STATE OF MICHIGAN

IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

PAUL J. BETTS, JR.,

Defendant-Appellant.

SC No. 148981

COA No. 319642

Lower Court File No. 12-062665-FH
Muskegon County Circuit Court

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PLAINTIFF-APPELLEE'S RESPONSE TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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Plaintiff-Appellee says, "No."
Defendant-Appellant says, "Yes."
The trial court says, "No."

COUNTERSTATEMENT OF JURISDICTION

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.302 *et seq*. An application for leave must be filed within 56 days of an opinion of the Court of Appeals. MCR 7.302(C)(2)(b). The Court of Appeals' order denying leave was entered on February 27, 2014. Accordingly, his application for leave to appeal is timely, having been filed within 56 days of the Court of Appeals' decision.

COUNTERSTATEMENT OF THE FACTS

Defendant applies for leave to appeal from the February 27, 2014, order of the Court of Appeals denying his application for leave to appeal from the July 2, 2013, judgment of sentence entered by the 14th Judicial Circuit Court for the County of Muskegon, the Honorable WILLIAM C. MARIETTI, presiding.

Defendant was convicted following a plea of nolo contendere of violation of sex offender registration act (SORA), MCL 28.729,[1] and by the trial court of being a habitual offender, third offense, MCL 769.11.

The trial court accepted the police report to support the factual basis for Defendant's no-contest plea. It provides:

> On 10-01-12 I was advised by an anonymous source that there was some concern about a sex offender frequenting both Verdonnis restaurant and The Coffee House. The party making the complaint advised they were concerned as the subject, identified as Paul J. Betts Jr, was not on the Michigan SOR and they saw that he was on the registry in Indiana. The complaint advised that he had made some inappropriate comments to some employees at both locations. The party making the complaint did not want their name involved.
>
> I checked Michigan SOR and saw that Paul was not registered in Michigan and was currently registered in Indiana. I contacted Det. Jason Morgan of the Tippecanoe County SD in Indiana. He advised he was familiar with Paul and he would check his listed address for me. He called me back a short time later and advised that Paul does not live there anymore and the new renters advised that he moved out over 2 months ago.
>
> I then met with employees at both Verdonnis and The Coffee House. I was advised by several employees that they were familiar with Paul and that he has made some comments that they considered inappropriate. None of the comments were to children or illegal but had raised concern for the employees. One alleged

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[1] Defendant had an obligation to register as a Tier III sex offender, MCL 28.722(v)(*ii*), based on his January 26, 1994, conviction of second-degree criminal sexual conduct involving a child under 13 years of age. MCL 28.722(w)(*v*)("'Tier III offense' means … [a] violation of section 520c … of the Michigan penal code, 1931 PA 328, MCL 750.520c …, committed against an individual less than 13 years of age."

comment Paul made was when he asked a male employee at Verdonnis if "there were any waitresses working that had daddy issues because he likes young girls".

I began attempting to locate Paul based on the description of his vehicle, a 2002 Ford pickup white in color with a red topper and a canoe on top. On 10-03-12 I located the truck parked in the south lot of Verdonnis. The truck had MI plate CGL1850 on it which came back registered to Paul at 453 Martin Luther King Blvd. Detroit MI 48201. I then went inside Verdonnis and located Paul sitting at the bar alone. I advised him that I was a detective for Norton Shores Police and needed to talk with him. He immediately said he was meeting with Attorney Joe Fisher in regards to this today and pulled out a folder to show me a Indiana court decision. I advised him I hadn`t even told him what it was about yet. I asked him if the truck outside was his and he stated it was. I advised him that I knew he had been using the internet service at The Coffee House and he said he had. I asked him what his e-mail address was and he stated it was giantkillerpjb@hotmail.com and wrote it down on a piece of paper for me. I asked him where he is staying and he stated between here and Indiana. I asked where he stayed last night and he said in Muskegon. I asked where and he said an apartment on Larch in Muskegon. He then gave me the address of 766 W. Larch apt 2. He then admitted that he has not been living in Indiana for two months and has had the apartment here for two months. He stated he came up here to fix up a sailboat but it wasn`t ready. He stated he was going to meet with Joe Fisher today at 1:30 to find out what he could do so he would not be in violation. I asked him about the comment asking "if there were any waitresses working that had daddy issues because he likes young girls". He stated anything a sex offender says gets taken wrong and it was probably a joke. He then said he didn`t remember that exact statement.

I advised Paul that at this point he was going to be placed under arrest for failing to register his address, his vehicle and his e-mail address. Officer Wasilewski and Officer Visser arrived and took him into custody and transported him to the Muskegon County Jail where he was lodged on the three violations. Prosecutor forms filled out and CCH attached.

* * *

I talked with the property owner of the Larch location, David. He advised that he did rent the apartment to Paul who was working for him. He advised that he fired Paul after he was sexually harassing his female employees. He stated they do have a lease for the apartment and he sent me a copy of the lease. It is attached to the report.

Defendant filed a motion to dismiss based on an ex post facto argument. The trial court denied his motion. He then entered a conditional no contest plea so he could raise the issue

whether the ex post facto clause is violated by applying the sex offender registration act to his offense that occurred before its adoption.

LAW AND ARGUMENT

APPLICATION OF THE SEX OFFENDER REGISTRATION ACT TO DEFENDANT'S PRE-JANUARY 1, 2006, CONVICTION OF FIRST-DEGREE CRIMINAL SEXUAL CONDUCT INVOLVING A CHILD UNDER THE AGE OF 13 DID NOT VIOLATE THE EX POST FACTO CLAUSE OF EITHER THE UNITED STATES OR MICHIGAN CONSTITUTIONS

A. *Standard of review*

Questions of constitutional interpretation are reviewed de novo. *People v Keller,* 479 Mich 467, 473-474; 739 NW2d 505 (2007).

B. *Analysis of the issue*

The thrust of defendant's argument is that requiring him to register as a sex offender is a violation of the Ex Post Facto Clause.[2] The quick answer to his argument is *Smith v Doe*, 538 US 84, 97; 123 S Ct 1140, 1149; 155 L Ed 2d 164 (2003), and *People v Pennington*, 240 Mich App 188, 191-192; 610 NW2d 608 (2000), which, respectively, hold that the registration requirements are not punishment and that SORA therefore did not violate the constitutional prohibition against ex post facto laws. See also *People v Bosca*, ___ Mich App ___; ___ NW2d ___; 2015 WL 1372641 (Appendix A, slip op, p 28 ["application of the 2011 version of SORA to defendant, notwithstanding that defendant's offenses were committed before its effective date, does not violate the ex post facto clause"]), and *People v Temelkoski (On Remand)*, 307 Mich App 241, 270-271; 859 NW2d 743 (2014). A more complete analysis follows.

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[2] US Const, art I, § 10, cl 1; Const 1963, art 1, § 10. As conceded by Defendant, 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). (Defendant's application for leave, p 6.)

It should be noted to begin with that *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), has no application here on the question of "punishment". It involved a HYTA[3] Defendant who challenged his registration requirements under SORA as a violation of Michigan's cruel or unusual punishment clause, Const 1963, art 1, § 16. This case, on the other hand, involves application of the Ex Post Facto Clause. The test for the former is different than that applied to the latter.[4] Also, the decision in *Dipiazza* is best described as *sui generis* in that its facts are rarely present and the Court in *Dipiazza* was quite clear in noting that it was an "as applied" case.[5] *Dipiazza*, 286 Mich App at 153. Without belaboring the point, Defendant can hardly position himself in the stead of Mr. Dipiazza. He was not placed on HYTA and was not a juvenile. Cf. *Temelkoski*, 307 Mich App at 257-258.

In any event, this is not the first time someone tried to challenge whether a state's SORA legislation violated the Ex Post Facto Clause. Such a challenge of Alaska's version of SORA

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[3] Holmes Youthful Trainee Act, MCL 762.11 *et seq*.

[4] In *Dipiazza*, the prosecution argued, unsuccessfully, that the test in *Smith*, 538 US at 97; 123 S Ct at 1149 (ex post facto case), applied equally to cruel or unusual punishment claims. The Supreme Court of California noted the question whether the test for cruel and unusual punishment was different than for ex post facto claims: "We also assume those decisions contemplated a test under which some measures might be considered punitive for Eighth Amendment purposes, even if not so under other constitutional provisions, such as the ex post facto and double jeopardy clauses." *In re Alva*, 33 Cal 4th 254, 286; 92 P3d 311, 330; 14 Cal Rptr 3d 811, 834 (2004). This view was supported by *Austin v United States*, 509 US 602, 610 n 6; 113 S Ct 2801, 2806 n 6; 125 L Ed 2d 488 (1993), wherein the Court stated, specifically, that, "[i]n addressing the separate question whether punishment is being imposed, the Court has not employed the tests articulated in *Mendoza–Martinez*[.]" The *Dipiazza* Court applied the test stated in *In re Ayres*, 239 Mich App 8, 13-14; 608 NW2d 132 (1999), which is not the test found in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963), known as the *Mendoza-Martinez* test. *Dipiazza*, 286 Mich App at 147-148. The United States Supreme Court, however, clearly includes the *Mendoza-Martinez* test as part of the *intent-effects* test it employs for ex post facto claims. *Smith*, 538 US at 97; 123 S Ct at 1149.

[5] This is confirmed, as well, by the Court in *In re TD*, 292 Mich App 678; 823 NW2d 101, 106 (2011), wherein the Court noted: "The Court thus went on to determine anew whether, *in light of the specific facts of Dipiazza*, the SORA registration requirements were punishment as applied to a juvenile. *Id.* at 147-153." (Emphasis supplied.)

reached the United States Supreme Court in *Smith, supra*. The Court held that Alaska's law is nonpunitive and, therefore, the Ex Post Facto Clause was not infringed. The Supreme Court reasoned that, "[i]n analyzing the effects of the [Alaska] Act [requiring registration as a sex offender] [the Court] refer[red] to the seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963), as a useful framework." *Smith v Doe*, 538 US 84, 97; 123 S Ct 1140, 1149; 155 L Ed 2d 164 (2003). This involves a two-step *intent-effects* analysis. *Id*., 92; 123 S Ct at 1146-1147.

Initially, under the *intent* prong, the Court must decide whether the Legislature's intent in enacting SORA was penal or remedial. *Id*. In making this evaluation the Court will look to the objectives expressed by the Legislature and "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Smith*, 538 US at 93-94; 123 S Ct at 1147-1148. If the Court concludes that the Legislature intended the statutory scheme to be nonpunitive, the Court will ordinarily defer to that legislative intent. *Id*.

The *effect* prong, however, recognizes that the Legislature's remedial intent is not dispositive of the issue whether it is remedial or punitive *in effect*. Thus, the Legislature's remedial intent can be overcome if the challenger can demonstrate by the "clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the Legislature's intention to deem it remedial rather than punitive. *Id*. It is this *effect* prong that involves the weighing of five of the seven factors that the *Smith* Court adopted from *Mendoza-Martinez*. The Court considered "most relevant to [the] analysis … whether, in its necessary operation, the regulatory scheme [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment;

[4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose."[6] *Smith*, 538 US at 97; 123 S Ct at 1149.

Again, in *Smith*, the Court was examining Alaska's version of Megan's Law, which, like Michigan's SORA, contains two components (a registration requirement and a notification system) to decide whether its retroactive application violated the *Ex Post Facto* Clause. *Smith*, 538 US at 90; 123 S Ct at 1145. The Court held that, because the law did not constitute "punishment" the *Ex Post Facto* Clause did not bar its retroactive application:

> Our examination of the Act's effects leads to the determination that 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. The Act is nonpunitive, and its retroactive application does not violate the *Ex Post Facto* Clause. [*Smith*, 538 US at 106; 123 S Ct at 1154.]

The Court in *Smith* noted that "[t]he following information is made available 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.'"[7] *Smith*, 538

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[6] The *Smith* Court stated that "[t]he two remaining *Mendoza-Martinez* factors-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 in this case." *Smith*, 538 US at 105; 123 S Ct at 1154.

[7] Under MCL 28.728(2)(a)-(*l*), Michigan's SORA generally makes the following information available to the public under MCL 28.728(7):

> (a) The individual's legal name and any aliases, nicknames, ethnic or tribal names, or other names by which the individual is or has been known.
>
> (b) The individual's date of birth.
>
> (c) The address where the individual resides. If the individual does not have a residential address, information under this subsection shall identify the village, city, or township used by the individual in lieu of a residence.

US at 91; 123 S Ct at 1146. The Alaska "Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet."[8] *Id*.

The Court explained that, "[i]f the intention of the legislature was to impose punishment, that ends the inquiry." *Smith*, 538 US at 92; 123 S Ct at 1147. In other words, if it is deemed punishment then the *Ex Post Facto* Clause would bar retroactive application of Alaska's law: "A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects. *Id*., 93; 123 S Ct at 1147. For this reason, "considerable deference must be accorded to the intent as the legislature has stated it." *Id*.

(d) The address of each of the individual's employers. For purposes of this subdivision, "employer" includes a contractor and any individual who has agreed to hire or contract with the individual for his or her services. Information under this subsection shall include the address or location of employment if different from the address of the employer.

(e) The address of any school being attended by the individual and any school that has accepted the individual as a student that he or she plans to attend. For purposes of this subdivision, "school" means a public or private postsecondary school or school of higher education, including a trade school.

(f) The license plate number or registration number and description of any motor vehicle, aircraft, or vessel owned or regularly operated by the individual.

(g) A brief summary of the individual's convictions for listed offenses regardless of when the conviction occurred.

(h) A complete physical description of the individual.

(i) The photograph required under this act. If no photograph is available, the department shall use an arrest photograph or Michigan department of corrections photograph until a photograph as prescribed in section 5a becomes available.

(j) The text of the provision of law that defines the criminal offense for which the sex offender is registered.

(k) The individual's registration status.

(*l*) The individual's tier classification.

[8] Under MCL 28.728(7), Michigan makes the information available to law enforcement agencies and "[t]he department shall make the public internet website available to the public by electronic, computerized, or other similar means accessible to the public. The electronic, computerized, or other similar means shall provide for a search by name, village, city, township, and county designation, zip code, and geographical area."

"Because we 'ordinarily defer to the legislature's stated intent,' … '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]"'" *Smith*, 538 US at 92; 123 S Ct at 1147 (citations omitted). "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we 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; 123 S Ct at 1147.

Thus, the Court began its foray into legislative intent by first determining whether the Alaska legislature had openly expressed its intent that Megan's Law is nonpunitive. It decided it had, stating:

> Here, the Alaska Legislature expressed the objective of the law in the statutory text itself. The legislature found 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. 1994 Alaska Sess Laws ch 41, § 1. The legislature further determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Ibid.* As we observed in *Hendricks*, where we examined an *ex post facto* challenge to a postincarceration confinement of sex offenders, an imposition of restrictive measures on sex offenders adjudged to be dangerous is "a legitimate nonpunitive governmental objective and has been historically so regarded." 521 US at 363; 117 S Ct 2072. In this case, as in *Hendricks*, "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil ... scheme designed to protect the public from harm." *Id.*, at 361, 117 S.Ct. 2072. [*Smith*, 538 US at 93; 123 S Ct at 1147.]

The same reasoning, of course, applies to Michigan's SORA. Under MCL 28.721a the Legislature stated the purpose behind SORA thusly:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state

> with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

Accordingly, this Court should defer to the Legislature's stated nonpunitive objective in concluding that registration under SORA is not punishment.

The Court in *Smith* rejected the respondent's attempt "to cast doubt upon the nonpunitive nature of the law's declared objective by pointing out that the Alaska Constitution lists the need for protecting the public as one of the purposes of criminal administration", stating that "even if the objective of the Act is consistent with the purposes of the Alaska criminal justice system, the State's pursuit of it in a regulatory scheme does not make the objective punitive." *Smith*, 538 US at 93-94; 123 S Ct at 1147-1148.

The Court also stated that "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes, are probative of the legislature's intent." *Smith*, 538 US at 94; 123 S Ct at 1148. It observed that Alaska's "notification provisions of the Act are codified in the State's 'Health, Safety, and Housing Code,' § 18, confirming [the Court's] conclusion that the statute was intended as a nonpunitive regulatory measure." *Id*. And, although "[t]he Act's registration provisions … are codified in the State's criminal procedure code," this was not considered dispositive because "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Id*.

The Court observed that Alaska's Code of Criminal Procedure "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 …; [and] laws governing civil postconviction actions[.]" *Smith*, 538 US at 95; 123 S Ct at 1148. "[U]nder Alaska law

[these] are 'independent civil proceeding[s.]'". *Id*. "Although some of these provisions relate to criminal administration, they are not in themselves punitive. [Thus, t]he 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*.

In Michigan, of course, SORA is not contained in either the Penal Code or the Code of Criminal Procedure so the analysis is easier. It is contained in Chapter 28 of the Michigan Compiled Laws that governs the Department of State Police. The Department of State Police like Alaska's Department of Public Safety is "an agency charged with enforcement of both criminal *and* civil regulatory laws." *Smith*, 538 US at 96; 123 S Ct at 1149. Accordingly, this militates in favor of finding that the legislative intent was nonpunitive.

The Court further explained that "[t]he procedural mechanisms to implement the Act do not alter our conclusion. After the Act's adoption Alaska amended its Rules of Criminal Procedure concerning the acceptance of pleas and the entering of criminal judgments. The rule on pleas now requires the court to 'infor[m] the defendant in writing of the requirements of [the Act] and, if it can be determined by the court, the period of registration required.'" *Smith*, 538 US at 95; 123 S Ct at 1148. This change, however, "to alert convicted offenders to the civil consequences of their criminal conduct does not render the consequences themselves punitive." *Smith*, 538 US at 95-96; 123 S Ct at 1149.

In Michigan no change in policy was made. Thus, again, the analysis in Michigan is easier. During plea proceedings, criminal defendants are not alerted to the civil consequences of their conduct that they may have to register as a sex offender. In addition, in Michigan, court

rules are the province of the judiciary, Const 1963, art 6, § 5,[9] and, therefore, the decision whether to include this change in the court rules has no bearing on *legislative* intent. Hence, this also militates in favor of finding that the Legislature intended SORA to be nonpunitive.

Finally, the Court in *Smith* stated:

> Our conclusion is strengthened by the fact that, aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, §§ 12.63.020(b), 18.65.087(d)—an agency charged with enforcement of both criminal *and* civil regulatory laws. See, *e.g.*, § 17.30.100 (enforcement of drug laws); § 18.70.010 (fire protection); § 28.05.011 (motor vehicles and road safety); § 44.41.020 (protection of life and property). The Act itself does not require the procedures adopted to contain any safeguards associated with the criminal process. That leads us to infer that the legislature envisioned the Act's implementation to be civil and administrative. By contemplating "distinctly civil procedures," the legislature "indicate[d] clearly that it intended a civil, not a criminal sanction." [*Smith*, 538 US at 96; 123 S Ct at 1149.]

In Michigan SORA contains the procedures for registering. MCL 28.724. This, however, does not make the Act punitive. Again, these procedures are contained in provisions separate from the Penal Code or Code of Criminal Procedure.

The only criminal aspect of SORA is when an individual willfully fails to comply with its requirements. MCL 28.729. Only then are there criminal sanctions imposed. Defendant, of course, is not raising any of these punitive provisions in his claim. Therefore, of course, this does not change the Legislature's stated purpose that the goals of SORA are nonpunitive. Also, as observed by the Court in *Smith*, although "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, [such] … prosecution is a proceeding separate from the individual's original offense." *Smith*, 538 US at 101-102; 123 S Ct at 1152. In other words, the Court did not deem this aspect of Alaska's

[9] Const 1963, art 6, § 5, provides in relevant part: "The supreme court shall by general rules establish, modify, amend and simplify the practice and procedure in all courts of this state."

Megan's Law as overriding the deference to be given to the Legislature's stated intent that the law is nonpunitive.

Having concluded that the Legislature's intent is clearly nonpunitive, the next question is whether deference should be paid to that intent. Again, "[i]f, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, [the 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; 123 S Ct at 1147. Defendant carries a "heavy burden" in attempting to upset the "manifest intent" of the Legislature that SORA is nonpunitive. *Kansas v Hendricks*, 521 US 346, 347; 117 S Ct 2072, 2075; 138 L Ed 2d 501 (1997). "Because [courts] 'ordinarily defer to the legislature's stated intent,' … '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]" *Smith*, 538 US at 92; 123 S Ct at 1147.

Again, the Court stated that, "[i]n analyzing the effects of the Act we refer to the seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963)." *Smith*, 538 US at 97; 123 S Ct at 1149. The Court explained that "[t]he 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." *Smith*, 538 US at 97; 123 S Ct at 1149. It rejected "[t]he two remaining *Mendoza-Martinez* factors—whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime—[as being] … of little weight in this case. *Id*., 105; 123 SCt at 1154.

Under the *effect* prong, applying the *Smith/Mendoza-Martinez* factors, Defendant has not demonstrated through "the clearest proof" that SORA is so punitive in purpose or effect as to negate the Legislature's intention to deem it civil or remedial. Again, those factors examine "whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose." *Smith*, 538 US at 97; 123 S Ct at 1149.

First, SORA has not been regarded in our history and traditions as a punishment. This is true because sex-offender registration laws are of fairly recent origin, meaning that they have not been historically viewed as a form of punishment. *Smith*, 538 US at 97; 123 S Ct at 1149. As stated in *Smith*, "[a]ny initial resemblance to early punishments is … misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information." *Smith*, 538 US at 98; 123 S Ct at 1150. "By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 US at 98-99; 123 S Ct at 1150. Thus, SORA does not resemble the shaming punishments of the colonial period.

Second, SORA does not impose an affirmative disability or restraint. Here the Court "inquire[s] how the effects of the [statute] are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith*, 538 US at 99-100;

123 S Ct at 1151. As was the case with the *Smith* Court's examination of Alaska's Megan's Law, Michigan's SORA does not impose any physical restraint and, therefore, it does not resemble imprisonment, "the paradigmatic affirmative disability or restraint." *Id.*, 100; 123 S Ct at 1151. Further SORA's requirements are less harsh than the sanction of occupational debarment, which the Supreme Court has held to be nonpunitive. *Id.*, see *Hudson v United States*, 522 US 93, 104; 118 S Ct 488; 139 L Ed 2d 450 (1997) (forbidding further participation in the banking industry); *De Veau v Braisted*, 363 US 144; 80 S Ct 1146; 4 L Ed 2d 1109 (1960) (forbidding work as a union official); *Hawker v New York*, 170 US 189; 18 S Ct 573; 42 L Ed 1002 (1898) (revocation of a medical license). In point of fact, "[t]he Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences."[10] *Smith*, 538 US at 100; 123 S Ct at 1151. Indeed, as observed in *Smith*, "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.* Michigan's SORA is actually less restraining than Alaska's Megan's Law, which was considered nonpunitive in *Smith*, in that, although registrants "are not required to seek permission to do so", Alaska's law requires "registrants [to] … inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment", *Smith*, 538 US at 101; 123 S Ct at 1152, whereas Michigan's SORA neither requires permission nor requires such information to be provided to the authorities. Although "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, [such] … prosecution is a proceeding separate from the individual's original offense." *Id.*, 101-102; 123 S Ct at 1152.

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[10] In Michigan, there are limits placed on movement and residency in a "[s]tudent safety zone", see MCL 28.734, which "means the area that lies 1,000 feet or less from school property", MCL 28.733(f), but this should not alter the analysis given that this limitation is not onerous and clearly falls within the stated regulatory nonpunitive purpose.

Although, perhaps, the statute might deter future crimes, this, in the words of the *Smith* Court, attempts to "prove[] too much. Any number of governmental programs might deter crime without imposing punishment. 'To 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.'" *Smith*, 538 US at 102; 123 S Ct at 1152 (citations omitted).

Third, SORA does not "promote[] the traditional aims of punishment—retribution and deterrence. Instead, as explained in *Smith*, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 US at 99; 123 S Ct at 1150. Defendant's "stigma" argument was thus soundly rejected by the Court in *Smith*. "[T]he stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." *Smith*, 538 US at 98; 123 S Ct at 1150. It is clear, however, that, by saying "*most of which* is already public", the Court was not relying on the "already public" aspect of the compilation as the driving force for its conclusion on this factor.

Finally, as with Alaska's Megan's Law, "[t]he State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record." *Id.*, 99; 123 S Ct at 1150-1151. To the contrary, "[a]n individual seeking the information must take the initial step of going to the … Web site, proceed to the sex offender registry, and then look up the desired information." *Id.*, 99; 123 S Ct at 1151. This "process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in

public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry." *Id*. Again, however, although analogous to visiting the archives of criminal records, this point is not dispositive of whether the statute is punitive.

Fourth, SORA "has a rational connection to a nonpunitive purpose". The Court in *Smith* was impressed with "[t]he Act's rational connection to a nonpunitive purpose[, labeling it] … a '[m]ost significant' factor in [its] determination that the statute's effects are not punitive…. [T]he Act has a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].'" *Smith*, 538 US at 102-103; 123 S Ct at 1152. Even if Defendant contended that "the Act lacks the necessary regulatory connection because it is not 'narrowly drawn to accomplish the stated purpose'", as was contended by the respondent in *Smith*, it does not have to be. "A statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Smith*, 538 US at 103; 123 S Ct at 1152. Indeed, as in *Smith*, Defendant certainly does not suggest that "the Act's nonpunitive purpose is a 'sham or mere pretext.'" *Id*.

Fifth, SORA is not "excessive with respect to this purpose." In addressing this issue, the *Smith* Court noted the erroneous conclusion reached by the lower court that "the Act was excessive in relation to its regulatory purpose [because,] … first, … the statute applies to all convicted sex offenders without regard to their future dangerousness; and, second, … it places no limits on the number of persons who have access to the information." *Smith*, 538 US at 103; 123 S Ct at 1152-1153. The Supreme Court stated, flatly, that "[n]either argument is persuasive." *Id*., 103; 123 S Ct at 1153. Thus, despite Defendant's efforts to try to prove the Legislature's findings and conclusions wrong (arguing that people like him should not be viewed

as dangerous recidivists), Michigan, like "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism." *Id*. "The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class." *Id*. This "risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v Lile,* 536 US 24, 34; 122 S Ct 2017; 153 L Ed 2d 47 (2002)…. 'When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault'". *Id*. (citations omitted).

Accordingly, under the *intent-effect* analysis, Defendant cannot show that requiring him to register as a sex offender under SORA is *punishment*. As a consequence, the Ex Post Facto Clause has no application. See *Pennington,* 240 Mich App at 191-192 (holding that the registration requirements were not punishment and that SORA therefore did not violate the constitutional prohibition against ex post facto laws); see also *Temelkoski*, 307 Mich App at 270-271, where after analyzing the *Mendoza-Martinez* factors, the Court held:

> In sum, the relevant *Mendoza–Martinez* factors indicate that SORA does not impose punishment as applied to defendant. SORA has not been regarded in our history and traditions as punishment, it does not impose affirmative disabilities or restraints, it does not promote the traditional aims of punishment, and it has a rational connection to a nonpunitive purpose and is not excessive with respect to this purpose. Defendant therefore has failed to show by "the clearest proof" that SORA is "so punitive either in purpose or effect" that it negates the Legislature's intent to deem it civil. *Earl,* 495 Mich at 44 (quotation marks and citation omitted). Accordingly, as applied to defendant, SORA does not violate the Ex Post Facto Clause … because it does not impose punishment.

RELIEF REQUESTED

For the foregoing reasons, Defendant's application for leave to appeal should be denied.

Respectfully submitted,
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/s/ Charles F. Justian

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