16-90-701 to 16-90-718; Ariz. Rev. Stat. Ann. § 41-191.08; Co Rev Stat §§24-4.1-100.1 to 24-4.1-124; DC Code §§4-501 to 4-518; Idaho Code §§72-1001 to 72-1025; Iowa Code Ann §§915.80 to 915.99; La Rev Stat §§ 46:1801 to 46:1821; Maine Rev Stat §§ 3360 to 3360-M; Miss Code Ann §§ 99-41-1 to 99-41-29; NH Rev Stat §§ 21-M:8-f to 21-M: 8-l; NC Gen Stat §§ 15B-1 to 15B-29; SC Code Ann §§ 16-3-1110 to 16-3-1360; SD Code §§ 23A-28B-1 to 23A-28B-44; Utah Code §§ 63M-7-501 to 63M-7-525; Vt Stat, Title 13, §§ 5351 to 5359; Wyo. Stat. Ann. § 1-40-101 to 1-40-119.

developed incrementally over time, gradually progressing from a taxpayer-funded system to one funded in large part by convicted criminal defendants.

(a). The Crime Victims Compensation Act (1976 PA 223)

The Legislature began by enacting the Crime Victims Compensation Act ("the Compensation Act"), MCL 18.351 *et seq*, which created an entity to hear claims submitted by eligible crime victims seeking reimbursement for certain losses not exceeding $15,000. 1976 PA 223 (effective March 31, 1977). The Legislature placed this act in the chapter set aside for matters relating to the Department of Management and Budget.

The program, at least initially, drew most of its funding from the state's general fund. *See* MCL 18.362. Eventually, the U.S. Congress passed the Victims of Crime Act of 1984, which provided federal grants amounting to 40% of the program's funding. *Sheppard v Crime Victims Comp. Bd.*, 224 Mich App 281, 284; 568 NW2d 405 (1997) (citing 42 USC § 10602(a)(1)). If a claimant received reimbursement, his or her civil claims against the defendant were subrogated to the state. MCL 18.364.

The Compensation Act also empowered "[a]ny court of record" to "impose a condition that the sentence include a method for reimbursement to the [state's general fund] . . . of the costs paid under this act to a victim of a crime for which the conviction was made." MCL 18.362. This provision, however, applied only to probationary terms or suspended sentences. *Id.* This is likely attributable to the fact that "[p]rior to July 10, 1985, restitution was authorized only as a condition of probation." *People v Littlejohn*, 157 Mich App 729, 733; 403 NW2d 215 (1987) (Kelly, P.J., concurring) (citing MCL 771.3). Judges could revoke the probation of defendants who failed to pay, subject to "the ability of the felon to comply[.]" MCL 18.362.

The Legislature made clear, however, that these provisions applied only to crimes committed six months after its effective date. MCL 18.368.

(b). The Crime Victims Rights Act (1985 PA 87)

In 1985, the Legislature expanded the availability of restitution with the enactment of what is now known as the William Van Regenmorter Crime Victim's Rights Act ("the CVRA"), MCL 780.751 *et seq*, named for the legislator who introduced it. *See* 2005 PA 184. The CVRA enumerated several statutory rights for victims of crimes. *See, e.g.,* MCL 780.761; MCL 780.765; MCL 780.771. It also supplemented the Compensation Act with a broader and far more direct form of restitution. MCL 769.1a; MCL 780.766(2). The Legislature placed the CVRA in the Code of Criminal Procedure and directed that it be applied only to crimes committed after its effective date. MCL 780.775.

The CVRA gave sentencing courts the discretion to order "that the defendant make full restitution to any victim or victim's estate of the defendant's course of conduct...." MCL 780.766(2), 1985 PA 87. For the first time, restitution could be a condition of all sentences, not just probationary terms. *Littlejohn,* 157 Mich App at 733. Although the CVRA initially required only convicted felons to pay restitution, it was soon expanded to provide for the rights of victims of juvenile offenders and of certain specified "serious misdemeanors." 1988 PA 21; MCL 780.811(1)(a) and 780.812.

The CVRA, in its original form, did not provide for an assessment in addition to any direct restitution imposed. Rather, it merely required prosecutors to advise victims of their eligibility for an award under the Compensation Act. MCL 780.756(1)(c), 1985 PA 87.

(c). Ballot Proposal B of 1988 (1988 HJR P)

In 1988, Rep. Van Regenmorter introduced House Joint Resolution P, which called for an amendment to the Michigan Constitution enumerating several rights for crime victims. 1988 HJR P. Included among these rights was "[t]he right to restitution." *Id.* The proposed amendment also empowered the Legislature to "provide for an assessment against convicted defendants to pay for crime victims' rights." *Id.* According to Rep. Van Regenmorter, this latter provision was included "[b]ecause of previous court decisions ... the courts have been unable to levy modest assessments on convicted criminals to pay for victims' rights." *Voters to Decide Whether to Add Crime Victims' Rights to Constitution*, Gongwer News Service No. 198, Oct 12, 1988, at page 3 (appended as Attachment A). Voters approved the amendment, now Const 1963 art 1, §24.

(d). Criminal Assessments Act (1989 PA 196)

The CVRA, while enacted before the constitutional amendment, is regarded as one of the statutes that implements the crime victim rights enumerated in Const 1963, art 1, §24(1). *See People v Cobbs*, 443 Mich 276, 285, n 8; 505 NW2d 208 (1993). After voters amended the constitution to provide victims with a right of restitution, the Legislature modified MCL 780.766(2) to make restitution mandatory in every case where the victim suffers an enumerated loss. 1993 PA 341, §1 (effective May 1, 1994).

Implementing the assessment provision of §24(3), however, required a new statute altogether. Accordingly, the Legislature enacted the Criminal Assessments Act of 1989 ("the Assessments Act"), MCL 780.901 *et seq*. 1989 PA 196. As with the CVRA, the Legislature placed the Assessments Act in the Code of Criminal Procedure. It further directed that "[t]his act shall take effect upon the expiration of 60 days after the date of its enactment." MCL 780.911.

The Assessments Act originally required "each person convicted of a felony to pay an assessment of $30.00." *Former* MCL 780.905(1), 1989 PA 196. This money would be deposited in a "Crime Victims Rights Fund" created as a separate fund within the state treasury. MCL 780.904(1). The fund's money could be spent "only as provided in this act," MCL 780.904, "to pay for crime victim rights services." MCL 780.907.

A few years later, in 1993, the Legislature increased the assessment for felons from $30 to $40. 1993 PA 345. In 1996, the amount increased to $60. 1996 PA 344. Finally, in 2010, the Legislature approved the increase at issue in this case, upping the assessment from $60 to $130. 2010 PA 281.

(e). Resultant Scheme of Indirect Restitution

As these acts demonstrate, Michigan's victim compensation scheme has gradually moved away from taxpayer funding and towards a scheme funded largely by the criminal defendants forced to pay into it. Once wrongdoing is established, the assessment is mandatory, even for those defendants who cannot afford to pay it. MCL 780.905(1). The monies collected are deposited in the Crime Victim's Rights Fund or retained by local courts to pay for crime victims' rights services. MCL 780.905(7)(a). Much of this money is used to fund the Compensation Act, which reimburses victims for certain losses and operates as a sort of insurance pool for those who cannot collect restitution directly from the perpetrator. MCL 780.904(2).

The assessment, therefore, has the same punitive effect as an order of restitution. "[F]orc[ing] the defendant to confront, in concrete terms, the harm his actions have caused" is "an effective rehabilitative penalty." *Kelly v Robinson*, 479 US 36, 49 n 10; 107 S Ct 353; 93 L Ed 2d 216 (1986) (holding that restitution obligations are not dischargeable in Chapter 7

bankruptcy proceedings). The Legislature surely recognized that the assessment it created bore far more resemblance to restitution than to ordinary usage fees like state minimum costs.

Restitution, in turn, has historically been regarded as punishment. Indeed, a majority of jurisdictions consider restitution to be punitive. *United States v Schulte*, 264 F3d 656, 661 (CA 6, 2001); *Eichelberger v State*, 916 SW2d 109, 110-111 (Ark 1996). Whether Michigan does as well is still an open question that this Court has not squarely confronted. In *People v Peters*, 449 Mich 515; 537 NW2d 160 (1995), this Court examined whether an order of restitution would abate if the defendant died before his appeal could be heard. *Id.* at 516. This Court's abatement inquiry differed somewhat from the ex post facto inquiry. Instead of a "punitive versus non-punitive" dichotomy, the abatement inquiry examines whether the sanction is compensatory or non-compensatory. *Id.* at 517. Anything that did not directly compensate for a party's loss fell in the category of "[p]urely punitive sanctions" that would abate upon the defendant's death "because they no longer continue to serve a purpose." *Id.* Compensatory sanctions, on the other hand, would survive because they still served the purpose of making others whole. *Id.*

The *Peters* Court held that restitution fell in the latter category, given its obvious function as a compensatory measure. *Peters*, 449 Mich at 523. It reasoned that "the fact that defendant, now his estate, will experience some 'financial pain' does not transform the restitution order into a primarily penal sanction." *Id.* To hold otherwise would deny victims their constitutional right to restitution under Const 1963, art 1, §24. *Id.* Thus, nothing in *Peters*, however, states that restitution is not punishment. Rather, *Peter* merely recognizes that restitution serves other goals and is therefore not a "[p]urely punitive sanction[]." *Id.* at 517.

The same can be said for the crime victims' rights assessment. The assessment serves both penal and compensatory aims. That is why several states with similar assessments view them as punitive. *See, e.g., Taylor v State*, 586 So 2d 964, 965 (Ala. Crim. App. 1991) (finding ex post facto violation); *Matter of Appeal in Maricopa Cnty. Juvenile Action No. J-92130*, 677 P2d 943, 947 (Ariz Ct App 1984) (same); *People v Kunitz*, 122 Cal App 4th 652, 657 (2004) (same); *Petition of State*, 603 A2d 814, 815 (Del 1992) (same); *Majors v State*, 658 So 2d 1234, 1235 (Fla. Dist. Ct. App. 1995) (same); *People v Sullivan*, 775 NYS2d 696 (2004) (same).

The court below, however, held that while restitution is a form of punishment, the assessment is not a form of restitution. (13a). In so holding, the appellate court relied on *People v Matthews,* 202 Mich App 175; 508 NW2d 173 (1993). *Matthews*, however, did not address whether the assessment constituted punishment. Rather, *Matthews* involved a challenge to the validity of MCL 780.905 itself, as well as due process and equal protection claims. *Matthews*, 202 Mich App at 176-177. In the portion cited below, the *Matthews* Court addressed whether the statute could be applied in cases where the victim suffered no financial loss. *Id.* at 177. In dicta, the Court "note[d] that the assessment is not intended to be a form of restitution dependent upon the injury suffered by any individual victim." *Id.* This statement, however, does not constitute a holding that the crime victim rights fee is non-punitive, or even that it is not restitution. Rather, it merely points out that is not the "form of restitution" that the defendant wanted it to be in that particular case. *Id.* The Court of Appeals' reliance on *Matthews*, therefore, is misplaced.

3. *The Legislature's punitive intent is reflected in its belief in the need for a constitutional amendment carving out an exception to the Library Clause for a crime victims' rights assessment.*

Further evidence that the Legislature viewed the assessment as punishment is its belief that it required a constitutional amendment. Neither the Compensation Act nor the original CVRA provided for an assessment against criminal defendants. Rep. Van Regenmorter, explaining why voters should approve Ballot Proposal B, indicated that "[b]ecause of previous court decisions ... the courts have been unable to levy modest assessments on convicted criminals to pay for victims' rights." *Voters to Decide Whether to Add Crime Victims' Rights to Constitution*, Gongwer News Service No. 198, Oct 12, 1988, at page 3 (appended as Attachment A).

Rep. Van Regenmorter did not specify which case he and his colleagues sought to supersede. There are, however, few limits on a court's levying power. Some can be found in the United States Constitution. *See, e.g.,* US Const, Am VIII (prohibiting excessive fines). But amending the Michigan Constitution would do nothing to avoid application of those provisions, due to the federal Supremacy Clause. *See* US Const, art VI, §2.

Another well-established limit is that a trial court may only require a convicted defendant to pay costs where such a requirement is expressly authorized by statute. *People v Wallace*, 245 Mich 310, 313; 222 NW 698 (1929). This rule was frequently invoked in the 1980's. *See, e.g., People v Jones*, 182 Mich App 125, 126; 451 NW2d 525 (1989); *People v Watts*, 133 Mich App 80, 84; 348 NW2d 39 (1984). But no constitutional amendment is required to sidestep this rule. Rather, it is sufficient to simply enact a new statute.

Thus, the only reason for pursuing a constitutional amendment would be to avoid application of the Michigan Constitution's Library Clause, Const 1963, art 8, §9. Again, that provision mandates that all penal fines be used to support public libraries. Michigan courts have

long relied upon it to invalidate punitive assessments disguised as mere costs. *People v Barber*, 14 Mich App 395, 401, 165 NW2d 608 (1968) (collecting cases).

In *Barber*, for example, the Court of Appeals considered a statute that levied an additional ten percent of every fine, penalty and forfeiture collected for criminal offenses. *Id.* at 400. The statute labeled this surcharge as "costs" to be placed in the law enforcement officers' training fund. *Id.* The Court of Appeals, however, rejected this label, noting that "the legislature cannot circumvent the explicit provision of the Constitution by placing the label 'costs' on what by no construction of the term can be considered costs." *Id.* at 403. Rather, the court concluded that the surcharge was, in actuality, a supplemental fine on top of the original fine imposed. *Id.* at 399-400. Thus, the money could not be deposited into the training fund without violating the Library Clause. *Id.* at 407.

Of course, as *Barber* suggests, the Library Clause does not apply to non-punitive costs and fees. Six years before voters approved Ballot Proposal B, the Court of Appeals considered the validity of the $5 judgment fee authorized by the version of MCL 600.8381 in effect at that time. *Saginaw Public Libraries*, 118 Mich App at 388. Although that fee was earmarked for the general fund, the Court held that it did not offend the Library Clause because it "is not a penal fine within the meaning of the constitution." *Id.* at 389. Rather, "the fee appears to be compensatory and not penal." *Id.*

The crime victims' rights assessment, on the other hand, is punitive. Without the exception to the Library Clause carved out by Art 1, §24(3), the monies collected under MCL 780.905(1) would have to go towards public libraries instead of crime victims' rights. Indeed, a recent Attorney General opinion supports this view. OAG, 2008, No. 7217, pp 146-148 (July 8,

2008). Thus, the assessment's plain language, legislative history, and historical ties to punishment all point to a conclusion that the Legislature intended it as punishment.

B. The Assessment Has the Effect of Punishment

Because the Legislature considered the assessment to be punitive, no further inquiry is needed. *Smith*, 538 US at 92. If, however, this Court finds otherwise, the inquiry continues. *Id.* As a second step, reviewing courts must look beyond the Legislature's label and consider the law's purpose and effects using the seven factors identified in *Mendoza-Martinez*, 372 US at 168-169. If the law is punitive in effect despite the Legislature's intent, may not be applied retroactively without offending the Ex Post Facto Clause. *Smith*, 538 US at 92.

The *Smith* Court wrote that "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" 538 US at 92 (quoting *Hudson v United States*, 522 US 93, 100; 118 S Ct 488; 139 L Ed 2d 450 (1997) (quoting *United States v Ward*, 448 US 242, 249; 100 S Ct 2636; 65 L Ed 2d 742 (1980)). Some scholars, however, have criticized this standard as antithetical to ex post facto analysis. *See, e.g.,* Logan, *supra*, at 1290. After all, the very purpose of the Ex Post Facto Clause is to protect against legislative vindictiveness. *Id.* at 1277. *See also Calder*, 3 US (3 Dall) at 389 (opinion of Chase, J.) ("With very few exceptions, the advocates of [retroactive] laws were stimulated by ambition, or personal resentment and vindictive malice."). As noted above, the Clause requires "assiduous, heightened scrutiny of legislative purpose[,]" rather than uncritical deference to legislative labels. Logan, *supra*, at 1291.

Further, as then-Justice Souter noted in *Smith*, the "clearest proof" standard "makes sense only when the evidence of legislative intent clearly points in the civil direction." *Smith*, 538 US

at 107 (Souter, J., concurring in judgment). If the Legislature's intent is ambiguous, there is little sense in deferring to that ambiguity. *Id.* For this reason, he has advocated for a neutral analysis of the challenged statute's purpose and effects, as have Justices Ginsburg and Breyer. *Smith*, 538 US at 114-115 (Ginsburg, J., dissenting with Breyer, J.).

Here, as discussed above, the Legislature expressed an intent to punish when it enacted MCL 780.905. At the very least, nothing in the statute's language or history establishes the opposite proposition with any certainty. It makes little sense to apply a presumption in favor of a non-punitive intent that the Legislature has not clearly expressed. Accordingly, this Court should neutrally apply the *Mendoza-Martinez* factors.

The seven factors are as follows: (1) Whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment—retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) and whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 US at 168-169. All of these factors weigh in favor of a finding that the assessment is punitive in effect if not in design.

1. Affirmative Disability or Restraint

First, this Court must consider "[w]hether the sanction involves an affirmative disability or restraint[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). This factor favors the defendant. There can be no doubt that the enhanced CVRA assessment "disadvantage[s] the offender affected by it." *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L Ed 2d 17 (1981).

As with direct restitution, payment of the assessment is a condition of every probationary sentence and every term of parole. *Compare* MCL 780.766(11) *with* MCL 780.905(2). Accordingly, any willful non-payment can lead to further incarceration. MCL 771.3(1)(f); MCL 780.766(11); MCL 791.236(7).

Moreover, like direct restitution, the CVRA assessment is mandatory. *Compare* MCL 780.766(2) *with* MCL 780.905(1). Both must be imposed without regard to the defendant's ability to pay. Once imposed, trial courts lack the discretion to reduce the defendant's obligation or otherwise mitigate his or her financial burden. This is because the assessment serves the same purpose of direct restitution: to make the victim whole. *See People v Law*, 459 Mich 419, 426; 591 NW2d 20 (1999).

This inflexibility distinguishes the CVRA assessment and direct restitution from other costs unrelated to restoring victims. State minimum costs, for example, may be remitted upon a showing of manifest hardship. MCL 771.3(6)(b). The same goes for costs of prosecution. MCL 771.3(2)(c), (5), (6)(b). Similarly, court costs are not statutorily mandated, but discretionary. MCL 769.34(6); MCL 769.1k(1)(b).

Lastly, the retroactive application of the enhanced CVRA assessment increased Mr. Earl's obligation by more than 116%, from $60 to $130. 2010 PA 281. This additional $70 works a particular hardship upon indigent defendants serving lengthy prison terms, like Mr. Earl. Inmates who are fortunate enough to obtain employment within the prison earn an average wage of only 75 cents per day. Senate Legislative Analysis, HB 4658 (March 21, 2012). Thus, an inmate would have to work seven days per week for three months just to pay off the additional amount, leaving nothing for personal care items, food, or his remaining court-ordered debts.

Considered as a whole, the enhanced assessment imposes a substantial disadvantage upon convicted criminal defendants. Thus, the first *Mendoza–Martinez* factor favors treating the assessment as punitive.

2. Historically Regarded as Punishment

Second, this Court must consider "whether [the sanction] has historically been regarded as a punishment[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). As discussed above, compulsory restitution, whether directly or indirectly imposed, has been historically regarded as a form of punishment. *See, e.g.,* Kleinhaus, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA...*, 73 Fordham L Rev 2711, 2717-2718 (2005). The assessment is a form of restitution, which in turn is a form of punishment. This factor also favors treating the assessment as punitive.

3. Scienter

Third, this Court must consider "whether [the sanction] comes into play only on a finding of scienter[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). Here, trial courts may only impose the CVRA assessment if the defendant is convicted or otherwise adjudicated guilty of a criminal offense. MCL 780.905(1). No assessment can be ordered in cases concluding with "an acquittal or unconditional dismissal." MCL 780.905(1).

A recent opinion of the Court of Appeals downplayed the significance of this language, asserting that "[t]he fact that the assessment is imposed only if a defendant is convicted is not, itself, dispositive." *People v Jones and Anderson*, __ Mich App __; __ NW2d __ (April 25, 2013) (Docket Nos. 309303, 310314). The United States Supreme Court, on the other hand, emphasizes that "[t]he existence of a scienter requirement is customarily an important element in

distinguishing criminal from civil statutes." *Kansas v Hendricks*, 521 US 346, 362; 117 S Ct 2072; 138 L Ed 2d 501 (1997). If a sanction is linked to a showing of *mens rea*, it is more likely to have a punitive impact. *Id.* Thus, this factor also favors the defendant.

4. Promotion of Punishment

Fourth, this Court must consider "whether [the sanction's] operation will promote the traditional aims of punishment—retribution and deterrence[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). Again, this factor favors the defendant. The United States Supreme Court has noted that "forc[ing] the defendant to confront, in concrete terms, the harm his actions have caused" is "an effective rehabilitative *penalty*." *Kelly v Robinson*, 479 US 36, 49 n 10; 107 S Ct 353; 93 L Ed 2d 216 (1986) (holding that restitution obligations are not dischargeable in Chapter 7 bankruptcy proceedings). Both the assessment and direct restitution accomplish this.

5. Application to Criminal Behavior

Fifth, this Court must consider "whether the behavior to which [the sanction] applies is already a crime[.]" *Mendoza-Martinez*, 372 US at 168 (citation omitted). The fact that a statute applies only to behavior that is already and exclusively criminal supports a conclusion that its effects are punitive. *Smith*, 538 US at 105. Here, as discussed above, only a criminal conviction will trigger the obligation to pay a crime victims' rights assessment. This factor therefore favors the defendant.

6. Alternative Purpose

Sixth, this Court must consider "whether an alternative purpose to which [the sanction] may rationally be connected is assignable for it[.]" *Mendoza-Martinez*, 372 US at 168-169 (citation omitted). Here, the assessment does not serve a non-punitive goal. Ninety percent of

the money collected is deposited into a statewide Crime Victim's Rights Fund. MCL 780.904(1); MCL 780.905(7). The Fund, in turn, pays for awards under the Compensation Act, MCL 18.351 *et seq.*, and provides financial support for crime victim services. MCL 780.904(2). The remaining ten percent of the money collected is retained by the court to pay for crime victim services. MCL 780.905(7)(a). Requiring defendants to restore victims, while laudable, is quintessentially punitive for the reasons discussed above.

Of course, from December 29, 2008, until October 1, 2009, the Legislature directed the Fund to funnel any "excess revenue" into five unrelated projects: (1) the sex offender registry, (2) the "Amber Alert" missing child notification system, (3) polygraph tests, (4) forensic expert testimony, and (5) treatment for victims of sexual assault. 2008 PA 396 (amending MCL 780.904). This diversionary program, however, sunsetted before the effective date of the statutory amendment giving rise to the instant case. *Id.* Beginning October 1, 2014, the Fund will again have the power to divert excess funds to a statewide trauma system. MCL 780.904(3), 2010 PA 280 (effective April 1, 2011). But for all times relevant to this case, the assessment supported reimbursement and services to make victim's whole.

7. Excessive with Respect to Alternative Purpose

Finally, this Court must consider "whether [the sanction] appears excessive in relation to the alternative purpose assigned[.]" *Mendoza-Martinez*, 372 US at 169 (citation omitted). As discussed above, the assessment serves no non-punitive purpose, at least not today. Even if the above-listed side projects are deemed to be non-punitive, Mr. Earl's assessment will not be used to pay for them. For future indigent defendants, however, requiring a $130 assessment to pay for a statewide trauma system is excessive, particularly in those cases where the system is not used.

C. Conclusion

In sum, the Legislature intended the crime victims' rights assessment as punishment, and the assessment has a punitive effect. The Ex Post Facto Clause therefore barred the Legislature from retroactively increasing that punishment. As a remedy, this Court should construe 2010 PA 281 as applying prospectively only to crimes committed after it took effect on December 16, 2010. This remedy is consistent with this Court's "duty … to read the Michigan act to be consistent with the Federal Constitution, if such interpretation can be made without doing violence to the language used by the Legislature." *Larkin v Wayne County Prosecutor*, 389 Mich 533, 541; 208 NW2d 176 (1973). Additionally, this Court should remand for ministerial correction of the judgment of sentence to reflect a $60 assessment, not a $130 assessment.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant Ronald Lee Earl asks this Honorable Court to find that the crime victims' rights assessment of MCL 780.905 constitutes punishment implicating the Ex Post Facto Clause. Mr. Earl further asks this Court to construe 2010 PA 281 as applying prospectively only to crimes committed after it took effect on December 16, 2010. Finally, Mr. Earl asks this Court to remand for the ministerial correction of the judgment of sentence to reflect a $60 assessment, not a $130 assessment.

Respectfully submitted,

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ATTACHMENT A

Voters to Decide Whether to Add Crime Victims' Rights to Constitution, Gongwer News Service No. 198, Oct 12, 1988

decision to file the suit. He said any money that a court might order be released by the national committee would go for television and radio ads in the last two weeks of the campaign, and not to reimburse him for his own contributions. Mr. Dunn has not run any advertising since October 2.

Mr. Dunn acknowledged a "mixed bag" of reactions among state party officials, with most believing he has a "legitimate gripe but they'd rather I didn't go forward with this." But he said no one asked him not to file suit.

Republican Party Chair Spencer Abraham, in a statement, said, "Since this is a matter in litigation, I have been advised to limit my comments. Here in Michigan, we are working as hard as we can for Jim's election."

House Minority Leader Paul Hillegonds (R-Holland) said he does not believe the controversy will hurt Republican candidates trying to narrow the 64-46 Democratic edge in the House, saying its impact will likely be limited to creating bad feelings between the National Committee and Mr. Dunn. "Jim is trying very hard to make sure he's not a negative," he said noting Mr. Dunn is not attacking the state party.

He said the money situation is similar to 1982 when the national committee did not give substantial aid to Phil Ruppe, but Mr. Ruppe did not sue.

Democratic Party Chair Rick Wiener said the suit is an "act of a very desperate man." He said it indicates the Republican National Committee recognizes the tremendous voter support for Mr. Riegle.

Mr. Dunn first aired his complaints about the National Committee last month, and said officials have refused to talk to him about reasons why the money has been held up. He alleges the committee hampered his campaign in other ways, such as excluding him from a list of U.S. Senate challengers to be aided by a group of party contributors, not informing him of President Reagan's offer to cut ads on behalf of Republican Senate challengers, and blocking payment of a mass mailing.

Mr. Mason, who said the committee is giving the full $638,938 allowed under federal law to a majority of the 33 Senate Republican challengers across the country, said contributions are based on how competitive the race is, how competitive it is relative to other races, and the ability of the committee to make a contribution.

The case was assigned to U.S. District Judge Richard Enslen. No hearing date has been set. If the request is granted for an injunction forcing the committee to release the funds, Mr. Dunn would have to post a bond to ensure repayment of the money should the decision eventually be reversed.

VOTERS TO DECIDE WHETHER TO ADD CRIME VICTIMS' RIGHTS TO CONSTITUTION

Probably one of the best kept secrets on the November 8 ballot is Proposal B, in which voters for the 45th time will be asked to amend the Constitution, this time to include a provision on crime victims' rights. Of the four statewide proposals, it is the only one seeking a revision of the 1963 Constitution.

Amendments have been adopted by voters just 15 times, the last ones in 1984 establishing a Natural Resources trust fund and revising procedures to approve administrative rules. However, almost twice as many proposed amendments have gone down to defeat, with voters rejecting 29 issues.

The proposal, which spells out crime victim's rights throughout the criminal justice process, found its way to the ballot through the regular legislative channels with two-thirds majority support of HJR "P," sponsored by Rep. William Van Regenmorter (R-Jenison).

Mr. Van Regenmorter said with all the controversy surrounding the Medicaid abortion issue (Proposal A) and the environmental bonds (Proposals C and D) receiving the full backing of government, Proposal B will have to be a true grass roots effort.

He said it will be a word-of-mouth campaign conducted by individual victims and victim organizations through speaking engagements and newsletters. These organizations include Save our Sons and Daughters (SOSAD) and Mothers Against Drunk Driving (MADD). He noted the Michigan State Police Troopers Association have taken it upon themselves to print bumper stickers in support of the proposal which will be distributed by the association and other victim organizations.

Mr. Van Regenmorter said a ballot proposal committee and advisory board have been established. Called Victims Organized Toward Equity (VOTE), the committee is contacting individuals and organizations to explain the proposal and ask for support. He said the group has no plans for a media campaign unless funding is received for some yet unidentified source.

The issue does apparently at least have substantial surface appeal. It is favored by an 80-12 margin in a poll sponsored by the Institute for Campaign and Election Studies of the State Chamber Foundation. Only 5 percent of the 800 voters in the sample said they did not know enough about the proposal to give a specific response. The survey was conducted September 20-25.

Although there is a crime victims' bill of rights in statute (PA 87, 1985), Mr. Van Regenmorter said including the language in the Constitution would give it greater status and recognition for more reliable enforcement. At the very least, he said, inclusion of the victims' rights in the Constitution would provide balance as the Constitution currently contains a "host" of rights for criminal defendants.

Because of previous court decisions, Mr. Van Regenmorter said the courts have been unable to levy modest assessments on convicted criminals to pay for victims' rights. Proposal B, he said, will make this clear in the Constitution to allow such an assessment.

Mr. Van Regenmorter said he knows of no opposition to the proposal.

The ballot question lists that the rights, as provided by law, will include the right to be "treated with fairness and respect" with dignity and privacy; be "reasonably" protected from the accused; be notified of court proceedings and attend trials; confer with prosecution and make a statement to court at sentencing; restitution; timely disposition of the case; and information about conviction, sentence, imprisonment and release of the accused. The language of the ballot question permits the Legislature to enact laws to enforce crime victims' rights and provide for assessments against convicted defendants to pay for crime victims' rights.