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State of Michigan
In the Supreme Court

The People of the State of Michigan

Plaintiff-Appellee,

v.

Gary J. Shaver

Defendant-Appellant.

MSC No. 167736

COA No. 361488

Tuscola County Circuit Court
Case No. 15-13521 FH

Appendix to
Gary J. Shaver's
Supplemental Brief

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Appendix A

April 4, 2022, Trial Court Order Granting Motion and Vacating Mr. Shaver's Conviction

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STATE OF MICHIGAN

IN THE TUSCOLA COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court No. 15-13521 FH

-vs-

Honorable Amy Grace Gierhart

GARY J. SHAVER, JR.

Defendant-Appellant.

TUSCOLA COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE
Attorneys for Mr. Gary Shaver

ORDER

At a session of the Tuscola Circuit Court
in the City of Caro, Michigan
on this 4 day of April, 2022

This matter having come before the Court on Mr. Shaver's motion for relief from judgment, and the Court being otherwise advised in the premises, it is hereby **ORDERED** that Gary J. Shaver, Jr.'s conviction and sentence in this case are hereby **VACATED** and that this case is **DISMISSED** with prejudice. This Order shall be given immediate effect and the Department of Corrections shall release Mr. Shaver as soon as practical upon its receipt of this Order.

SO ORDERED.

Honorable Amy Grace Gierhart

Prepared on April 1, 2022 by the State Appellate Defender Office

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Appendix B

April 29, 2022, Trial Court Order Denying Motion

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STATE OF MICHIGAN

IN THE TUSCOLA COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

Lower Court No. 15-13521 FH

-vs-

Honorable Amy Grace Gierhart

GARY J. SHAVER, JR.

Defendant-Appellant.

TUSCOLA COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE
Attorneys for Mr. Gary Shaver

ORDER

At a session of the Tuscola Circuit Court
in the City of Caro, Michigan
on this 29 day of April, 2022

This matter having come before the Court on the prosecutor's motion for reconsideration, and the Court being otherwise advised in the premises, the Prosecutor's motion for reconsideration is hereby

☐ Granted

☒ Denied

Honorable Amy Grace Gierhart

Prepared on April 28, 2022 by the State Appellate Defender Office

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Appendix C

People v Shaver, __ Mich App __, __ (2024) (Docket No. 361488)

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GARY J. SHAVER, JR.,

Defendant-Appellee.

FOR PUBLICATION
September 5, 2024
9:00 a.m.

No. 361488
Tuscola Circuit Court
LC No. 15-013521-FH

Before: CAVANAGH, P.J., and JANSEN and MALDONADO, JJ.

MALDONADO, J.

This case requires us to consider the retroactive application of the Supreme Court's conclusion in *People v Betts*, 507 Mich 527; 968 NW2d 497 (2021), that the 2011 version of Michigan's Sex Offender Registration Act (SORA), MCL 28.721, *et seq*., was unconstitutional pursuant to the federal and state constitutional prohibitions against ex post facto laws. Defendant was placed on the sex offender registry in 2004, and he was convicted of failure-to-register offense in 2015 pursuant to the 2011 SORA. The Michigan Supreme Court subsequently decided in *Betts* that the stricter reporting requirements imposed by the 2011 SORA were punitive and therefore constituted impermissible ex post facto punishments. In 2022, defendant filed a motion for relief from judgment, arguing that *Betts* entitled him to reversal of his 2015 conviction. The trial court, without affording the prosecution an opportunity to respond, concluded that *Betts* applied retroactively and reversed defendant's conviction. The prosecution appeals by leave granted,[1] arguing that the court erred by failing to allow it to respond to defendant's motion and that the court erred by concluding that *Betts* applied retroactively rather than prospectively. We agree with both arguments and, therefore, reverse.

[1] *People v Shaver*, unpublished order of the Court of Appeals, entered February 15, 2023 (Docket No. 361488).

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I. BACKGROUND

This appeal stems from defendant's November 23, 2015 guilty plea to failure to comply with the Sex Offender Registration Act (SORA), MCL 28.729 (willful failure to immediately notify law enforcement of change of residence), second offense, MCL 28.729(1)(b), with a fourth-offense habitual offender enhancement, MCL 769.12.[2] Defendant has a juvenile history of sexual contact with a victim under the age of 13, which occurred in 1998. In 2004, defendant was adjudicated as a juvenile of three counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d. He was discharged from juvenile detention facilities in 2009. As a sex offender, defendant was required pursuant to SORA to register his change of address with law enforcement. MCL 28.729 *et seq*. In 2015, defendant was planning to move to a new home and, accordingly, he updated his address with local law enforcement. When the prior tenant held over, he was not able to move in as planned. However, defendant failed to change his address back because he was hoping the situation would be resolved before the authorities noticed anything was awry. Needless to say, this plan did not work.

In 2016, defendant was sentenced to serve five years of probation and six months in jail. In 2022, defendant moved for relief from judgment pursuant to MCR 6.500 on the basis of our Supreme Court's holding in *Betts*. The trial court promptly granted without affording the prosecution any opportunity to respond. The prosecution moved for reconsideration, arguing that the trial court did not have the authority to grant defendant relief under MCR 6.504(B)(4) without first directing the prosecution to respond to the motion for relief from judgment within a minimum of 56 days and that *Betts* should apply prospectively. The trial court denied this motion, and this appeal followed.

II. STANDARDS OF REVIEW

This Court reviews a trial court's grant or denial of a defendant's motion for relief from judgment under MCR 6.502 for an abuse of discretion. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). "A trial court abuses its discretion when it selects an outcome outside the range of reasonable and principled outcomes." *People v Uphaus*, 278 Mich App 174, 181; 748 NW2d 899 (2008). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted). This Court also reviews de novo the interpretation and application of the court rules. *People v White*, 337 Mich App 558, 567; 977 NW2d 138 (2021). Finally, whether a court decision applies retroactively is a question of law that we review de novo. *People v Sexton*, 458 Mich 43, 52; 580 NW2d 404 (1998).

[2] This appeal was submitted with another application for leave to appeal by defendant, which this Court denied. See *People v Shaver*, unpublished order of the Court of Appeals, entered February 23, 2017 (Docket No. 336542), p 1.

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III. MCR 6.506(A)

The trial court erred by granting defendant's motion for relief from judgment without affording the prosecution an opportunity to respond.

Whether the trial court was authorized to grant defendant's motion requires consideration of MCR 6.500, which governs criminal procedure for seeking relief from judgment when no further appeal by right is available. When interpreting court rules, we must "consider the rule's plain language." *People v Owens*, 338 Mich App 101, 114; 979 NW2d 345 (2021). "If the plain language is clear, this Court will not engage in further construction or interpretation." *Id*. The trial court may deny the motion for relief from judgment without conducting additional proceedings if the motion "plainly appears from the face of" the submissions that the motion is without merit. MCR 6.504(B)(2). However, when the entire motion is not dismissed pursuant to subrule (B)(2), "the court shall order the prosecuting attorney to file a response . . . ." MCR 6.504(B)(4). "The trial court shall allow the prosecutor a minimum of 56 days to respond." MCR 6.506(A). "As we have stated many times, 'shall' indicates a mandatory directive." *People v Lockridge*, 498 Mich. 358, 387; 870 NW2d 502 (2015). Therefore, courts have no discretion to grant such a motion without granting the prosecution 56 days to respond.

By granting defendant's motion for relief from judgment the day after it was filed, the trial court violated the pertinent court rules because it failed to afford the prosecution 56 days, to respond. Violating the court rules was necessarily an abuse of discretion. *Franklin*, 500 Mich at 100. Defendant concedes the trial court failed to direct a response from the prosecution in violation of the court rules but argues, citing MCR 2.613, that this amounts to a procedural misstep which this Court should review for harmless error. MCR 2.613 provides an error in an order is not grounds for vacating the order unless refusal to vacate appears inconsistent with substantial justice. While this is a rule of civil procedure, it also applies to criminal cases. MCR 6.001(D).

Ultimately, at this stage of the proceeding, the fact that the prosecutor was denied the opportunity to respond is immaterial to the outcome. The resolution of this case is purely a question of law. If *Betts* applies retroactively, then the trial court's decision to grant defendant's motion for relief from judgment must be affirmed. If *Betts* applies prospectively, then it must be reversed. Accordingly, we now consider whether *Betts* is to be applied retroactively.

IV. OVERVIEW OF SORA AND *BETTS*

SORA has undergone several changes since its inception in 1994. Relevant to this appeal is MCL 28.725(1)(a), which is the specific provision defendant was convicted of violating by failing to update his address in 2015. In 1994, MCL 28.725(1)(a) provided:

> (1) Within *10 days* after any of the following occur, an individual required to be registered under this act shall notify the local law enforcement agency in which his or her new address is located, or the state police or the sheriff's department of the individual's new address:

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> (a) The individual *changes* his or her address. [1994 PA 295 (emphasis added).]

This provision was amended in 1999, and referred to in the briefs on appeal as the "pre-2006" SORA.

When defendant was convicted of the registerable offense in 2004, this provision provided:

> (1) Within *10 days* after any of the following occur, an individual required to be registered under the act shall notify the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the department post of the individual's new residence or domicile:
>
> (a) The individual *changes* his or her residence, or place of work or education . . . . [1999 PA 85 (emphasis added).]

This provision was amended again in 2005, to add the term "vacates." 2005 PA 132, effective January 1, 2006. Referred to as the "2006 SORA" throughout the briefs on appeal, it provided:

> (1) Within *10 days* after any of the following occur, an individual required to be registered under the act shall notify the local law enforcement agency or sheriff's department having jurisdiction where his or her new residence or domicile is located or the department post of the individual's new residence or domicile:
>
> (a) The individual *changes or vacates* his or her residence, domicile, or place of work or education . . . . [Emphasis added.]

The 10-day reporting time frame was shortened by 2011 PA 17, effective July 1, 2011. This is the "2011 SORA," which provided:

> (1) An individual required to be registered under this act who is a resident of this state shall report in person and notify the registering authority having jurisdiction where his or her residence or domicile is located *not more than 3 business days after any of the following occur:*
>
> (a) The individual *changes or vacates* his or her residence or domicile. [2011 PA 17 (emphasis added).]

This is the version of MCL 28.725(1)(a) defendant was convicted of violating in 2015, and did not change when SORA was amended in 2015.

In *Betts*, the defendant challenged his 2012 failure-to-register conviction for a sex offense he committed in 1993. *Betts*, 507 Mich 536-537. The defendant alleged that the changes to SORA since 1994 transformed it from a regulatory scheme to a punishment scheme that imposed significant restrictions on the lives of registrants "such that the retroactive application of those provisions to him violated the Ex Post Facto Clauses of the Michigan and United States Constitutions." *Betts*, 507 Mich at 533-534, 536; see US Const, art I, § 10; Const 1963, art 1, § 10. The Court determined that the Legislature intended for the 2011 SORA to be a civil remedy rather

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than a criminal punishment. *Id*. at 548. Nevertheless, after applying "each of the *Mendoza-Martinez*[3] factors that the United States Supreme Court identified as relevant in *Smith*,[4]" the Court determined that the 2011 SORA's effect was so punitive "as to negate the State's intention to deem it civil." *Id*. at 549 (quotation marks and citation omitted).

The Court went through the five factors, concluding that the 2011 SORA (1) "bears significant resemblance to the traditional punishments of banishment, shaming, and parole,"(2) "imposed onerous restrictions on registrants by restricting their residency and employment, and it also imposed significant affirmative obligations by requiring extensive in-person reporting,"(3) "promotes the traditional aims of punishment" through deterrence and retributive restrictions, (4) "is connected to a nonpunitive purpose," and (5) contained "demanding and intrusive requirements, imposed uniformly on all registrants regardless of an individual's risk of recidivism" that "were excessive in comparison to SORA's asserted public-safety purpose." *Id*. at 550-562. The Court concluded that, in sum, "the 2011 SORA's aggregate punitive effects negate the state's intention to deem it a civil regulation. Accordingly, the retroactive imposition of the 2011 SORA increases registrants' punishment for their committed offenses in violation of federal and state constitutional prohibitions on ex post facto laws." *Id*. at 562 (citation omitted). The Court further explained that the unconstitutional portions of the 2011 amendments could not be severed to maintain the remaining portions. *Id*. at 563. Revival of a prior version of SORA was also untenable because of concerns about infringing on the Legislature's prerogatives. *Id*. at 571-572.

While the Court made clear that the 2011 SORA was unconstitutional, it did not address whether those whose convictions for violating the 2011 SORA were final could obtain collateral relief. Thus, we are left to determine whether *Betts* applies retroactively.

V. RETROACTIVE APPLICATION OF *BETTS*

Application of federal and state retroactivity standards leads us to conclude that *Betts* should not apply retroactively.

"The retroactivity of a court's ruling presents an issue of law that this Court reviews de novo." *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008).

The Supreme Court's decision to strike down the 2011 SORA was based both on the United States Constitution's and 1963 Michigan Constitution's prohibitions on ex post facto laws. *People v Betts*, 507 Mich 527, 542; 968 NW2d 497 (2021). Because the decision arose both from federal and state constitutional law, the federal and state tests for retroactive application must both be considered. See *People v Barnes*, 502 Mich 265, 268-269, 273-274; 917 NW2d 577 (2018).

---

[3] *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed2d 644 (1963) (articulating seven factors relevant for determining if "an Act of Congress is penal or regulatory in character").

[4] *Smith v Doe*, 538 US 84, 97; 123 S Ct 1140; 155 L Ed2d 164 (2003) (articulating five of the factors articulated in *Mendoza-Martinez* that were relevant to determining whether Alaska's sex offender registration law was, in effect, penal or regulatory).

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A. FEDERAL RETROACTIVITY

Federal law does not mandate retroactive application because *Betts* creates a new rule, *Betts* does not prohibit a certain class of primary conduct, and *Betts* does not establish a watershed rule of criminal procedure.

The first step in the federal analysis of retroactivity is whether the decision created a "new rule." *Maxson*, 482 Mich at 388, citing *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed2d 334 (1989).

> A case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. Deciding whether a rule is "new" requires a court to determine whether a state court considering the defendant's claim at the time his conviction became final would have felt *compelled* by existing precedent to conclude that the rule he seeks was required by the Constitution. If a reasonable jurist would not have felt compelled by existing precedent, then the rule is new. In other words, the relevant question is not simply whether existing precedent might have *supported* the rule, but whether the rule was *dictated* by then-existing precedent. [*Id*. at 388-389 (quotation marks, citations, and alterations omitted).]

We conclude that *Betts* announced a new rule because Michigan courts before *Betts* consistently rejected ex post facto challenges to SORA on the ground that the registration requirements of the act were not considered punishment, but a civil remedy. See *People v Bosca*, 310 Mich App 1, 72; 871 NW2d 307 (2015), rev'd in part on other grounds 509 Mich 851 (2022) ("[T]his Court has consistently ruled that SORA's registration requirement . . . does not constitute punishment . . . ."); see also *People v Golba*, 273 Mich App 603, 620; 729 NW2d 916 (2007) ("SORA is a remedial regulatory scheme furthering a legitimate state interest of protecting the public; it was not designed to punish sex offenders."). Given the state of the law at the time defendant's conviction became final, no state court considering the claim could have felt compelled by existing precedent to grant the relief now sought. Therefore, *Betts* established a new rule.

In general, new rules are not applied retroactively, but as our Supreme Court has explained, there are exceptions:

> The first exception is whether the rule is a "substantive rule of constitutional law," defined as a rule forbidding certain primary conduct or a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense. . . . The second exception is whether the new rule is a "watershed rule" of criminal procedure. In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction and alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding. [*Barnes*, 502 Mich at 271-272 (quotation marks, citations, and alterations omitted).]

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The first exception is whether the rule is a "substantive rule of constitutional law," which is defined as "a rule forbidding certain primary conduct or a rule prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Id*. at 271. As the prosecution argues, this exception does not apply because *Betts* did not narrow the range of conduct SORA punishes. Defendant would be required to register his address under any iteration of SORA in existence since 1999. *Betts*'s categorization of the 2011 SORA as punitive does not make it a substantive rule of constitutional law.

The second type of special concern or exception to the rule against retroactive application of judicial decisions creating new rules is on the basis of whether the new rule is a "watershed rule" of criminal procedure. *Id*. at 271 (quotation marks and citation omitted). "In order to qualify as watershed, a new rule must be necessary to prevent an impermissibly large risk of an inaccurate conviction and alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Id*. (quotation marks, citation, and alterations omitted). In other words, a rule qualifies as "watershed" if it is needed to make a conviction more accurate. "Although the precise contours of this exception may be difficult to discern, [the Supreme Court of the United States has] usually cited *Gideon v Wainwright*, 372 US 335 [83 S Ct 792, 9 L Ed 2d 799] (1963), holding a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception." *Saffle v Parks*, 494 US 484, 495; 110 S Ct 1257, 108 L Ed 2d 415 (1990). The "watershed rule" of criminal procedure exception to the rule against retroactive application of new rules to already closed cases is extremely limited. Because defendant's failure-to-register conviction would have arisen under any iteration of SORA since its inception in 1999, application of the 2011 SORA to him did not create an impermissibly large risk of an inaccurate conviction or alter the fairness of the proceedings concerning his failure-to-register conviction. More generally, *Betts* did not establish a procedural rule because its application has no bearing on the process through which criminal convictions are obtained.

B. STATE RETROACTIVITY

Our conclusion that *Betts* does not apply retroactively pursuant to federal standards is not the end of our analysis because "[a] state may accord broader effect to a new rule of criminal procedure than federal retroactivity jurisprudence accords." *Maxson*, 482 Mich at 392. Therefore, we now turn to whether *Betts* is retroactive pursuant to Michigan law. Michigan's "state-law test" for retroactive application of new rules established by case law requires courts to "consider: (1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice." *Barnes*, 502 Mich at 273, quoting *People v Hampton*, 384 Mich 669; 187 NW2d 404 (1971).

The first prong of the *Hampton* test requires an analysis of the new rule's purpose. "Under the 'purpose' prong, a law may be applied retroactively when it concerns the ascertainment of guilt or innocence; however, a new rule of procedure which does not affect the integrity of the fact-finding process should be given prospective effect." *Maxson*, 482 Mich at 393 (quotation marks, citations, and alteration omitted). "The most important factor is the first one." *People v Woods*, 416 Mich 581, 618; 331 NW2d 707 (1982). This prong gravitates against retroactive application for reasons similar to the above discussion of the "watershed exception." Application of *Betts* has no bearing on "the integrity of the fact-finding process" and does not create a rule of procedure. Maxson, 482 Mich at 393 (quotation marks and citation omitted). Put differently, application of

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this rule is not going to impact the chances of a wrongful conviction. Therefore, the purpose of the rule weighs in favor of prospective application.

The second prong of the *Hampton* test requires an analysis of the extent to which the old rule has been relied upon. Finally, the third prong of the *Hampton* test requires consideration of the new rule's effect on the administration of justice. "Because the amount of past reliance will often have a profound effect on the administration of justice, the second and third factors are often dealt with together." *People v Sexton*, 458 Mich 43, 63; 580 NW2d 404 (1998). There is likely to be greater reliance "[w]hen a decision overrules settled law" as opposed to "cases in which the law was unsettled or unknown." *Id*. at 63.

An examination of caselaw discussing these two factors provides useful guideposts for our analysis. In *People v Kennedy*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 363575); slip op at 4-5, this Court concluded that factors two and three weighed in favor of retroactive application of the new prohibition against one-person grand juries because "indictment by a one-man grand jury does not appear to have ever been a ubiquitous or commonly used practice" and because it appeared unlikely that retroactive application "undermine the validity of a large number of convictions." The opinion did not specify how many convictions would be undermined but rather seemed to be inferring this based on the clear rarity of the practice. *Id*. It seems clear that there was greater reliance upon the 2011 SORA than on one-person grand juries. In *Barnes*, 502 Mich at 273-275, this Court determined that the decision to render the sentencing guidelines advisory did not "qualify for the *extraordinary remedy* of retroactive application to cases on collateral review" partly because virtually every felony sentence imposed pursuant to the guidelines would be impacted. (Emphasis added.) Clearly, reliance on the 2011 SORA was less widespread than the sentencing guidelines. In *People v Quinn*, 305 Mich App 484, 490; 853 NW2d 383 (2014), this Court considered whether the Supreme Court's decision "to reestablish the common-law rule that a person may resist an unlawful arrest" applied retroactively. Because "prosecutors and courts relied on" the old rule "and full retroactivity could upset the public's interest in the finality of convictions," this Court determined that the new rule "should be given limited retroactive effect to cases in which a defendant raised the issue on appeal and the defendant either preserved it in the trial court or can demonstrate plain error affecting substantial rights under Carines." *Id*. This unique approach would not help defendant because he pleaded guilty. In *Maxson*, 482 Mich at 398-399, the Supreme Court concluded that factors two and three weighed heavily against retroactive application of the rule that defendants who pleaded guilty are entitled to counsel on direct appeal because providing relief to "a small number of defendants" would "not outweigh the certainty that" a significant number of offenders who pleaded guilty "would inundate the appellate process with new appeals." The Court emphasized the state's interest in preserving its limited resources for those currently charged with crimes. *Id*. In *Sexton*, 458 Mich at 57, the Supreme Court concluded that retroactive application of the rule that police must inform detained suspects when their attorney attempts contact "would be extremely disruptive to the administration of justice" because it would "undermine the validity of a large number of convictions and burden the criminal justice system with numerous retrials." Notably, retroactive application of *Betts* would not result in retrials.

Returning to the issue before us, in *Betts*, the Supreme Court "overrule[d] settled law" by upending the 2011 SORA. *Betts*, 507 Mich at 566-574 (discussing the inadequacy of severability and revival to remedy the 2011 SORA's constitutional defects). Every time a court sanctioned

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somebody who was convicted of a sex offense prior to implementation of the 2011 SORA for violating the 2011 SORA, it did so in reliance upon the old rule. This "amount of past reliance" could "have a profound effect on the administration of justice" because everybody convicted of violating the 2011 SORA whose underlying offense was committed before its implementation would be entitled to reversal. *Sexton*, 458 Mich at 63. In his motion for relief from judgment, plaintiff argued that the reach of the new rule was "limited" because it only affected "a narrow set of people" whose underlying crimes "were committed before July 1, 2011, and whose failure to register convictions occurred after that date." However, despite describing this reach as "narrow," defendant did not provide evidence regarding the number of people who would be affected.

Simply put, the breadth of the impact *Betts* would have if it were applied retroactively is not easily ascertainable, and as noted, defendant did not provide the trial court with any concrete information regarding its breadth.[5] In its motion for reconsideration and again on appeal, the prosecution has presented exhibits suggesting that, as of the start of 2022, retroactive application would affect 306 probationers and parolees, but the prosecution also correctly notes that this does not include "those hundreds—if not thousands—of offenders who are not serving sentences who could attempt to seek relief" from old convictions that have become final. While we know there was broad reliance on the prior rule, we simply do not know the toll that retroactive application of *Betts* would have on the administration of justice. However, we do know that this decision would apply to an entire class of criminal convictions that were committed and finalized between 2011 and 2021, so it is clear that this would cause some strain on the administration of justice. All of this strain would be the result of valid reliance upon the 2011 SORA. We also note that, while factors two and three present closer calls, factor one clearly weighs against retroactivity. Therefore, given the information available to us, we view the second and third factors as weighing slightly against retroactive application.

On balance, we conclude that Michigan's standard for retroactive application of judicial decisions weighs against retroactive application of *Betts*. Therefore, we conclude that *Betts* applies prospectively, and those whose convictions were finalized before *Betts* was decided are not entitled to collateral relief.

[5] Defendant bears the burden to establish that he is entitled to relief pursuant to MCR 6.502. *People v Neuman*, 492 Mich 853; 817 NW2d 93 (2012). We then review for abuse of discretion the trial court's assessment of whether defendant met his burden. *Clark*, 274 Mich App at 251.

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VI. CONCLUSION

The trial court erred by deciding defendant's motion for relief from judgment without affording the prosecution an opportunity to respond. Moreover, the trial court erred by concluding that *Betts* applies retroactively. Because our decision regarding *Betts* necessarily decides the merits of defendant's motion, no additional proceedings below are warranted. Therefore, we reverse the trial court's order granting defendant's motion for relief from judgment and remand this case for the limited purpose of reinstating defendant's conviction. We do not retain jurisdiction.

/s/ Allie Greenleaf Maldonado
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

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Appendix D

October 11, 2023, *McMahan* Trial Court Opinion

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 17-07077-FH

v

Hon. Paul J. Denenfeld

JEREMY NATHANIEL MCMAHAN,

Defendant.

Kent County Prosecutor's Office
82 Ionia Avenue NW
Suite 450
Grand Rapids, MI 49503

Jessica Zimbelman (P72042)
State Appellate Defender Office
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200 North Washington, Ste. 250
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OPINION AND ORDER GRANTING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT AND VACATING JANUARY 9, 2018 CONVICTION

I. Introduction

Defendant Jeremy Nathaniel McMahan, originally acting *in pro per*, filed a Motion for Relief from Judgment pursuant to MCR 6.500 *et seq.*, arguing that SORA has been held unconstitutional as applied to the circumstances of his case. The People filed a response in opposition. Defendant was thereafter appointed counsel and, pursuant to this Court's order, Defense counsel filed a reply to the People's response.

Defendant was convicted by plea on July 9, 2002 of one count of Criminal Sexual Conduct. He was therefore required to register under the version of SORA in place before 2006. In 2017, Defendant was charged for failing to register his address when he moved from Michigan to North Carolina. Defendant pled guilty on December 4, 2017 to the offense as a third habitual offender and was sentenced on January 9, 2018 to 18 months to 7 years in prison. Defendant now moves for relief from judgment arguing that this conviction is properly vacated pursuant to the Michigan Supreme Court's decision in *People v Betts*, 507 Mich 527, 533; 968 NW2d 497 (2021).

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II. Legal Standard

Under MCR 6.508(D), it is the Defendant's burden to establish entitlement to the relief requested. Typically, the court is prohibited from granting relief if the defendant "alleges grounds for relief . . . which could have been raised on appeal from the conviction and sentence . . . unless the defendant demonstrates (a) good cause for failure to raise such grounds on appeal . . . and (b) actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3). Here, Defendant could not have raised the current argument on appeal; *Betts* was decided after Defendant's case was final on direct review. And the People do not now argue that Defendant's motion is procedurally barred. Accordingly, the Court will proceed with an analysis of Defendant's motion.

III. Analysis

In *Betts*, the Supreme Court was asked to decide whether the retroactive application of Michigan's Sex Offenders Registration Act (SORA), MCL 28.721 *et seq.*, as amended by 2011 PA 17 and 18 (the 2011 SORA), violated state and federal constitutional prohibitions on ex post facto laws. *Id.* at 533. The defendant was convicted of second-degree criminal sexual conduct in 1993 and was required to register under SORA. *Id.* at 536. In 2012, the defendant failed to report a change of residence, his e-mail address, and the purchase of a vehicle within three days, and the defendant was convicted of violations of the 2011 SORA. *Id.* at 536-537. On appeal, the defendant argued that the 2011 amendments to SORA transformed it from a regulatory scheme into a punishment scheme such that the retroactive application of those amendments to him violated the Ex Post Facto Clauses of the Michigan and United States Constitutions. *Id.* at 533-534.

Because our Supreme Court concluded that the amendments potentially increased the punishment for the conviction of a crime committed before the amendments and that the statute was intended to be a civil remedy, the Court applied the *Mendoza-Martinez* factors to determine whether the statue imposed an ex post facto penalty.[1] *Id.* at 543-544. After weighing the factors, the Court concluded that the 2011 SORA imposed a criminal punishment and enforcing it against

[1]The *Mendoza-Martinez* factors are whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. [*Kennedy v Mendoza-Martinez*, 372 US 144, 168-189; 83 S Ct 554; 9 L Ed 2d 644 (1963).]

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someone who committed his or her crime before the 2011 amendments took effect violates the Michigan and United States Constitutions' prohibitions against ex post facto laws. *Id.* at 562. The Court further concluded that the unconstitutional provisions of SORA could not be severed. *Id.* Therefore, the Court held that it was unconstitutional to apply the 2011 SORA amendments to someone whose crime was committed before the 2011 amendments took effect. Because the crime subjecting the defendant to registration occurred in 1993, the Court vacated the defendant's conviction of failure to register as a sex offender.

Defendant in the current case is in the same position as the defendant in *Betts*; the crime subjecting him to registration occurred prior to the 2011 amendments but he was convicted of violations of the 2011 SORA. The People nevertheless argue that the Michigan Supreme Court's decision in *Betts* should not be retroactively applied to the current case. The Court disagrees.

In general, new substantive rules apply retroactively, including to cases on collateral review, but new procedural rules do not. The United States Supreme Court has explained as follows:

> The normal framework for determining whether a new rule applies to cases on collateral review stems from the plurality opinion in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). . . . Under *Teague,* as a general matter, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S., at 310, 109 S.Ct. 1060. *Teague* and its progeny recognize two categories of decisions that fall outside this general bar on retroactivity for procedural rules. First, "[n]ew *substantive* rules generally apply retroactively." *Schriro v. Summerlin,* 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); see *Montgomery v. Louisiana,* 577 U.S. ——, ——, 136 S.Ct. 718, 728, 193 L.Ed.2d 599 (2016); *Teague, supra,* at 307, 311, 109 S.Ct. 1060. Second, new "'watershed rules of criminal procedure,'" which are procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding," will also have retroactive effect. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); see *Teague, supra,* at 311–313, 109 S.Ct. 1060. [*Welch v United States*, 578 US 120, 128; 136 S Ct 1257; 194 L Ed 2d 387 (2016) (emphasis in original.]

"A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." *Schriro v Summerlin*, 542 US 348, 353; 124 S Ct 2519; 159 L Ed 2d 442 (2004). "This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish." *Id.* at 351–352. Procedural rules, by contrast, "regulate only the manner of determining the defendant's culpability." *Id.* at

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353. Such rules alter "the range of permissible methods for determining whether a defendant's conduct is punishable." *Id.* "They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352.

The People now argue that the holding of *Betts* is procedural because, when applied to Defendant in this case, it did not alter the range of conduct at issue.[2] The Court is unconvinced that the above analysis is subjective. Rather, without regard to the specific conduct at issue in this case, this Court must determine whether the *Betts* decision alters the range of conduct that the law punishes or narrows the scope of a criminal statute. The Court concludes that it does. Because the Michigan Supreme Court held that the unconstitutional provisions of SORA could not be severed, individuals in Defendant's position may no longer be convicted of violations of the 2011 SORA regardless of the specific conduct that lead to the conviction. Therefore, the Court holds that the new rule in *Betts* is substantive and "[n]ew *substantive* rules generally apply retroactively." *Schriro,* 542 US at 351.

Moreover, and importantly, the Michigan Supreme Court has directed trial courts to retroactively apply the *Betts* decision and has done so in cases that were on collateral review. "[N]otably, the Supreme Court entered orders directing trial courts to grant relief from judgment to remove SORA registration requirements for defendants convicted of sex offenses before the 2011 amendments after it decided *Betts* and with knowledge of the 2021 SORA amendments." *People v Johnson*, unpublished opinion of the Court of Appeals, issued April 27, 2023 (Docket No. 361607), 2023 WL 3140158, p *8; see also *People v Pohly*, 969 NW2d 330 (Mich, 2022); *People v Smith*, 969 NW2d 15 (Mich, 2022); *People v Werner*, 969 NW2d 330, 331 (Mich, 2022); *People v Almadrahi*, 509 Mich 853; 969 NW2d 56, 57 (2022); *People v Bosca*, 509 Mich 851; 969 NW2d 55 (2022); *People v Hadley*, 969 NW2d 14 (Mich, 2022).

Similarly, the Supreme Court has vacated convictions for failure to comply with the 2011 SORA in cases where the defendant's conviction for the offense requiring registration occurred prior to 2011.

> Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the defendant's conviction for failure to comply with the Sex Offenders

---

[2] The People argue that Defendant's act—or his failure to act—was conduct that the SORA law punished before 2006, in the 2011 version, and it punishes it today. Therefore, the People argue that the change in law was not a substantive change *for him*.

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> Registration Act, MCL 28.721 *et seq.* The retroactive application of 2011 PA 17 to the defendant, well after the 1998 offenses that required him to register, violates the federal and state constitutional prohibitions on ex post facto laws. *People v. Betts*, 507 Mich. 527, 968 N.W.2d 497 (2021). We REMAND this case to the Oakland Circuit Court for further proceedings consistent with *Betts*. [*People v Fleck*, 969 NW2d 14, 15 (Mich, 2022).]

Because the Court finds that the *Betts* decision is a new substantive rule and the Michigan Supreme Court has impliedly held that it applies retroactively, the Court concludes that *Betts* applies retroactively to the current case.

IV. Conclusion

Under *Betts*, the retroactive application of the 2011 SORA to Defendant, well after the 2002 offense that required him to register, violates the federal and state constitutional prohibitions on ex post facto laws. For this reason, Defendant's Motion for Relief from Judgment is hereby GRANTED and Defendant's January 9, 2018 conviction is VACATED.

IT IS SO ORDERED.

Dated: October 11, 2023

PAUL J. DENENFELD

Hon. Paul J. Denenfeld, Circuit Judge

7th CIRCUIT COURT
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Appendix E

11/23/2015 Plea

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STATE OF MICHIGAN

54TH JUDICIAL CIRCUIT COURT (TUSCOLA COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

vs. File No. 15-013521-FH

GARY J. SHAVER, JR.,

Defendant.
_____/

PLEA

BEFORE THE HONORABLE WILLIAM J. CAPRATHE, VISITING CIRCUIT JUDGE

Caro, Michigan - Monday, November 23, 2015

APPEARANCES:

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WITNESSES: DEFENDANT	
None	

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None		

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Caro, Michigan

Monday, November 23, 2015

(Proceedings commenced at 3:49 p.m.)

THE COURT: All right. People vers- -- versus Gary Shaver, 15-13521.

May we have the appearance of counsel present?

MR. WANINK: Eric Wanink on behalf of People.

MS. BLANTON: Lisa Blanton. I represent Mr. Shaver.

THE COURT: All right. And I'm informed that there has been a plea agreement in this case as well.

MS. BLANTON: There is.

THE COURT: Would you place Mr. Shaver under oath?

THE CLERK: Yes.

Please raise your right hand. You do solemnly swear or affirm that the testimony you shall give in this case between the People of the State and the defendant at the Bar will be the truth, the whole truth and nothing but the truth, so help you God?

THE DEFENDANT: Yes.

THE CLERK: Thank you.

(Defendant sworn at 3:50 p.m.)

THE COURT: All right. And we -- who wishes

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to state the plea agreement then, Mr. Wanink or Miss Blanton?

MR. WANINK: I can, Your Honor.

THE COURT: Okay.

MR. WANINK: It's my understanding defendant is pleading to Count I, failure to comply with Sex Offender Registration Act, second offender -- second offense, I'm sorry, and admitting three priors for enhancement as a habitual offender. There is a Cobbs agreement of a one-year cap on the minimum term of incarceration.

THE COURT: Is that a complete and accurate statement of the plea agreement then, Ms. Blanton?

MS. BLANTON: It is.

THE COURT: And, Mr. Shaver, did you understand the plea agreement?

THE DEFENDANT: Yes.

THE COURT: Is that a complete and accurate statement of it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any question about it at all?

THE DEFENDANT: No.

THE COURT: Other than the statement that was made, have there been any promises or indications to

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you that you'd receive some other benefit from your plea?

THE DEFENDANT: No, sir.

THE COURT: Is there anything that's been explained so far that you have questions about?

THE DEFENDANT: No.

THE COURT: You want to proceed with the plea agreement?

THE DEFENDANT: Yes, please.

THE COURT: Now, Ms. Blanton, are you appointed in this case?

MS. BLANTON: Yes.

THE COURT: Do you understand that if you could afford to hire an attorney and you wanted an opportunity to do that that the Court would give you an opportunity to do that, Mr. Shaver?

THE DEFENDANT: Yes, sir.

THE COURT: But it's my understanding you want to continue with Ms. Blanton representing you.

THE DEFENDANT: Yes, please.

THE COURT: Now, I have been handed an Advice of Rights form. Did you go over that with your attorney? This form that --

THE DEFENDANT: Yes.

THE COURT: -- states ten different rights

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that you have.

THE DEFENDANT: Yes.

THE COURT: Did you understand those rights?

THE DEFENDANT: Yes, I did.

THE COURT: Do you understand that by pleading guilty, you'd be giving up or waiving those rights?

THE DEFENDANT: Yes, sir.

THE COURT: That's what you want to do here today?

THE DEFENDANT: Yes, please.

THE COURT: Any questions about them at all?

THE DEFENDANT: No, sir.

THE COURT: The charge that you'd be pleading to in this case, Count I, is failing to register on or about -- and then there's a span -- 9-10-15 through 9-29-15 in Wells Township in Tuscola County. Wilfully violating the Sex Offender Registration Act by failing to notify law enforcement or other registering authority that you had changed or vacated a residence or domicile immediately after doing so as required by law.

That's a felony. It normally carries up to four years in prison and/or a $2,000 fine, and by admitting habitual fourth, at least having three prior

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felony or attempt-to-commit felony convictions, it raises it to a maximum of up to 15 years in prison.

MR. WANINK: Actually, Your Honor, the second offense enhancement makes it a seven-year, so with three priors, it would be a life offense.

THE COURT: Oh, I see that. Yeah. You're correct. He's pleading under the second offense aspect of it, so it -- it raises it to a life offense rather than a 15-year. I stand corrected, and I appreciate your pointing that out 'cause it's a seven-year instead of a four-year and/or a $5,000 fine.

So that would be up to life in prison and/or a $5,000 fine. However, there was a Cobbs or a sentencing indication that I would have a one-year jail cap plus probation if you were to plead guilty today, and that's what you're doing.

And so at the time of sentencing -- we'll set this matter for sentencing. At the time of sentencing, if for some reason I feel that I need to exceed the one-year jail cap, that I can't stay within that sentence indication, I would withdraw -- allow you to withdraw your plea and have your rights reinstated and you would be right where you are now. You could go to trial or pursue whatever you felt was appropriate to pursue at that time. Understood?

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THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you have any question at all about the nature of the charges or what they mean?

THE DEFENDANT: No, sir.

THE COURT: You fully understand the nature of the charges and what they mean?

THE DEFENDANT: Yes.

THE COURT: And you went over that Advice of Rights form, so I think we can proceed to plea if there's nothing further at this time, Mr. Wanink?

MR. WANINK: No, nothing.

THE COURT: Ms. Blanton?

MS. BLANTON: I have nothing.

THE COURT: How do you plead to -- to that charge of sex offender, failing to register under the registration act as a second offense?

THE DEFENDANT: Guilty.

THE COURT: And how do you plead to having at least three prior felony or attempt-to-commit felony convictions --

THE DEFENDANT: Guilty.

THE COURT: -- before that? Is it your own choice to plead guilty?

THE DEFENDANT: Yes, sir.

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THE COURT: Has anyone threatened you to get you to plead?

THE DEFENDANT: No, sir.

THE COURT: Are you making your plea freely and voluntarily?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that by pleading guilty, you're giving up the rights that have been explained to you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you also understand that if your plea is the result of any undisclosed promises or threats, you have to tell me about them now or you'll be giving up the claim later that it was because of some undisclosed promises or threats that caused you to enter your plea rather than your own choice? Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Have there been any undisclosed promises or threats?

THE DEFENDANT: No, sir.

THE COURT: Do you know of any, Ms. Blanton?

MS. BLANTON: I don't.

THE COURT: Mr. Wanink?

MR. WANINK: No, Your Honor.

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THE COURT: Have you taken any medicines, drugs or intoxicants which are affecting you at the present time?

THE DEFENDANT: No, sir.

THE COURT: What happened then -- let's go back to that time period, that span of September the 10th, 2015, and September the 29th, 2015. Were -- were you under the law required to report your residency in Michigan?

THE DEFENDANT: Yes, sir.

THE COURT: And tell me what happened then, how this was a violation of that law.

THE DEFENDANT: I knowingly registered an address that I wasn't currently living at with the -- with the state police. It was under -- I was under the impression from the person I got permission from that owned the place that I'd be able to move in, but that didn't happen due to the current occupants not wanting to move out.

THE COURT: And so you didn't -- you found that out and didn't go back and rechange your address?

THE DEFENDANT: Correct.

THE COURT: And so you violated by not --

THE DEFENDANT: Yes.

THE COURT: -- informing them that the

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address that you originally gave them was no longer valid?

THE DEFENDANT: Yes, sir.

THE COURT: You were still expecting it to become valid, but it never did before your arrest, is that correct?

THE DEFENDANT: Yes, sir. I was supposed to move in October 1st. That was when the eviction papers stated they had to move out.

MS. BLANTON: The other people.

THE COURT: Eviction of the people that were actually in the --

THE DEFENDANT: At the place at the time, yes.

THE COURT: -- place that you were gonna replace there once they were evicted?

THE DEFENDANT: Yes.

THE COURT: Okay. Mr. Wanink, anything further on that part of the plea?

MR. WANINK: I guess if we could have some statement that he understood he was obligated to report his new address sooner than what -- and that he failed to do so.

THE COURT: Do you understand that --

THE DEFENDANT: Yes.

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THE COURT: -- you have an obligation? If your address is different than the one that you have registered, you have to change that within, what is it, three days?

MR. WANINK: Three days.

THE DEFENDANT: Yes, sir.

THE COURT: And you understood that you should have changed that address?

THE DEFENDANT: Yes, sir.

THE COURT: You just didn't do it waiting to expect to be moving into the house?

THE DEFENDANT: Yes, sir. I was hoping to move in before it kind of got noticed.

THE COURT: All right. That's fine.

Anything further on that factual basis --

MS. BLANTON: No.

THE COURT: -- Ms. Blanton?

MS. BLANTON: Thank you, Your Honor.

THE COURT: All right. And then prior to that September the 10th date of this year, had you been previously convicted in 2010 -- 10-25-10 convicted of assault with a dangerous weapon?

THE DEFENDANT: Yes, sir.

THE COURT: In Caro?

THE DEFENDANT: Yes.

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THE COURT: Michigan?

THE DEFENDANT: Yes, sir.

THE COURT: And 8-30-10 were you convicted of the offense of sex offender/failure to comply with the registration act?

THE DEFENDANT: Yes, sir.

THE COURT: And on 12-6 were you convicted -- of 2010 were you convicted of carrying a concealed weapon?

THE DEFENDANT: Yes, sir.

THE COURT: And as far as you -- and on 3-31-11 were you convicted of the offense of attempted police officer/assaulting or resisting?

THE DEFENDANT: Yes, sir.

THE COURT: And as far as you know, those are all still valid convictions on your record?

THE DEFENDANT: Yes, sir.

THE COURT: Anything further on the priors, Mr. Wanink?

MR. WANINK: Your Honor, just if the Court could -- well, I guess the Court made inquiry on the SOR for the second offense enhancement, so --

THE COURT: That was -- that was the third -- second one here, I think.

MR. WANINK: Okay.

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THE COURT: So I should do that, though.

That was a -- that -- let's see which one it was. That one on 8-30, 2010, that was a conviction of sexual offender/failure to register which is the basis also of the offense that you're -- causing you to have a second offense here --

THE DEFENDANT: Yes, sir.

THE COURT: -- in this case, is that correct? Okay. Yup. Thank you.

Anything further, Mr. Wanink?

MR. WANINK: No, Your Honor. Thank you.

THE COURT: And Miss Blanton?

MS. BLANTON: No. Thank you, Your Honor.

THE COURT: Do you believe the Court's complied then with the rules --

MS. BLANTON: I do.

THE COURT: -- for taking pleas?

And Mr. Wanink?

MR. WANINK: Yes, Your Honor.

THE COURT: All right. Then the Court finds that the defendant's plea is made voluntarily with understanding, that there have been no threats or force used to get the defendant to plead and no promises were made except as stated in court today.

I find the offense that he's pleading to was,

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in fact, committed, the defendant is guilty of committing that offense and the plea is accurate.

I find that he understands the nature of the charges to which he has offered his plea and the maximum possible sentence that can be imposed.

I find that he finds that -- I find that he understands that by pleading guilty he'll not have a trial of any kind, so he gives up all of his trial rights including, among others, those explained to him.

I find that -- further determine that he understands the other matters explained to him during the course of these proceedings.

The plea of guilty is hereby accepted and ordered entered upon the records of this court.

And since there's a Cobbs in this case, I'd like to adjourn this to my sentencing. Again, that option could be either in December 18th if it could be done or in February. Which?

MS. BLANTON: I would request December 18th if at all possible. I know that he does have prior PSIs, so it shouldn't be much more than an update.

MR. WANINK: Your Honor, as I understand it, Department of Corrections is already pretty well swamped for the rest of the year, and I don't know if I want to ask them to do any more favors than we've

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probably already asked them to do at this point.

MS. BLANTON: Could I then ask that the Court allow him, if -- if able, to participate in any jail programming prior to his sentencing such as PA 511, work site? Anything that he would typically do after sentencing, that he be allowed to do that beginning today?

THE COURT: Mr. Wanink?

MR. WANINK: If for some reason he should qualify through the jail, we never have any opposition to that. He may not qualify, though.

MS. BLANTON: I understand that, but I would rather -- that was my only issue, is if there's something that he can start doing, I don't want to wait until February for him to have to start doing it.

MR. WANINK: Anything that he qualifies for we take no position on.

THE COURT: All right. So I would say that the Court would allow any program he's qualified for after sentencing he could do prior to sentencing.

MS. BLANTON: Okay.

THE COURT: All right. And then the matter will be adjourned.

And what was that date in February? Do we have that date in February?

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THE CLERK: No.

THE COURT: Okay. We'll get that from the secretary --

MS. BLANTON: Okay.

THE COURT: -- as to when I'm gonna be back again.

MS. BLANTON: Thank you, Your Honor.

THE COURT: Okay. Thank you very much then.

(Proceedings concluded at 4:02 p.m.)

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STATE OF MICHIGAN)
) SS
COUNTY OF TUSCOLA)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable William J. Caprathe, Visiting Circuit Judge, in Caro, Michigan.



Linda L. Fini, CSR-3278
Official Court Reporter
440 N. State Street
Caro, MI 48723

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Appendix F

3/21/16 Sentencing

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STATE OF MICHIGAN

54TH JUDICIAL CIRCUIT COURT (TUSCOLA COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

vs. File No. 15-013521-FH

GARY J. SHAVER, JR.,

Defendant.
_____/

SENTENCE

BEFORE THE HONORABLE WILLIAM J. CAPRATHE, VISITING CIRCUIT JUDGE

Caro, Michigan - Monday, March 21, 2016

APPEARANCES:

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Caro, Michigan

Monday, March 21, 2016

(Proceedings commenced at 10:50 a.m.)

THE COURT: All right. People versus Gary Shaver, Jr., 15-13521.

May we have the appearance of counsel present?

MR. WANINK: Eric Wanink on behalf of the People.

MS. BLANTON: Lisa Blanton. I represent Mr. Shaver.

THE COURT: All right. There are a couple things that I think we -- well, I met in counsel -- with counsel in chambers, and on the Sentencing Information Report I have that it's agreed that PRV 1 should be 0 instead of 75, PRV 3 should be 50 instead of 0. Thus, the total PRV would be 82 instead of 107 but the PRV level remains F. And then on the OVs, that there should be 0 for OV 19, and, therefore, the total OV would be 0 and the OV level would be I, which changes the guideline minimum range from 19 to 76 to 10 to 46. Is that your understanding?

MS. BLANTON: It is.

MR. WANINK: It is, Your Honor.

THE COURT: Okay. And so those corrections

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should be made.

MS. BLANTON: And reflect throughout the report wherever they're referenced.

THE COURT: And reflected at any point in the report. I know there's another spot that we'll come to as we're going through them, but -- but, as you said, that will -- that will be taken care of. They're on Page 1, actually. In the third paragraph down, they refer to again 19 to 76. It should be 10 to 46.

Also, there's another correction that the Court wanted to clarify, and that is in the plea agreement. In the CFJ 145 on Page 1 where it says plea agreement, there's a couple corrections. First of all, it's a Cobbs or the judge gave that as a sentencing indication, and, secondly, it was one year in jail and it didn't talk about what the term of probation would be. So I would suggest if there's no objections just deleting the eight-month probation and adding that it's a Cobbs.

MS. BLANTON: No objection.

MR. WANINK: No objection, Your Honor.

THE COURT: Okay. All right. Those were -- those were my corrections. Miss Blanton, did you review the entire report then with your client?

MS. BLANTON: I reviewed it, as did my

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client. There is a correction as far as total days of jail credit.

THE COURT: Okay.

MS. BLANTON: I had originally used the 130 and then added on from February 16th to today, but the 130 in and of itself from 9-29 to 2-16 is incorrect. He actually should have 175 days of credit as of today.

THE COURT: Okay. Now, generally we -- I think we count up until yesterday because then --

MS. BLANTON: Then he should have 174.

THE COURT: Do you agree with that then, Mr. Wanink?

MR. WANINK: Yes, Your Honor.

THE COURT: Okay. So 174 would be the correction to yesterday. All right. Any other corrections?

MS. BLANTON: Not -- none noted.

THE COURT: And you reviewed the report with your attorney?

THE DEFENDANT: Yes, sir.

THE COURT: And do you have any other corrections?

THE DEFENDANT: No, sir.

THE COURT: Mr. Wanink --

MR. WANINK: Just under --

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THE COURT: -- any corrections?

MR. WANINK: On the cover sheet under prior record, number of felonies should indicate four instead of seven. Again, those three offenses, the CSCs, were juvenile adjudications, not felony convictions.

THE COURT: And that's why the guidelines changed as well.

MR. WANINK: That's correct.

THE COURT: So we'll make that correction. No objection, Miss Blanton?

MS. BLANTON: Oh, no. Thank you, Your Honor.

THE COURT: Any other corrections?

MR. WANINK: None, Your Honor.

THE COURT: All right. Ms. Blanton, anything you want to add before I impose sentence?

MS. BLANTON: Yes, Your Honor. In this case, I mean the Presentence Report I think goes into great detail as to why it sounds like they don't like Mr. Shaver. However, I'm asking that the Court focus on the case at hand.

What happened here was that my client registered before he moved instead of registering the day he moved. He was going to move, went and registered. The owner of the property even went with him when he registered. The -- his anticipation was

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that is where he was going to live, so he went ahead and registered. He actually had -- wasn't living at the home at the time, but his intent was there to register where he was going to live. In fact -- I'm sorry. Excuse me.

THE COURT: Bless you.

MS. BLANTON: As of the date of his plea, the people that he was going to live with in the home were actually living there.

So I believe that at this point in time Mr. Shaver has served 174 days in jail for this offense. I would ask that he be released with a year of probation. Thank you.

THE COURT: What it looks like is that the Probation Department is recommending that the Court not follow the Cobbs and sentence him to prison. Is that --

MS. BLANTON: That's what I understand.

THE COURT: Is that your understanding?

MR. WANINK: Yes, Your Honor, but I think that recommendation was based on inaccurately calculated guidelines, too. So --

THE COURT: Okay. I just wanted to make sure that we -- that I understood it correctly 'cause with that eight-month probation thing in there, it may have

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been a --

MR. WANINK: Yes.

THE COURT: -- misunderstanding. But -- so that -- all right. So I'm gonna call on Mr. Wanink and I'll call on you last, sir.

So, Mr. Wanink, what is your comments regarding my -- my considerations before sentencing?

MR. WANINK: Your Honor, I mean obviously the defendant's prior record is -- is terrible. He started at a very young age with juvenile CSC convictions, has been through the juvenile system up through the max that they could hold him in the juvenile system, which is age 21. This is the second time he's violated the Sex Offender Registration Act. He went to prison I believe previously for this vi- -- same sort of conduct, but this particular violation under the Sex Offender Registration Act is somewhat de minimus by comparison.

So we're asking the Court to follow the Cobbs agreement in this case, placing the defendant on a term of probation. We would request five years' probation given the prior criminal history as well as 12 months in the Tuscola County jail. That is within the Cobbs agreement. He certainly doesn't deserve any reduction beyond the 12 months given his prior record. Along

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with standard terms and conditions. Fines, costs and attorney fees appear to be appropriate, and as I understand it, we've agreed to 174 days' credit.

THE COURT: All right. Now, is there anything that you want to add before I impose sentence, Mr. Shaver?

THE DEFENDANT: Yes, sir. While incarcerated, I've completed the Thinking Matters class.

THE COURT: The what class?

THE DEFENDANT: The Thinking Matters class.

THE COURT: Oh, Thinking Matters.

THE DEFENDANT: It might not sound like a major class in and of itself, but throughout the class I come to the realization that it's not what I think is best, it's I need to do as the law says. So next time I wouldn't, as Miss -- my attorney, Miss Blanton, says, register before I move out. Register after I move.

I take full responsibility for what I did. I knew I was taking a chance and shouldn't have done it, but I thought I was gonna be moving there so I thought it would be all right.

THE COURT: Okay. All right. Well, I'm gonna place you on probation for five years and all the standard conditions of probation that would have been

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recommended, I'm sure, if we had a recommendation of probation including the costs that are on the recommendation. $68 state cost, crime victim fee of $130, attorney fee of $500 and a probation supervision fee of $500. I'll add that.

Any other costs that normally would have been imposed, Mr. Wanink?

MR. WANINK: Typically the Court will impose $500 in costs and a fine.

THE COURT: $500 in fine. So I had the costs. Oh, I see. Costs are in addition to the attorney fee and $500 fine. Okay. I'm imposing both of those. And any others?

MR. WANINK: No, Your Honor. I believe that -- well, there is a $60 DNA fee, too, that's statutory.

THE COURT: That we didn't -- that wasn't referred to there?

MR. WANINK: Correct.

THE COURT: $60 DNA fee. Okay.

And then I'm going to impose along with that -- I'm gonna take a shot at you and give you a sentence of six months' jail with credit for 174 days and defer six months. So any minor violation which is not major, you may end up just going back to the last

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six months, but if it's a major violation, you obviously know you could be sentenced to prison to up to 15 years. So --

THE DEFENDANT: Yes.

THE COURT: -- it may not be doing you a favor to give you that less jail time if -- if you haven't really learned your lesson from the time that you've done there, but you're telling me you have.

THE DEFENDANT: Yes, sir.

THE COURT: I'm gonna take your word for it and allow you to have that six months instead of the one year as a jail sentence. Six months of it will be deferred.

THE DEFENDANT: Thank you.

THE COURT: All right. Anything further, Mr. Wanink?

MR. WANINK: No, Your Honor.

THE COURT: And Mr. Blan- -- Ms. Blanton?

MS. BLANTON: I have nothing further at this time. I would like to reserve the opportunity, though, possibly 30 days once I receive the rules and regulations of probation to object.

THE COURT: That's an excellent point. When you have those, if there's any objections, make them to the Court.

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MS. BLANTON: And I would tender to the Court the signed appellate rights.

THE COURT: All right. Having imposed sentence upon you, it's my duty to inform you that you have a rel- -- an appellate right to appeal. If you're financially unable to afford an attorney, the Court will appoint one for you at public expense. If you want an attorney appointed, you should fill out the form and request that in writing within 42 days of today's date or you may lose your right to have an attorney appointed. Any action you want to take with respect to appeal should be started within 42 days of today's date or you may lose whatever right you have.

All right. Then the defendant is remanded to complete the 180 days, which is probably --

MS. BLANTON: Done.

THE COURT: -- done when -- if -- if they are giving him credit for time served. I'll leave that to the jail.

(Proceedings concluded at 11:02 a.m.)

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STATE OF MICHIGAN)
) SS
COUNTY OF TUSCOLA)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable William J. Caprathe, Visiting Circuit Judge, in Caro, Michigan.



Linda L. Fini, CSR-3278
Official Court Reporter
440 N. State Street
Caro, MI 48723

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Appendix G

10/5/16 Probation Violation

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STATE OF MICHIGAN

54TH JUDICIAL CIRCUIT COURT (TUSCOLA COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

vs. File No. 15-013521-FH

GARY J. SHAVER, JR.,

Defendant.
_____/

PROBATION VIOLATION PLEA

BEFORE THE HONORABLE AMY GRACE GIERHART, CIRCUIT JUDGE

Caro, Michigan - Wednesday, October 5, 2016

APPEARANCES:

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None		

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Caro, Michigan

Wednesday, October 5, 2016

(Proceedings commenced at 3:55 p.m.)

THE COURT: Calling the case People of the State of Michigan versus Gary Shaver, File 15-13521-FH.

Thank you.

MS. BLANTON: Thank you.

THE COURT: Good afternoon, Mr. Shaver.

THE DEFENDANT: Good afternoon.

THE COURT: Today is the date and time set for -- are there two separate probation violations?

MS. BLANTON: I only have one, Your Honor.

THE COURT: There's a show cause -- the show cause that I signed on August 17th, and then there's the bench warrant which I signed on August -- or, excuse me, Judge Schmidt signed on August 23rd.

MS. BLANTON: The only one that I know of is the one for August 23rd.

THE COURT: Mr. Wanink?

MR. WANINK: I don't -- I don't see anything other than the --

THE COURT: There's an order to show cause.

MR. WANINK: -- warrant. Okay. I --

THE COURT: We'll just pass this for a moment and then I'll -- you can look at my file when we're

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done.

MR. WANINK: Okay.

THE COURT: Mr. Shaver, if you could have a seat for me? Thanks.

(Proceedings adjourned at 3:56 p.m.)

(Proceedings reconvened at 4:03 p.m.)

THE COURT: Re-calling the case People of the State of Michigan versus Gary J. Shaver, Jr., File 15-13521-FH.

Good afternoon again, Mr. Shaver.

THE DEFENDANT: Good afternoon, ma'am.

THE COURT: Today is the date and time set for probation violation hearing. Is there a resolution of the show cause as well as the bench warrant?

MS. BLANTON: Your Honor, it's my understanding that my client will be entering a plea to Count 6 of the Motion, Affidavit, and Bench Warrant dated 8-23 of 2016 and the --

THE COURT: Show cause.

MS. BLANTON: The show cause will be dismissed.

THE COURT: Okay.

MS. BLANTON: I would like the opportunity after his plea to address bond, please.

THE COURT: Okay. Mr. Wanink, is that your

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understanding?

MR. WANINK: It is, Your Honor. My understanding defendant is pleading guilty to Count 6 of the Motion, Affidavit, and Bench Warrant dated 8-23 of '16 and that the People would be dismissing the remaining counts in that bench warrant as well as dismissing the show cause signed by the Court on -- I can't quite see the date, but --

THE COURT: I think it's the 17th of August.

MR. WANINK: 17th of August. Thank you.

THE COURT: All right. Mr. Shaver, sir, can you please raise your right hand, be sworn in by the clerk?

THE CLERK: You do solemnly swear or affirm that the testimony you shall -- that the testimony you shall give in this case between the People of the State and the defendant at the Bar will be the truth, the whole truth and nothing but the truth, so help you God?

THE DEFENDANT: I do.

THE CLERK: Thank you.

(Defendant sworn at 4:05 p.m.)

THE COURT: All right, sir. Again for the record, are you the defendant in this action, Gary J. Shaver, Jr.?

THE DEFENDANT: Yes, ma'am.

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THE COURT: And how old are you, sir?

THE DEFENDANT: 28.

THE COURT: And are you on probation or parole at this time in any other court besides this court?

THE DEFENDANT: No, not yet.

THE COURT: Are you able to read and write the English language?

THE DEFENDANT: Yes.

THE COURT: It's my understanding that presently you're on probation for the offense of failure to comply with registration act, second offense, with a habitual fourth which makes the maximum penalty in this matter up to life in prison. Do you understand what the possible penalty could be?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you have an opportunity, Mr. Shaver, to review this (indicating) Advice of Rights form today with your attorney, Ms. Blanton?

THE DEFENDANT: Yes, I did.

THE COURT: Before you signed that, did you read through and understand all of those rights?

THE DEFENDANT: Yes, ma'am.

THE COURT: Do you see your signature on this form?

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THE DEFENDANT: Yes.

THE COURT: Do you understand that if I accept your plea here today, you will be waiving and giving up all of the rights set forth on that form?

THE DEFENDANT: Yes, ma'am.

THE COURT: And that includes you will not have a contested hearing of any kind. Do you understand that?

THE DEFENDANT: Yes, ma'am.

THE COURT: Has anyone promised you anything in addition to what I've stated on the record to cause you to enter a plea here today?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you, sir?

THE DEFENDANT: No.

THE COURT: Is it your own choice enter a guilty plea to Count 6 of the Motion, Affidavit, and Bench Warrant which was signed by the Court on or about August 23rd of '16?

THE DEFENDANT: Yes, ma'am.

THE COURT: So, sir, as to Count 6 which alleges that you violated Standard Condition Number 1, that you're not to violate any criminal law, and that on or about August 22nd, 2016, you broke a television, a cable box and a shower door in Room 219 of the Budget

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Motel in Bay City, Michigan, and that there were approximately $400 of damages to that motel room, how do you plead to that allegation, sir?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: All right. So on or about the date of August 22nd, 2016, were you on probation with the Court?

THE DEFENDANT: Yes, ma'am.

THE COURT: And an order of your probation was that you were not to violate any criminal law, is that correct?

THE DEFENDANT: Yes.

THE COURT: And on that same date you caused some damage, approximately damage in -- of approximately $400 to a motel room, Room 219 at the Budget Motel in Bay City, Michigan, is that correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Mr. Wanink, any comment as to the plea-taking process?

MR. WANINK: Just for the record, again, there was no sentence bargain in this case. I don't know if anybody indicated that, but --

THE COURT: I think that was indicated, but -- all right.

MS. BLANTON: There would be an updated

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Presentence Report.

THE COURT: All right. Any comment as to the plea-taking process, Ms. Blanton?

MS. BLANTON: No.

THE COURT: The Court finds that the elements of the offense have been established on the record by Mr. Shaver's testimony, he wishes to waive his constitutional rights as stated upon the record and in writing. The plea is accurate and offered voluntarily with knowledge and understanding of what is involved. I accept the plea. Refer the matter to Probation for updated Pre. Sentencing to be set by the Court.

Ms. Blanton, you wanted to address bond.

MS. BLANTON: Your Honor, in this case it's currently set at $50,000. He's also on bond in Bay City for the -- for what he pled to here today. He's doing PBTs three times a week there, so the Court would be ensured that he would be sober.

He has a job at Perfection Construction, and he would be staying at Restoration Community Out- -- Outreach. It's a 90-day shelter where they help him find a place to live. He assured me that he would not be around any minor children at that specific outreach center since it's only for men.

I'm asking that the Court consider a 10,000

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10 percent bond at this point in time.

THE COURT: All right. Mr. Wanink?

MR. WANINK: Your Honor, given that the presumption of innocence has been removed with regards to the probation violation and the fact of the defendant's prior record, the fact that he's on probation and has now admitted to committing new criminal offenses while on probation, we'd ask for bond to either be revoked or remain unchanged at 50,000.

THE COURT: The motion to modify bond is considered and denied. Thank you.

MS. BLANTON: Thank you, Your Honor.

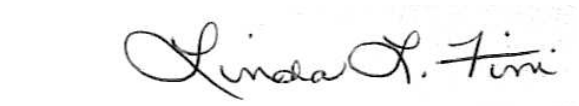
THE COURT: Court in recess.

(Proceedings concluded at 4:09 p.m.)

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STATE OF MICHIGAN)
) SS
COUNTY OF TUSCOLA)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable Amy Grace Gierhart, Circuit Judge, in Caro, Michigan.



Linda L. Fini, CSR-3278
Official Court Reporter
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Appendix H

11/2/16 PV Sentencing

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STATE OF MICHIGAN

54TH JUDICIAL CIRCUIT COURT (TUSCOLA COUNTY)

PEOPLE OF THE STATE OF MICHIGAN

vs. File No. 15-013521-FH

GARY J. SHAVER, JR.,

Defendant.
_____/

PROBATION VIOLATION SENTENCE

BEFORE THE HONORABLE AMY GRACE GIERHART, CIRCUIT JUDGE

Caro, Michigan - Wednesday, November 2, 2016

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Caro, Michigan

Wednesday, November 2, 2016

(Proceedings commenced at 3:35 p.m.)

THE COURT: Calling the case People of the State of Michigan versus Gary J. Shaver, Jr., File 15-13521-FH.

Good afternoon, Mr. Shaver.

THE DEFENDANT: Good afternoon, Your Honor.

THE COURT: Today's the date and time set for sentencing on probation violation plea, underlying offense being failure to register, second offense, with a habitual fourth which makes the maximum penalty on this matter up to life.

Guideline range is 10 to 46. Do you have any objection to that, Ms. Blanton?

MS. BLANTON: No, I don't.

THE COURT: Mr. Wanink, any objection to 10 to 46 as the guideline range?

MR. WANINK: I have none, Your Honor.

THE COURT: So the Court finds that the proper sentence guideline range in this matter is 10 months to 46 months and that is an advisory range pursuant to the Lockridge opinion.

Ms. Blanton, did you have any additions, corrections, deletions to the content of the report?

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MS. BLANTON: No, I -- I don't have any of those.

THE COURT: Mr. Wanink, any additions, corrections, deletions to the content of the report?

MR. WANINK: No, Your Honor.

THE COURT: Ms. Blanton, allocution on behalf of Mr. Shaver.

MS. BLANTON: The first thing that I -- I want the Court to be aware of although it's not an addition, correction or deletion is that on August 22nd is when he was arrested in Bay City. They didn't bring him to Tuscola County until the 29th. So I would ask that the Court take into consideration that he's technically been incarcerated on this since August 22nd. Although he wasn't -- the hold -- although the hold was placed then, he wasn't arraigned until the 29th of September.

The thing that I find and the thing in talking with Mr. Shaver that is striking to me is that clearly -- clearly the issue is drug use for Mr. Shaver and that he's never had any treatment. He does have jail credit of 219 days at this point. I would ask that the Court consider a sentence of a term of local incarceration with the TRI-CAP program. Sending Mr. Shaver back to prison frankly isn't going to solve

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the problem the way that the TRI-CAP program possibly could.

He was working when he was out. He had a plan once he was released to go back to the Restoration Community Outreach shelter. They there would allow him to stay for 90 days, help him find a place to live, help him find employment if he was unable to go back to his job at Perfection Construction. So I would ask that the Court consider that as an option for Mr. Shaver, that he be allowed to attend the TRI-CAP program and then go to the Restoration Outreach Center where he would be able to at that point put into practice what he's learned in the TRI-CAP program.

If the Court is not going to sentence him to a local term with TRI-CAP, I would ask that the -- the Court sentence him to the original recommendation of the 24 months as opposed to 36 months that's recommended in the updated PSI. Thank you.

THE COURT: Thank you.

Mr. Shaver, anything in addition to Ms. Blanton's comments, sir?

THE DEFENDANT: I'd just like to apologize for coming back before the Court and ask that possibly the Court follow what me and my lawyer have talked about that she just presented so I can get help. I

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don't plan on making this a very extensive coming before the Court type thing, and given the leniency if that's what we go with, I would also be able to complete 7411 misdemeanor probation in Bay City.

THE COURT: Okay. Thank you.

Mr. Wanink, allocution.

MR. WANINK: Thank you, Your Honor. Obviously Mr. Shaver's no stranger to the criminal justice system. He knows what's expected of him. He's been on parole. He's been on probation.

In this case he was placed on probation in March of this year and almost immediately out of the gate we start having problems in May with controlled substance use, failing to report. Then we see in August we have new criminal conduct involving operation of a motor vehicle, destruction of property, you know, and even more concerning, the contact with the 4-year-old which he admits to the agent to doing. And all of these things -- we didn't ask much of him by way of conditions of probation, but pretty much whatever conditions he had he did not follow.

So I believe the recommendation is appropriate given his criminal history and his absolutely abysmal performance on probation. Ask that probation be revoked and he be sentenced to a term of

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incarceration with the Department of Corrections as recommended. Leave that to the discretion of the Court as to the amount.

THE COURT: All right. Mr. Shaver, it's the sentence and judgment of the Court that your probation's revoked without improvement. I sentence you to 40 months on the minimum, 15 years on the maximum. Credit for 219 already served.

I have to advise you that you are entitled to file an application for leave to appeal your conviction and sentence. If you are financially unable to retain an attorney, you may request appointment of an attorney to represent you on appeal. That request must be made within 42 days from today's date. Ms. Blanton has a form for you, sir, that I need you to sign that advises you of those rights in writing. Thank you.

MS. BLANTON: I've tendered to the Court the signed appellate rights.

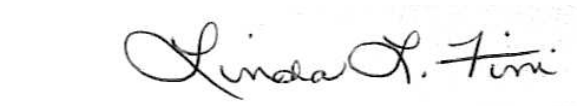
THE COURT: Thank you.

(Proceedings concluded at 3:41 p.m.)

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STATE OF MICHIGAN)
) SS
COUNTY OF TUSCOLA)

I certify that this transcript is a complete, true and correct transcript of the proceedings and testimony taken in this case before the Honorable Amy Grace Gierhart, Circuit Judge, in Caro, Michigan.



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