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,

-vs-

Supreme Court
No. 145677

RONALD LEE EARL,

Defendant-Appellant.

_____/

Court of Appeals No. 302945
Oakland County Circuit Court No. 2010-232176-FC

Brief on Appeal – Appellee

Oral Argument Requested

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APPELLEE'S JURISDICTIONAL STATEMENT

The People agree with Defendant's jurisdictional statement.[1] Def's Br, p vi. This Court granted Defendant's application for leave to appeal. 493 Mich 945, 945; 828 NW2d 359 (2013) (19a).

This case involves a question of whether a recent public act implicates the *ex post facto* clauses of the Michigan and federal constitutions. The U.S. Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed[,]" US CONST, art I, § 9, cl 3, and that

> [n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. [US CONST, art I, § 10, cl 1.]

The Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." CONST 1963, art I, § 10.

The public act in question provides, in relevant part, as follows;

> The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:
> (a) If the offense is a felony, $130.00.
> (b) If the offense is a misdemeanor or ordinance violation, $75.00. [2010 PA 281 (3b), MCL 780.905(1)].

Prior to December 16, 2010, the statute read, in part:

> The court shall order each person convicted of a felony to pay an assessment of $60.00, and each person convicted of a serious misdemeanor or a specified misdemeanor to pay an assessment of $ 50.00. The court shall order a defendant to pay only 1 assessment under this subsection per criminal case. Payment of the assessment shall be a condition of a probation order entered under chapter XI of the code of criminal procedure. [1996 PA 344 (1b), former MCL 780.905(1)].

[1] Defendant alleges this Court has jurisdiction pursuant to two sections of the Michigan Constitution. Def's Br, p vi (citing CONST 1963 art I, §§ 4, 20). The reference to section 4, apparently, is a typographical error. Any such error is of no consequence, however, as the People do not dispute the court's jurisdiction in this matter.

COUNTER-STATEMENT OF QUESTION PRESENTED

I. WHERE THE TEXT OF THE CRIME VICTIMS RIGHTS ACT AND PROPOSAL B ESTABLISH THAT THE LEGISLATURE'S INTENT IN ENACTING THE C.V.R.A. ASSESSMENT WAS TO PROVIDE A FUNDING SOURCE FOR PROGRAMS IN SUPPORT OF CRIME VICTIMS' WELFARE, AND NOT TO PUNISH OFFENDERS; AND WHERE DEFENDANT CANNOT MEET HIS HEAVY BURDEN TO SHOW BY THE 'CLEAREST PROOF' THAT THE STATUTE IS SO PUNITIVE IN EFFECT OR PURPOSE AS TO OVERRIDE THE LEGISLATURE'S INTENT TO ESTABLISH A NON-PUNITIVE PROCEDURAL SCHEME, DOES THE LEGISLATIVE AMENDMENT VIOLATE THE *EX POST FACTO* CLAUSE OF THE STATE OR FEDERAL CONSTITUTIONS?

The People contend the answer is, "No."

Defendant contends the answer should be, "Yes."

The Court of Appeals answered, "No."

The trial court did not answer this question.

COUNTER STATEMENT OF FACTS

The Court of Appeals summarized the facts as follows:

> Defendant was convicted of robbing a Southfield branch of Bank of America on March 18, 2010, while dressed as a woman. He was identified as the perpetrator by both the confronted bank teller and a bank manager, and a bystander identified defendant as the person the bystander had observed fleeing from the area. The prosecution also presented three witnesses who each testified that defendant had approached them about being a getaway driver for a planned bank robbery. When defendant was arrested on March 24, 2010, the police found crack cocaine and heroin on his person. At trial, defendant conceded that he was guilty of the narcotics offenses, but denied committing the bank robbery. He presented an alibi defense through his fiancée, and the defense argued that the identification testimony was not credible, and that the witnesses who claimed that they were solicited to be a getaway driver were unreliable drug users.

People v Earl, 297 Mich App 104, 106-07; 288 NW2d 271 (2012) (13a). The Court of Appeals affirmed Defendant's conviction and sentence, *id.* at 106 (13a), including the trial court's imposition of the $130 Crime Victim's Rights Act (CVRA) assessment, *id.* at 111-14 (13a). Defendant did not object to the assessment in the trial court. *Id.* at 111 (13a).

The previous CVRA assessment amount for defendants convicted of a felony was $60. 1996 PA 344 (1b), former MCL 780.905(1). This amount increased to $130 on December 16, 2010. 2010 PA 281 (3b), MCL 780.905(1).

This Court granted Defendant's application for leave to appeal on the sole question of whether the trial court erred in ordering Defendant to pay a $130 CVRA fee in violation of the *ex post facto* clauses of the state and federal constitutions. 493 Mich at 945.

SUMMARY OF ARGUMENT

The sole question in this case is whether the $130 individuals convicted of a felony must pay as a Crime Victims Rights Act (CVRA) assessment is punishment. The People answer no. If it is not, the trial court's imposition of the assessment, which increased from $60 after Defendant committed an armed robbery, does not constitute an *ex post facto* violation because the federal and state constitutions prohibit retroactive application only of new or increased "punishment." *Cal Dep't of Corrs v Morales*, 514 US 499, 506; 115 S Ct 1597; 131 L Ed2d 588 (1995) (citing *Collins v Youngblood*, 497 US 37, 41; 110 S Ct 2715; 111 L Ed2d 30 (1990)).

The U.S. Supreme Court has rejected an interpretation that the federal Ex Post Facto Clause prohibits retroactive application of "any change which 'alters the situation of a party to his disadvantage[.]'" *Collins*, 497 US at 50 (quoting *Kring v Missouri*, 107 US 221, 235; 2 S Ct 443; 27 L Ed 506 (1883)). Accordingly, the focus is not whether the assessment disadvantages Defendant, but, instead, whether it punishes him. In fact, "a statute has been considered nonpenal if it imposes a disability, not to punish, **but to accomplish some other legitimate governmental purpose**." *Trop v Dulles*, 356 US 86, 96; 78 S Ct 590; 2 L Ed2d 630 (1958) (emphasis added).

Defendant's argument that the trial court's retroactive application of the higher CVRA assessment is punishment fails the two-prong legislative intent/effects test of *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140, 155 L Ed2d 164 (2003). Beginning with the "intent" prong, the text of Michigan's criminal code and the state constitution clearly differentiate between fines/penalties and non-punitive "assessments," the latter of which is the label the state attaches to Defendant's CVRA obligation. *See, e.g.*, CONST 1963, art I, § 24 (3) (emphasis added) ("The legislature may provide for an **assessment** against convicted defendants to pay for crime victims' rights."); and MCL 780.905(1) (emphasis added) ("The court shall order each person [convicted of a crime] to pay an **assessment** as

follows..."). The Legislature clearly differentiates between "fines" and "assessments" and treats the two differently. *See* MCL 750.5; MCL 769.1k(1)(b); MCL 775.22(2); MCL 775.22(5); MCL 780.766a(2). Importantly, the Library Clause of the Michigan Constitution directs that all penal **fines** support public libraries, whereas the CVRA assessment supports crime victims rights. CONST 1963, art VIII, § 9 (Library Clause); CONST 1963, art I, § 24(3) (hereinafter "the Crime Victims Rights Amendment" or "Proposal B"). Furthermore, the text of both the William Van Regenmorter Crime Victims Rights Act (hereinafter "the Van Regenmorter Act" or "CVRA"), MCL 780.901-780.911, and Proposal B establish the Legislature's intent that the assessment support a civil, non-punitive regime of victim services, trauma support and victim compensation.

The Legislature had no intent to punish when crafting or increasing the CVRA assessment statute. Therefore, Defendant must show by "the clearest proof" that "the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92 (quoting *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072, 138 L Ed2d 501 (1997)). Defendant cannot do so.

As part of the "effects" analysis, the court considers several factors, five of which the *Smith* Court identified as the "most relevant to our analysis." *Id.* at 97. First, because crime victims rights statutes and assessments are new concepts, there are no history or traditions to which to liken them, unlike "[f]ines[,]" in contrast, which "were by far the most common form of noncapital punishment in colonial America." *S Union Co v United States*, __ US __, 132 S Ct 2344, 2350; 183 L Ed2d 318 (2012). Defendant thus does not show that the assessment "has been regarded in our history and traditions as a punishment[.]" *Smith*, 538 US at 97. Second, the assessment is not equivalent to incarceration (physical restraint) or occupational debarment, thus the CVRA assessment does not constitute "an affirmative disability or restraint[.]" *Smith*, 538 US at 97.

Third, the assessment is a static $130 in **every** criminal case resulting in a felony conviction, regardless of the number or severity of charges, MCL 780.905(2), "meaning the more felonies one is convicted of at once, the *lower* the fee charged per felony. Thus, it is effectively the opposite of the way in which punishment is expected to operate." *People v Jones*, __ Mich App __, __ NW2d __, 2013 Mich App LEXIS 773, at *5 (2013). The assessment is not equivalent to a fine, as it is not "calculated by reference to particular facts." *S Union*, 132 S Ct at 2350. Thus, this low-dollar assessment has minimal deterrent or retributive value and does not "promote[] the traditional aims of punishment[.]" *Smith*, 538 US at 97.

With respect to the fourth and fifth factors, Defendant fails to show that the assessment lacks "a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Id.* As the People demonstrate in the argument portion of this brief, the assessment is necessary to support the welfare of Michigan crime victims, a special class of persons in the state constitution. CONST 1963, art I, § 24. Given a forecast that a mere $60 assessment no longer would allow the state to fully fund victims services pursuant to its constitutional mandate, and the fact that the Legislature had not increased the assessment since 1996, the state did not act excessively in bolstering the assessment to $130 per criminal case. Accordingly, utilizing the five *Smith* "effect" factors, Defendant does not meet his "heavy burden" of showing that the assessment "is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92; *Hendricks*, 521 US at 361.

Hence, because Defendant fails to establish that the Legislature's intent was to punish — to "chastise, deter or discipline an offender[,]'" *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007)) — and because he fails to show by the "clearest proof" that the purpose or effects of the statute are "so punitive" regardless of the non-punitive label, Defendant does not demonstrate that

the CVRA assessment is "punishment" within the meaning of the *ex post facto* clauses. Accordingly, the trial court did not err when it ordered Defendant to pay the $130 CVRA assessment.

ARGUMENT

I. WHERE THE TEXT OF PROPOSAL B AND THE CRIME VICTIMS RIGHTS ACT ESTABLISH THAT THE LEGISLATURE'S INTENT IN ENACTING A C.V.R.A. ASSESSMENT WAS TO PROVIDE A FUNDING SOURCE FOR PROGRAMS IN SUPPORT OF CRIME VICTIMS' WELFARE, AND NOT TO PUNISH OFFENDERS; AND WHERE DEFENDANT CANNOT MEET HIS HEAVY BURDEN OF SHOWING BY THE 'CLEAREST PROOF' THAT THE STATUTE IS SO PUNITIVE IN EFFECT OR PURPOSE TO NEGATE THE LEGISLATURE'S INTENT TO ESTABLISH A NON-PUNITIVE PROCEDURAL SCHEME, THE LEGISLATIVE AMENDMENT DOES NOT VIOLATE THE *EX POST FACTO* CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS.

Issue Preservation and Standard of Review

Ordinarily, an appellate tribunal applies a *de novo* standard of review in considering whether state action violates the constitutional *ex post facto* clauses. *Davis v Henry*, 282 Mich App 656, 681; 765 NW2d 44 (2009). The People agree with Defendant, however, that he did not preserve this issue in the trial court, thus the Court's review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-64; 597 NW2d 130 (1999). Michigan courts treat the state prohibition on *ex post facto* laws as identical to its federal counterparts. *Attorney General v Mich Pub Serv Comm'n*, 249 Mich App 424, 434; 642 NW2d 691 (2002).

Law

A. The Crime Victim Rights Act Fee and State Obligations Under CVRA

In 1988, the Michigan electorate ratified Proposal B, the Crime Victim Rights Amendment, which stated that crime victims shall have "[t]he right to notification of court proceedings[, t]he right to attend trial and all other court proceedings the accused has the right to attend[, t]he right to confer with the prosecution[, ... and t]he right to information about the conviction, sentence, imprisonment, and release of the accused." CONST 1963, art I, § 24(1).

Proposal B further stated, in relevant part, that "[t]he legislature may provide for an assessment against convicted defendants to pay for crime victims' rights." CONST 1963, art I, §

24(3). The amendment also authorized the Legislature to "provide by law for the enforcement of the section." § 24(2).

Pursuant to section 24(2), the Legislature enacted what is now the William Van Regenmorter Crime Victims Rights Act, which provides that, within 24 hours of a victim's initial report of a crime to a law-enforcement agency, the agency must provide a victim with information concerning:

> (a) The availability of emergency and medical services, if applicable.
> (b) The availability of victim's compensation benefits and the address of the crime victims compensation board.
> (c) The address and telephone number of the prosecuting attorney whom the victim should contact to obtain information about victim's rights.
> [MCL 780.753].

Within 24 hours of a suspect's arraignment, the agency must give further notice "of the availability of pretrial release for the defendant, the telephone number of the sheriff or juvenile facility, and notice that the victim may contact the sheriff or juvenile facility to determine whether the defendant has been released from custody." MCL 780.755(1) (first sentence).[2]

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[2] Upon the victim's request, the agency must notify the victim of the arrest or any pretrial release of the defendant. *Id.* (second sentence). Furthermore, within seven days of arraignment and not less than one day before a preliminary examination, the prosecuting official must provide to victims:

> (a) A brief statement of the procedural steps in the processing of a criminal case.
> (b) A specific list of the rights and procedures under this article.
> (c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.
> (d) Details and eligibility requirements for compensation from the crime victim services commission under 1976 PA 223, MCL 18.351 to 18.368.
> (e) Suggested procedures if the victim is subjected to threats or intimidation.
> (f) The person to contact for further information.
> [MCL 780.756(1)].

At the victim's request, the prosecutor must apprise the victim of any court proceedings. MCL 780.756(2). Furthermore, the act obligates prosecuting officials to consult with victims prior to entering into a plea bargain, or sentencing agreement, or dismissing the charges. MCL 780.756(3). Upon conviction, the prosecuting official must notify the victim of

> (a) The defendant's conviction.
> (b) The crimes for which the defendant was convicted.
> (c) The victim's right to make a written or oral impact statement for use in the preparation of a presentence investigation report concerning the defendant.
> (d) The address and telephone number of the probation office which is to prepare the presentence investigation report.

In 1989, the Legislature established the Crime Victim Services Commission (CVSC), whose present duties are to:

> (a) Investigate and determine the amount of revenue needed to pay for crime victim's rights services.
> (b) Investigate and determine an appropriate assessment amount to be imposed against convicted criminal defendants and juveniles for whom the probate court or the family division of circuit court enters orders of disposition for juvenile offenses to pay for crime victim's rights services.
> (c) By December 31 of each year, report to the governor, the secretary of the senate, the clerk of the house of representatives, and the department the commission's findings and recommendations under this section.
> [MCL 780.903].

The Legislature also authorized a Crime Victims Rights Fund to support crime victim services. MCL 780.904. Assessments from convicted defendants support that fund. The assessment provision of the statute provides, in relevant part, as follows:

> The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of

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> (e) That a presentence investigation report and any statement of the victim included in the report will be made available to the defendant unless exempted from disclosure by the court.
> (f) The victim's right to make an impact statement at sentencing.
> (g) The time and place of the sentencing proceeding.
>
> (2) The notice given by the prosecuting attorney to the victim must be given by any means reasonably calculated to give prompt actual notice.
>
> (3) A notice given under subsection (1) shall inform the victim that his or her impact statement may include but shall not be limited to the following:
> (a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
> (b) An explanation of the extent of any economic loss or property damage suffered by the victim.
> (c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.
> (d) The victim's recommendation for an appropriate sentence.
> [MCL 780.763].

The prosecutor must give victims similar notice concerning the occurrence and result of appellate proceedings. MCL 780.768a. Should the trial court terminate a defendant's probation earlier than the time frame it established at sentencing, the court must notify the victim. MCL 780.768b. Should defendants seek to set aside (expunge) their convictions, the prosecuting officials must notify the victims. MCL 780.772a.

Courts and agencies that provide crime victim services in furtherance of the act may apply to the state for funds to support such services. MCL 780.906. Under the law, state government is to "make the implementation of crime victim's rights a priority, and may develop financial incentive programs to enhance the delivery of crime victim's rights services under this act." MCL 780.907(2).

judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:

(a) If the offense is a felony, **$130.00**.

(b) If the offense is a misdemeanor or ordinance violation, $75.00.

[2010 PA 281 (3b), MCL 780.905(1) (emphasis added)].

Prior to December 16, 2010, the statute read, in relevant part:

> The court shall order each person convicted of a felony to pay an assessment of **$ 60.00**, and each person convicted of a serious misdemeanor or a specified misdemeanor to pay an assessment of $ 50.00. The court shall order a defendant to pay only 1 assessment under this subsection per criminal case. Payment of the assessment shall be a condition of a probation order entered under chapter XI of the code of criminal procedure. [1996 PA 344 (1b), former MCL 780.905(1) (emphasis added)].

Public Act 223 of 1976 established the Crime Victims Compensation Board, now the CVSC. MCL 18.352, 1976 PA 223. The act and its successors authorized CVSC to promulgate rules, to "[i]nvestigate and determine claims for awards[,]" to conduct a public-awareness program regarding crime victims' rights, to "[m]onitor, evaluate, and coordinate state and local victim assistance programs[,]" and to administer federal funds pursuant to the federal Victims of Crime Act of 1984, 42 USC §§ 10601-10608. MCL 18.353(1).[3]

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[3] Subject to various exceptions, victims may file claims within one year of the crime. MCL 18.355. The act specifically provides that "[a] claim shall be investigated and determined regardless of whether the alleged criminal was apprehended, prosecuted, convicted, acquitted, or found not guilty of the crime in question[.]" MCL 18.356(2). Crime-victim compensation covers "out-of-pocket loss, including indebtedness reasonably incurred for medical or other services necessary as a result of the injury upon which the claim is based, together with loss of earnings or support resulting from the injury." MCL 18.361(1) (first sentence). These awards may include funeral and burial expenses, grief counseling for relatives, crime-scene cleanup services and psychological counseling. MCL 18.361(3) and (4). The cap on awards is $25,000 per claimant. MCL 18.361(1) (second sentence).

The state may also pay claims to healthcare providers who conduct sexual assault medical forensic examinations. MCL 18.355a. Victims of sexual assault may elect to have the state pay for such examinations, and for their healthcare provider not to bill or to disclose the examination to their insurance providers "if [the victim] believes that submitting a claim to the insurance carrier would substantially interfere with his or her personal privacy or safety." MCL 18.355a(3)(a). The state does not permit compensation for loss to personal property, for pain and suffering or for nonpecuniary damages. MICH ADMIN CODE R 18.356.

CVRA assessments "support[] comprehensive mandatory rights of crime victims to participate and be notified of all pertinent proceedings in the criminal justice process, compensation for crime related losses, and training of advocates to better assist victims." Crime Victim Svcs Comm'n, Annual Report FY 2011, <http://www.michigan.gov/documents/mdch/2011_Annual_Report_Final2_400770_7.pdf> (accessed August 4, 2013). Pursuant to Public Act 280 of 2010, any funds in excess of those CVSC deems necessary to provide crime victim services are to support a statewide trauma system. MCL 780.904.

In 2011, the state spent CVRA funds for victim services as follows[4]:

Victims Rights Prosecutor Grants	$5,919,312
Victims Rights Cases	84,288
MCVNN[5] Crime Victims Registered for Notification	27,304
MCVNN Crime Victim Notification Calls	320,436
MCVNN Email Notifications	25,355
MCVNN Text Notifications	2,328

In addition to the amounts the state awarded for crime victim services, the agency also awarded $3.59 million in compensation to victims of crime.[6] It assisted in disbursing $13.3 million in federal pass-through dollars through the federal Victims of Crime Act.[7] "The Crime victim assistance program provides federal pass-through dollars in grants to local public and non-profit agencies that engage in direct services to crime victims in the community."[8] "Direct services that may be funded include crisis counseling, therapy, group treatment, shelter and safe-house, emergency legal and personal advocacy, information and referral, and criminal justice support."[9] Without funding from the CVRA assessment, such programs would not be possible.

B. Ex Post Facto Laws

1. Ex Post Facto Laws Generally

Three state and federal constitutional provisions reference *ex post facto* laws. The U.S. Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed[,]" US CONST, art I, § 9, cl 3, and that

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[4] Crime Victim Svcs Comm'n, Annual Report FY 2011, <http://www.michigan.gov/documents/mdch/2011_Annual_Report_Final2_400770_7.pdf> (accessed August 4, 2013).

[5] "The Michigan Crime Victim Notification Network (MCVNN) is a free, confidential, fully automated telephone notification service that immediately notifies registered crime victims and other users upon a change in an offender's custody status." Crime Victim Svcs Comm'n, Annual Report FY 2011, <http://www.michigan.gov/documents/mdch/2011_Annual_Report_Final2_400770_7.pdf> (accessed August 4, 2013).

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

> [n]o State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. [US CONST, art I, § 10, cl 1].

The Michigan Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." CONST 1963, art I, § 10.

The United States Supreme Court continues to follow Justice Samuel Chase's definition of *ex post facto* laws:

> 'Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.'

Carmell v Texas, 529 US 513, 522; 120 S Ct 1620; 146 L Ed2d 577 (2000) (quoting *Calder v Bull*, 3 US 386, 390; 1 L Ed 648 (1798) (Chase, J.)). *See also Dobbert v Florida*, 432 US 282, 292; 97 S Ct 2290; 53 L Ed 2d 344 (1977); and *Beazell v Ohio*, 269 US 167, 169-70; 46 S Ct 68; 70 L Ed 216 (1925)).

The U.S. Supreme "Court has consistently adhered to the view expressed by Justices Chase, Paterson, and Iredell in *Calder* that the Ex Post Facto Clause applies only to penal statutes." *Collins*, 497 US at 42 n2. In *Collins*, the Supreme Court overruled a prior holding that the *ex post facto clauses* prohibit retroactive application of "any change which 'alters the situation of a party to his disadvantage[]' [as] such a reading of the Clause departs from the meaning of the Clause as it was understood at the time of the adoption of the Constitution, and is not supported by later cases." *Id.* at 50 (quoting *Kring*, 107 US at 235). Explaining its holding in *Collins*, the high court observed that "the focus of the *ex post facto* inquiry is not on whether a

legislative change produces some ambiguous sort of 'disadvantage,' ... but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 US at 506 (citing *Collins*, 497 US at 41).

Essentially, "[a]n ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed." *Burgess v Salmon*, 97 US 381, 384; 24 L Ed 1104 (1878). *See also Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996) (citing *People v Moon*, 125 Mich App 773, 776; 337 NW2d 293 (1983); and *Harisiades v Shaughnessy*, 342 US 580, 594; 72 S Ct 512; 96 L Ed 586 (1952)) ("It always has been considered that that which it forbids is penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment."). "[T]he Constitution 'forbids the application of any new punitive measure to a crime already consummated.'" *Morales*, 514 US at 505 (quoting *Lindsey v Washington*, 301 US 397, 401; 57 S Ct 797; 81 L Ed 1182 (1937)).

2. "Punishment" Within the Meaning of the Ex Post Facto Clauses

The purpose of the *ex post facto* clauses, the Michigan Court of Appeals explained, is "to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit legislative control of remedies and procedures that do not affect matters of substance." *Riley*, 216 Mich App at 244. "Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." *Id.* (citing *People v Russo*, 439 Mich 584, 592-93; 487 NW2d 698 (1992)). For the purpose of an *ex post facto* analysis, "[t]he critical question ... is whether the new provision imposes greater punishment after the commission of the offense, not merely whether it increases a criminal sentence." *Weaver v Graham*, 450 US 24, 32 n17; 101 S Ct 960; 67 L Ed2d 17 (1981).

As a member of this Court observed, "[a] punishment is a 'deliberate imposition, by some agency of the state, of some measure intended to chastise, deter or discipline an offender.'" *People v Boadway*, 482 Mich 1058, 1058; 758 NW2d 245 (2008) (Markman, J., concurring) (quoting *Golba*, 273 Mich App at 620).

> 'The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century . . . . If [a] guard accidentally stepped on [a] prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985.' [*Wilson v Seiter*, 501 US 294, 300; 111 S Ct 2321, 115 L Ed2d 271 (1991) (quoting *Duckworth v Franzen*, 780 F2d 645, 652 (CA 7, 1985))].

The United States Supreme Court has further clarified that

> [t]he question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession. [*Flemming v Nestor*, 363 US 603, 614; 80 S Ct 1367, 4 L Ed2d 1435 (1960) (quoting *De Veau v Braisted*, 363 US 144, 160; 80 S Ct 1146; 4 L Ed2d 1109 (1960) (plurality opinion of Frankfurter, J.))].

To determine whether a law constitutes punishment for the purpose of an *ex post facto* analysis, the court has developed a two-part test that assesses first, whether the legislature's intent in enacting the statute was to punish, and, if not, "whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92 (quoting *Hendricks*, 521 US at 361).

a. Step 1: Determine Whether the Legislature Intended to Punish

In *Smith*, the United States Supreme Court explained that the critical question in an *ex post facto* analysis is "'whether the legislature meant the statute to establish 'civil' proceedings.'" 538 US at 92 (quoting *Hendricks*, 521 US at 361). However, "[i]n making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly

understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *United States v Halper*, 490 US 435, 447; 109 S Ct 1892; 104 L Ed2d 487 (1989), overruled on other grounds, *Hudson v United States*, 522 US 93; 118 S Ct 488, 139 L Ed2d 450 (1997).

The court further explained that

> [w]hether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' *Hendricks*, *supra*, at 361 (internal quotation marks omitted); see also *Hudson*, *supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, 4 L. Ed. 2d 1435, 80 S. Ct. 1367 (1960). A conclusion that the legislature intended to punish would satisfy an ex post facto challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it. [*Smith*, 538 US at 92-93].

The *Smith* Court further held that "[w]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Id.* at 93-34 (quoting *Flemming*, 363 US at 616). To that end, the reviewing court examines whether the legislature's intent contains "'a legitimate nonpunitive governmental objective.'" *Id.* at 93 (quoting *Hendricks*, 521 US at 363). The U.S. Supreme Court further observed that "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Id.* at 96.

b. Step 2: In the Absence of Legislative Intent to Punish, Determine Whether the Act Has a Highly Punitive Effect that Overrides Legislative Intent

Having determined a non-punitive intent, the reviewing court "must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92 (quoting *Hendricks*, 521 US at 361). "'[O]nly the clearest proof' will suffice to override legislative intent and transform what has been

denominated a civil remedy into a criminal penalty[.]'" *Id.* (quoting *Hudson*, 522 US at 100). The United States Supreme Court has characterized the "clearest proof" standard as a "heavy burden." *Hendricks*, 521 US at 361.

The *Smith* Court explained:

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose. [*Id.* at 97 (citing *Kennedy v Mendoza-Martinez*, 372 US 144, 168-69 (1963))].

Two other, less relevant factors are "whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime[.]" *Id.* at 105 (citing *Mendoza-Martinez*).

In assessing the *Mendoza-Martinez* factors, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance[unless t]he imprecision ... suggest[s] that the Act's nonpunitive purpose is a 'sham or mere pretext.'" *Smith*, 538 US at 103 (quoting *Hendricks*, 521 US at 371 (1997) (Kennedy, J., concurring)).

3. *Smith v Doe*: Sex Offender Registration and the *Ex Post Facto* Clauses

In *Smith*, the United States Supreme Court considered whether an Alaska sex-offender registration law that applied to all convicted sex offenders violated the *ex post facto* clauses. 538 US at 90 (citing ALASKA STAT §§ 12.63.010(a), (b)). Pursuant to the Alaska act, the state maintained a central registry of convicted sex offenders and published the following to the public:

> the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the

> update] requirements . . . or cannot be located.' [*Id.* at 91 (citing ALASKA STAT § 18.65.087(b))].

Alaska elected to publicize the information on the Internet. *Id.* at 91.

The United States Supreme Court noted Alaska's legislative finding that "'sex offenders pose a high risk of reoffending,' and identified 'protecting the public from sex offenders' as the 'primary governmental interest' of the law.'" *Id.* at 93 (quoting 1994 ALASKA SESS. LAWS CH 41, § 1). "[A]n imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *Id.* (quoting *Hendricks*, 521 US at 363). Furthermore, even if the Alaska Constitution identified protecting the public as a purpose of criminal administration, the high court observed that "where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Id.* (quoting *Flemming*, 363 US at 616).

The *Smith* Court did not ignore that Alaska codified the registration requirements in its criminal procedure code. *Id.* However, it observed that

> Title 12 of Alaska's Code of Criminal Procedure (where the Act's registration provisions are located) contains many provisions that do not involve criminal punishment, such as civil procedures for disposing of recovered and seized property, ... laws protecting the confidentiality of victims and witnesses, ...; laws governing the security and accuracy of criminal justice information, ... laws governing civil postconviction actions, ...; and laws governing actions for writs of habeas corpus, ..., which under Alaska law are 'independent civil proceedings[.]' Although some of these provisions relate to criminal administration, they are not in themselves punitive. The partial codification of the Act in the State's criminal procedure code is not sufficient to support a conclusion that the legislative intent was punitive. [*Id.* at 95 (internal citations omitted)].

Accordingly, the court concluded that Alaska had a legitimate nonpunitive intent in enacting the sex offender registration provisions and applying them retroactively to previously convicted sex offenders and child kidnappers. *Id.* at 96.

The court then turned to analyzing whether the effects of the act were so punitive as to override the official intent. To that end, it considered whether the history and traditions suggested the registration provisions evinced an intent to punish. *Id.* at 97. The United States Supreme Court observed:

> Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.
> [*Id.* at 98-99].

With respect to the next factor, the court considered whether the statute imposed an affirmative disability or restraint. *Id.* at 100. It held that, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* The high court continued:

> The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. *Hudson*, 522 U.S., at 104. The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. See *ibid.* (forbidding further participation in the banking industry); *De Veau v. Braisted*, 363 U.S. 144, 4 L. Ed. 2d 1109, 80 S. Ct. 1146 (1960) (forbidding work as a union official), *Hawker v. New York*, 170 U.S. 189, 42 L. Ed. 1002, 18 S. Ct. 573 (1898) (revocation of a medical license). The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.
> [*Id.* at 98-99].

The registration requirements were dissimilar to probation or supervised release because "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction[,]" whereas "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101. It rejected the suggestion that the deterrence

value of the requirements suggested an overly punitive effect, as "'[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation.'" *Id.* at 101 (quoting *Hudson*, 522 US at 105).

That the legislation had a rational connection to a legitimate nonpunitive purpose, was the "most significant" factor in its determination that the registry act's provisions were not so punitive as to override the state's nonpunitive intent. *Id.* at 102-03. Whereas offenders argued the state should have drawn the statute more narrowly, the U.S. Supreme Court reiterated that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance. The imprecision respondents rely upon does not suggest that the Act's nonpunitive purpose is a 'sham or mere pretext.'" *Id.* at 102 (quoting *Hendricks*, 521 US at 371 (Kennedy, J., concurring)). The statute was not excessive in relation to the state's purpose in mandating registration given offenders' high rate of recidivism. *Id.* at 103. The high court explained:

> The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau*, 363 U.S. at 160; *Hawker*, 170 U.S., at 197. As stated in *Hawker:* 'Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application . . . .' *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause. [*Id.* at 103-04].

Accordingly, the court rejected the offenders' challenge to the act on *ex post facto* grounds because "respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme." *Id.* at 106.

Discussion

For the reasons the People explain herein, the CVRA assessment is not punishment. The text of the statute does not suggest the Legislature's intent was to punish offenders. *Morales*, 514 US at 506. Nor can Defendant establish by the "clearest proof" that "the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 92. Because the assessment is not punishment, the trial court's imposition of the higher $130 assessment to Defendant, who committed his crime before the assessment increased, does not constitute an *ex post facto* violation. *Riley*, 216 Mich App at 244; *Weaver*, 450 US at 32 n17.

A. The Text of Both the Van Regenmorter Act and Proposal B Establish that the Legislature's Intent Was Not Punitive, Rather to Provide a Funding Source for Programs in Support of Crime Victim Services and to Support the Welfare of Crime Victims.

Here, the text of Proposal B and the Van Regenmorter Act establish that the Legislature's intent in imposing the assessment was "'incident of the State's power to protect the health and safety of its citizens,' [thus, it must] be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Smith*, 538 US at 93-34 (quoting *Flemming*, 363 US at 616).

In one of its first sections, the Michigan penal code defines "crime" as "an act or omission forbidden by law which is not designated as a civil infraction, and which is **punishable** upon conviction by any 1 or more of the following:

(a) Imprisonment.
(b) Fine not designated a civil fine.
(c) Removal from office.
(d) Disqualification to hold an office of trust, honor, or profit under the state.
(e) Other penal discipline.
[MCL 750.5 (emphasis added)].

The Library Clause of the state constitution requires that "[a]ll fines assessed and collected ... for any breach of the penal laws shall be exclusively applied to the support of ... public libraries, and county law libraries as provided by law." CONST 1963, art VIII, § 9 (second sentence). "Fines were by far the most common form of noncapital punishment in colonial America. ... And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, is often calculated by reference to particular facts." *S Union*, 132 S Ct at 2350.

As Defendant observes, "the Library Clause does not apply to non-punitive costs and fees." Def's Br, p 21, ¶ 2. In ratifying Proposal B, the electorate did not even partially repeal the Library Clause. Proposal B, in fact, reads, "The legislature may provide for an **assessment** against convicted defendants to pay for crime victims' rights." CONST 1963, art I, § 24(3) (emphasis added). That Proposal B does not reference the Library Clause establishes that the assessment is **not** a fine. In fact, the clearest proof of the electorate's non-punitive intent in authorizing the CVRA assessment is that section 24(3) of the constitution does **not** read, "Notwithstanding the provisions of article I, section 24(3), the legislature may provide for ~~an assessment~~ **a fine** against convicted defendants to pay for crime victims' rights."[10]

Similarly, the statute authorizing courts to order convicted persons to pay various costs clearly differentiates between "fines" and assessments. The code of criminal procedure provides that, at sentencing:

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[10] Defendant argues that "a recent Attorney General opinion supports []his view." Def's Br, p 21, ¶ 3. In fact, the attorney general took no position whether the CVRA assessment is punitive. At the time of the opinion, the Legislature was considering amending the CVRA assessment statute. The attorney general cautioned the Legislature in amending the CVRA assessment statute, to "**be aware of the limitations** imposed by Const 1963, art 8, § 9, which requires that fines assessed for any breach of the penal laws be used to support libraries." OAG, 2008, No 7217 (July 8, 2008), 2008 Mich AG LEXIS 8, at *16 (emphasis added). The attorney general's words of caution derived from his opinion that "the assessment authorized under art 1, § 24 could **arguably** be regarded as a 'penal fine[.]'" *Id.* at *12 (emphasis added). He expressed no opinion whether the assessment was or was not a fine. Finally, even if the AG **had** expressed a position on the issue at bar, "Attorney General opinions are not binding on this Court." *Frey v Dep't of Mgmt & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987) (citing *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 412; 185 NW2d 9 (1971)).

[t]he court may impose any or all of the following:

(i) Any **fine**.
(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).
(iii) The expenses of providing legal assistance to the defendant.
(iv) Any **assessment** authorized by law.
(v) Reimbursement under section 1f of this chapter. [MCL 769.1k(1)(b) (emphasis added)].

The Van Regenmorter Act further distinguishes between fines and other costs such as assessments.

> The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, ... or in another way that is not an acquittal or unconditional dismissal, to pay an **assessment** as follows:
> (a) If the offense is a felony, $130.00.
> (b) If the offense is a misdemeanor or ordinance violation, $75.00.
> [MCL 780.905(1), 2010 PA 281 (3b) (emphasis added)].

"'Criminal sanctions' are 'punishments attached to conviction of crimes such as fines, probation and sentences.'" *Roark v Graves*, 936 P2d 245, 247 (Kan, 1997) (quoting Black's Law Dictionary 337 (5th ed 1979)). *See also People v Vlahon*, 977 NE2d 327, 333 (Ill App Ct 4th Dist, 2012) (citing *People v Jones*, 861 NE2d 967, 974 (Ill, 2006)) (holding that time a defendant served in pretrial custody "may only be applied to offset eligible fines, not fees."); and *People v White*, 776 NE2d 836, 839 (Ill App Ct 2d Dist, 2002) (holding that "[u]nlike a fine, which is punitive in nature, a cost does not punish a defendant in addition to the sentence he received, but instead is a collateral consequence of the defendant's conviction that is compensatory in nature."[11]

[11] Defendant argues the CVRA assessment is restitution in substance (if not in form), and, furthermore, restitution is punishment. Def's Br, pp 12-19. Hence, he argues, the assessment **must** be punishment. In *People v Grant*, however, this Court, in a unanimous opinion, rejected a view of restitution as punishment:

> Although restitution implies a penalty, the line between penal and that which is compensatory is not always clear. However, a legislative enactment that requires a defendant to return victims to something resembling their precrime status contrasts with the policy factors of rehabilitation, deterrence, protection of society, and punishment, that are the general foundation for criminal sentences usually involving a term of imprisonment, a fine, or both.

[455 Mich 221, 230 n10; 565 NW2d 389 (1997) (citing *People v Schultz*, 435 Mich 517, 531-32; 460 NW2d 505 (1990))].

Similarly, in *People v Peters*, this Court held that that a restitution order will survive a convicted defendant's death because restitution, **unlike a fine**, is compensatory and not penal in nature. 449 Mich 515, 522-526; 537 NW2d 160 (1995). *See also Boadway*, 482 Mich at 1058-59 (Markman, J., concurring) (explaining that "minimum state costs" under MCL 769.1k do not constitute punishment).

Defendant relies in part on *People v Slocum*, in which the Court of Appeals held that restitution is penal. 213 Mich App 239, 243-244; 539 NW2d 572 (1995). The *Slocum* Court, however, in reaching that determination, relied on a framework for *ex post facto* analysis that the United States Supreme Court has discarded. The *Slocum* Court wrote:

> Examining the law here in question, it is clear that the amendment would make the statute apply to defendant's extradition, and that action occurred before the amendment of the statute. **Thus, it must only be determined whether applying the statute to defendant would disadvantage him.** In *People* v *Peters (After Remand)*, 205 Mich. App. 312, 319; 517 N.W.2d 773 (1994), rev'd on other grounds, 449 Mich. 515; 537 N.W.2d 160 (1995), this Court determined that restitution is a form of punishment. Thus, the amendment of MCL 780.766; MSA 28.1287(766), by increasing the amount of restitution for which defendant would be responsible, would increase his punishment. Application of the statute in this case, therefore, would be in violation of the Ex Post Facto Clause. [*Id.* (emphasis added)].

Justice Markman has rightfully criticized *Slocum* as a complete misreading of *Peters*: He explained, "the Court of Appeals held [in *Slocum*] that a restitution statute authorizing the trial court to impose costs on a defendant constituted a 'punishment.' In doing so, it stated that '[*Peters*] determined that restitution is a form of punishment.' [213 Mich App at 244]. **This seems exactly the opposite of what *Peters* held.**" *Boadway*, 482 Mich at 1059 (Markman, J., concurring) (emphasis added).

The United States Supreme Court has since explained that "the focus of the *ex post facto* inquiry is **not** on whether a legislative change produces some ambiguous sort of **'disadvantage,'** ... but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 US at 506 (citing *Collins*, 497 US at 41).

Furthermore, *Slocum* relied on the *Kring* "disadvantage" test for *ex post facto* laws, which the United States Supreme Court discarded in *Collins* and *Morales*; thus *Slocum*'s holding is no longer good law. Accordingly, even if this Court were to view the CVRA assessment as restitution, the Court should clarify that restitution is not punishment and overrule *Slocum* as inconsistent with the United States Supreme Court's jurisprudence in *Collins* and *Morales, and* this Court's own jurisprudence in *Peters* and *Grant*.

Regardless, the CVRA assessment is not restitution. "The purpose of restitution is to 'allow crime victims to recoup losses suffered as a result of criminal conduct.'" *People v Newton*, 257 Mich App 61, 68; 665 NW2d 504 (2003) (quoting *Grant*, 455 Mich at 230). As the People already detailed in describing the history and purposes of Proposal B and the Van Regenmorter Act, the CVRA assessment provides a revenue stream for a host of programs in furtherance of the rights of crime victims under the Michigan Constitution.

In its most recently available annual report, the Crime Victims Services Commission awarded $4.19 million in compensation in fiscal year 2010-11, which was more than one-third **less** than the $6.40 million the commission paid to prosecuting officials and other agencies to support victims' rights services and crime-victim notifications. Crime Victim Svcs Comm'n, Annual Report FY 2011, <http://www.michigan.gov/documents/mdch/2011_Annual_Report_Final2_400770_7.pdf> (accessed August 4, 2013). Accordingly, Defendant's use of the word "much" when he argues that "**much** of [CVRA assessment] money is used to fund the Compensation Act," Def's Br, p 17, ¶ 3 (emphasis added), is an inartful way of conceding that **less than half** of CVRA assessment revenue supports victim compensation.

In any event, compensation within the meaning of the act is not equivalent to restitution. Restitution in criminal cases only arises upon conviction of a crime. *People v Becker*, 349 Mich 476, 486; 84 NW2d 833 (1957). In contrast, CVRA specifically provides that "[a compensation] claim shall be investigated and determined regardless of whether the alleged criminal was apprehended, prosecuted, convicted, acquitted, or found not guilty of the crime in question[.]" MCL 18.356(2).

Furthermore, the Crime Victims Rights Commission, the beneficiary of CVRA assessment revenue, has many duties other than providing compensation to victims, as it must "conduct a public-awareness program regarding crime victims' rights," "[m]onitor, evaluate, and coordinate state and local victim assistance programs" and administer federal funds pursuant to the federal Victims of Crime Act of 1984, 42 USC §§ 10601-10608. MCL 18.353(1). CVRA assessments also fund claims to healthcare providers who conduct sexual assault medical forensic

In *People v Mathews*, 202 Mich App 175, 176; 508 NW2d 173 (1993), the Michigan Court of Appeals rejected a defendant's contention that the CVRA assessment (then $30) was an unauthorized tax. The panel explained:

> The assessment is 'uniform upon the class . . . on which it operates,' Const 1963, art 9, § 3, and is not arbitrary in amount. The criminal assessment commission act provides that the assessment amount be investigated and determined by the commission on the basis of the amount of revenue needed to pay for crime victim rights services, MCL 780.903; MSA 28.1287(903). Moreover, contrary to defendant's assertions, the **Legislature's decision to assess convicted felons the same amount to fund the services is not arbitrary or irrational**, considering services provided to victims of felonies are provided without regard to the seriousness of the offense. [*Id.* (emphasis added)].

The *Mathews* Court observed that the electorate specifically authorized the CVRA assessment in the Michigan Constitution, and by implication, prioritized the rights of crime victims when it ratified Proposal B. *Id. See also People v Chapman*, 301 Mich 584, 597; 4 NW2d 18 (1942) (holding that, in *ex post facto* categorizations, "It is well recognized that the legislature may make classifications of persons, provided such classifications are based on substantial distinctions and are in accord with the aims sought to be achieved.")

In ratifying Proposal B, the People made a series of findings and policy judgments — they determined that crime victims are a special class of persons and that, because of their status, these individuals deserve specific constitutional rights to minimize the emotional harm and distress they may suffer during the process of criminal litigation. Those rights are:

> The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.
> The right to timely disposition of the case following arrest of the accused.

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examinations pursuant to state law where victims do not wish to tell their insurance carriers that they are victims of rape. MCL 18.355a. Accordingly, even if the Court were to distinguish *Peters* and *Morales* and view restitution as a penalty, the CVRA assessment is not restitution. Defendant argues that "*Peter[s]* merely recognizes that restitution serves other goals and is therefore not a '[p]urely punitive sanction[].'" Def's Br, p 18, ¶ 2 (quoting *Peters*, 449 Mich at 517). However, the U.S. Supreme Court has held that "the mere presence of [a deterrent] purpose is insufficient to render a sanction criminal, as deterrence 'may serve civil as well as criminal goals.'" *Hudson*, 522 US at 105 (quoting *United States v Ursery*, 518 US 267, 292; 116 S Ct 2135; 135 L Ed2d 549 (1996)).

> The right to be reasonably protected from the accused throughout the criminal justice process.
> The right to notification of court proceedings.
> The right to attend trial and all other court proceedings the accused has the right to attend.
> The right to confer with the prosecution.
> The right to make a statement to the court at sentencing.
> The right to restitution.
> The right to information about the conviction, sentence, imprisonment, and release of the accused. [CONST 1963, art I, § 24(1)].

Second, the Van Regenmorter Act, pursuant to authority from Proposal B, imposes numerous affirmative duties upon prosecuting attorneys, trial courts and law-enforcement agencies to provide services — informational and otherwise — to victims in furtherance of their constitutional rights. MCL 780.751-780.775, 780.781-780.802 and 780.11-780.834. In the words of the Crime Victims Services Commission, CVRA assessments "support[] comprehensive mandatory rights of crime victims to participate and be notified of all pertinent proceedings in the criminal justice process, compensation for crime related losses, and training of advocates to better assist victims."[12]

Eleven sections of the act concern the operations of the Crime Victim Services Commission and the procedures for collecting payments from convicted defendants. MCL 780.901-780.911. The assessment is a mere two lines in one section of a 67-section act. MCL 780.905(1)(a) and (b).

There is no dispute that the Van Regenmorter Act forms part of the Code of Criminal Procedure, which Defendant emphasizes heavily. Michigan's code covers such topics as extradition, MCL 780.1-780.31; jurisdiction over Great Lakes waters, MCL 780.51-52; bail in misdemeanor cases, MCL 780.61-780.63; disposition of files and papers relating to prosecution,

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[12] Crime Victim Svcs Comm'n, Annual Report FY 2011, <http://www.michigan.gov/documents/mdch/2011_Annual_Report_Final2_400770_7.pdf> (accessed August 4, 2013).

MCL 780.221-780.225; detainers, MCL 780.601-780.608; search warrants, MCL 780.651-780.659; immunity for witnesses, MCL 780.701-780.705; the Appellate Defender Act, MCL 780.711-780.719; self-defense and deadly force, MCL 780.951-780.974; and the Indigent Defense Commission, MCL 780.981-780.1003. As was **precisely** the case in Alaska, many of the provisions in the code "relate to criminal administration, [but] they are not in themselves punitive." *Smith*, 538 US at 95 (internal citations omitted). It was for that reason that the *Smith* Court observed that "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Id.* at 96. *See also United States v O'Neal*, 180 F3d 115, 123 (CA 4, 1999) (upholding retroactive application of statute barring felons from carrying firearms as having non-punitive purpose where "[t]he Act is merely a measured public safety provision whose applicability to those previously convicted of felonies is eminently reasonable.").[13]

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[13] As the People stated previously, the *Smith* analysis for *ex post facto* questions contains both an "intent" and "effects" prong. At two points in his analysis of the Legislature's intent, Defendant confuses "effects" factors with "intent" factors.

First, Defendant argues that because a CVRA assessment is part of a Defendant's sentence it **must** be a form of punishment, *See* Def's Br, p 11, ¶ 1. He emphasizes that "the statute only authorizes its imposition in cases where the defendant has been adjudicated guilty of wrongdoing. ... Acquitted defendants do not have to pay." Def's Br, p 11, ¶ 2. However, as the *Smith* Court observed, whether the regulation ties to a court's finding of scienter is one of the *Mendoza-Martinez*, or "effects," factors, and even then, it is not one of the five "most relevant to [the "effects"] analysis[.]" 538 US at 97.

In support of this meritless argument, Defendant cites *People v Cole*, 491 Mich 324, 335; 817 NW2d 497 (2012) (emphasis added), in which this Court held that, during the plea process, courts must advise defendants who plead guilty to first- or third-degree criminal-sexual-conduct that they will be subject to lifetime electronic monitoring because the monitoring requirement "is a **direct** consequence of a guilty or no-contest plea to a charge of CSC-I—or CSC-II involving a victim under age 13 and a defendant 17 or older[.]" This Court reached this conclusion because "mandatory lifetime electronic monitoring is part of the sentence itself[.]" *Id.* at 335. The *Cole* Court, however, did not consider whether the monitoring requirement was "punishment" within the meaning of the *ex post facto* clauses, rather whether lifetime monitoring was a "direct consequence" of a defendant's CSC conviction. *Id.* at 333. *See id.* (quoting *Brady v United States*, 397 US 742, 755; 90 S Ct 1463; 25 L Ed2d 747 (1970) (holding that the due process clauses of the Fifth and Fourteenth amendments require that "a defendant entering a plea must be 'fully aware of the direct consequences' of the plea.").

In fact, the *Smith* Court was well aware that a defendant's guilty plea to a specified sex offense will trigger registration requirements, but concluded that "the procedural mechanisms to implement the Act do not alter our conclusion." 538 US at 95.[13] There is no dispute that a CVRA assessment forms a part of a defendant's sentence, but that is of little import, as the United States Supreme Court has held that "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive." *Smith*, 538 US at 96. In *Smith*, the high court observed that there was nothing wrong with notifying offenders of their new obligations via the "plea colloquy or

On its face, the legislation evinces no evidence of legislative intent of "a deliberate act intended to chastise or deter." *Wilson*, 501 US at 300. There is no evidence that "the legislative aim was to punish that individual for past activity[.]" *Flemming*, 363 US at 614. Thus, the legislation's text demonstrates the "'legislature meant the statute to establish 'civil' proceedings.'" *Smith*, 538 US at 92 (quoting *Hendricks*, 521 US at 361). As the *Smith* Court held, "[w]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Id.* at 93-34 (quoting *Flemming*, 363 US at 616). Here, the text of the legislation establishes the Legislature's intent to promote the welfare of Michigan citizens, specifically victims of crime in Michigan. As the People already detailed in describing the history and purposes of the Proposal B and the Van Regenmorter Act, the assessment provides a revenue stream for a host of programs in furtherance of the rights of crime victims under the Michigan Constitution.[14] It was not to pile additional punishment atop existing jail time, probation and fines.

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the judgment of conviction." *Id.* "Where a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered 'as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Id.* at 93-34 (quoting *Flemming*, 363 US at 616).

Second, Defendant argues that "parolees and probationers who fail to [pay the CVRA assessment] may find themselves back in custody... establish[es] the Legislature's intent to punish." Def's Br, p 11-12, ¶ 3 (citing MCL 771.3(8) and 791.240a(11)). While it is true that a defendant's willful failure to pay the CVRA assessment may trigger unpleasant consequences, such consequences result from a **new** offense — failure to comply with probation or parole conditions — not to the original offense. In fact, the *Smith* Court considered, and rejected, a similar argument for the purpose of weighing the "affirmative disability or restraint" factor of the "effects" prong. 538 US at 101-02 ("A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.").

[14] The People were unable to find additional cases concerning crime victims assessments in other states. They have cited out-of-state cases concerning other fees not relating to crime victims throughout this brief.

Defendant, however, cites six cases for the proposition that "states with similar assessments view them as punitive." Def's Br, p 19, ¶ 1. However, the cases are entirely distinguishable and/or of no persuasiveness.

For example, Alabama treated a purported "assessment" as punishment where the amount of the assessment was at least $50 and up to $10,000 "for each such felony for which such person was convicted" and at least $25 and up to $1,000 "for each such misdemeanor for which such person was convicted[.]" *Taylor v State*, 586 So2d 964, 965 (Ala Crim App, 1991). That scheme is in stark contrast to Michigan's, where "[t]ellingly, the statute provides that a

B. Defendant Fails to Establish by the 'Clearest Proof' that the Statute is So Punitive in Effect or Purpose to Override the Legislature's Intent to Establish a Non-Punitive Procedural Scheme.

The Legislature had no punitive intent in enacting the CVRA assessment or in increasing its amount. Defendant cannot meet his heavy burden of manifesting by "the clearest proof" that "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 US at 93, 92 (internal quotations and citations omitted). Again, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]'" *Id.* (quoting *Hudson*, 522 US at 100).[15]

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defendant can be charged only one such fee per criminal case, meaning the more felonies one is convicted of at once, the *lower* the fee charged per felony. Thus, it is effectively the opposite of the way in which punishment is expected to operate." *Jones*, __ Mich App __, 2013 Mich App LEXIS 773, at *5. *See also* MCL 780.905(2) (emphasis added) ("The court shall order a defendant to pay only 1 assessment under subsection (1) **per criminal case**."). Furthermore, *Taylor* was a pre-*Collins/Morales* case, a point in time during which the *Kring* "disadvantage" test was still good law.

Second, Delaware reached a similar conclusion as Alabama where "assessments" were calculated as percentage fractions of a **fine**. *In re Petition of State*, 603 A2d 814, 815 (Del, 1992). (The "assessments" at issue were "an assessment of eighteen percent of the [$50,000] fine to the victim Compensation Fund, and an assessment of fifteen percent of the fine for payment to the Drug Rehabilitation Fund.") As was true in *Taylor*, this case also preceded *Collins* and *Morales*.

Third, similar to the Delaware and Alabama cases, a 2004 California case concerned not victim restitution, but "restitution **fines**." *People v Kunitz*, 122 Cal App4th 652, 657 (Cal App 3d Dist, 2004) (emphasis added). Such fines were "the product of two hundred dollars ($ 200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." *Id.* at 655. The California court, however, noted that, "[v]ictim restitution is not punishment[,]" whereas "[a] restitution fine, by contrast, is punishment, and thus must relate to the defendant's individual culpability." *Id.* at 657 (citations omitted).

Fourth, an Arizona case Defendant cited relied on the *Kring* "disadvantage" test, which is no longer good law, and interpreted a statute authorizing trial courts to impose "a monetary '**penalty**' if the court determined that such penalty was in aid of rehabilitation." *In re Appeal in Maricopa Cnty Juv Action*, 677 P2d 943, 944 (Ariz Ct App, 1984) (emphasis added). Again, in Michigan, the CVRA assessment is a flat fee of $130, regardless of the number of felony counts and irrespective of purposes of rehabilitation or culpability.

Finally, Defendant cites Florida and New York cases that reached the result he seeks, but with scant explanation as the path by which the respective courts reached those results. In fact, each of those opinions contains no more than one short paragraph regarding the defendants' *ex post facto* claims. *Majors v State*, 658 So2d 1234, 1235 (Fla Dist Ct App 1st Dist, 1995); *People v Sullivan*, 775 NYS2d 696, 696 (App Div 4th Dep't, 2004). It goes without saying that, for that an out-of-state case to constitute persuasive authority, it must contain at least a modicum of analysis.

[15] Defendant cites concurring and dissenting opinions that question the wisdom of the *Smith* holding requiring "only the clearest proof." Def's Br, p 22, ¶ 2 (citing *Smith*, 538 US at 107 (Souter, J., concurring); and *Smith*, 538 US at 114-15 (Ginsburg, J., dissenting)). This Court, however, has held that "'[w]here Federal questions are involved we are bound to follow the **prevailing** opinions of the United States supreme court.'" *Betty v Brooks & Perkins*, 446 Mich 270, 276; 521 NW2d 518 (1994) (emphasis added) (quoting *Harper v Brennan*, 311 Mich 489, 493; 18 NW2d 905 (1945)).

1. History and Traditions

With respect to the first of *Smith*'s "purpose and effect" factors, Defendant has made no showing that the CVRA assessment "has been regarded in our history and traditions as a punishment[.]" 538 US at 97. "Fines[,]" in contrast, "were by far the most common form of noncapital punishment in colonial America." *S Union*, 132 S Ct at 2350. The assessment is not a fine. Defendant does not allege that it is a fine. CVRA assessments, in fact, are a new concept, dating to the 1980s, and there are no history or traditions to which to liken such assessments.

Defendant repeats his allegation that restitution is punishment and CVRA is restitution, hence CVRA **must** be punishment. Def's Br, p 25, ¶ 2. However, Michigan courts have rejected the argument that restitution is punishment in *Peters*, *Grant* and *Boadway*, as the People discussed in Part A of this brief. *See supra* note 11. Defendant further cites some scholarship that

> [t]he Code of Hammurabi and the Bible contain references to a preference for restitution over physical punishment for crimes of theft. These texts, which call for repayment over and above the value of the stolen item, imply that the purpose of restitution was more than victim compensation; it was also to punish the offender. [Kleinhaus, Note, *Serving Two Masters: Evaluating the Criminal or Civil Nature of the VWPA and MVRA*, 73 FORDHAM L REV 2711, 2717 (2005)].

Importantly, the note author acknowledges that "the historical record is not complete." *Id.* At best, this admittedly incomplete historical record merely suggests that ancient governments imposed penal fines **in addition to** ("over and above," *id.*,) restitution, not that restitution is inherently punitive. The note also observes that "evidence exists that restitution continued to be meted out by judges in common law England as part of a criminal sentence." *Id.* at 2718.[16] The note then makes a passing reference to an obscure federal statute that incorporated restitution into a defendant's criminal sentence (which also included fines and possible imprisonment) and then quickly begins discussing the modern victim rights' movement. *Id.* at 2719. Accordingly,

[16] Again, there is no dispute that the CVRA is part of the criminal sentence. The dispute concerns whether the assessment is punishment. *See Morales*, 514 US at 506. *See supra* note 13.

the note argues, restitution is punishment. *Id.* Defendant, in turn, citing this note, repeats his allegation that the CVRA assessment is punishment. This argument is without merit. *See supra* note 11.

This complicated analysis obscures a very simple answer: crime victims rights legislation is a new concept. *Id.* at 2719-22. While fines and imprisonment are punishment, Defendant does not show that CVRA assessments to support crime victim services "ha[ve] been regarded in our history and traditions as a punishment[.]" 538 US at 97. Accordingly, this first factor does not evidence that the CVRA assessment is punitive in effect or purpose.

2. (Not) An Affirmative Disability or Restraint

Nor has Defendant shown that the CVRA assessment "imposes an affirmative disability or restraint[.]" *Smith*, 538 US at 97. Like the statutory scheme in *Smith*, "[t]he Act imposes no **physical** restraint, and so does not resemble the punishment of imprisonment, which is the **paradigmatic** affirmative disability or restraint." *Id.* at 98-99 (emphasis added) (citing *Hudson*, 522 US at 104). The current $130 assessment is "less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive[,]" nor does "[t]he Act [] restrain activities [defendants] may pursue but leaves them free to change jobs or residences." *Id. See also United States v Coccia*, 598 F3d 293, 298-299 (CA 6, 2010) (holding that retroactive application of a federal statute requiring convicted individuals to submit DNA samples constitutes some disability, but "the [bodily] intrusion was minimal[]" and "this fact does not establish the DNA Act as punitive.") Similar to the Michigan sex-offender law's registration and notification provisions, the CVRA assessment neither "inflicts suffering, disability, [n]or restraint on the" defendant. *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000) (quoting *Lanni v Engler*, 994 F Supp 849, 852-55 (ED Mich, 1998)).

Defendant asserts that "[t]here can be no doubt that the enhanced CVRA assessment 'disadvantage[s] the offender affected by it.'" Def's Br, p 23, ¶ 3 (quoting *Weaver*, 450 US at 29). However, in *Collins*, the Supreme Court overruled its prior holding that the *ex post facto clauses* prohibit retroactive application of "any change which 'alters the situation of a party to his disadvantage[.]'" 497 US at 50 (quoting *Kring*, 107 US at 235). The U.S. Supreme Court has clarified that "[t]he critical question ... is whether the new provision imposes greater punishment after the commission of the offense, **not merely whether it increases a criminal sentence.**" *Weaver*, 450 US at 32 n17 (emphasis added).

Even if the court were to construe the assessment as a some form of a disability or restraint, a $130 assessment is a very minor one, as the *Smith* Court specifically held that "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 100. To that end, it is not improper for the court to accord great weight to the assessment's small amount in considering its effects. *See Myrie v Comm'r*, 267 F3d 251, 260-61 (CA 3, 2001) (holding that a 10-percent surcharge on prison commissary sales is "comparatively minor" and not an "affirmative disability or restraint[.]"); *S Union*, 132 S Ct at 2351 (citing *Blanton v N Las Vegas*, 489 US 538, 541; 109 S Ct 1289, 103 L Ed2d 550 (1989) (reaffirming that "petty" offenses do not trigger a Sixth Amendment right to jury trial); and *DeMartino v Comm'r*, 862 F2d 400, 409 (CA 2, 1988) (holding that statutory 20-percent increase on interest payments the petitioner owed on delinquent taxes was "simply not so punitive as to be criminal either in purpose or effect[.]").

3. (Non-)Promotion of the Traditional Aims of Punishment

The CVRA assessment does not "promote the traditional aims of punishment[.]" *Smith*, 538 US at 97. Those "traditional aims" are deterrence and retribution. *Id.* at 102. An assessment

of $130 will not have any effect in deterring criminal conduct or in subjecting the offender to punishment, especially in light of the fact that a felony conviction necessarily exposes an individual to the possibility of one year or more in prison.

"[T]he assessment does not 'make[] more burdensome the punishment for a crime,' ... because it simply is not a consequence of any particular crime, but rather is a consequence of crime itself." *Jones*, 2013 Mich App LEXIS 773, at *5 (quoting *People v Russo*, 439 Mich 584, 592; 487 NW2d 698 (1992); and *Dobbert*, 432 US at 292-93). The *Jones* Court emphasized that:

> Tellingly, the statute provides that a defendant can be charged only one such fee per criminal case, meaning the more felonies one is convicted of at once, the *lower* the fee charged per felony. Thus, it is effectively the opposite of the way in which punishment is expected to operate. We are unpersuaded that *Earl* was wrongly decided.[*Id.* (emphasis in original)].

See also MCL 780.905(2) (emphasis added) ("The court shall order a defendant to pay only 1 assessment under subsection (1) **per criminal case**."). Moreover, "[t]he assessment is 'uniform upon the class . . . on which it operates,' Const 1963, art IX, § 3, and is not arbitrary in amount." *Mathews*, 202 Mich App at 176. Even if the court were to conclude that the act has some retributive or deterrent effects, even "a secondary criminal purpose may not undermine the [a]ct's primary remedial purpose, as deterrence 'may serve civil as well as criminal goals.' *Lanni*, 994 F Supp at 854 (quoting *Hudson,* 522 US at 105). In *Ursery*, the United States Supreme Court held that criminal forfeiture statutes do not violate the federal Ex Post Facto Clause, and in doing so observed that "though [the] statutes may fairly be said to serve the purpose of deterrence, we long have held that this purpose may serve civil as well as criminal goals." 518 US at 292.[17] Importantly, Defendant concedes that "restitution ... [is] not a '[p]urely punitive sanction[].'" Def's Br, p 18, ¶ 2 (quoting *Peters*, 449 Mich at 517).

[17] "Requiring the forfeiture of property used to commit federal narcotics violations encourages property owners to take care in managing their property and ensures that they will not permit that property to be used for illegal purposes." *Id.* at 290.

Furthermore, "services provided to victims of felonies are provided without regard to the seriousness of the offense.'" *Earl*, 297 Mich App at 113 (quoting *Mathews*, 202 Mich App at 176). *See also S Union,* 132 S Ct at 2350 (emphasis added) ("Fines were by far the most common form of noncapital punishment in colonial America. ... And the amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, **is often calculated by reference to particular facts**."); and *Vlahon*, 977 NE2d at 333 (holding that time defendant served in pretrial custody "may only be applied to offset eligible fines, not fees.") Finally, as the *Jones* Court noted, the assessment "does not act as a 'punishment' in the legal sense because it is tied to being a felon in the abstract, rather than to any specific crime." 2013 Mich App LEXIS 773, at *5.

4. A Rational Connection to a Nonpunitive Purpose

The assessment also "has a rational connection to a nonpunitive purpose[.]" *Id.* at 97. In ratifying Proposal B, the People recognized the importance of minimizing the pain and anguish crime victims may suffer in the criminal justice system. The Legislature provided for services state officials must render to victims in furtherance of that objective. Recognizing that such services would entail costs to the state, the People ratified the language that "[t]he legislature may provide for an assessment against convicted defendants to pay for crime victims' rights." CONST 1963, art I, § 24(3). In analyzing the fiscal impact of the bill elevating the assessment from $60 to $130, a Senate Fiscal Agency analyst wrote:

> The Crime Victim's Rights Fund had a surplus of $7.4 million at the beginning of FY 2009-10. Ongoing spending, exclusive of the cost of the programs subject to the sunset, is projected to be over $12.0 million in FY 2009-10. Anticipated revenue, without any changes in the statute, is projected to be about $9.2 million. **As such, if one assumes no changes in policy, the surplus will be exhausted by the beginning of FY 2012-13**. In effect, there is a structural deficit between the

revenue and the expenditures, **with an ongoing surplus available to allow for three more years of deficit spending** in the program.[18]

"The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103. There is no dispute that $130 is a higher assessment than the $60 assessment defendant would have had to pay prior to the 2010 amendment, but "a statute has been considered nonpenal if it imposes a disability, not to punish, **but to accomplish some other legitimate governmental purpose.**" *Trop*, 356 US at 96 (emphasis added).

5. (Not) Excessive With Regard to a Nonpunitive Purpose

Given the assessment's nonpunitive purpose, the assessment is not "excessive with respect to this purpose." *Smith*, 538 US at 97. Far from it. Prior to 2010, the CVRA assessment for felons was $60, which dated to 1996. 1996 PA 344 (1b), 2010 PA 281 (3b). The Bureau of Labor Statistics (BLS) of the U.S. Department of Labor regularly monitors changes in the Consumer Price Index. Per BLS' calculations, it would take $83.39 in 2010 to equal the buying power of $60 in 1996 dollars, and $89.29 to equal the same buying power in 2013. CPI Inflation Calculator, <http://data.bls.gov/cgi-bin/cpicalc.pl> (accessed August 4, 2013). In other words, the CVRA assessment's value as a revenue source diminishes every year the Legislature elects not to increase the assessment to adjust for inflation.

The $60 assessment remained static for 14 years, until 2010, when the Legislature chose to increase the assessment to $130. MCL 780.905(1); 1996 PA 344 (1b), 2010 PA 281 (3b). Perhaps, the Legislature could have authorized a state official to adjust the amount of the assessment every year or two years pursuant to changes in the CPI. Instead, it directed the Crime

[18] Senate Fiscal Agency: Crime Victim Services Fees H.B. 5661 (S-1) & 5667 (S-1): Floor Summary, <http://www.legislature.mi.gov/documents/2009-2010/billanalysis/Senate/htm/2009-SFA-5661-F.htm>, (accessed August 4, 2013) (emphasis added).

Victims Rights Commission to "[i]nvestigate and determine an appropriate assessment amount to be imposed against convicted criminal defendants." MCL 780.903(b). Thus, the Legislature instead chose to reserve the right to make any changes in the assessment's amount to itself, and then did so in 2010.

Additionally, "[t]he excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are **reasonable** in light of the nonpunitive objective." *Smith*, 538 US at 105 (emphasis added). *See Taylor v Rhode Island*, 101 F3d 780, 784 n7 (CA 1, 1996) (holding that retroactive imposition of fees for offenders on probation do not violate *ex post facto* clauses, and "[w]e note no contention, and no evidence, that the $15.00 monthly fee exceeds the costs associated with providing Department supervision of offenders released into the community."); *Roark*, 936 P2d at 247 (holding that prison system's imposition of $1 monthly fee to manage prisoners' trust accounts was not punitive as it was related to Kansas' penological goals and "reasonably prepares [prisoners] for reentry into the social and economic system of the community upon leaving the correctional institution.")

The lower court premised its determination that the CVRA assessment is not punishment on the uniformity of the assessments — which, at present, are the same for every felony ($130), and for every misdemeanor ($75), MCL 780.905(1), and noted the holding of *Mathews* that "'the Legislature's decision to assess convicted felons the same amount to fund the services is not arbitrary or irrational, considering services provided to victims of felonies are provided without regard to the seriousness of the offense.'" *Earl*, 297 Mich App at 113 (quoting *Mathews*, 202 Mich App at 176). The *Earl* Court emphasized the *Mathews* Court's holding that "'the

assessment is not intended to be a form of restitution dependent upon the injury suffered by any individual victim.'" *Id.* (quoting *Mathews*, 202 Mich App at 177). In short, the *Earl* panel was correct.

6. Other *Mendoza-Martinez* Factors:

Defendant repeats[19] his assertion that because "trial courts may only impose the CVRA assessment if the defendant is convicted or otherwise adjudicated guilty of a criminal offense[,]" Def's Br, p 25, ¶ 3, the CVRA assessment **must** be punishment. As was the case in *Smith*, however, "whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime — are of little weight[.]" 538 US at 105. California has rejected such an argument similar to Defendant's regarding incarceration fees inmates must pay:

> The fact that the fees come into play only upon a criminal conviction is a factor which can be viewed as punitive. However, an alternative view is that this simply reflects a legislative determination that those who are not convicted are involuntary users of the jail system who should not have to pay for services for which they did not choose to avail themselves; whereas those who are convicted in effect 'chose' to use the jail services when they chose to commit an unlawful act. [*People v Rivera*, 65 Cal App 4th 705, 711 (Cal App 3d Dist, 1998)].

See also Griffin v State, 980 So2d 1035, 1037 (Fla, 2008) (holding that "[a] statute is not punitive, for purposes of determining whether it violates the ex post facto clause, merely because it can be applied in the context of a criminal case.").

Similarly, in *Department of Corrections v Goad*, Florida employed a new statute to sue an inmate who committed a crime prior to the statute to partially recoup costs of incarceration. 754 So2d 95, 96 (Fla Dist Ct App 1st Dist, 2000). The inmate challenged the statute on *ex post*

[19] Earlier, in attempting to establish that the legislature had punitive intent (in the first prong of the *Smith* analysis), Defendant wrote that "the statute only authorizes its imposition in cases where the defendant has been adjudicated guilty of wrongdoing. ... Acquitted defendants do not have to pay." Def's Br, p 11, ¶ 2. The People addressed this argument earlier in their brief. *See supra* note 13.

facto grounds, but the court disagreed, explaining that the statute was "remedial" given the state's "urgent need to alleviate the increasing financial burden on the state and its local subdivisions caused by the expenses of incarcerating convicted offenders." *Id.* at 97, 98. *See also Griffin v State*, 980 So2d 1035, 1036-37 (Fla, 2008) (reaching a similar conclusion).

As was the case in *Smith*, "[t]he regulatory scheme applies only to past conduct, which was, and is, a crime," 538 US at 105, but the defendant's obligation to pay the assessment ties to being a member of a class—a class of persons with criminal convictions—which is not "predicated upon some present or repeated violation." *Id.* Furthermore, as in *Smith*, these two factors are not among the five "most relevant to [the "effects"] analysis[.]" *Smith*, 538 US at 97. Accordingly, they "are of little weight[.]" *Id.* at 105.

Finally, the U.S. Supreme Court has held that "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 US at 103. The CVRA assessment "does not act as a 'punishment' in the legal sense because it is tied to being a felon in the abstract, rather than to any specific crime." *Jones*, 2013 Mich App LEXIS 773, at *5.

Conclusion

Defendant fails to establish that the Legislature's intent was to punish — to "chastise, deter or discipline an offender[,]'" *Golba*, 273 Mich App at 620 — and fails to establish by the "clearest proof" that the purpose or effects of the statute are "so punitive" regardless of the Legislature's intent. Accordingly, the CVRA assessment is not "punishment" within the meaning of the *ex post facto* clauses. The trial court did not err when it ordered Defendant to pay a $130 CVRA assessment.

RELIEF

For the reasons they stated herein, the People respectfully request the Court affirm Defendant's judgment of sentence, including the trial court's order that he pay a $130 CVRA assessment.

Respectfully submitted,

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