STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

PAUL J. BETTS,

Defendant-Appellant.
_____/

Supreme Court No.

Court of Appeals No. 319642

Circuit Court No. 12-62665 FH

MUSKEGON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

JEANICE DAGHER-MARGOSIAN (P35933)
Attorney for Defendant-Appellant

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Suppl

AMENDED APPLICATION FOR LEAVE TO APPEAL

STATE APPELLATE DEFENDER OFFICE

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JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant Paul J. Betts applies for leave to appeal the February 27, 2014 order of the Court of Appeals denying leave to appeal his conviction for failure to register as sex offender, and asks this Court to reverse his conviction.

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Muskegon County Circuit Court by plea of *nolo contendere* and was sentenced on July 2, 2013. Defendant-Appellant requested the appointment of appellate counsel on August 8, 2013. The offenses occurred after the effective date of the November, 1994 ballot Proposal B that eliminated the right to file a claim of appeal from plea-based convictions. The Court of Appeals had jurisdiction to consider the Defendant-Appellant's application for leave to appeal as it was filed within six months of judgment. MCR 7.203(B); MCR 7.205. The Court of Appeals denied leave to appeal on February 27, 2014. This Court has jurisdiction to grant leave to appeal. MCR 7.301(A).

STATEMENT OF QUESTIONS PRESENTED

I. DO APPLICATION OF THE SEX OFFENDER LAWS, AND AMENDMENTS TO THE LAWS, TO AN OFFENSE OCCURRING BEFORE JANUARY 1, 2006 VIOLATE BOTH THE STATE AND FEDERAL EX POST FACTO CLAUSES?

Trial Court answers, "No".

Defendant-Appellant answers, "Yes".

Plaintiff-Appellee answered, "No".

Court of Appeals answered, "No".

STATEMENT OF FACTS

Defendant Paul Betts pled no contest to failure to register as sex offender, MCL 28.729 on May 30, 2013 before the Honorable William C. Marietti in the Muskegon County Circuit Court. He was supplemented as a third felony offender, also. MCL 769.11. See Judgment of Sentence, attached. The underlying conviction was a plea-based conviction for CSC 2d degree on December 16, 1993. See PSIR, attached, at 4.

On July 2, 2013, Defendant was sentenced to 36 months on probation with 12 months in jail, credit for 15 days, suspended for pendency of the appeal. *Id.* The sentence was based on a *Cobbs* evaluation for a sentence of 13 months or less. ST 9-10. The plea was conditional in that the trial court allowed Defendant to raise issues which were raised prior to trial in the trial court which might otherwise have been forfeited by a plea. ST at 11.

The State Appellate Defender Office was appointed to perfect an appeal on August 14, 2013. Mr. Betts filed a timely application for leave to appeal in the Court of Appeals; the Court of Appeals denied leave on February 27, 2014. See attached order. Mr. Betts now seeks leave to appeal from this Court.

I. APPLICATION OF THE SEX OFFENDER LAWS, AND AMENDMENTS TO THE LAWS, TO AN OFFENSE OCCURRING BEFORE JANUARY 1, 2006 VIOLATE BOTH THE STATE AND FEDERAL EX POST FACTO CLAUSES.

Standard of Review. The proper standard of review is de novo, because this claim involves an error of law. Questions of law, including the proper interpretation and application of statutes and constitutions, are reviewed de novo. *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 141 (2010).

Discussion. Defendant Paul Betts was plea-convicted of CSC 2d, MCL 750.520c on December 16, 1993. He was sentenced to 5-15 years in prison, and was paroled on November 30, 1999. See PSIR at 4, attached.[1] As noted above, he was most recently convicted of violating the Michigan sex offender registration laws after leaving the state and then moving back for a temporary period. There is a suspended 1-year jail term pending for failing to change his address. See Statement of Facts, above. He challenges the Michigan Sex Offenders Registration Act (SORA), as constitutionally infirm. It is a violation of state and federal ex post facto protections. SORA, especially as amended July 7, 2011, has changed from what was originally a civil law for the protection of society, into a criminal law which imposes serious punishment for violating any of its myriad conditions. Other jurisdictions[2] have already determined what this Court must find today: the nature of SORA has evolved to the

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[1] The victim was a 10-year old child. This Court should also make note of the correct underlying conviction, CSC 2d degree. The prosecution's brief in opposition to Defendant's application for leave to appeal in the Court of Appeal erroneously refers to the conviction as a CSC 1st degree conviction at several points, including the issue heading in the Table of Contents and Counter-Statement of Questions Presented, as well as in the issue heading on page 3. Mr. Betts points this out in advance, although the error may be corrected in the prosecutor's responsive pleading to this Court.

[2] *See infra*, 11-25.

point that they are punitive now, even if that was not originally true. Accordingly, Mr. Betts has had his constitutional due process rights violated by the prosecution in this case because he was convicted before SORA even existed. Professor Catherine Carpenter says it well:

> This Article does not challenge the state's legislative power to enact sex offender registration laws. Instead, this Article posits that, even if sex offender registration schemes initially were constitutional, serially amended sex offender registration schemes--what this Article dubs super-registration schemes- -are not. Their emergence demands reexamination of the traditionally held assumptions that defined original registration laws as civil regulations.

See Catherine L. Carpenter and Amy E. Beverlin (Carpenter and Beverlin), *The Evolution of Unconstitutionality in Sex Offender Registration Laws,* 63 Hastings L.J. 1071 (2012). Even if SORA was did not cross the line from civil regulation to criminal punishment at the time it was originally enacted, it does now. Accordingly, it cannot be imposed on those convicted before it became law.

A. History and Development of the Sex Offenders Registration Act

The Michigan Sex Offenders Registration Act (SORA), MCL 28.721 et seq, took effect October 1, 1995. MCL 28.721 et seq. When it was first enacted, the registry information was confidential and not open to public inspection except by law enforcement. *People v Dipiazza,* 286 Mich App 137, 142-143 (2009).[3] In September 1999, the statute was amended to make the registry accessible to anyone. Access is

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[3] The prosecution may argue that *Dipiazza* is not relevant because its facts are very different from those in the case at bar. It is not cited here because of factual similarity as to age of perpetrators and victims. It is cited for other reasons. Above, the devastating effects are clear for someone very young, with virtually no criminal history. For Mr. Betts, who is much older and who is registering at Tier III for CSC on a 10-year-old, the effects are much greater.

by way of the Internet. Any person can see the name, alias, address, physical description, birth date, and specific offenses of any sex offender in Michigan. *Id.*, citing MCL 28.728(4)(a). SORA has been transformed from a law enforcement tool into a community notification law. This is not the intent. It is stated within the statute as follows [MCL 28.721a]:

> ...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.[4]

However, in order to comply with the federal Adam Walsh Child Protection and Safety Act,[5] the federal sex offender law, Michigan's statute underwent a sweeping overhaul. By July 1, 2011 the many changes to the law further altered its character. The changes were ostensibly promulgated toward the above regulatory objective. The result, though, is that they enormously increased the law's punitive effect.

SORA's amendments were largely effective between 2006 and 2011, MCL 28.721 *et seq.*, years after the decision in *Smith v Doe,* 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003).[6] Now, registrants are barred from "loitering" or working within 1000

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[4] This, however, was added to the statute *eight years* after the statute was first enacted. See Mich Pub Act 542, § 1a (2002).

[5] 42 USC § 16901 et seq (includes the Sex Offender Registration and Notification Act, or SORNA). The law was enacted July 27, 2006.

[6] In *Smith v Doe, supra,* the US Supreme Court held that Alaska's sex offender

feet of a school, as well as "having a residence in a school safety zone." These are known as the "school safety zone" provisions (on school property or within 1,000 feet of a school), which became effective January 1, 2006. *See* MCL 28.733 MCL - MCL 28.735. As a result, persons can theoretically be prosecuted for watching their child's sports event or meeting with teachers on school grounds.[7] Another such change is

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registration law was not punitive in nature, and, thus, did not violate ex post facto prohibitions. There are many reasons that this holding does not control the instant case. Among them are that the Alaska statute is not as punitive as the Michigan statute in many respects. For example, ,the split Court found in-person reporting was not required; that registrants were "free to move where they wish and to live and work as other citizens, with no supervision" and were "free to change jobs or residences;" that there was "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred;" that the "Act does not restrain activities sex offenders may pursue;" and that the consequences of the Act "flow[ed] not from the Act's registration and dissemination provision, but from the fact of conviction." *Id.* at 100-101. Also important is that the most punitive changes to the statute, such as quarterly in-person reporting, the school "loitering" provisions, and the annual $50 fee, became law many years after the 2003 decision in *Smith v Doe.*

The present version of SORA severely limits Mr. Betts's ability to find housing and employment, get an education, travel, engage in free speech, be free from harassment and stigma, and understand what is legally required of him. It also subjects him to in-person supervision that is more onerous than what he experienced while serving his prison sentence and being on parole. It publicly and falsely identifies him as among the most dangerous sex offenders on the registry as a Tier III offender, despite any clinical or legal evidence to support this. This is discussed further, *infra.*

[7] There are many cases which illustrate the absurd outcomes which result from imposing the ever more stigmatizing state SOR schemes on those convicted before their enactment. This is especially true with residency requirements. See e.g., *Mann v Ga. Dep't of Corr.*, 653 SE2d 740 (Ga. 2007) (finding Georgia's residency restrictions unconstitutional only insofar as they permitted the regulatory taking of the defendant's home without just compensation; Defendant was also prohibited from entering the restaurant he half owned and ran because child-care facilities located themselves within 1000 feet of Mann's business). See also, *F.R. v St. Charles County Sheriff's Department* and *Missouri v Raynor,* 301 SW3d 56 (2010) (concerning sex offenders convicted well before enactment of state SOR scheme, but punished under

that many individuals had to register for life, rather than for 25 years. MCL 28.725(12). These changes are discussed more fully below.

SORA Tiers. The amended version of SORA categorizes offenders as one of three kinds: Tier I, Tier II, or Tier III. The classifications are not based on any kind of individualized risk assessment. Instead, they are based only on the designated conviction. MCL 28.722(r)-(v). There are no provisions for petitioning for removal from the registry for many, if not most, individuals. Further, there are now regular in-person reporting requirements to verify residence: once a year for Tier I (registration period-15 years), twice a year for Tier II (registration period-25 years) and four times a year for Tier III (registration period-life).[8] MCL 28.725(1)(10)-(13). Tier III offenders are required to report in person quarterly, within a specific 15-day period. MCL 28.725a(3)(c). This requirement is life-long. MCL 28.725(12). *Id.*

Other particular requirements. Any change in one's address requires in-person reporting within three business days; there is no exception to this requirement. MCL 28.725(1)(a); MCL 28.722(g). Other changes which require this immediate in-person

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same). In *F.R. v St. Charles County Sheriff's Department*, the offender moved into a home after being released only to be told that it was only 913 feet, rather than 1,000 feet, from a child care facility and that he would have to move out. *Id.*, at 60. In *Missouri v Raynor,* the state SOR required Mr. Raynor, as a sex offender, observe these restrictions on Halloween night: (1) avoid contact with children; (2) remain inside his residence; (3) post a sign on his door; and (4) leave his light off. Although his female partner was giving out candy and he did not have contact with any children, he had not posted the sign. This was a violation under the state scheme. The Supreme Court of Missouri held that both cases impermissibly violated the state constitutional prohibition against use of retrospective laws to support conviction. *Id.*, 62, 65-66.

8 Mr. Betts is a Tier III offender, as the victim in his case was a 10-year old child. MCL 28.722. See *Carpenter, supra,* at 4.

reporting include: changing or discontinuing employment, enrolling in discontinuing higher education, name changes, temporary residing at other than registered address for more than 7 days, email address change, and purchase or "regular operation of any vehicle. MCL 28.725(1)(b)-(g). Most recently, the fees were increased. Registrants will be required to pay not a one-time registration fee of $50, but an annual fee for the time they are listed. Public Act 149 of 2013. The legislation is also retroactive. MCL 28.723. Violations result in criminal penalties and include sentences up to ten years. MCL 28.729; 28.734(2); 28.735(2). See also, Cheryl Carpenter (C. Carpenter), *One Step Forward, Two Steps back for Reform: The 2011 Michigan Sex Offender Registry Amendments, Part One*; Criminal Defense Newsletter, May 2011, Volume 34, No. 8 at 1-4.

Of these cumulative changes, experienced together for someone on the SOR, Ms. Carpenter observes:

> Being a listed offender entails much more than verifying an address and having a photograph on the registry. SOR impacts every area of a registrant's life - personal relationships, employment, housing, travel and mental health. Parents who are registered sex offenders cannot participate in their child's school activities because the student safety zone does not allow them to "loiter" within a 1000 feet of an elementary middle or high school. School districts and law enforcement liberally construe loiter (sic) to include parent/teacher conferences, sporting activities and the like. SOR is not a collateral consequence of a sexual conviction. It is a direct, punitive consequence that has major implications on a person's life. *Id. at 2.*

B. Michigan's sex offender registration statutory scheme is punishment, not regulation, on its face and as applied for state and federal ex post facto purposes.

Instant claim. Ex post facto laws are prohibited by both the Michigan and federal constitutions. *People v Callon*, 256 Mich App 312, 316-317 (2003):

> Ex post facto laws are prohibited by both the Michigan Constitution, Const. 1963, art. 1, § 10 ("no bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted"), and United States Constitution, U.S. Const., art. I, § 10 ("no state shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts...."). Michigan does not interpret its constitutional provision more expansively than its federal counterpart. *Attorney General v. Pub. Service Comm.*, 249 Mich.App. 424, 434, 642 N.W.2d 691 (2002); *People v. Pennington*, 240 Mich.App. 188, 191 n. 1, 610 N.W.2d 608 (2000). Both the state and federal ex post facto clauses are designed to secure substantial personal rights against arbitrary and oppressive legislation, *People v. Russo*, 439 Mich. 584, 592, 487 N.W.2d 698 (1992); *Pennington, supra,* and to ensure fair notice that conduct is criminal, *People v. Stevenson*, 416 Mich. 383, 396, 331 N.W.2d 143 (1982); *People v. Davis*, 181 Mich.App. 354, 357, 448 N.W.2d 842 (1989).

The federal courts have prohibited the passage of laws that impose punishments for acts that 1) were not punishable at the time they were committed or 2) impose punishments in addition to those prescribed at the time of the offense. *Weaver v Graham*, 450 US 24, 28; 101 S Ct 960; 67 L Ed 2d 17 (1981). Accordingly, to be ex post facto, a law must both operate retrospectively and disadvantage the person affected by it by either changing the definition of criminal conduct or imposing additional punishment for such conduct. *Id.* Michigan courts have similarly held that an ex post facto law is one that affects the prosecution or disposition of cases involving crimes committed before the law's effective date by (1) criminalizing conduct that was innocent, (2) making an act a more serious offense, (3) inflicting greater punishment for a crime, or (4) allowing conviction on lesser evidence. *Callon, supra*, at 317; *People v Haynes*, 256 Mich App 341, 350 (2003). Both the state and federal ex post facto clauses are designed to protect citizens from arbitrary and oppressive legislation and to ensure fair notice of conduct that is criminal. *Id.*

The Michigan Sex Offenders Registration Act violates protections against ex post facto laws under both the Michigan Constitution and the United States Constitution.[9] Mich Const 1963, art 1, § 17; US Const, Ams V, XIV. See also, *Foster v Booker*, 595 F.3d 353 (CA 6, 2010). This is because it imposes retroactive criminal sanctions for conduct committed before its enactment. Additionally, the combination of requirements under the law are, in and of themselves, too onerous to be civil. Many of them were enacted from 2006-2011; all of them were enacted after Mr. Betts was convicted and sentenced. The State maintains that SORA is civil and non-punitive, but this is not the case. *See infra.* Even though the Legislature states that the purpose of the law is to regulate potentially dangerous conduct by ex-offenders, if the scheme is "so punitive either in purpose or effect as to negate the State's

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[9] The US Constitution provides:

> § 10, Clause 1. Treaties, Letters of Marque and Reprisal; Coinage of Money; Bills of Credit; Gold and Silver as Legal Tender; Bills of Attainder; Ex Post Facto:
>
> "No 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."
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> ***
>
> The Michigan Constitution provides:
>
> art 1, § 10. Attainder; ex post facto laws; impairment of contracts
>
> Currentness:
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> Sec. 10. No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted.

intention to deem it 'civil', it is, in reality, a law with criminal penalties." *Kansas v Hendricks*, 521 US 346, 361; 117 S Ct 2072; 138 L Ed 2d 501 (1997). SORA is clearly punitive for reasons discussed below.

Previous decisions. In many past cases which examine the Michigan scheme and other state registry schemes, courts have held that sex offender registries are not punitive in nature. Thus, the reasoning goes, they do not violate ex post facto protections. See e.g., *Doe v Kelley*, 961 F Supp 1105, 1109 (WD Mich, 1997); *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998). In *Smith v Doe*, 538 US 84, 92; 123 S Ct 1140; 155 L Ed 2d 164 (2003), the US Supreme Court also held that Alaska's sex offender registration law does not violate the ex post facto clause.

Smith was a civil § 1983 action. The court granted certiorari to "decide whether the registration requirement is a retroactive punishment prohibited by the Ex Post Facto Clause." *Smith*, 538 US at 89, 123 S Ct at 1140. In this respect, it differs from the case at bar, which examines whether the punishment imposed for not registering, as well as the many additions to the requirements, renders it ex post facto.[10] The Court relied on a two-part test to determine whether the statute at issue imposed a punishment. *Id.* First, the court examined legislative intent. If the intent was to impose a punishment, the statute is a punishment. *Id.* However, if the intention of the Legislature was to create a civil, nonpunitive regulatory scheme,

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[10] In fact, "[t]he only issue before the court was whether the registration and notification scheme, by itself, violated ex post facto." *United States v Kent*, 2008 WL 360624, at *4 (S.D. Ala. 2008). "Nothing in the *Smith* case indicates that the respondents were facing criminal prosecutions or jail time for failing to comply with the registration and notification scheme." *Id.*

courts must determine whether the statutory scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation marks and brackets omitted). The Court held that the Alaska statute was not punitive in nature, and, thus, did not violate ex post facto prohibitions. This is because the law did not meet the standard of "clearest proof" that the law is punitive based on substantial factors. Only this "clearest proof" can overcome a legislative intention to establish a civil regulatory scheme, the Court decided. 123 S Ct 1140 at 1144.

To reach its decision, the Supreme Court relied on seven factors laid out in *Kennedy v Mendoza-Martinez,* 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963). They are: 1) affirmative disability or restraint, 2) sanctions historically considered as punishment, 3) finding of scienter, 4) traditional aims of punishment-retribution and deterrence, 5) the behavior is already a crime, 6) rational connection to a non-punitive purpose, 7) excessiveness.

What is clear is that *Smith* is not controlling in the case *sub judice*. First, the Court considered the registration and notification aspects of Alaska's SOR law. In contrast, an array of additional factors have become part of Michigan's law, including unreasonable fees, quarterly registration for life (TIER III), residence and loitering prohibitions, and punishment ranging from 90 days to 10 years, and also revocation of probation, parole and youthful trainee status. MCL 28.729 (2)-(7). Further, *Smith* was decided in 2003, well before many of these onerous requirements were enacted. When the *Mendoza-Martinez* factors are applied to Michigan's law as it stands today, these factors, on balance, indicate that the law is punitive in nature. There is no question that the changes have made this so. Also important is that even if the

registration and notification requirements are not ex post facto violations in and of themselves, punishing Mr. Betts with a one-year jail sentence for failing to change his address most certainly is. *See Gillette*, n. 11. It is appropriate that this Court join other jurisdictions, considering Michigan's SORA in light of the many added penalties, and find that it is clearly ex post facto.[11]

Analysis under the Mendoza-Martinez factors: Although *Smith* is not controlling, the factors which the Court used are a useful framework for analyzing the issue as to whether Michigan's present SORA scheme is punitive, not regulatory:

1) Affirmative disability or restraint. This factor considers how the effects of the Acts are felt by those subject to it. "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v Doe, supra,* 538 US 84 at 99-100. However, the present version of SORA, effective much after the decision in

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[11] *In United States v Gillette*, 553 F Supp 2d 524, 528 (Virgin Islands 2008), the Federal District Court of the Virgin Islands found that *Smith v Doe* did not control the defendant's challenge for the above reasons and found an ex post facto violation. The Court observed:

> The Supreme Court ruled only that it did not violate the Ex Post Facto Clause to require a sex offender to comply with ASORA's registration requirements, in that such compliance did not constitute punishment. *United States v. Deese*, 2007 WL 2778362, at *4, n. 7 (W.D. Okla. Sept. 21, 2007) (recognizing that *"[a]t issue in Smith was whether the registration itself—and the resulting publication of that information—constituted punishment"*) (emphasis added). Thus, Smith does not even remotely stand for the proposition that retrospective punishment for failure to register, under ASORA or SORNA, is permissible under the Ex Post Facto Clause. *United States v. Sallee*, 2007 WL 3283739, at *3, n. 7 (W.D. Okla. Aug.13, 2007) (noting that *Smith* did not address criminal penalties associated with failure to register as sex offender, but only whether registration, itself, constitutes punishment); *Deese*, 2007 WL 2778362 at *4, n. 7 (same).

Smith v Doe, has many requirements which meet this test and go beyond the Alaskan statute that the US Supreme Court considered. One of the main ones is quarterly reporting, in-person, for life, or a minimum of 15 years. MCL 28.725(1)(10)-(13). The US Supreme Court observed that the Alaskan statute in *Smith v Doe* did not contain such an in-person reporting requirement. 538 US at 101. The same is true for Michigan's loitering and school safety zone provisions. *See supra.* The "school safety zone" provisions, which were not part of the original Michigan scheme, are also punitive in nature. MCL 28.734; MCL 28.735. The Supreme Court of Kentucky held that a similar retroactive residency restriction for sex offenders violated state and federal ex post facto clauses. It noted that it was "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint." *Commonwealth v Baker,* 295 SW3d 437, 445 (2009). See also *State v Pollard,* 908 NE2d 1145 (Ind. 2009) (Indiana Supreme Court held that residency provisions violated ex post facto protections); *Doe v Schwarzenegger,* 476 F Supp 2d 1178, 1181 (ED Cal. 2007) (application of residency restrictions retroactively raises serious ex post facto concerns).

The Court should consider, also, the defendant's experience in *Dipiazza, supra.* In holding that the sex offender registry laws in Michigan, as applied, were not only punishment, but cruel and unusual, the Court considered the following in finding that placement on the registry was punishment in that case: [at 152-153]:

> Defendant argues that he has been unable to find work as a result of being listed on the sex offender registry. He asserts that when he applies for work, he correctly states that he does not have a criminal record [defendant completed a HYTA sentence]. However, because information about him is publicly available through the sex offender

> registry, which can be accessed through the Internet, employers still discover the information. . . .He was able to get hired at Burger King and Meijer, but in both cases was let go after the results of the record check were returned, which indicated that he was a registered sex offender. . .He further asserts that because of his inability to work he must rely on food stamps. He was also diagnosed with depression and believes that this was the direct result of the emotional and financial consequences of having to register as a sex offender. . .

Further, as noted above, a person must "report in person" and immediately notify the registering authority of a change in address, even if it is temporary. MCL 28.725(1). As noted above, this personal reporting requirement was not present in the Alaska scheme considered by the United States Supreme Court. See 538 US at 101. Some courts, especially in recent years, have looked at this distinction in finding their own state schemes punitive, and, thus, ex post facto. See, e.g. *Starkey v Oklahoma Department of Corrections*, 305 P3d 1104, 1021-1022 (2013). *Defendant's experience under SORA.*

Cheryl Carpenter's observations, *supra,* are consistent with what Mr. Betts tried to tell the court about his experience with affirmative disability or restraint. During a hearing on 3-4-13, he told the court that he was precluded from buying a house that he wanted because it was within 1,000 feet of a school. He related that when he goes to Staples to make copies relative to this case, only male employees provide service to him, while women "have to go stand in the back." He had his house broken into, and the perpetrators stated that they were somehow less culpable because he was a sex offender. He also had his business destroyed in Indiana after his sex offender registration information was distributed to the public. Motion Hearing

Transcript (MHT) at 15-17, attached. These experiences detail the punitive effect SORA, applied retroactively, has had on Mr. Betts.

He was also approached by officers in a public eating establishment, and the officer "stood there in Verdonis and looked at me he had pleasure broadcasting to the room my humiliation." MHT at 22-23. He continued [*Id.*]:

> The studies that are there from virtually all the things show that, in fact, it [registration] doesn't even lower recidivism. It doesn't do anything. It is an absolutely neutral thing other than the fact that it makes it so that a whole class of people are unemployable. A whole class of people are ostracized. A whole class of people have to live in hovels. I don't wanna live in a single wide trailer three miles outside of town because that's the only place people are gonna let me live. The more you poke a man the more likely he's gonna do something and, and I'm not. I swear I'm working really, really hard to do this. I've done it for almost 14 years now regardless of the outcome, truly. I'm still gonna stand up and do the best that I can but this is punishment. There is no question.
>
> Constitutionally, the evolution from the 12 points that they have to the 43 points that are listed on the sex offender registration and with serious impositions (sic) to my freedom with serious reductions into what I can do as a person. That's punishment . . .

On this first factor, Michigan's SORA is clearly punishment, on its face and as applied.

2) Sanctions historically considered as punishment. Regular, life-long reporting and monitoring bears a strong resemblance to probation or parole; this is clearly punishment. Courts have struck down registry schemes because of the similarity to these traditional penal sanctions. *See e.g., Doe v State,* 189 P3d 999, 1012 (Alaska 2008).

Courts have noted, and Defendant articulately told the trial court, that being placed on a sex offender registry is chillingly close to old historical punishments such

"shunning", "shaming" or "banishment."[12] While the Supreme Court in *Smith v Doe* dismissed this as a punishment factor, both *Starkey, supra,* at 1025-1026, and a later Alaska case, *Doe v State,* 189 P3d 999, 1012 (2008) instruct that the registries are mechanisms for banishment and marginalization. Particularly because there is no limitation on access by the public for Tiers II and III, this banishment is very real.

Also, much of the reasoning relative to the first factor, above, apply here, also. Sex offenders are prevented from living in many desirable areas of cities because of residency restrictions. As a practical matter, they are shunned or banished from the rest of the citizenry. See *Commonwealth v Baker, supra,* at 444.

Finally, the most obvious point is that the registry itself is open to all for viewing. It is no longer a targeted law enforcement tool. Instead, it is a modern-day version of being placed in stockades in the public square for passers-by to gawk at, or worse. In this way, it is a present version of "shaming." See *Smith v Doe*, 538 US 84, 97-98 (2003) (reviewing colonial punishments used to inflict public disgrace); *see also, generally,* Toni M. Massaro, *Shame, Culture and American Criminal Law*, 89 Mich L Rev 1880 (1990). This is especially true because offenders are fully accessible by name and photo, and listed by tier. It is significant, that they are individually identified, or "singled out" in this manner. Mr. Betts argues that this increases the punitive effect, especially since it is for the entire life of Tier III offenders.

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[12] Banishment has been defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life." *United States v Ju Toy*, 198 US 253, 269-70; 25 S Ct 644; 49 L Ed 1040 (1905).

3) Scienter. This would weigh toward a punitive characterization if the triggering crime did not require scienter, such as in cases of statutory rape. *Starkey, supra,* at 1026-1027. *See also,* Catherine L. Carpenter (Catherine Carpenter), *The Constitutionality of Strict Liability in Sex Offender Registration,* 86 B.U. L. Rev. 295 (2006).

4) Traditional aims of punishment-retribution and deterrence. As was true in *Starkey,* the three-tier system of the 2011 amendments increases the reporting period for many individuals. These extended periods are not related to negative conduct or a triggering event caused by the offender. Further, the tier designations are not related to anything other than the underlying offense; there is no opportunity to show, at any point, that the offender is no longer a danger. This constitutes punishment, as well:

> (I)n our view, the retroactive extensions of SORA registration clearly appear in the nature of retribution imposed against sex offenders for their past crimes. For all intents and purposes, the extensions are solely based on the statute the offender was convicted without regard to mitigating factors. No hearing is allowed when making a level designation. Further, there is essentially no mechanism to reduce or end registration based upon a showing the offender is no longer a threat to the community."

Starkey at 1027. For these reasons, as well, Michigan's sex offender registry is punitive in nature. As was noted by Justice Stevens in his dissent in *Smith v Doe, supra:*

> ". . .these unique consequences of conviction of a sex offense are punitive. They share three characteristics, which in the aggregate are not present in any civil sanction. The sanctions (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals. Unlike any of the cases that the Court has cited, a

criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction."

Smith v Doe, supra, at 111 (Stevens, J. dissenting). He points out that registries are distinct from the civil commitment process examined in *Kansas v Hendricks, supra,* because "a conviction standing alone (in *Hendricks)* did not make anyone eligible for the burden imposed." *Id.*, at 113. He further observes, (emphasis added):

> "(N)o matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and on no one else as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment." *Id.*

5) *The behavior is already a crime.* Again, placement on the SOR is based solely on the crime of conviction, i.e., establishment of criminal guilt. A person is then subject to its terms. He or she can be imprisoned for failing to change an address, or for "loitering" near a school. For most, there is no petition process for removal, mitigation is not considered, and there is no assessment of recidivism at any point in the registration period. "Therefore, the fact that SORA applies only to behavior that is already a crime supports the conclusion this *Mendoza-Martinez* factor has a punitive effect." *Starkey, supra,* at 1028.

6) Rational connection to a non-punitive purpose. The stated purpose of the statute, as noted *supra,* is to assist law enforcement in monitoring sex offenders and, thus, curtail the danger that certain sex offenders pose to the public. This is non-

punitive in nature. However, there is significant research showing that statutes like Michigan's present SORA scheme do not decrease recidivism.[13] See e.g., Bob Vasquez,

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[13] The idea that sex offender registries protect the community against recidivism is a myth. "Residence restrictions are designed to address "stranger danger." This term refers to the idea that sex offenders prey on children that they do not know. In reality, this is a highly inaccurate myth. In fact, amongst juvenile female victims only 7.5% were assaulted by a stranger, while 58.7% were assaulted by an acquaintance and 33.9% were assaulted by a family member. Juvenile male victims were even less likely to be assaulted by a stranger where only 5% of young male victims were assaulted by strangers, while 59.2% were assaulted by acquaintances and 35.8% were assaulted by family members. This data contradicts the common fear that a stranger will be the one to assault a child. In fact, based on the statistics, the people surrounding children daily are the ones potentially posing the greatest danger. Residence restrictions are useless to prevent acquaintances or family members from assaulting children. They also do not stop strangers from assaulting children since they do not prevent registered sex offenders from entering a restricted zone, just from living within one." Meghan Silē Towers (Towers), *Notes and Comments: Protectionism, Punishment and Pariahs: Sex Offenders and Residence Restrictions*, 15 J.L. & Pol'y 291, 318-319 (2007) (footnotes omitted).

What is even more important is that sex offenders do not re-offend at a higher rate than other criminals do. Rather, it appears to be at a lower rate. A comment by Caleb Durling in the Journal of Law and Criminology cites an expansive Department of Justice study. He writes:

> "Government statistics have also concluded that sex offenders re-offend at *a far lower rate than do other offenders.* In 2003, the Department of Justice (DOJ) published a comprehensive study of sex offenders released from prison in 1994. Of those sex offenders and rapists released from prison in 1994, only 14% were recidivists at that point. Of those child molesters released in 1994, only 3% were rearrested within three years for a sexual offense against a child, and 14% were rearrested within three years for any violent offense. All told, 39% of released sex offenders were rearrested within three years, but half of those arrests were for "public order offenses" like parole violations or traffic infractions." Caleb Durling (Durling), *Never Going Home: Does It Make Us Safer? Does It Make Sense? Sex Offenders, Residency Restrictions, and Reforming Risk Management Law*, 97 J. Crim. L. & Criminology 317, 331 (2006) (Emphasis added, footnotes omitted).

The Influence of Sex Offender Registration and Notification Laws in the United States, 54 Crime and Delinquency 175, 179, 188 (2008).[14]

7) Excessiveness. The question here is whether the SORA requirements are excessive in light of the above legitimate objective of protecting the public. Defendant asserts that they certainly are. First, any person convicted of CSC 2d is required to register for a period of either 25 years or life. There is no mitigation or

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[14] Professor Carpenter states it articulately:

> In general, regulations that appear to be criminal penalties have been upheld as constitutionally permissible where (i) the regulation serves an alternative nonpunitive purpose that is rationally connected to the restriction, and (ii) the regulation is not excessive in relationship to the alternative purpose assigned. Based on this two part "intent-effects" test, a regulation meets the guarantees of due process if it is sufficiently tailored to its civil aims. Even where a measure carries incidental effects of punishment, the legislation will be regarded as nonpunitive. Sex offender registration requirements, therefore, can only be viewed as regulatory legislation if the stigmatizing nature of registration is outweighed by a clear demonstration of sufficient alternative purpose: in this case, protection of the public from sexual predators. As one court stated,
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> > [To find sex offender notification laws unconstitutional] is to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence. That the remedy has a potentially severe effect arises from no fault of government, or of society, but rather from the nature of the remedy and the problem; it is an unavoidable consequence of the compelling necessity to design a remedy. Where sex offender registration laws serve to protect the community and track recidivists, they are legitimate regulatory vehicles that withstand constitutional scrutiny. But central to their legitimacy must be the determination that the regulation is carefully crafted to limit its punitive effect. Only statutes that are sufficiently tailored to meet their civil aims and limit their incidental punitive effects will be deemed constitutional.
>
> *See* Catherine Carpenter, *supra*, at 302-304. (Emphasis added, cites omitted.)

individualized assessment. There is no mechanism for rebutting the registration requirements or for petitioning for removal for most offenders. There is the in-person presentation requirement immediately after changing an address. There is now the quarterly reporting and verification requirement, as well. *See supra.*

Additionally, payment will soon be in an amount of $50 per month, with a cap of $550. This sharply contrasts with the $50 one time payment offenders previously had to pay. See Public Act 149 of 2013, at (6), amending MCL 28.725a, amendment effective April 1, 2014. See also, attached, Enrolled Senate Bill No. 221. This is punitive in nature and contributes to the inevitable conclusion that the sex offender registry in Michigan is punishment, not regulation.

It is critical, also, that these extreme requirements are imposed with absolutely no showing of particularized risk. Without any assessment of risk of reoffending or posing a danger, the extreme requirements for in-person quarterly reporting, annual payment, no mechanism for removal from the list, residency restrictions, and even reporting regarding employment and school attendance, are excessive. This factor also weighs toward a finding of punishment. See *Baker, supra,* at 446.

Many factors were not part of the law when it was scrutinized earlier. As is discussed elsewhere, it is important to note that many of these requirements, including the tier system, the increased period of reporting for many individuals, the multiple dates on which that many, if not most, offenders must verify their addresses in person, and the increase in fees, were not part of the original law. Thus, when the

courts in *Lanni v Engler* and *Smith v Doe, supra,* considered the question of punishment for *ex post facto* purposes, the statutes were far less onerous.

Other jurisdictions. Other jurisdictions have looked hard at this question, and have considered it in the current context of statutory changes. After looking at the seven relevant factors, the *Starkey* court noted that the retroactive application of numerous changes to the statute "transformed the registry into a system of punishment." *Id.* at 1031. The court also noted that reliance on *Smith v Doe, supra,* to uphold the scheme is "*misplaced because the Alaska registration system reviewed in that case did not have the constitutional infirmities present in this case.*" *Id. (Emphasis added).* The same is true in the case *sub judice.*

Alaska. Similarly, in *Doe v State, supra,* the Supreme Court of Alaska declared the registration scheme unconstitutional on state constitutional grounds, based on the punitive factors contained in the law. This followed the US Supreme Court's rejection of the *ex post facto* claim in *Smith v Doe,* which was based on federal constitutional grounds alone.

Ohio. In *State v Williams,* 952 NE2d 1108 (Ohio 2011), the Supreme Court of Ohio, the court considered the changes to the registration scheme which made it far more onerous. The stigma, which attaches to all sex offenders, is significant to begin with. *Id.* at 1112. The increasingly punitive changes further push the law into the realm of penal statute rather than regulatory scheme.

A major change in the Ohio scheme was comparable to Michigan's school safety zone provision. The court noted, for example, that all sex offenders, not just those convicted of sex crimes involving minors, were prohibited from living within 1,000

feet of a school. As in Michigan, registration duties have become far more difficult and cumbersome in Ohio. *Id.*, at 1111-1112. Most importantly, while offenders could initially petition to be removed from the list and, thus, no longer be referred to as a "sexual predator", that possibility was removed in later versions of the statute. *Id.*, at 1111-1112. There is no analysis as to future dangerousness; all registration consequences flow solely from the crime of conviction, as it also true in Michigan. The court concluded that there was no way to *not* characterize these effects as punishment [*Id.* at 1113]:

> Sex offenders are no longer allowed to challenge their classifications as sex offenders because classification is automatic depending on the offense. Judges no longer review the sex-offender classification. In general, sex offenders are required to register more often and for a longer period of time. They are required to register in person and in several different places. R.C. 2950.06(B) and 2950.07(B). Furthermore, all the registration requirements apply without regard to the future dangerousness of the sex offender. Instead, registration requirements and other requirements are based solely on the fact of a conviction. Based on these significant changes to the statutory scheme governing sex offenders, we are no longer convinced that R.C. Chapter 2950 is remedial, even though some elements of it remain remedial. We conclude that as to a sex offender whose crime was committed prior to the enactment of S.B. 10, the act "imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction," *Pratte*, [*Pratte v Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415 (2010)], ¶ 37,125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, at ¶ 37, and "create[s] new burdens, new duties, new obligations, or new liabilities not existing at the time."
>
> No one change compels our conclusion that S.B. 10 is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional. Cook [*State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998)] 83 Ohio St.3d at 418, 700 N.E.2d 570.

Maine. In Maine, in *State v Letalien*, 985 A2d 4 (Me. 2009), the state court analyzed a challenge which concerned provisions in the state registration and

notification act which closely resemble those in the Michigan SORA overhaul. The changes were retroactively applied, as is true in the case at bar. The defendant challenged, among other things, the state registration and notification legislation, referred to as "SORNA". The SORNA provision which increased registration for some offenders from 15 years to an entire lifetime. The challenged changes also encompassed a quarterly verification requirement, imposed retroactively.

The defendant was convicted August 19, 1996, and so, was subject to an existing registration requirement which applied to sex offenders sentenced from June 30, 1992 to August 31, 1996. However, the statute was amended more than once. The latest version which applied to the defendant was SORNA of 1999. It did not provide possible waiver for good cause short of pardon or complete reversal of the conviction (the earlier versions of the law did allow waiver for good cause). It also increased the defendant's reporting period from fifteen years to life. And additional changes were made in 2003, 2005, and 2007 which made notification within 24 hours mandatory with a job or school change, or a residence change. The amendments also incorporated "sex offender restricted zones" such as a school or playground (similar to Michigan's school safety zone and address change notification laws). These changes, considered together, increased the criminal penalties for non-compliance. *Id.* at 8-11.

After applying the *Mendoza-Martinez* factors, see above, the *Letalien* Court determined that the later amendments, applied retroactively, made the reporting requirements more burdensome than at the time of the offense. The increased lifetime reporting period, quarterly in-person verification requirements, and no

opportunity for waiver with good cause, are punitive "by clearest proof." *Id.* at 26. The Court held the amendments, on their face, violate ex post facto prohibitions under both the state and federal constitutions. *Id.* The Maine amendments parallel those in Michigan quite closely. *Letalien* is very persuasive in support of Mr. Betts's claim.

Indiana. A group of cases out of Indiana is similar in reasoning. In the leading case, *Wallace v State of Indiana,* 905 NE2d 371 (Ind. 2009), the Supreme Court of Indiana held the sex offender registry to violate *ex post facto* protections under the Indiana Constitution. Mr. Wallace succinctly asserted that the state scheme for sex offender registration did not apply to him because he "committed his crime, was sentenced, and served his sentence before any registration or notification was required." *Id.* at 377. Using the same *Mendoza-Martinez* factors used in *Smith v Doe, supra,* and *Starkey, supra,* the Court concluded that, as applied, the registration statutes were unconstitutional as violations of the Indiana Constitution's *ex post facto* clause. Of interest is the Court's note that of all the factors, the excessiveness factor was the most compelling. *Id.* at 383. *See also, State v Hough,* 978 NE2d 505 (Ind. 2012) (Defendant moved to Indiana after being convicted of a sex offense in Pennsylvania, but before Indiana enacted the sex offender registry statutes; Indiana law controls, as that is where he was living, and under Indiana law, the statures violate state constitutional ex post facto protections); *Andrews v State,* 978 NE2d 494 (Ind. 2012) (sex offense was committed, sentence was served, and the defendant was discharged off probation in 1989, before INSORA (Indiana sex offender registration statutes) was enacted in 1994; the Court ordered that the Defendant's name be

removed from the registry on ex post facto grounds); *State v Pollard,* 908 NE2d 1145 (Ind. 2009) (state Supreme Court held that residency requirements violated state the state *ex post facto* clause).

Maryland. In March of 2013, the Court of Appeals of Maryland declared requiring an offender to register violated the state constitution's prohibition against ex post facto laws. In *Doe v Department of Public Safety and Correctional Services,* 430 Md 535 (Md. 2013), the petitioner, a junior high school teacher, was plea-convicted of having "inappropriate contact" with a 13-year old student during the 1983-1984 school year. At that time, the sex offender registry in Maryland did not exist. *Id.* at 537. When the petitioner was released from prison in 2008, the state sex offender was in existence. It mandated that those who were convicted before it was in effect register as sex offenders. Further, in 2010, it was made more onerous. At that time, it was amended to include tiers much like Michigan's; the petitioner was a Tier III offender. *Id.* at 540-541.

The Court determined that retroactively imposing a retroactive sex offender registration on the petitioner "changes the consequences of Petitioner's crime to his disadvantage." If further noted that the " 'fact that a particular proceeding or matter is labeled 'civil' rather than 'criminal' does not necessarily remove it from the ambit of the ex post facto prohibition.' " *Id.* at 560-561. Of great interest is the court's observation that being on the registry is much like being on probation, the effect is the same; there has never been a question that probation is punishment, citing *United States v Knights,* 534 US 112, 119; 122 S Ct 587, 591; 151 L Ed 2d 497, 505 (2001). *Id.* at 561-563; 568. The court also said, like other courts, see e.g., *Starkey,*

supra, that the dissemination of information about sex offender registrants is "tantamount to the historical punishment of 'shaming.' *Id.* at 564. The Court observed that it is well-established that sex offenders suffer discrimination in housing, eviction (expulsion from the community,[15] see *Smith v Doe*, 123 S Ct at 1150). They are regularly forced out of jobs and homes, their children are bullied, and are barred from employment even where employers hire felons who have been convicted of non-sex crimes. *Id.* at 565-568.

The Maryland court emphasized that whether a law is labeled "punitive" or "regulatory", "civil" or "criminal" makes no difference. It is the *effect* of the law that is determinative for ex post facto purposes. If the effect is to impose an "additional sanction for a crime committed in the 1980's", it is punishment, not regulation, and it is an *ex post facto* violation. *Id.* at 563-564. The Court held that the statute was in violation of the state's *ex post facto* protections. *Id.* at 568-569.

Additional federal case law. Some federal courts, as well, have found that registration requirements are, indeed, punishment under an ex post facto analysis. See e.g., *Gillette, supra,* n 11. In *US v Juvenile Male*, 590 F3d 924 (CA 9, 2009),[16] the Ninth Circuit considered the provision of SORNA which required registration for those convicted of juvenile offenses before enactment of the law. The court observed

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[15] A powerful reference to such 'shaming' was raised by Mr. Betts in the instant proceedings, when he told the court he could not find reasonable housing and said," I don't wanna live in a single wide trailer three miles outside of town because that's the only place people are gonna let me live." This is exactly the kind of expulsion that is "tantamount to shaming" and classic expulsion from the community." MHT 22-23.

[16] Vacated as moot due to expiration of sentence, ___US ___; 131 S Ct 2860; 180 L Ed 2d 811 (2011).

intent of the statute is non-punitive, but held that the *effect* of the statute was punitive. Applying the "clearest proof" test of *Smith v Doe, supra,* and using the same *Mendoza-Martinez* factors, the Court wrote: "(W)e interpret the "clearest proof" requirement in the only way that is sensible: that the terms of the statute, the legal obligations it imposes, the practical and predictable consequences of those obligations, our societal experience in general, and the application of our own reason and logic, *establish conclusively that the statute has a punitive effect.*" (Emphasis added). *Id.* at 931. The Court held that SORNA's juvenile registration and reporting requirement, applied retroactively, violated the federal ex post facto clause. It further ordered that the offender be relieved of the registration obligation. *Id.* at 941-942.

C. Relief is appropriate under both, the state and federal constitutions, or either one standing alone.

Mr. Betts urges this Court to adopt the analysis in *Letalien, supra,* and other cited case law, to find that *inter alia,* the increased burden in Michigan of increased in-person reporting requirements, longer registration periods, greatly increased fees, and no mechanism to petition for removal from the registry meet the "clearest proof" test of *Smith v Doe, supra.* This is punishment, not regulation. It allows for relief under the federal constitution, since Michigan's law has become so much more onerous and punitive than may originally have been the case.

However, Mr. Betts also argues that if this Court does not find that it can base relief on the federal constitution, that the Michigan constitution alone affords relief.

Const 1963, art 1, §10. See e.g., *Doe v Department of Public Safety and Correctional Services*, 430 Md 535 (2013); *Doe v State*, 189 P3d 999 (2008).

Whether the on the face of the law, or as applied, Mr. Betts is subject to an invalid conviction under SORA. Relief may be found on the face of the law, as in *Letalien*. Alternatively, it may be found on the basis of application to Mr. Betts, himself. *See supra.* As the court reasoned in *Doe v Department of Public Safety and Correctional Services, supra*, at the time Mr. Betts pled guilty, he could not possibly have known the extreme punitive effect that the sex offender registry would have on his life because the law was not enacted. In addition, ever-increasing changes to the law have made his in-person reporting for Tier III quarterly, the fees dramatically increase, and broadened access to his personal information. These are just a few of the punitive changes. There is also is no avenue for him to petition to be removed for good cause.

D. Conclusion and remedy.

Today, with the far-reaching changes in Michigan's statutory scheme, the questions posed about the punitive nature of SORA are very different. It is settled that the authority of an older case may be as effectively dissipated by a later trend of decisions as by a statement expressly overruling it. See, e.g., *Olsen v State of Nebraska*, 313 US 236, 244-246; 61 S Ct 862, 864-65; 85 L Ed 1305 (1941). This takes Defendant's claim out of the category of "immutably decided," and into the category of "appropriate for judicial review." Although the federal precedent above does not strictly govern the questions presented here, see infra, the precedent carries weight

in this analysis. However, "(W)hen the reason for a rule of law fails, the rule should fail."

The sex offender registry has always been unnecessarily oppressive. Even so, it has gotten far more oppressive. Thus, the context for the analysis has changed dramatically. A court does not need to perpetuate error simply because it reached wrong result in an earlier decision. *Petrie v Curtis*, 387 Mich 436 (1972).

Based on the above case law and constitutional precedent, Defendant Paul Betts should be relieved of the punitive sanctions of SORA. He requests relief in the form of this Court granting leave to appeal and a) finding SORA to be unconstitutional on its face, on state or federal ex post facto grounds, or both or, b) a finding that SORA is inapplicable in this case based on state or federal ex post facto grounds, or both.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court grant leave and grant the relief requested, or grant any other relief which it deems fair and just, because this case involves a substantial question as to the validity of the applicable law, has significant public interest, and involves legal principles of major significance to the state's jurisprudence.

Respectfully submitted,

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