STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 313670
Lower Court No. 94-000424-FH

v.

BOBAN TEMELKOSKI,

Defendant-Appellant

_____/

WAYNE COUNTY PROSECUTOR

Attorney for Plaintiff-Appellee

_____/

DEFENDANT/APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

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Statement of Jurisdiction

Mr. Boban Temelkoski pled guilty as charged to Criminal Sexual Conduct Third Degree. The Honorable Gershwin Drain sentenced Mr. Temelkoski pursuant to the Holmes Youthful Trainee Act (hereafter referred to as HYTA) with three years of probation. Mr. Temelkoski's plea and sentencing both occurred prior to the time SORA was enacted (July 13, 1994) and effectuated (October 1, 1995). Mr. Temelkoski did not receive jail time or any further probation conditions. Mr. Temelkoski was successfully discharged from probation pursuant to HYTA. As such, Mr. Temelkoski does not have a conviction for this case or any other criminal conviction.

On or about November of 1995, Mr. Temelkoski was required to register as a sex offender on the Michigan Sex Offender Registry for 25 years because he was on probation for a listed offense when the Sex Offender Registry Act (hereafter referred to as "SORA") was enacted on October 1, 1995. MCL § 28.723(1)(b). On August 9, 2012, Mr. Temelkoski filed a Motion for Removal from the Sex Offender Registry in the Wayne County Circuit Court. Subsequently, on September 21, 2012, the Trial Court ruled in his favor, removing him from the Michigan Sex Offender Registry. Because of the Trial Court's decision, on December 4, 2012, the Wayne County Prosecutor filed a Delayed Application for Leave to Appeal. On February 4, 2013, Mr. Temelkoski filed an answer to the Prosecution's Leave to Appeal. On July 8, 2013, the Court of Appeals denied the Prosecution's Leave to Appeal.

The Wayne County Prosecutor, on August 22, 2013, filed a Leave to Appeal to the this Honorable Court, which on October 28, 2013, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, remanded this case to the Court of Appeals for

consideration as on leave granted. On December 3, 2013, the Wayne County Prosecutor re-filed its original Brief on Appeal to the Michigan Court of Appeals, to which the Mr. Temelkoski filed a response on December 12, 2013. Oral Arguments were scheduled for (and conducted on) April 9, 2014. On April 7, 2014, the Michigan Court of Appeals issued an order requiring the parties to focus their arguments on the recently decided case of *People v. Earl*, with which the parties complied. Thereafter, on October 21, 2014, the Michigan Court of Appeals issued a published opinion, in which the Court found that placement on SORA for those convicted under the Holmes Youthful Trainees Act did not constitute punishment, and therefore Mr. Temelkoski would have to re-register as a Sex Offender for the remainder of his life. (A copy of said order is attatched hereto as Exhibit D).

The Defendant-Appellant hereby files this timely application for Leave to Appeal provided for by Mich Const 1963, Art 1, § 20, pursuant to Michigan Court Rule 7.302 whereby the issues presented have significant public interest also involves legal principles of major significance to the state's jurisprudence.

Statement Of Questions Presented

I. **DID THE TRIAL COURT CORRECTLY DETERMINE THAT REQUIRING A DEFENDANT, WHO HAS NO CONVICTION PURSUANT TO A PLEA UNDER HYTA, TO REGISTER AS A SEX OFFENDER REPRESENTS CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMS. VIII AND XIV; CONST 1963 ART 1, §16?**

The Trial Court answered "Yes"

The Court of Appeals answered "No"

Defendant-Appellant answers, "Yes".

Statement of Facts

Mr. Temelkoski, the Defendant in this matter, seeks leave to Appeal to this Honorable Court. In doing so, he is asking the Court to find that his placement back onto the Sex Offender Registry, (hereafter referred to as SORA) as an individual who has no conviction on his record pursuant to a plea taken under the Holmes Youthful Trainee Act, (hereafter referred to as HYTA) is Cruel and/or Unusual Punishment in violation of the Eighth and Fourteenth Amendment of the United States Constitution, as well as Article 1, §16 of the Michigan Constitution.

This case involves the consensual touching of breasts, which occurred when the parties were kissing. There was not sexual penetration of any kind. At the time of the offense, Mr. Temelkoski was 19 years old and the complaining witness, A.M. was 12 years old, just shy of her 13th birthday. Mr. Temelkoski and A.M. knew each other through a mutual friend - Mr. Temelkoski's girlfriend. They saw each other while A.M. was a waitress at a banquet center. Mr. Temelkoski went to the banquet to see his brother who was working there. During the evening, A.M. became upset because she was not receiving tips like the other service staff. (Exhibit A, Mr. Temelkoski's letter). A.M. asked Mr. Temelkoski to drive her home before her shift ended.

While Mr. Temelkoski was driving A.M. home, A.M. started to kiss Mr. Temelkoski. (Exhibit A). Mr. Temelkoski pulled into an alley so the two could make out. While the two were kissing, Mr. Temelkoski unbuttoned A.M.'s shirt and touched her breast. At this point, A.M. told Mr. Temelkoski that she was 12 years old and not to proceed any further. Mr. Temelkoski stopped and drove A.M. home. Contrary to the police report, Mr. Temelkoski did not continue touching A.M. after she asked him to

stop. Mr. Temelkoski states that on the drive home, A.M. was "acting normal and happy and didn't seem upset at all." (Exhibit A). When A.M. arrived home, her mother noticed a hickey (red mark) on her neck. A.M.'s mother became upset and reported the incident to the police.

Mr. Temelkoski took responsibility for his actions and pled guilty as charged to Criminal Sexual Conduct Third Degree. The Honorable Gershwin Drain sentenced Mr. Temelkoski pursuant to HYTA, with three years of probation. Mr. Temelkoski's plea and sentencing both occurred prior to the time SORA was enacted (July 13, 1994) and effectuated (October 1, 1995). Mr. Temelkoski did not receive jail time or any further probation conditions. Mr. Temelkoski was successfully discharged from probation pursuant to HYTA. As such, Mr. Temelkoski does not have a conviction for this case or any other criminal conviction.

On or about November of 1995, Mr. Temelkoski was required to register as a sex offender on the Michigan Sex Offender Registry for 25 years because he was on probation for a listed offense when SORA was enacted on October 1, 1995. MCL § 28.723(1)(b). In July of 2011, SORA was amended and registrants were placed in one of three separate categories strictly based on the conviction offense, not risk to reoffend or danger to the community. MCL § 28.722(w)(v). As such, Mr. Temelkoski was forced to register as a sex offender for his entire lifetime even though he was originally not required to register and, when he was required, his length of registration was 25 years.

On August 9, 2012, Mr. Temelkoski filed a Motion for Removal from the Sex Offender Registry in the Wayne County Circuit Court. Subsequently, on September 21, 2012, the Trial Court ruled in his favor, removing him from the Michigan Sex Offender

Registry. Because of the Trial Court's decision, on December 4, 2012, the Wayne County Prosecutor filed a Delayed Application for Leave to Appeal. On February 4, 2013, Mr. Temelkoski filed an answer to the Prosecution's Leave to Appeal. On July 8, 2013, the Court of Appeals denied the Prosecution's Leave to Appeal.

The Wayne County Prosecutor, on August 22, 2013, filed a Leave to Appeal to the this Honorable Court, which on October 28, 2013, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, remanded this case to the Court of Appeals for consideration as on leave granted. On December 3, 2013, the Wayne County Prosecutor re-filed its original Brief on Appeal to the Michigan Court of Appeals, to which the Mr. Temelkoski filed a response on December 12, 2013. Oral Arguments were scheduled for (and conducted on) April 9, 2014. On April 7, 2014, the Michigan Court of Appeals issued an order requiring the parties to focus their arguments on the recently decided case of *People v. Earl*, with which the parties complied. Thereafter, on October 21, 2014, the Michigan Court of Appeals issued a published opinion, in which the Court found that placement on SORA for those convicted under the Holmes Youthful Trainees Act did not constitute punishment, and therefore Mr. Temelkoski would have to re-register as a Sex Offender for the remainder of his life. It is based on the Court's ruling that Mr. Temelkoski now files the present Application for Leave to Appeal to this Honorable Court.

I. THE TRIAL COURT CORRECTLY DETERMINED THAT REQUIRING A DEFENDANT, WHO HAS NO CONVICTION PURSUANT TO A PLEA UNDER HYTA, TO REGISTER AS A SEX OFFENDER REPRESENTS CRUEL AND/OR UNUSUAL PUNISHMENT IN VIOLATION OF THE UNITED STATES CONSTITUTION, AMS. VIII AND XIV; CONST 1963 ART 1, §16.

Standard of Review

Michigan Appellate Courts review constitutional issues de novo. *People v. Darden*, 230 Mich App 597, 600 (1998). As the present issue questions whether the placement of a criminal defendant on SORA, who has been adjudicated pursuant to HYTA, is statutory in nature, the court must therefore review under the notion that "[s]tatutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Ayres*, 239 Mich App 8, 10 (1999). As such, the party challenging a statute has the burden of proving its invalidity. *Id.* To the extent this Court must interpret the applicable statutory provisions, issues involving statutory interpretation are questions of law that we review de novo. *People v. Hardy*, 494 Mich 430, 438 (2013).

Discussion

The requirements of Michigan's Sex Offender Registry Act are onerous in their own right. However, when one takes into context the issues facing defendants adjudicated under HYTA, and their continued placement on SORA, those requirements become unconscionable, unconstitutional and violate the ex post facto clause of the United States Constitution. As a threshold question, for a law to be considered ex post facto, "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). In this instance, there is no question that Mr. Temelkoski's

placement onto SORA applies to conduct that occurred before the law's enactment. In addition, placement on SORA places severe limitations on all aspects of Mr. Temelkoski's life, including but not limited to his ability to maintain employment, travel and have an active role in the life of his children. Furthermore, to violate the ex post facto clause, the statute must also be punitive. *California Dept. of Corr. v. Morales*, 514 U.S. 499, 506 n. 3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). In this instance, the Michigan Court of Appeals found that the SORA statute, as it relates to individuals adjudicated under HYTA, is not punitive and as such, is neither cruel and/or unusual punishment nor a violation of the Ex Post Facto Clause. *People v. Temelkoski*, 2014 Mich. App. LEXIS 1970, 37. It is the contention of Mr. Temelkoski that the Michigan Court of Appeal's ruling was not only erroneous, but also sets forth precedent which violates the Equal Protection clause as well.

In coming to its conclusion, the Court of Appeals focused on whether a legislative scheme imposes punishment. In doing so, the Court examined the ruling of *People v. Earl*, 495 Mich 33, 37 (2014), which held that the determination on whether a legislative scheme such as the SORA imposes punishment involves a two-part inquiry. Per *Earl*, a reviewing court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. . . . If the Legislature's intention was to impose a criminal punishment . . . the analysis is over. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil. . . . [*Earl*, *supra* at 38, (quotation marks and citations omitted).]

The *Earl* court explained that the first step in this inquiry—*i.e.* determining

whether the Legislature "intended for a statutory scheme to impose a civil remedy or a criminal punishment"—requires examining the statute's text and its structure to determine whether the Legislature "indicated either expressly or impliedly a preference for one label or the other." *Id.* (quotation marks and citations omitted). "If the statute imposes a disability for the purposes of punishment that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id.* at 38-39 (quotation marks and citations omitted). In contrast, "a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose." *Id.* "[W]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered as 'evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Id.* at 42, quoting *Smith v. Doe*, 538 U.S. 84, 93-94; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (quotation marks and citation omitted). In the event that the Legislature did not intend for an act to impose punishment, the second part of the analysis is to determine whether the act is "so punitive either in purpose or effect as to negate the State's intent to deem it civil." *Id.* at 44, quoting *Smith*, *supra* at 92 (quotation marks and citations omitted).

The *Earl* court then set out to make the determination whether "an act has the purpose or effect of being punitive". In doing so, it considered the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963). The *Mendoza-Martinez* factors include:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected

> is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. [*Earl*, *supra* at 44, quoting *Mendoza-Martinez*, *supra* at 168-169.]

In this instance, the plain language of MCL § 28.721a sets forth the Legislature's intent in enacting the SORA as follows:

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

As such, it is readily apparent that the Legislature formally intended that the SORA was enacted to protect the public welfare, and not to punish. The Court of Appeals noted as much, and thereafter focused on the *Mendoza-Martinez* factors to determine whether the SORA nevertheless, "is so punitive either in purpose or effect as to negate the State's intent to deem it civil." *Earl*, *supra* at 44, quoting *Smith*, *supra* at 92 (citations and quotation marks omitted). The Court of Appeals found that the factors enumerated in *Mendoza-Martinez*, when analyzed with the facts of the present case, led to a determination that the placement of a Defendant who is adjudicated pursuant to HYTA on the SORA did not constitute cruel and/or unusual punishment. US Constitution Ams. VIII, XIV; Const 1963 art 1, §16. It is Mr. Temelkoski's contention that this is erroneous, and in support of this contention, will focus on each factor and explain why the Court of Appeals was wrong in its ruling.

(1) Historical Form of Punishment

The Michigan Court of Appeals held that the SORA for those adjudicated pursuant to HYTA, when analyzed under the first *Mendoza-Martinez* factor, weighs in favor of a finding that the SORA is non-punitive in its purpose and effects as applied to Mr. Temelkoski. The Court reasoned that the ramifications of being on the SORA are based on the actions of the individual themselves, and that the purpose of SORA is to inform the public for its own safety, and not to humiliate the offender. *Temelkoski, supra* at 27. (quoting *Smith*, *supra* at 99)

The Court also noted that historically, courts have found (as regards to adult defendants) that sex offender registration and notification laws are non punitive in nature. Such reasoning by the Court, however, is shortsighted and ignores the actual ramifications of being on the registry and how it is tantamount to punishment. Webster's Dictionary defines punishment as suffering, pain, or loss that serves as retribution. (http://www.merriam-webster.com/dictionary/punishment). Placement on SORA in Michigan, albeit not formally intended in its original purpose, can and has resulted in the loss of employment and residence, as well as ostracization of those on the registry.

It can therefore be argued on several grounds that SORA is sufficiently similar to forms of historical punishment so as to be considered as punishment itself. First and foremost, the personal reporting provisions are similar to probation and parole. In fact, the reporting requirements of those placed on SORA are arguably more restrictive than those placed on probation or parole. See MCL § 28.727. For instance, SORA requires in-person reporting and limits where registrants can live and work. Mr. Temelkoski must report significantly more information than those individuals who are on probation or

parole must. For example, he must provide any phone number or email address he regularly uses, any and all professional licenses he possesses, and the names and location of any school he is attending or planning to attend. Furthermore, Mr. Temelkoski must report in person to law enforcement more frequently and for far longer (life) than those on probation or parole must. Moreover, he must inform law enforcement if he is to be away from his residence for more than seven days, and advise where he will be residing during that time. Mr. Temelkoski must also provide his employer's name and address and, if the employment is not at a fixed location, must provide the routes and general areas where employment occurs. He must also disclose his license plate number, and registration information and description relative to any vehicle he owns or any vehicle that he regularly uses. He must also provide his passport. Moreover, he must re-register in person within three days whenever certain information (such as an email address) changes.

Conditions of Parole tend to be far less intrusive. MCL § 791.236; MSA 28.2306 indicates that the setting of conditions of parole is to be left to the discretion of the parole board. Each case is different, but general conditions of parole require the parolee to report regularly to the parole agent, prohibit travel out of state without the agent's permission, require the parolee to maintain employment, to obey the law, to submit to drug and alcohol testing at the agent's request, and to reside at an approved residence. The parolee must also avoid any unauthorized association with known criminals and cannot possess firearms. In some situations, the Parole Board imposes special conditions of parole that are based on the offender's background and crime, and are intended to provide the right amount of structure to increase the parolee's chance of making a successful adjustment.

It is easy to see that those on the registry face far more requirements than those on parole or even probation. To travel out of state, a parolee just has to get permission, and inform the parole agent of where to and how long they will be traveling. A SORA registrant, on the other hand, can only leave the state of Michigan for a period of seven days before he has to return to report in person that he or she will be out of the state again. Failure to return to report such information in person could result in arrest and potential incarceration.

The limitations placed on residency, employment and travel are also similar to (and often exceed) those restrictions placed on probationers and parolees, in that they are all akin to banishment. 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). Like banishment, Michigan's residency restriction excludes registered sex offenders from certain neighborhoods and imperils their acceptance into new ones. As the Supreme Court of Kentucky recently noted, the residency restriction is "decidedly similar to banishment" because "it does prevent the registrant from residing in large areas of the community. It also expels registrants from their own homes, even if their residency predated the statute or the arrival of the school ... or playground." *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Kentucky Supreme Court, 2009). Mr. Temelkoski must live in an area that is not within 1000 feet of a school, park or other building where children may congregate for social purposes. Should he be found to be living in such proximity, he could face legal consequences, even though he has no conviction on his record.

Placement on SORA is also akin to shaming. Mr. Temelkoski's photo and private

information, not readily available through normal circumstances to the public eye, are made available for all to see. Those seeking out the information are shown his home address, his work address, the make, model and license plate of his automobiles on the registry. Moreover, his tier status, Level III, insinuates that Mr. Temelkoski is the worst type of offender, even though the Trial Court, in taking his plea, allowed Mr. Temelkoski to plea under HYTA, which leads to an inference that Mr. Temelkoski was not viewed as a threat to public safety and was a minimal risk to ever reoffend. Mr. Temelkoski's record, or rather lack thereof, since 1994 is further testament to that.

It is also important to point out that because Mr. Temelkoski pled under HYTA, any information regarding his plea and the charges upon which it was based, are sealed from public record. The only place where there is any notation available to the public eye is on SORA, which violates the tenor of HYTA, as it existed at the time of Mr. Temelkoski's plea. The primary crux of the Court's reasoning was that although Mr. Temelkoski was adjudicated under HYTA, the HYTA statute does not provide that his adjudication would be sealed from the public. Such a statement is erroneous from the perspective of the HYTA statute as written in 1994, when Mr. Temelkoski took his plea.

In 1994, MCL § 762.11[1], (the HYTA Statute) stated "An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime, and the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." Moreover, it also stated that "Unless the court enters a judgment of conviction against the individual for the criminal

[1] A copy of the version of MCL § 762.11 in effect in 1994 is attached hereto as Exhibit B.

offense under section 12 of this chapter, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the department of social services, and law enforcement personnel for use only in the performance of their duties."

Thus, for the Court to rely on the most recent version when discussing Mr. Temelkoski's case is disingenuous. At no time during the pendency of his time under HYTA supervision was the law changed or remedied to reflect the current status of the law. In fact, the SORA was not in existence in Michigan at the time Mr. Temelkoski entered into a guilty plea; rather, it did not even go into effect for a full year following Mr. Temelkoski's plea.

Furthermore, in Michigan, the registry permits those seeking out information to sign up for an email to be notified if an individual on SORA has moved within the specific geographic zone the subscriber requests. Whereas once needed to seek out specific individuals, this information is now delivered right to the interested party. Thus, to argue that being placed on SORA is not akin to shaming is hypocritical and blatantly false.

It is important to remember that should an individual attempt to seek out information on Mr. Temelkoski's criminal history (outside looking him up on the Sex Offender Registry), they would not be able to locate any such information. Mr. Temelkoski took a plea, and pursuant to his plea, his conviction would be sealed from public view. Mr. Temelkoski completed his probation without a single problem, and, in return, the Court kept its end of the deal and erased any signs of a conviction.

Unfortunately, and unjustifiably, Mr. Temelkoski's placement on SORA has made that agreement moot. He is a man without a conviction who is being punished as if his record says otherwise. His placement on the registry has forced him to lose employment, limited his options for residence, and had far-reaching effects on him and his family. Moreover, because of the nature of his plea, Mr. Temelkoski has no other recourse, such as withdrawing an obviously invalid plea, which further punishes him. As such, when taking all of these factors into account, the first *Mendoza-Martinez* factor weighs in favor of finding that SORA is punitive its purpose and effect as applied to Mr. Temelkoski.

(2) Affirmative Disability or Restraint

The Michigan Court of Appeals, in weighing this second factor, found that the facts and circumstances of Mr. Temelkoski's case led them to a finding that SORA does not impose punishment as applied to Mr. Temelkoski. The Court reasoned that SORA "inflicts no suffering, disability or restraint." *Temelkoski, supra* at 30. (quoting *People v. Pennington*, 240 Mich App 188, 195 (2000), quoting *Doe v. Kelley*, 961 F Supp 1105, 1108-1109 (W.D. Mich 1997)). Moreover, "although defendant certainly experiences adverse impacts from being listed on the PSOR, these impacts stem from the commission of the underlying act, not the SORA's registration requirements. While secondary effects may flow indirectly from the PSOR, 'punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline. Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.'" *Id.* at 30-31. (quoting *Pennington, supra* at 196, quoting *Kelley, supra* at 1111). The Court reasoned that the central purpose of the SORA is not intended to chastise, deter or discipline;

rather, it is a remedial measure meant to protect the health, safety and welfare of the general public. *Id.* at 31. The Court further noted that the 2011 amendment to SORA narrowed the scope of the SORA by allowing certain individuals to petition the court for removal from the registry because they engaged in a consensual sexual act. It stated that, "while the Legislature did not extend the exemption to individuals who commit sexual offenses against children under the age of 13, this does not serve to transform the SORA into punishment. Rather, this furthers the SORA's purpose of protecting the public". *Id.*

In reaching this conclusion, the Court of Appeals cites a lot of case law, including *Smith, supra*, the preeminent case upon which the court relies to assert that SORA is not punishment; but at no time truly explains why the factors favor a finding of non-punishment as it relates to Mr. Temelkoski. In reality, the excessive affirmative obligations placed on Mr. Temelkoski constitute affirmative disabilities and restraints on him, tipping this factor in favor of his placement on SORA as being punitive.

Consider, for example, the reporting requirements placed upon Mr. Temelkoski. Because he is registered under Tier III, Mr. Temelkoski must report **for the rest of his life, in person, every three months**. Moreover, as discussed previously, he must disclose extensive private information for posting on the Internet. He must inform law enforcement if he is to be away from his residence for more than seven days and advise as to his whereabouts during that period. Mr. Temelkoski must also provide his employer's name and address, and if the employment is not at a fixed location, provide the routes and general areas where employment occurs. He must provide the name and address of places of education, his telephone number and all numbers that he uses. He must disclose his email address and any login names routinely used for email purposes.

He must also disclose his license plate number and registration information and description relative to any vehicle he owns or any vehicle that he regularly uses. He must also provide his passport and any professional licensing information. Moreover, he must re-register in person within three days whenever certain information (such as an email address) changes. See MCL § 28.727.

SORA further requires Mr. Temelkoski to obtain and maintain a valid Michigan driver's license or identification card. He must also pay a $50.00 registration fee as well as annual fee. MCL § 28.725a(6). He must provide fingerprints and palm prints to the Michigan State Police. Mr. Temelkoski cannot live or work within 1000 feet of any building that is owned, leased or controlled by a school for kindergarten through 12th grade (aka a school safety zone). Nor may he "loiter" in a school safety zone. MCL §§§§ 28.733-28.736.

Several courts throughout the United States have found that intrusive reporting constitutes an affirmative restraint. For instance, in *State v. Letalien*, 985 A.2d 4, 12 (Me. 2009) the Maine Supreme Court held that reporting was "undoubtedly a form of significant supervision by the state." *Id.* at 12. The court reasoned that "it belies common sense to suggest that a newly imposed life-time obligation to report to a police station every ninety days to verify one's identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint on the exercise of individual liberty." *Id.* at 24-25. Much the same, in *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), the Indiana Supreme Court found its registry statute was punishment because it "imposes significant affirmative obligations and a severe stigma..., and compels affirmative post-discharge conduct (mandating registration, re-

registration, disclosure of public and private information, and updating of that information) under threat of prosecution." *Id.* at 379-380.

SORA's residency requirements further add to the notion of an affirmative disability and restraint. As stated previously, SORA requires that Mr. Temelkoski not reside within a "school safety zone". As such, Mr. Temelkoski is limited in where he may take up residence. This has far reaching effects, not just on him, but his family as well. For example, this could affect where Mr. Temelkoski's children can go to school, because a desired home might be within such a geographical area. Moreover, if Mr. Temelkoski were to live in an area for years, and the city decides to build a school within one thousand feet of his home, Mr. Temelkoski is now forced to move from his home and find housing elsewhere, likely at a financial loss to Mr. Temelkoski. These requirements are far different than those in *Smith, supra* upon which the Court of Appeals relied. Wherein *Smith* there was no in-person registration requirements nor were there restrictions on where a registrant may live and work, Michigan's SORA is far different. Restricting where a registrant can live and work, as is the case in Michigan, would most certainly qualify as an affirmative disability or restraint. As the Kentucky Supreme Court said in *Commonwealth v. Baker, supra* at 445, it is "difficult to imagine that being prohibited from residing within certain areas does not qualify as an affirmative disability or restraint".

The same can also be said as it pertains to "loitering". Because of the intrusive restrictions placed on him, Mr. Temelkoski cannot partake in many activities as parent that those not on the registry take for granted. Mr. Temelkoski cannot take his kids to the park. Nor can he attend his children's school activities, because doing so would violate

SORA and result in Mr. Temelkoski's arrest.

The Court of Appeals reasoned that although Mr. Temelkoski certainly experiences adverse impacts from being listed on the registry, these impact stems from the commission of the underlying act, not the SORA's registration requirements. *Temelkoski, supra* at 30. This is not true as pertains to Mr. Temelkoski. Pursuant to HYTA, Mr. Temelkoski has no criminal record. The public has no access or knowledge of his past, due to a plea agreement that his record would be sealed. Under the terms of said agreement, there is no public access to the facts of a conviction because there is no conviction or judgment. If not for his placement on SORA, which was not in effect at the time of his plea, none of these affirmative disabilities and restraints would be placed on Mr. Temelkoski. As such, the burdens imposed by SORA bear no resemblance to the "minor and indirect" consequences upheld in *Smith, supra*.

The cumulative effect of SORA's obligations and restraints, especially as pertains to Mr. Temelkoski, who has no criminal record, is to convert the Michigan law from a regulatory statute to a punitive one. Mr. Temelkoski bargained for a specific outcome on the basis of his age and ability to stay out of further trouble. Mr. Temelkoski kept up his end of the bargain, and to the extent he has no conviction on his record, so too did the Court. However, he is not free from the encumbrances promised him when he took his plea, and all aspects of his life now face an affirmative disability and restraint due to the rules and regulations associated with SORA. Failure to comply with these rules can result in further incarceration for a man with no documented criminal history upon which to base the potential consequences. Therefore, the second *Mendoza-Martinez* factor weighs in favor of finding that SORA does impose punishment as applied to Mr. Temelkoski.

(3) Traditional Aims of Punishment

The Court of Appeals once again found that this factor weighs in favor of SORA not being punitive. The Court opined that "while the SORA may deter future sexual offenses, that is not the primary purpose of the act and it does not render the SORA punitive". *Temelkoski, supra* at 32-33. The Court elaborated that, "while the SORA exempts certain individuals from the registry requirements in situations involving a consensual act, and categorizes offenders into tiers depending on the severity of the underlying offense, like in *Smith,* these mechanisms are 'reasonably related to the danger of recidivism' which is 'consistent with the regulatory objective'" *Id. (quoting Smith, supra* at 99-100).

In coming to this conclusion, however, the Court of Appeals ignores basic realities. Placement on SORA results in not only a negative stigma geared towards Mr. Temelkoski, who has no conviction on his record, but also severely restrains his personal liberties, such as where he may live, work and congregate. This most certainly creates retribution, and therefore constitutes punishment. Moreover, the Court's reliance on the notion of recidivism is misguided, and does more to prove Mr. Temelkoski's point that SORA is punitive in nature. Michigan's tier system for SORA is based on the nature of the conviction and has nothing to do with whether a registrant has more or less inclination to commit further unwanted sexual acts in the future. "Where a restriction is 'imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than regulation intended to prevent future ones.'" *Commonwealth v. Baker, supra* at 439. This is the case here. Because Mr. Temelkoski

pled to CSC II, he is now labeled as a Tier III offender and must register for life. If SORA were not punitive in purpose, then the tier would be ranked on a professional opinion as to an offender's likelihood of offending again. If this were the case, Mr. Temelkoski would likely be considered the lowest tier, especially when one considers his clean record in the twenty years following his arrest, and the professional determination by Dr. Gary Rasmussen, a licensed psychotherapist who specializes in sex offender evaluations and treatment; Dr. Rasmussen found that Mr. Temelkoski is a low risk to reoffend and lacks the traits of a pedophile or sexual predator. (A copy of Dr. Rasmussen's report is attached hereto as Exhibit C).

Most important is the fact that Mr. Temelkoski took the plea under HYTA. The purpose of HYTA is to give youthful offenders a second chance in life, free from the encumbrances of a mistake made in their youth. Had Mr. Temelkoski taken a plea under HYTA in 1994 to any other crime of a non-sexual nature covered under the act, he would be free from any further encumbrances on him, and would be permitted to never have to look over his shoulder again for fear that his youthful indiscretion would come back to haunt him. It seem unequitable that, because of SORA, he cannot stop looking over his shoulder for fear that his past will come back to haunt him.

One must remember that at the time of Mr. Temelkoski's plea, HYTA was permitted for those who committed CSC III. While the same might not be true in the present, it does not negate the rationale at the time of the plea. The Trial Court felt that Mr. Temelkoski deserved a second chance, free from his one youthful mistake. Had Mr. Temelkoski violated this trust that the Trial Court had granted, he would have deserved additional punishment. Mr. Temelkoski, in reality, did not violate this trust, and as such,

has no criminal record. Yet, his placement on SORA, is, in effect, a second form of punishment, and an antithesis of the goals HYTA sets out. When one takes into account, the retributive nature of the Tier system and the consequences associated with being placed on SORA, the third *Mendoza-Martinez* factor weighs in favor of finding that SORA is punitive as applied to Mr. Temelkoski.

(4) Rational Connection to Non-Punitive Purpose

The Court of Appeals once again found that this factor weighs in favor of SORA not being punitive. The Court reasoned that purpose of SORA is to promote public safety, by alerting the public to the risk of sex offenders in their community. *Temelkoski, supra* at 33. While public safety may be the rationale behind the law, studies have shown, that at best, public registration makes no difference in recidivism rates and has actually been viewed as being counter-productive to the intended goal of public safety. Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*(12/1/08), at SSRN: http://ssrn.com/abstract=1437098 (No decline in sex offense rates after introduction of registry nor does recidivism decrease in states with registries); Bob Vasquez, *The Influence of Sex Offender Registration and Notification Laws in the United States*, 54 Crime & Delinquency 175, 179, 188 (2008) (empirical research indicates that sex offender legislation seems to have no uniform/observable influence on the number of reported rapes).

Moreover, while the intended basis for SORA is promotion of public safety, it is hard to find evidence supporting that public safety is helped by the registry. This is true because the notion that sex offenders reoffend at a higher rate than other criminals do, has been found to be untrue. Rather, it is the opposite. Government statistics show 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, *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)]. It is also important to note that the Department of Justice found that more new sex crimes were committed by other types of criminals (87%) than by previously identified sex offenders (13%). Bureau of Justice Statistics. *Recidivism of Sex Offenders Released from Prison in 1994.* (No. NCJ 198281) Washington, DC; U.S. Department of Justice. Furthermore, several recidivism studies indicate that most recidivists are apprehended within the first few years at-large, and that risk decreases as offenders spend more time in the community offense free. See A. Harris and R. Karl Hanson. *Sex offender recidivism: A simple question.* (No. 2004-03). Ottawa: Public Safety and Emergency Preparedness Canada.

When viewed as a whole, SORA, as applied here in Michigan, is not rationally related to a non-punitive interest. This is true because of the failure of the system to accurately identify potential offenders. When looked at specifically with regard to someone like Mr. Temelkoski, the relation to non-punitive purposes is made even more

tenuous, to the point of being non-existent. Mr. Temelkoski was adjudicated under the purview of HYTA. This means that the Trial Court deemed Mr. Temelkoski an appropriate candidate to not have his youthful mistake and indiscretion follow him around for the rest of his life. Mr. Temelkoski has never reoffended in any form or fashion in the twenty years since he took his plea. He poses no threat to anyone, let alone children. Based on the above-referenced studies, if in the twenty years since his plea he has never been arrested, then the likelihood of him ever doing so are miniscule at best.

As stated previously, Michigan's tier system is based on the nature of the crime for which the registrant was convicted. Unless Michigan were to switch to a tier system in which the basis of the specific tier placement is on individual characteristics of the offender and a reasoned determination of their likelihood to reoffend, then SORA will continue to exhibit punitive traits. For someone like Mr. Temelkoski, who has no conviction, and has not even raised the eyebrow of the police or court system since, there is no rational connection to a non-punitive purpose. He is not the predator that SORA makes him out to be, as proven by the nature of his plea and his actions since. As such, this *Mendoza-Martinez* factor should result in a finding that SORA is punishment, especially as it relates to Mr. Temelkoski.

(5) Excessive with Respect to Non-Punitive Purpose

The Court of Appeals once again found that this factor weighs in favor of SORA not being punitive. The Court based its holding on the rationale set forth in *Smith, supra*, which held that the Public SORA is passive and requires individuals to seek out information on specific sex offenders. *Temelkoski, supra* at 34. Moreover, the Court opined that the requirements set forth for those on the registry are tied to a legitimate

regulatory purpose, i.e. protecting the public. *Id.* at 35. Lastly, the Court found that because the Defendant was not in a consensual relationship, and the "victim" was just under 13 years old, SORA is not excessive. *Id.* at 37.

The Court's reasoning however, is flawed. The Court fails to recognize that even if there is a determination that SORA is a legitimate registration system to protect the public from sex offenders, the Act is excessive. SORA uses broad strokes to try to rectify a problem, rather than focus on specific factors. SORA, as it currently stands, offers no true system to help find whether a registrant has a greater or lesser chance of recidivism. Rather, SORA offers information that is available to the general public without any regard to whether an individual poses any future risk. Justice Ginsburg, in her dissent in *Smith, supra*, summed it up the best when she stated:

> What ultimately tips the balance for me is the Act's excessiveness in relation to its non-punitive purpose. See *Mendoza-Martinez, supra* at 169. As respondents concede, ... the Act has a legitimate civil purpose: to promote public safety by alerting the public to potentially recidivist sex offenders in the community. But its scope notably exceeds this purpose. The Act applies to all convicted sex offenders, without regard to their future dangerousness. And the duration of the reporting requirement is keyed not to any determination of a particular offender's risk of reoffending, but to whether the offense of conviction qualified as aggravated. The reporting requirements themselves are exorbitant: The Act requires aggravated offenders to engage in perpetual quarterly reporting, even if their personal information has not changed. And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation. *Smith v. Doe*, 538 U.S. 84, 116-17, 123 S.Ct. 1140, 1160, 155 L.Ed.2d 164 (2003) (Ginsburg, J., dissenting) (citations omitted).

SORA's many obligations impose a severe restraint on liberty without a

determination of the threat a particular registrant poses to public safety. Placement within a specific tier has more to do with the nature of the crime and nothing to do with the likelihood of reoffending. While the Legislature and Courts might think otherwise, the truth is hard to ignore, and the truth of the matter is that placement on specific tier has more to do with past conduct and less to do with future dangerousness.

This restraint is highlighted further in Mr. Temelkoski's case, due to his plea, which was taken under HYTA. Here, the trial court in 1994, made a determination that Mr. Temelkoski was entitled to diversion and the possibility of moving forward with no criminal conviction. The basic premise of the HYTA statute is that once the supervision period has been successfully completed, an individual can continue his/her life unencumbered by the stigma associated with a criminal conviction. Pursuant to the statute itself, all records regarding the disposition and the status of the defendant as a youthful trainee are sealed to the general public. MCL § 762.14(4). Mr. Temelkoski completed probation without any problems, and as such, his record shows no convictions. Yet, he is still forced to register on the SORA, which seems counter-intuitive to the goals and premise of HYTA.

Moreover, the Court, in an attempt to differentiate from *People v. Dipiazza*, 286 Mich. App. 137 (2009) highlights to factual differences in the case. In the Court's eyes, the factual differences in the case is a determining factor of whether the effects of SORA are devastating or not upon someone who is a registrant. This notion is ludicrous. The hyper-focus on the factual scenarios should be the least of the Court's concern. Rather, the Court should be focusing on the notion that both Mr. Temelkoski and the Defendant in *Dipiazza* were both adjudicated pursuant to HYTA, and neither has a criminal

conviction. In each case, the trial court sought to give the offending parties a second chance at life, free from the encumbrances placed upon them by their previous actions. When you take into account that SORA was not even enacted when Mr. Temelkoski took his plea, the excessiveness of his placement on SORA is made even more glaring.

It should also be pointed out that the Court's reliance on the argument that SORA is passive is without merit. While it is true that one has to sign up to receive alerts, an individual can be emailed alerting them that sex offender has moved into their general vicinity through the Michigan State Police Website.[2] Access to this information is easier now than it has ever been, further ostracizing people like Mr. Temelkoski. The ease of access to such information further proves how excessive SORA is and has become.

SORA's obligations are excessive in relation to its non-punitive public safety purpose for most on the registry, especially true in the case of Mr. Temelkoski. As stated previously, Mr. Temelkoski has no criminal record as a result of his plea taken under HYTA. The Court deemed him a worthy candidate to be rehabilitated and not have his offense follow him around for the rest of his life. Yet, because of SORA, his criminal act is doing just that. While SORA's goals and purpose might be to promote public safety, it flies in the face of HYTA as it was in 1994 when Mr. Temelkoski took his plea. Therefore, it should be seen as excessive with respect to its non-punitive purpose. It is hard to fathom that the Court of Appeals has found otherwise. As such, the fifth *Mendoza-Martinez* factor weighs in favor of finding that SORA is punitive as applied to Mr. Temelkoski.

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[2] see http://www.icrimewatch.net/register.php?AgencyID=55242&disc=

Finding based on the *Mendoza-Martinez* Factors

As stated previously, because the Legislature's intention in enacting SORA was for the promotion of safety for the general public, the Court's must look to determine whether placement on SORA constitutes punishment, by analyzing the facts pursuant to the *Mendoza-Martinez* factors enumerated through *Earl, supra.* Based on the above-stated facts, it is without doubt that SORA, as it relates to Mr. Temelkoski, is punitive in nature. From the excessive restraints placed upon Mr. Temelkoski, to the stigma of being placed on SORA where there is no conviction to base it upon pursuant to HYTA, it is readily apparent that placement on SORA is another form of punishment for Mr. Temelkoski. Therefore, this Honorable Court should have no other option but to reverse the Michigan Court of Appeals ruling, and find that Mr. Temelkoski's placement on SORA is cruel and/or unusual punishment, thereby resulting in his removal from the registry.

Remedy

The Michigan Court of Appeals erred in finding that Mr. Temelkoski's placement on the Public Sex Offender Registry was not cruel and/or unusual punishment. Even though the intent of the legislation was for non-punitive purposes, the actual effect of the law makes his required registration another form of punishment. Considering that Mr. Temelkoski was adjudicated pursuant to HYTA and has no criminal conviction, his required registration is Cruel and/or Unusual Punishment, and a violation of the Ex Post Facto clause. As such, this Honorable Court should grant Leave to Appeal and reverse the Michigan Court of Appeals ruling.

Relief Requested

WHEREFORE, for the foregoing reasons, Mr. Temelkoski requests this Honorable Court grant the present Application for Leave to Appeal.

Respectfully submitted,

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(248) 356-2010 ext 229

Dated: December 15, 2014

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 313670
Lower Court No. 94-000424-FH

v.

BOBAN TEMELKOSKI,

Defendant-Appellant

_____/

Exhibit A: Letter from Boban Temelkoski to Circuit Court included with Defendant's Motion for Removal from Sex Offender Registry

To Whom It May Concern

My name is Boban Temelkoski. I am 38 years old. I have been on the sex offenders registry since 1994. I cannot find a job because the sex offenders list and it is hard for me to support my family. I have been married for 13 years and my wife loves and supports me, and we are so happy to be with each other. I have two wonderful kids, the oldest being my daughter Nikolina Temelkoski, who is 11 years old and my youngest is my son Dimitar Temelkoski, who is 5 years old. We are a happy family, and thanks to god that he gave us tow beautiful kids and it makes me happy.

I am on the sex offenders registry because I took a plea, under the Holmes Youthful Trainee Act in 1994, to CSC 2nd degree. What had happened was that I was a banquet center where I went to see my brother. April was working there and she was crying about that everyone was getting tips and she was not. She asked me to give her a ride home and i did. During the drive, she was talking to me and she started to kiss me, so i kissed her too. I pulled my car into an alley in Hamtramck, and she again kissed me, which led to more kissing, and I eventually touched her breast. I stopped kissing and feeling her breasts when she told me she was 12 years old, Although the police report says that I told her "it didn't matter", this is not true, I never said that. I stopped the kissing and touching and I took her home. As we drove home, she was still acting normal and happy and didn't seem upset at all.

Because I am on the registry, it is hard for me to get a job. The registry also makes it hard on my family and me in other ways. When I was going on a vacation with my family to Europe, and we came back, when we came back to US the customs worker pulled me to the side and asked me about being on the sex offender registry. This is not the only time this happened, but more times, like every time i go to Canada, the same thing happens over and over. My kids start to cry when they see officer pulling me to the side and asking me questions. This usually happens on the Michigan side, not on Canada side, and they always looking in my car for something. It feels like i did something wrong , even though i have done nothing to make them need to search my car. It is so hard for my kids. I cannot tell them about the registry. My daughter ask me to go to school for her play but i could not go to school because I am on the registry and had to make up a lie to tell her why I couldn't go. This made her very upset and made me feel guilty and upset.

I am writing this to you so I can be removed from the sex offenders registry. I want to be a better father to my kids, so i can have more interaction with my children outside of the house, like at their school and on family vacations. I want to be a good husband to my wife so we can spend our lives together for many

years to come. Getting off of the sex offender registry could help me towards those goals. Please, I am a good father, and a good husband and a good person to everyone. I have learned from my mistakes and just want to be able to live a normal life once again.

Thank you

Boban Temelkoski

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 313670
Lower Court No. 94-000424-FH

v.

BOBAN TEMELKOSKI,

Defendant-Appellant

_____/

Exhibit B: MCL § 762.11 (as worded and in effect in 1994)

1993 Mi. HB 4587

Enacted, December 28, 1993

Reporter
1993 Mi. ALS 293; 1993 Mi. P.A. 293; 1993 Mi. HB 4587

MICHIGAN ADVANCE LEGISLATIVE SERVICE > 87TH LEGISLATURE (Regular Session) > (Act 293, Public Acts of 1993) > HOUSE BILL NO. 4587

Notice

[A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

Synopsis

AN ACT to amend sections 11, 12, 13, 14, and 15 of chapter II of Act No. 175 of the Public Acts of 1927, entitled as amended "The code of criminal procedure,"

section 11 as amended by Act No. 4 of the Public Acts of 1988 and section 13 as amended by *Act No. 185 of the Public Acts of 1993*, being *sections 762.11*, *762.12*, *762.13*, *762.14*, and *762.15 of the Michigan Compiled Laws*.

Text

The People of the State of Michigan enact:

Section 1. Sections 11, 12, 13, 14, and 15 of chapter II of Act No. 175 of the Public Acts of 1927, section 11 as amended by Act No. 4 of the Public Acts of 1988 and section 13 as amended by *Act No. 185 of the Public Acts of 1993*, being *sections 762.11*, *762.12*, *762.13*, *762.14*, and *762.15 of the Michigan Compiled Laws*, are amended to read as follows:

CHAPTER II

Sec. 11. [D> When a youth is alleged to have committed <D][A> IF AN INDIVIDUAL PLEADS GUILTY TO A CHARGE OF <A]a criminal offense, other than a felony for which the maximum punishment is life imprisonment, a major controlled substance offense, or a traffic offense[A> , <A][D> between the youth's seventeenth and twentieth birthdays, <D][A> COMMITTED ON OR AFTER THE INDIVIDUAL'S SEVENTEENTH BIRTHDAY BUT BEFORE HIS OR HER TWENTY-FIRST BIRTHDAY, <A]the court of record having jurisdiction of the criminal offense may, [A> WITHOUT ENTERING A JUDGMENT OF CONVICTION AND <A]with the consent of [D> both the affected youth and the youth's legal guardian or guardian ad litem <D][A> THAT INDIVIDUAL <A], consider and assign that [D> youth <D][A> INDIVIDUAL <A]to the status of youthful trainee. As used inthis section, "traffic offense" means a violation of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being *sections 257.1* to *257.923 of the Michigan Compiled Laws*, or a [A> VIOLATION OF A <A]local ordinance substantially corresponding to that act, [D> which violation <D][A> THAT <A]involves the operation of a vehicle and[A> , <A]at the time of the violation[A> , <A]is a felony or [A> A <A]misdemeanor.

Sec. 12. The court of record [D> , <D]having jurisdiction over the criminal offense referred to in section [D> 1, <D][A> 11 OF THIS CHAPTER <A]may[A> , <A]at any time[A> , <A]terminate its

consideration of the [D> youth <D][A> INDIVIDUAL <A]as a youthful trainee or, once having assigned the [D> youth <D][A> INDIVIDUAL <A]to the status of a youthful trainee, may at its discretion revoke [D> such <D][A> THAT <A]status [D> at <D]any time [D> prior to <D][A> BEFORE <A]the [D> youth's <D][A> INDIVIDUAL'S <A]final release. [D> Such <D][A> UPON <A]termination of consideration [D> , <D]or [D> such <D]revocation of status as a youthful trainee, [D> shall serve to reinstate the criminal case against such youth at the point interrupted when the consideration as a youthful trainee was commenced. No information divulged by the youth, subsequent to the commencement of consideration of the youthful trainee status, may be admissible as evidence in the criminal case. Should <D][A> THE COURT MAY ENTER AN ADJUDICATION OF GUILT AND PROCEED AS PROVIDED BY LAW. IF <A]the status of [D> a <D]youthful trainee [D> be <D][A> IS <A]revoked[A> , AN ADJUDICATION OF GUILT IS ENTERED, <A]and [A> A <A]sentence [A> IS <A]imposed[A> , <A][D> under criminal procedure, <D]the court in imposing sentence shall specifically grant credit against the sentence for time served as a youthful trainee in an institutional facility of the department of corrections [A> OR IN A COUNTY JAIL <A].

Sec. 13. (1) If [D> a youth <D][A> AN INDIVIDUAL <A]is assigned to the status of a youthful trainee and the underlying charge is an offense punishable by imprisonment [D> in a state correctional facility <D]for a term of more than 1 year, the court shall [D> commit the youth <D][A> DO 1 OF THE FOLLOWING:

(A) COMMIT THE INDIVIDUAL <A]to the department of corrections for custodial supervision and training for [D> a period not to exceed <D][A> NOT MORE THAN <A]3 years in an institutional facility designated by the department for [D> such <D][A> THAT <A]purpose[A> . <A][D> or place <D]

[A> (B) PLACE <A]the [D> youth <D][A> INDIVIDUAL <A]on probation for [D> a period not to exceed <D][A> NOT MORE THAN <A]3 years [A> SUBJECT TO PROBATION CONDITIONSAS PROVIDED IN SECTION 3 OF CHAPTER XI.

(C) COMMIT THE INDIVIDUAL TO THE COUNTY JAIL FOR NOT MORE THAN 1 YEAR.

(2) IF AN INDIVIDUAL IS ASSIGNED TO THE STATUS OF YOUTHFUL TRAINEE AND THE UNDERLYING CHARGE IS FOR AN OFFENSE PUNISHABLE BY IMPRISONMENT FOR 1 YEAR OR LESS, THE COURT SHALL PLACE THE INDIVIDUAL ON PROBATION FOR NOT MORE THAN 2 YEARS, SUBJECT TO PROBATION CONDITIONS AS PROVIDED IN SECTION 3 OF CHAPTER XI <A].

[A> (3) <A][D> A youth <D][A> AN INDIVIDUAL <A]placed on probation [A> PURSUANT TO THIS SECTION <A]shall be under the supervision of a probation officer[A> . <A][D> or community assistance officer appointed by the department of corrections. <D]Upon commitment to and receipt by the department of corrections, a youthful trainee shall be subject to the direction of the department of corrections.

[A> (4) IF AN INDIVIDUAL IS COMMITTED TO THE COUNTY JAIL UNDER SUBSECTION (1)(C) OR AS A PROBATION CONDITION, THE COURT MAY AUTHORIZE WORK RELEASE OR RELEASE FOR EDUCATIONAL PURPOSES.

(5) <A][D> (2) <D]The court shall include in each order of probation for [D> a youth <D][A> AN INDIVIDUAL <A]placed on probation under this section that the department of corrections shall collect a probation supervision fee of not more than $ 30.00 multiplied by the number of months of probation ordered, but not more than 60 months. The fee is payable when the probation order is entered, but the fee may be paid in monthly installments if the court approves installment payments for that probationer. In determining the amount of the fee, the court shall consider the probationer's projected income and financial resources. The court shall use the following table of projected monthly income in determining the amount of the fee to be ordered:

Projected Monthly Income	Amount of Fee
$ 0-249.99	$ 0.00
$ 250.00-499.99	$ 10.00
$ 500.00-749.99	$ 20.00
$ 750.00 or more	$ 30.00

The court may order a higher amount than indicated by the table, up to the maximum of $ 30.00 multiplied by the number of months of probation ordered but not more than 60 months, if the court determines that the probationer has sufficient assets or other financial resources to warrant the higher amount. If the court orders a higher amount, the amount and the reasons for ordering that amount shall be stated in the court order. The fee shall be collected as provided in section 25a of Act No. 232 of the Public Acts of 1953, being *section 791.225a of the Michigan Compiled Laws*. A person shall not be subject to more than 1 supervision fee at the same time. If a supervision fee is ordered for a person for any month or months during which that person already is subject to a supervision fee, the court shall waive the fee having the shorter remaining duration.

Sec. 14. (1) [A> IF CONSIDERATION OF AN INDIVIDUAL AS A YOUTHFUL TRAINEE IS NOT TERMINATED AND THE STATUS OF YOUTHFUL TRAINEE IS NOT REVOKED AS PROVIDED IN SECTION 12 OF THIS CHAPTER, UPON FINAL RELEASE OF THE INDIVIDUAL FROM THE STATUS AS YOUTHFUL TRAINEE, THE COURT SHALL DISCHARGE THE INDIVIDUAL AND DISMISS THE PROCEEDINGS. <A]

(2) An assignment of [D> a youth <D][A> AN INDIVIDUAL <A]to the status of youthful trainee [D> , <D]as provided in this chapter [D> shall <D][A> IS <A]not [D> be deemed to be <D]a conviction [D> of <D][A> FOR A <A]crime[A> , <A] and [D> such person <D][A> THE INDIVIDUAL ASSIGNED TO THE STATUS OF YOUTHFUL TRAINEE <A]shall [A> NOT <A]suffer [D> no <D][A> A <A]civil disability [D> , <D][A> OR LOSS OF <A]right or privilege following his [A> OR HER <A]release from [D> such <D][A> THAT <A]status because of [D> such <D][A> HIS OR HER <A]assignment as a youthful trainee.

(3) Unless [D> such person shall be later convicted of <D][A> THE COURT ENTERS A JUDGMENT OF CONVICTION AGAINST THE INDIVIDUAL FOR <A]the [D> crime alleged to have been committed, referred to in section 1, <D][A> CRIMINAL OFFENSE UNDER SECTION 12 OF THIS CHAPTER, <A]all proceedings [D> relative to <D][A> REGARDING <A]the disposition of the criminal charge and [D> to <D]the [A> INDIVIDUAL'S <A]assignment as youthfultrainee shall be closed to public inspection, but shall be open to the courts of [D> the <D][A> THIS <A]state, the department of corrections, the department of social services[A> , <A]and law enforcement personnel [A> FOR USE ONLY <A]in the performance of their duties. [D> and such information may only be used for the performance of such duties. <D]

Sec. 15. [D> The provisions of this <D][A> THIS <A]chapter [D> may <D]also [D> be applied <D][A> APPLIES <A]to [D> a youth <D][A> AN INDIVIDUAL <A]over [D> the age of <D]15 years [A> OF AGE <A]whose jurisdiction has been waived under [D> the provisions of <D]section 27 of chapter [D> 4 <D][A> IV <A]of this act.

Section 2. This amendatory act shall take effect January 1, 1994.

History

Filed with the Secretary of State December 28, 1993

MICHIGAN ADVANCE LEGISLATIVE SERVICE

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 313670
Lower Court No. 94-000424-FH

v.

BOBAN TEMELKOSKI,

Defendant-Appellant

_____/

Exhibit C: Forensic Psychology Evaluation Report of Boban Temelkoski, Prepared by Dr. Gary Rasmussen, LMSW, Psy.S. Ph.D

Gary K. Rasmussen, LMSW, Psy.S. Ph.D.
Consulting Forensic Examiner
Psychotherapist
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Forensic Psychological Evaluation of Boban Temelkoski

Name of Client:	Boban Temelkoski
Sex:	Male
File Name:	TEMELKOSKI, RPT
Age:	37 years old [DOB: February 5, 1974]
Date of Report:	January 5, 2012
Prepared For:	Cheryl Carpenter, Esq. [Defendants Attorney]
	Completed By: Gary K. Rasmussen, LMSW, Psy.S, Ph.D.
Dates of Interview:	December 10, 2011, December 16, 2011, and December 22, 2011

CONFIDENTIAL

This report is confidential and is intended for the use of the Judge and the Attorneys involved. Material contained in this report should not be directly shared with others outside the Court unless otherwise authorized by a signed release.

REASON FOR REFERRAL:
Boban Temelkoski was referred for an independent psychological evaluation by his attorney; Cheryl Carpenter, Esq. Boban Temelkoski is seeking removal from the sex offender registry Prior to the session Boban Temelkoski was appraised of the purpose and scope of psychological evaluation and the inherent limits on confidentiality when a report is used in a Court proceeding. Boban Temelkoski stated that he understood that there might be restrictions to the privileged nature of the material under certain conditions. He then agreed to participate in the interviews and examination proceeded.

GENERAL AND BACKGROUND/INFORMATION:
Please be advised that for the purposes of this evaluation I find it important to state as briefly as possible my experience in making the following clinical determinations. I have been in the mental health-counseling field for the past 20+ years. I have been providing psychosexual risk assessments on adults and juveniles for the past 12 years. I have provided theses assessments for the Wayne, Oakland, and Macomb County Court systems.

I am the Founding Board Member of the Macomb County Child Advocacy Center, (Care House). I am currently the past President of the Board of Directors, and remain on the Board in an honorary position. My educational attainment is as follows, Doctor of Philosophy Forensic Psychology, Post Graduate Specialists Degree-Clinical and Humanistic Psychology and Education, and I hold a Master of Social Work degree. I have provided the following services in my tenure of practice:

- ✓ Case consultation with attorneys, (Prosecution and Defense)
- ✓ Outpatient sex offender treatment for adults and juveniles
- ✓ Psychological testing
- ✓ Individual, group and family counseling
- ✓ Guardianship/conservator evaluations
- ✓ Custody evaluations
- ✓ Parenting fitness evaluations-Abuse and neglect
- ✓ Psychosexual Recidivistic Perpetration Evaluations, Youth/Adults
- ✓ Competency evaluations
- ✓ Substance abuse assessments and DLAD evaluations
- ✓ Assault and sexual behavior/potential profiling
- ✓ Mental status examinations
- ✓ Expert witness testimony
- ✓ Examination of mental health/clinical reports

The clinical evaluation to follow, of Boban Temelkoski took place on the above-indicated dates and location. I interviewed Boban Temelkoski for approximately one and one half hours on each occasion. I focused on Boban Temelkoski's current and presenting problem, the history and context of the problem and his mental state at the time.

I questioned him as to whether he was consuming any psychoactive substances, whether he was experiencing any signs of mental illness, such as delusions, hallucinations or confusing thoughts. I questioned Boban Temelkoski about any situational stressors he may have been experiencing and, if so, how they may have affected his mentation and motivation.

I did a comprehensive psychosocial history, which focused on his birth and developmental history, history of educational and vocational adjustment, mental health history, substance abuse history, psychosexual history, past criminal contacts and his general adjustment within the community. I also tested Boban Temelkoski psychometrically utilizing several measurement instruments.

Procedure

When conducting sex offender "risk assessments" (i. e., risk of recidivism and risk of future violence/dangerousness" this clinician prefers to use a "blended" forensic/clinical and actuarial technique. Therefore, this evaluation will draw upon the broad array of standard clinical psychological methods and tools. Given the nature of the offense described above and the reported circumstances surrounding the offense behavior of Boban Temelkoski, this examiner, specifically, will assess in this report the following three key questions:

1. Explore and assess the possible presence of a Sexual Paraphilia, such as Pedophilia; or any other sexually compulsive disorders;

2. Explore and assess the possibility that Boban Temelkoski is a "sexual predator" of minors;

3. Determine a potential risk for re-offence/recidivism or a sexual violence risk at home or within the community;

TESTS ADMINISTERED:
Minnesota Multiphasic Personality Inventory, MMPI-2
Millon Clinical Multiaxial Inventory-III
Multiphasic Sexual Inventory-MSI (Adult Version)
Sexual Addictions Inventory
Bumby Cognitive Distortions Scales
Child Abuse Potential Inventory
Vermont Assessment of Sex-Offender Risk (VASOR)
State-Trait Anger Expression Inventory-2
Substance Abuse Subtle Screen Inventory-Adult Version
Norris Hystad Alcohol Use Profile
Miller Forensic Assessment Test for Malingering
Thematic Apperception Test
Bender Gestalt Visual/Motor Test
Psychosexual Life History/Clinical Interview

BEHAVIORAL OBSERVATIONS:
(Boban Temelkoski)
Boban Temelkoski is a 37-year-old, right-handed Caucasian male of average stature and buildAs an informant, Boban Temelkoski appeared to be open in most respects.

He was candid about his history and took responsibility for his own behavior. His cooperation level was adequate. His frustration tolerance level was appropriate and his impulse control was unremarkable at the time of the evaluation. Gait and hand-eye coordination presented no remarkable features. Fine motor control appeared intact. There were no remarkable features to his ability to use language and indeed his speech appeared spontaneous and evenly paced. Thought processes were for the most part logical and coherent, he appears to function at an appropriate cognitive level. There were no signs of retardation and thought blocking.

The psychological testing that was performed was valid, suggesting that Boban Temelkoski made an honest effort to present his psychological status in a realistic manner.

His cognition appeared to be grossly normal. There was no evidence of hallucinations, delusions or loose associations.

Affectively, he appeared to be somewhat depressed and anxious. He did not display any signs of self-depreciating thought processes.

The results of this assessment/evaluation are believed to be an accurate reflection of Boban Temelkoski's current personality organization, emotional stability, overall psychological functioning, and his potential "risk" to the welfare of the community as a result of the past instant offence.

Boban Temelkoski was able to establish and maintain good eye contact with this evaluator during our time together.

Boban Temelkoski's general appearance was that of being well nourished and cared for. His hygiene was within normal limits. He was dressed casually. There were no unusual physical features noted.

Boban Temelkoski is absent of suicidal and/or homicidal ideations, at present.

Boban Temelkoski is presently absent of any hallucinations including auditory, visual, olfactory. He does not demonstrate any difficulty in recognizing the cause and effect links of his own behavior. He is capable of discerning right from wrong. He does not have a history of being delusional and/or suffering from psychotic episodes. He does not demonstrate any symptomology related to paranoia such as ideas of reference, feelings of persecution, a grandiose self-concept, or suspiciousness.

Boban Temelkoski was oriented x four, person, place, time and intent during this evaluation. His memory appears intact, both recent and remote. His responses to hypothetical judgment oriented questions were within normal limits, he was able to abstract reason.

Boban Temelkoski's estimated level of intellectual functioning appears to be in the high/average range compared with age and academic attainment. He has never been deemed educationally and/or emotionally impaired.

RESULTS OF PSYCHOLOGICAL TESING:
(Boban Temelkoski)

Boban Temelkoski was administered the Sexual Adjustment Inventory (Adult Version). Results of this test are as follows:

Test Items Truthfulness Scale:
The scores on this scale evidence a **low risk range**. This client was generally cooperative and non-defensive. This scale determines how open and truthful the client was while completing the Sexual Adjustment Inventory. Responses to non-sex related Sexual Adjustment Inventory test items are valid, accurate and truthful.

Sex Items Truthfulness Scale:
The scores on this scale evidence a **low risk range**. There was no evidence of sensitivity and/or guardedness regarding sex related areas of inquiry on this profile. Truth correlated sex items and answers are considered accurate.

Sexual Adjustment Scale:
The scores on the scale evidence a **low risk range**. Boban Temelkoski's response pattern does not indicate problematic sexual adjustment concerns and/or problems at this time.

Child Molest Scale:
The responses on this scale evidence a **low risk range**. Boban Temelkoski's scores indicate few, if any; indicators of child molest behaviors (pedophilia) present. This client does not present as a sexual risk to children.

Sexual Assault Scale:
The scores on this scale evidence a **low risk range**. Boban Temelkoski's responses reflect a very low probability of sexual assault. There are no indicators that Boban Temelkoski can be characterized as a rapist.

Incest Scale:
The scores on this scale evidence a **low risk range**. Low risk scorers reveal few, if any, indicators of chronic incestuous behavior.

Exhibitionism Scale:
The scores on this scale evidence a **low risk range**.

Violence Scale:
The scores on this scale evidence a **low risk range**. Violent tendencies are not evident. Low risk individuals are typically respectful of human rights and mutual cooperation. Others would likely describe them as easy-going and peaceful.

They prefer a nonviolent lifestyle. Violence refers to physical force used to violate rights, injure, damage, abuse or destroyed. Violence is unjust use of power. Low risk scorers typically manifest nonviolent attitudes and behavior.

Antisocial Scale:
The scores on this scale evidence a **low risk range**. Few, if any, indicators of repeated lying, deceit, or chronic inability to conform to society are present. A moral or ethical blunting is not evident. This person is capable of affection, sympathy and remorse. Low risk usually is not associated with antisocial personality disorder.

Distress Scale:
The scores on this scale evidence a **low risk range**. Symptoms of distress include anxiety and depression are not present.

Judgment Scale:
The scores on this scale evidence a **low risk range**.

The Thematic Apperception Test (TAT) was administered. The protocol did not reveal signs of deviant sexual content. It has been my experience that individuals who are sexually preoccupied and sexually motivated (career child molesters and/or sexual deviants) tend to have sexual content on this protocol.

The Multiphasic Sexual Inventory- II was administered to Boban Temelkoski. This protocol proved to be valid and evidences a realistic appraisal. The purpose of this testing is to help identify psychological/sexual problems, if any, that may exist. Specifically, the test data is used for the following reasons:

- To help develop hypotheses about psychological problems an individual may be experiencing.
- To help develop hypotheses about any sexual problems and individual may be experiencing such as sexual desires, obsessions, dysfunction, sex knowledge and deviant or atypical sexual behaviors.

This testing did not reveal evidence of early and/or premature sexualization.
This protocol did not reveal and/or demonstrate any indications of sexual deviance, sexual predatory behavior, and/or pedophilia at the present time. He does not demonstrate having been sexually aroused by thoughts or fantasies involving a child.

A general assessment of sexuality was undertaken for this individual and the findings show that he has accurate information about sexual anatomy and physiology.
He indicates that he is heterosexual and presents himself as having age appropriate sexual interests; he does report having impaired erectile functioning problems. This examination did not reveal any paraphilia interests and behaviors involving transvestic fetish, bondage/discipline, sexual sadism, and sexual masochism. There is no evidence that this person is sexually obsessed or compulsively driven at this time.

He is cognizant of the fact that it is wrong to either force someone to have sex or to engage a minor in sex.

The Minnesota Multiphasic Personality Inventory for Adults, (MMPI-2) produced a valid profile, suggesting Boban Temelkoski cooperated with the evaluation to produce useful interpretive information.

There was evidence of mild depression. He is not satisfied with his current life situation.

He shows a profile of an individual who is worried, anxious, tense, and experiencing emotional discomfort. Disabling guilt feelings are present. He worries excessively; these symptoms are readily apparent to him and others.

Boban Temelkoski was administered both the Substance Abuse Subtle Screening Inventory for Adults, and the Norris Hystad Alcohol Use Profile. Both profiles did not prove chemical dependency and/or abuse issues.

Boban Temelkoski was administered the State-Trait Anger Expression Inventory-2. The results of this profile were valid and represent a realistic appraisal.

The State-Trait Anger Expression Inventory-2 demonstrated to be valid and a realistic appraisal. Four major components of anger expression and control were measured. The first component, Anger Expression-Out, involves the expression of anger towards other persons or objects in the environment.

The second component, Anger Expression-In, is anger directed inward (i.e., holding in or suppressing angry feelings).

The third component, Anger Control-Out, is based on the control of angry feelings by preventing the expression of anger toward other persons or objects in the environment. The fourth component, Anger Control-In, is related to the control of suppressed angry feelings by calming down or cooling off when angered.

Boban Temelkoski did not evidence scores consistent with an individual who suffers with chronic anger issues. He is more likely to suppress his anger. His anger reaction scales reveal an individual who is highly sensitive to criticism, perceived affronts, and negative evaluations by others. He is likely to experience intense feelings of anger under such circumstances. These intense angered feelings are often suppressed which is likely to lead to passivity and depression, as well as withdrawal from others. He is likely to be at an increased risk to develop medical problems, ulcers, gastrointestinal difficulties, headaches, etc.

The Miller Forensic Assessment of Symptoms Test was administered. This examination proved to be valid. This examination is utilized to determine evidence of malingering. Malingering is defined in the Diagnostic and Statistical Manuals of Mental Disorders (DSM-IV) as the "intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives" (p. 739). Individuals who malinger can represent significant problems for mental health practitioners. When patients feign psychopathology, the result may be an inappropriate allocation of resources, inaccurate diagnosis, and/or inefficient use of treatment providers. Individuals involved in legal proceedings may malinger to avoid prosecution or obtain monetary awards for psychological damages. Inmates in correctional facilities may also malinger psychiatric illness for a variety of reasons, including a transfer to treatment centers, early release, or increased access to psychotropic drugs.

The results of this examination did not reveal the use of any extreme symptomology, unusual symptom course, or evidence of suggestibility. There is no evidence by the means of this examination to indicate that Boban Temelkoski is either feigning symptoms and/or malingering. He is considered competent and able to understand the cause and effects links of his own behavior.

The Millon Clinical Multiaxial Inventory-III was administered. The results of this examination reveals an individual who can be characterized as having adjustive depressive symptomology that is interfering with his ability to feel good about himself and the general aspects of his life. He may have difficulty sharing on an emotional level. His profile appears consistent with those individuals who are on the SORA.

The Rogers Criminal Responsibility Assessment evidenced a valid protocol as follows:

Assessment Criteria for Criminal Responsibility:

Boban Temelkoski evidenced a highly reliable self-report; this examiner was impressed by his openness and honesty which could have included, (but did not) volunteering potentially self-damaging information. There was no evidence that he glosses over incidental details.

Involuntary Interference with Patients Self-Report:

There was no evidence of involuntary interference or the probability of organic brain interfering with his reliability at this time.

Planning and Preparation for the Alleged Crime:

There was evidence of disorganized and haphazard planning and preparation of the instant offense of charge. Boban Temelkoski evidences an individual who was situationally impulsive and not an individual who can be considered organized in the development, planning and preparation of the offense.

Awareness of Criminality during the Commission of the Alleged Crime:

Boban Temelkoski evidences a relative awareness of the wrongfulness of the act with a complete understanding of the consequences. He evidences genuine remorse for his actions and his behavior.

Sexual Addictions Inventory

Patrick J. Carnes, Ph.D., a leading researcher and educator in the field of compulsive sexual disorders, developed the Sexual Addictions Inventory as a comprehensive "intake" tool and, in addition, for a differential diagnostic purpose.
The inventory is utilized to survey a broad range of sexual behaviors and thus to identify those behaviors that are possibly compulsive and/or deviant for the individual.

Boban Temelkoski and this examiner carefully reviewed all areas that might possibly give rise to compulsive sexual behaviors, or reveal inappropriate sexual attitudes and sexual arousal patterns, such as compulsive masturbation, addiction to pornography, voyeurism, exhibitionism, sadism, masochism, compulsive touching (i.e., Froteurism) and pedophilia.

With regard to compulsive sexual disorders, Boban Temelkoski denied (not in psychological sense of the term) participation directly or indirectly in the deviant sexual behaviors or direct involvement in pedophilic activity.

Based on the results of Boban Temelkoski's SAI, it is this examiner's opinion that Boban Temelkoski does not presently suffer from a Sexual Addiction/Sexually Compulsive type of sexual disorder.

Sexual History Questionnaire

The history surveyed by this questionnaire did not identify any unusual aspect of Boban Temelkoski's sexual adjustment history that would be of concern.

There was no evidence of past practices/involvement, and cognitive thoughts/compulsions with sexual exhibitionism, sadistic trends, masochism practices, self-castration, and/or infantilism.

Bumby Cognitive Distortions Scales

This scale attempt to measure the conscious attitudes of sex offenders concerning their sexually compulsive behaviors. One scale (The Molest Scale) has been designed to measure attitudes of those who have molested children, while the other scale (Rape Scale) attempts to measure the cognitive attitudes of those who have raped adult female victims.

The attitudes taped into by these scales reflect the values, rationalizations, and other possible cognitive distortions (i.e., distortions of thinking) that are known to be characteristic of pedophilia and with regard to other sex offenders that have engaged in these types of sexually deviant behaviors.

These items, in particular, describe potential justifications that are frequently used by those who are sexually involved with children or have raped woman. The higher the score the more inappropriate the cognitive style and the more substantial are the distortions of thinking.

These scales are found to be particularly useful in terms of identifying treatment needs and goals relative to identifying and changing the distorted cognitive attitudes and behaviors for actual sex offenders. They are also useful for assessing if someone possesses "appropriate" thinking surrounding sex with children or with regard to the potential sexual abuse of others. These scales do not have a score range, per se, since their principle purpose is to identify distortions of thinking, which are obviously greater in number and degree in the high re-offense risk offenders.

The specific results of these scales for Boban Temelkoski indicate that he endorsed a low number of the cognitive distortions typical of the thinking and behavior of adult sex offender's. Therefore, in the opinion of this examiner, **this man understands and does not attempt to justify or minimize the impact of adult seductive behavior relative to children or the nature or wrongfulness of sexually aggressive behavior involving adult females and/or males.**

Vermont Assessment of Sex-Offender Risk (VASOR)

The VASOR was developed by the Vermont Department of Corrections in 1994 to assist probation and parole officers with placement decisions. The validity of the VASOR has been established through a series of studies, but it has yet to be tested with large and diverse populations outside of Vermont. Nevertheless, this instrument shows promise for several reasons. The level of information required to score the measure gives probation officers a very broad view of their case and fosters the collaborative approach to sex offender management.

The instrument yields a "Re-Offense Risk" score and a "Violence Risk" score to achieve an overall "Risk Score."

The criteria measured were chosen because, they reflect discrete factors (i.e., Actuarial data concerning discrete factors) that, based upon objective research, are found to be high in those offenders that have re-offended and/or continue their violent behavior after release from incarceration. The instrument is not designed, however, to replace the judgment of professionals familiar with sex offenders and both aggravating and mitigating factors not addressed by the instrument would be taken into consideration by the rater.

Most offenders who scored in the "Low Risk" range, and many who score in the "Moderate Risk" range, can be safely supervised and treated in a community setting. Offenders who score in the "High Risk" range, generally speaking, require incarceration to protect the public or intensive supervision if they must be treated in a community setting.

The specific criteria factors measured by this scale are the following:

Re-Offense Risk: Prior sex offense convictions, prior adult convictions, VOP's and other court order violations during the past five years, force used during current offense, relationship to victim, deviant sexual fixation, alcohol use during the past five years, drug abuse during the past five years, address changes during the past year, time employed or in school during the past year, re-offense during or after treatment, or terminated unsuccessfully from treatment, amenability to outpatient treatment.

Violence Risk:

Prior convictions for crimes involving violence, prior convictions for a crime involving a potentially deadly weapon, forced used during current offenses, sexual intrusiveness of current offense, physical harm to current victim, victim under age five, over age fifty five, or mentally or physically disadvantaged.

The score obtained for Boban Temelkoski are as follows:

Re-Offense Risk Score = 0
Violence Risk Score = 0

Risk Score: Low (Low is from zero to 24 on each scale)

The Child Abuse Potential Inventory was administered to Boban Temelkoski. This protocol appears to be valid and the following interpretation appears to be a realistic appraisal:

- Abuse Scale=63 (this scale is within normal limits)
- Distress Scale=55 (this scale is within normal limits)
- Rigidity Scale=22 (this scale is within normal limits)
- Unhappiness Scale=41 (this scale is within normal limits)
- Problems with Child and Self=4 (this scale is within normal limits)
- Problems with Family=8 (this scale is within normal limits)
- Problems from Others=6 (this scale is within normal limits)

Boban Temelkoski's scores were within normal limits. There is no evidence of abuse and/or neglect potential.

CLINICAL PROFILE:
(Boban Temelkoski)

In completing the interview, the clients' demeanor was cooperative, frank and forthcoming. Based on the character and coherency of the client's responses, spontaneous comments, and behavior, the information obtained during the interview and from the various assessment instruments is believed to be reliable. The results of the examination are therefore believed to be reliable and valid.

Based on this interview, Boban Temelkoski did not provide any strong indications of personality features that would be considered clearly pathological and, certainly, none suggesting antisocial trends or psychopathic personality traits at this time.

In response to stress and threats to the ego, the client's primary defense mechanisms include mostly sophisticated ones such as repression, rationalization, and intellectualization. Insight into his own psychological functioning and adjustment appears to be good at this time but he, plainly, has the intellectual potential to significantly improve his insight even further. Judgment with regard to decisions affecting his own well-being is typically good and he clearly has internalized appropriate social mores and values.

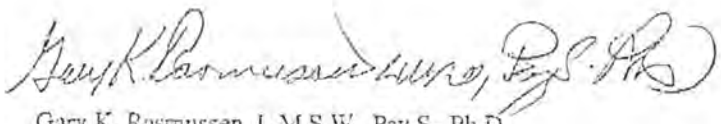
Discussion
As noted in the discussion of his psychosexual adjustment, Boban Temelkoski does not present at this time with any notable deviant sexual interests and/or arousal patterns, either by recent history or by the data gathered by my assessment protocols that indicates an exclusive or "fixated" interest in young minor children.

Summary and Recommendations
In formulating my opinions and recommendations about Boban Temelkoski, this examiner took into consideration that he has no prior sex offenses nor any background of such allegations prior to the instant offense; he has a number of positive and stable relationships in the community and, therefore, a good "support system"; he has a decent employment background; he is academically interested for future betterment; he is not mentally ill, that is, he does not suffer from a substantial disorder of thinking or mood that impairs his reality testing or his cognitive or emotional capacity to cope with life stressors, and, he does not present as harboring antisocial or strongly narcissistic personality traits.

Boban Temelkoski is an excellent candidate for removal from SORA. I find that he is a low recidivistic risk.

If you have, any questions or concerns please feel free to contact me at the above listed number.

Respectfully Submitted,



Gary K. Rasmussen, L.M.S.W., Psy.S., Ph.D.
Clinically Certified Forensic Therapist
Licensed Master Clinical Social Worker
Diplomat, American College of Certified Forensic Counselors
Specialist Degree in Clinical, Humanistic Psychology and Education
American College of Forensic Psychology and Corrections

STATE OF MICHIGAN

IN THE SUPREME COURT

STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals No. 313670
Lower Court No. 94-000424-FH

v.

BOBAN TEMELKOSKI,

Defendant-Appellant
_____/

Exhibit D: Court of Appeals Opinion
***People v. Temelkoski* (COA 313670)**

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BOBAN TEMELKOSKI,

Defendant-Appellee.

FOR PUBLICATION
October 21, 2014
9:05 a.m.

No. 313670
Wayne Circuit Court
LC No. 94-000424-FH

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM.

This case is before this Court for consideration as on leave granted.[1] The people contend that the trial court erred in granting defendant's motion to be removed from the sex offender registry under the Sex Offender Registration Act (SORA), MCL 28.721 *et seq.* For the reasons set forth in this opinion, we reverse.

I. FACTS & PROCEDURAL HISTORY

In 1994, defendant, then age 19, was charged with second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (person under 13 years of age). The charge arose from an incident where defendant kissed and groped a 12-year-old female. The facts and circumstances of the incident are disputed.

On March 4, 1994, defendant pleaded guilty to CSC-II. Defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.*, and sentenced to three years' probation. On April 16, 1997, upon successful completion of probation, the trial court dismissed the case and defendant did not have a conviction on his record. However, defendant was required to register as a sex offender pursuant to the SORA, which took effect after defendant pleaded guilty. See MCL 28.723(1)(b); MCL 28.722(w)(*v*). Under the current version of the SORA, defendant is required to register as a sex offender for life. See MCL 28.722(w)(*v*) (CSC-II involving a minor under age 13 is a "Tier III" offense); MCL 28.725(12) ("Except as otherwise provided . . . a Tier III offender shall comply with this section for life.")

[1] *People v Temelkoski*, 495 Mich 879; 838 NW2d 698 (2013).

On August 9, 2012, defendant filed a motion seeking removal from the sex offender registry. Citing *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), defendant argued that requiring him to register as a sex offender when he does not have a conviction for a sex offense constitutes cruel or unusual punishment. Defendant argued that, like in *Dipiazza*, he engaged in a consensual act with the complainant. Defendant further claimed that his status as a sex offender caused him difficulty gaining employment and adversely affected his ability to father his children and caused depression. Defendant attached a psychological risk assessment conducted by a licensed psychologist who opined that defendant is at a low risk for reoffending and that he does not meet the clinical classification of a pedophile or sexual predator.

In opposing the motion, the prosecution claimed that it was well-settled law that the SORA's registration and reporting requirements do not constitute "punishment" in the constitutional sense, and therefore, the requirements did not violate the constitutional proscriptions against cruel or unusual punishment. The prosecution further argued that *Dipiazza* was limited by *In re TD*, 292 Mich App 678; 823 NW2d 101 (2011), vacated 493 Mich 873; 821 NW2d 569 (2012), and that the circumstances of the underlying offense were unlike the circumstances in *Dipiazza* making the case distinguishable.

On September 21, 2012, the trial court granted defendant's motion, stating:

> One, Holmes Youthful Trainee is not a conviction, and it's not subject to S.O.R.A. That's – it may be in the face of the law that you have, but that's my ruling.
>
> Second thing is, this is an ex post facto law. He was not subject to the law at the time that he was sentenced. All of a sudden, they pass a law later saying that he has to register. ||
>
> And thirdly, I'll make a ruling, so that you have a proper record for the Court of Appeals. This is a punishment . . . I'm gonna grant the motion to remove him from the Sex Registry.

On December 4, 2012, the prosecution filed a delayed application for leave to appeal in this Court, arguing that the trial court erred in: (1) holding that registration on the sex offender registry amounted to punishment, (2) holding that the punishment was cruel or unusual, and (3) holding that SORA violated the Ex Post Facto Clause.

After this Court denied the prosecution's application for leave to appeal,[2] in lieu of granting leave to appeal, our Supreme Court remanded the case to this Court for consideration "as on leave granted." *People v Temelkoski*, 495 Mich 879; 838 NW2d 698 (2013).

II. STANDARD OF REVIEW

[2] *People v Temelkoski*, unpublished order of the Court of Appeals, entered July 8, 2013 (Docket No. 313670).

"We review constitutional issues de novo." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). "The party challenging a statute has the burden of proving its invalidity." *Id.* To the extent we must interpret the applicable statutory provisions, issues involving statutory interpretation are questions of law that we review de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

III. LEGAL BACKGROUND

A. RELEVANT STATUTES

Under the HYTA, when a defendant between the ages of 17 and 21 pleads guilty to certain criminal offenses,[3] "the court of record having jurisdiction of the criminal offense, may, without entering a judgment of conviction . . . consider and assign that individual to the status of youthful trainee." MCL 762.11(1). "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *Dipiazza*, 286 Mich App at 141-142, citing MCL 762.12. In the event the defendant successfully completes his or her HYTA assignment, the court "shall discharge the individual and dismiss the proceedings," MCL 762.14(1), and, "all proceedings regarding the disposition of the criminal charge and the individual's assignment as a youthful trainee shall be closed to public inspection." MCL 762.14(4). However, an individual assigned HYTA status "*before* October 1, 2004, for a listed offense enumerated in section 2 [MCL 28.722] [of the SORA],[4] is required to comply with the requirements of [the SORA]." MCL 762.14(3) (emphasis added).

The SORA was enacted in 1994 and took effect on October 1, 1995. 1994 PA 295. In relevant part, subject to certain exceptions, the SORA requires the following individuals to register as sex offenders:

> (a) An individual who is convicted of a listed offense after October 1, 1995.
>
> (b) An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, or under the jurisdiction of the juvenile division of the probate court or the department of human services for that offense. . . . [MCL 28.723(1).]

The SORA defines "convicted" in relevant part as follows:

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[3] Pursuant to a 2004 amendment, the HYTA no longer applies to individuals who plead guilty to CSC-II, and other offenses. See MCL 762.11(2).

[4] CSC-II involving a person less than 13 years of age is a listed Tier-III offense for purposes of the SORA. MCL 28.722(k); MCL 28.722(w)(*v*).

(i) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses . . . .

* * *

(A) *Being assigned to youthful trainee status . . . before October 1, 2004.* [MCL 28.722(b) (emphasis added).]

"The SORA, as it was first enacted, was designed as a tool solely for law enforcement agencies, and registry records were kept confidential." *Doe v Mich Dep't of State Police*, 490 F3d 491, 495 (CA 6, 2007). "As of September 1, 1999, however, the SORA was amended to create the [public sex offender registry (PSOR)] which can be accessed by anyone via the internet." *Id.*; see MCL 28.728(2). Generally, offenders required to register under the SORA are included on the PSOR,[5] MCL 28.728(2), and the PSOR lists "names, aliases, addresses, physical descriptions, birth dates, photographs, and specific offenses. . ." of registered offenders. *Dipiazza*, 286 Mich App at 143.

The Sixth Circuit Court of Appeals explained the interplay between the SORA and the HYTA as follows:

When the Michigan legislature enacted the SORA, it also amended the HYTA to provide that even individuals assigned to youthful trainee status were required to register as sex offenders . . . . This . . . provision is in effect an exception to HYTA's general provision . . . that "[u]nless the court enters a judgment of conviction against the individual . . . all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection." []

* * *

Both the original and the amended versions of the SORA . . . define the term "convicted" to reach youthful trainees charged with certain sex offenses. The SORA thus creates an exception to the HYTA's provisions that "assignment of an individual to the status of youthful trainee ... is not a conviction for a crime" and that an "individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." . . . Notwithstanding the HYTA, the SORA thus requires youthful trainees charged with certain sex offenses to register as "convicted sex offenders" and information about their identities and "convictions" appears on the PSOR. [*Doe*, 490 F3d at 495-496 (internal citations omitted).]

[5] Some juvenile offenders and some "Tier I" offenders are exempted from the PSOR, see MCL 28.728(4); however, these exceptions are not at issue in this case.

In this case, defendant pleaded guilty to CSC-II involving a person under 13, MCL 750.520c, a Tier-III offense for purposes of the SORA. MCL 28.722(k); MCL 28.722(w)(*v*). Although defendant was assigned and completed youthful trainee status under the HYTA, because defendant's adjudication under the HYTA occurred before October 1, 2004, he is considered to have been "convicted" of a listed offense for purposes of the SORA and must register as a sex offender. MCL 762.14(3). As a Tier-III offender who does not qualify under any of the exceptions, defendant is required to register as a sex offender for life. MCL 28.723(1)(b); MCL 28.722(w)(*v*).

B. CONSTITUTIONAL PRINCIPLES

"The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) *increases the punishment for a crime*; or (4) allows the prosecution to convict on less evidence." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014), citing *Calder v Bull*, 3 US (3 Dall) 386; 390; 1 L Ed 648 (1798) (emphasis added). "The Michigan Constitution prohibits cruel *or* unusual punishment, Const. 1963, art. 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, U.S. Const. Am. VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). Thus, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id.* (quotation omitted).

IV. ANALYSIS

Defendant argues that we should affirm the trial court's order removing him from the sex offender registry because the SORA as applied to him constitutes cruel or unusual punishment and violates the Ex Post Facto Clause. Necessarily, determination of whether a law violates the Ex Post Facto Clause or amounts to cruel or unusual punishment involves a threshold inquiry into whether the law imposes punishment in the constitutional sense.

This Court has previously addressed whether the SORA imposes punishment as applied to adult defendants. In *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000), this Court rejected the defendant's argument that the SORA violated the Ex Post Facto Clause, holding that the SORA's registration requirement did not constitute punishment. This Court relied on *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), two federal cases holding that the SORA did not constitute punishment and was instead aimed at protecting the public. *Pennington*, 240 Mich App at 193-197.

Similarly, in *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), this Court rejected a constitutional challenge brought by an adult defendant. In *Golba*, the defendant argued that the trial court violated his constitutional rights by ordering him to register as a sex offender based on judicially found facts. *Id.* at 615. In rejecting the defendant's argument, this Court held that the SORA did not offend the constitution because it did not amount to punishment. *Id.* at 619-620. Instead, this Court explained that the act "advances a legitimate government interest in protecting the community by promoting awareness of the presence of convicted sex offenders from whom certain members of the community may face a danger." *Id.* (Quotation marks and citation omitted).

This Court has also addressed whether the SORA imposes punishment as applied to a juvenile. In *Ayres*, 239 Mich App at 9-10, the juvenile respondent was adjudicated delinquent in family court for CSC-II and was required to register as a sex offender. This Court rejected the respondent's argument that the SORA amounted to cruel or unusual punishment. *Id.* at 18-19, 21. In doing so, this Court held that the SORA was not a form of punishment, adopting the reasoning set forth in *Kelley*, 961 F Supp at 1105, and *Lanni*, 994 F Supp at 852. *Ayres*, 239 Mich App at 18-19. However, the *Ayres* Court "buttressed its conclusion" that the SORA did not constitute punishment "with the fact that SORA at that time exempted juveniles from the provisions requiring public notification." *Golba*, 273 Mich App at 618.

Following the creation of the PSOR, in rejecting various constitutional arguments brought by another juvenile respondent, this Court questioned the continuing validity of *Ayres*. *In re Wentworth*, 251 Mich App 560, 568-569; 651 NW2d 773 (2002). Seven years later in *Dipiazza*, 286 Mich App at 146-147, in a case involving an 18-year-old HYTA defendant, this Court held that *Ayres* was no longer binding and concluded that the SORA as applied to the defendant in that case, amounted to cruel or unusual punishment.

In *Dipiazza*, the defendant, than age 18, was involved in a consensual sexual relationship with NT, a female who was "nearly 15 years old." *Id.* at 140. NT's parents were aware of the relationship and condoned it, but one of NT's teachers reported the defendant to police. *Id.* The defendant was adjudicated under the HYTA for attempted CSC-III, and he successfully completed probation. *Id.* at 140, 154. Although his case was dismissed and he eventually married NT, the defendant was still required to register as a sex offender. *Id.* at 140.

The defendant petitioned the trial court for removal from the sex offender registry, arguing that the registry requirement amounted to cruel or unusual punishment. *Id.* at 140-141. Specifically, the defendant argued that he did not have a conviction on his record because he successfully completed HYTA and the registry wrongfully identified him as having been convicted of a sex offense. *Id.* The defendant argued that he would not have had to register on the PSOR if he had been convicted six weeks later due to amendments to the SORA that became effective on October 1, 2004. *Id.* at 141. The trial court denied the defendant's request, ruling that it was bound by *Ayres*, 239 Mich App at 8. *Dipiazza*, 286 Mich App at 141.

On appeal, in addressing whether the registration and notification requirements of the SORA imposed "punishment" on the defendant, this Court examined *Ayres*, and then noted that *Ayres* was decided under the SORA as first enacted, when public access to registration was foreclosed, and that the continuing validity of *Ayres* was questioned by this Court in *Wentworth*, 251 Mich App at 560. *Dipiazza*, 286 Mich App at 144-146. This Court proceeded to apply anew the four factors[6] set forth in *Ayres* for determining whether government action is punishment in the constitutional sense. *Id.* at 147-148.

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[6] These factors include: (1) legislative intent, (2) design of the legislation, (3) historical treatment of analogous measures, and (4) effects of the legislation. *Dipiazza*, 286 Mich App at 147, citing *Ayres*, 239 Mich App at 14-15.

With respect to the first factor (legislative intent), this Court noted that the amendments to the SORA on October 1, 2004, were motivated in part by concerns that the "reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending," *id.* at 148 (quotation marks and citations omitted), and observed that:

> It is incongruous to find that a teen who engages in consensual sex and is assigned to youthful trainee status after October 1, 2004, is not considered dangerous enough to require registration, but that a teen who engaged in consensual sex and was assigned to youthful trainee status before October 1, 2004, is required to register. The implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship. [*Dipiazza*, 286 Mich App at 149.]

With respect to the second factor (the design of the legislation), this Court noted that the federal decisions (*Lanni* and *Kelley*) concluded that the notification scheme in the SORA was "purely regulatory and remedial" and did not inflict "suffering, disability or restraint." *Id.* Yet, this Court went on to distinguish the federal decisions, finding that the defendant in the matter at hand did suffer a disability and loss of privileges:

> That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination . . . . Searches on the sex offender registry are no longer limited . . . to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state. [*Dipiazza*, 286 Mich App at 150-151 (citations omitted).]

With respect to the third factor (historical treatment of analogous measures), this Court found that none existed, and with respect to the fourth factor (the effects of the legislation), this Court held that the SORA negatively impacted the HYTA's purpose and the defendant who had successfully completed his probation:

> While the government has always had the authority to warn the public about dangerous persons and such warnings have never been understood as imposing punishment . . . in this case, the warning is not about the presence of an individual who is dangerous . . . . [T]he government is warning the public that defendant is dangerous, thus publicly labeling defendant as dangerous. Such warning or "branding" in the context of this case clearly constitutes punishment.
>
> Further, the basic premise of HYTA is "to give a break to first-time offenders who are likely to be successfully rehabilitated" by having the offender's act not result in a conviction of a crime and by requiring that the offender's record not be available for public inspection . . . . However, the PSOR provides a "Conviction Date" . . . for defendant . . . . Consequently, requiring defendant to register for 10 years forces him to retain the status of being "convicted" of an

offense, thus frustrating the basic premise of HYTA. [*Dipiazza*, 286 Mich App at 152 (citations omitted).]

This Court also set forth the "devastating" effects on the defendant caused by the requirement to register, and concluded that the registration requirements under the SORA, "as applied to defendant," constituted punishment. *Id.* at 152-153.

Next, this Court addressed whether the punishment imposed by the SORA was cruel or unusual as applied to the defendant, and concluded that, "considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment." *Id.* at 156.

Following this Court's decision in *Dipiazza*, the Legislature again amended the SORA and added a "consent exception" for certain offenders who can prove that they engaged in a consensual sexual act. 2011 PA 18. That exception is codified at MCL 28.728c(3) and (14), and provides as follows:

> (3) An individual classified as a tier I, tier II, or tier III offender who meets the requirements of subsection (14) . . . may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.
>
> * * *
>
> (14) The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense *was the result of a consensual sexual act between the petitioner and the victim* and any of the following apply:
>
> (a) All of the following:
>
> (i) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.
>
> (ii) The petitioner is not more than 4 years older than the victim.
>
> (b) All of the following:
>
> (i) The individual was convicted of a violation of [MCL 750.158, MCL 750.338, MCL 750.338a, or MCL 750.338b.]
>
> (ii) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.
>
> (iii) The individual is not more than 4 years older than the victim.
>
> (c) All of the following:

(i) The individual was convicted of a violation of [MCL 750.158, 750.338, 750.338a, 750.338b, and 750.520c.[7]]

(ii) The victim was 16 years of age or older at the time of the violation.

(iii) The victim was not under the custodial authority of the individual at the time of the violation. [Emphasis added.]

In addition, in *In re TD*, 292 Mich App at 678, in a case involving a juvenile defendant convicted by jury of CSC-II, this Court rejected the defendant's argument that the SORA amounted to cruel or unusual punishment. This Court differentiated *Dipiazza*, noting "[t]he *Dipiazza* Court's analysis was limited to the specific facts in that case." *Id.* at 689. However, our Supreme Court vacated this Court's opinion and dismissed the case as moot because the defendant was "no longer required to register under the amended [SORA]." *In re TD*, 493 Mich at 873. *In re TD*, therefore, has no precedential value and the prosecution's reliance on the case is misplaced.

In this case, defendant was not a juvenile at the time he was assigned youthful trainee status under the HYTA. The HYTA applies to individuals between the ages of 17 and 21. Thus, assignment under the HYTA is not indicative of whether an individual is a juvenile under the law. However, *Pennington*, 240 Mich App at 188 and *Golba*, 273 Mich App at 603, are not controlling in this case because, unlike the defendants in *Pennington* and *Golba*, defendant was assigned youthful trainee status under the HYTA.

Defendant argues that *Dipiazza* is controlling. He contends that, like in *Dipiazza*, he engaged in a consensual act with the complainant and was adjudicated under the HYTA. Defendant argues that requiring him to register as a sex offender is punishment when he does not have a conviction for a sex offense.

Dipiazza is not controlling in this case. First, the facts of this case are distinguishable. Defendant was not involved in consensual relationship similar to the one at issue in *Dipiazza*, which involved an 18-year-old and a female who was "nearly" 15-years-old. In contrast, in this case, defendant was 19 when he committed the offense and the complainant was only 12 years old. This was not an ongoing "Romeo and Juliet" relationship condoned by the complainant's parents. Second, the *Dipiazza* Court analyzed whether the SORA constituted punishment *before* the Legislature amended the SORA in 2011 and added the "consent exception" discussed above. This exception addressed a primary concern the *Dipiazza* Court had with the SORA—i.e. requiring a youthful trainee to register as a sex offender after he engaged in a consensual sexual relationship with a peer. Because the *Dipiazza* Court did not have the opportunity to consider if the 2011 amendment had any impact on whether the SORA constitutes punishment, its constitutional analysis is outdated.

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[7] For purposes of the SORA, defendant is considered to have been "convicted" of MCL 750.520c (CSC-II); because the complainant in this case was not age 16 at the time of the offense (she was age 12), the "consent exception" under MCL 28.728c(3) and (14)(c) does not apply to defendant.

To determine whether the SORA is a form of punishment as applied to defendant, we turn to *Earl*, 495 Mich at 33, our Supreme Court's most recent decision addressing whether a statutory scheme imposes punishment for purposes of the constitution.

In *Earl*, our Supreme Court explained that, determining whether a legislative scheme imposes punishment involves a two-part inquiry:

> The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. . . . If the Legislature's intention was to impose a criminal punishment . . . the analysis is over. [] However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil. . . . [*Earl*, 495 Mich at 38, (quotation marks and citations omitted).]

The first step in this inquiry—i.e. determining whether the Legislature "intended for a statutory scheme to impose a civil remedy or a criminal punishment"—requires examining the statute's text and its structure to determine whether the Legislature "indicated either expressly or impliedly a preference for one label or the other." *Id.* (quotation marks and citations omitted). "If the statute imposes a disability for the purposes of punishment that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id.* at 38-39 (quotation marks and citations omitted). In contrast, "a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose." *Id.* "[W]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered as 'evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." *Id.* at 42, quoting *Smith v Doe*, 538 US 84, 93-94; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (quotation marks and citation omitted).

In the event that the Legislature did not intend for an act to impose punishment, the second part of the analysis is to determine whether the act is "so punitive either in purpose or effect as to negate the State's intent to deem it civil." *Id.* at 44, quoting *Smith*, 538 US at 92 (quotation marks and citations omitted). In determining whether "an act has the purpose or effect of being punitive, courts consider seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963)." *Earl*, 495 Mich at 43-44. The *Mendoza-Martinez* factors include:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned. [*Earl*, 495 Mich at 44, quoting *Mendoza–Martinez*, 372 US at 168-169.]

These factors are "useful guideposts" and are neither "exhaustive nor dispositive." *Earl*, 495 Mich at 44 (quotation marks and citation omitted). Moreover, "courts will 'reject the

legislature's manifest intent [to impose a civil remedy] only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect to negate the . . . intention to deem it civil." *Id.* (quotation marks and citations omitted).

(A) Legislative Intent

MCL 28.721a sets forth the Legislature's intent in enacting the SORA as follows:

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

This statutory provision indicates that the Legislature was acting pursuant to its police powers to protect the citizenry against individuals it deemed pose a danger of recidivism by providing police and the public with a means of monitoring those individuals. "[W]here a legislative restriction 'is an incident of the State's power to protect the health and safety of its citizens,' it will be considered as 'evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.'" *Earl*, 495 Mich at 42, quoting *Smith* 538 US at 93-94. Here, the Legislature did not intend that the SORA impose punishment, instead, "[t]he Legislature's intent as set forth in express terms was not to chastise, deter, or discipline an offender, but rather to 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." *Dipiazza*, 286 Mich App at 148 (quotation marks and citations omitted).

The *DiPiazza* Court reasoned that the Legislature's stated intent as expressed in MCL 28.721a was "frustrated" because "[t]he implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship." *Id.* at 148-149. The 2011 amendment addressed the *DiPiazza* Court's concern. Specifically, the 2011 amendment added a "consent exception" to the SORA which provides some youthful offenders relief in situations involving consensual sexual acts. See MCL 28.728c(14). While the exception does not apply in this case because the complainant was only 12 years old and defendant was 19, the Legislature could have reasonably concluded that the public should be protected and informed of individuals, including HYTA trainees, who commit sexual offenses against persons under age 13, irrespective of whether the complainant consented. Failure to extend the consent exception to include situations involving complainants under the age of 13 does not make the SORA punitive in nature.

In sum, we conclude that the Legislature intended the SORA as a civil remedy to protect the health and welfare of the public.

B. Purpose and Effects

Having determined that the Legislature intended the SORA as a civil remedy, we must determine whether the SORA nevertheless "'is so punitive either in purpose or effect as to negate the State's intent to deem it civil.'" *Earl*, 495 Mich at 44, quoting *Smith*, 538 US at 92 (citations and quotation marks omitted). This inquiry involves applying the relevant *Mendoza-Martinez* factors. In *Smith*, 538 US at 97, the Supreme Court applied these factors to Alaska's Sex Offender Registration Act (ASORA) and concluded that the purpose and effects of the ASORA did not negate the state's intent to deem it civil. The *Smith* Court applied the following five factors in reaching this conclusion: (1) whether, "in its necessary operation, the regulatory scheme has been regarded in our history and traditions as punishment," (2) whether the SORA "imposes an affirmative disability or restraint," (3) whether the SORA "promotes the traditional aims of punishment," (4) whether the SORA "has a rational connection to a nonpunitive purpose," and (5) whether the SORA "is excessive with respect to this purpose." *Id.* These five factors are relevant in this case and they govern our analysis.

(1) Historical Form of Punishment

With respect to whether the SORA has been regarded historically and traditionally as punishment, sex offender registration and notification laws are a relatively new form of legislation. See *Kelley*, 961 F Supp at 1106-1107. Today, all 50 states and the federal government have enacted some form of sex offender registration and notification provisions, see *id.*, and a body of law has developed on a range of issues related to the legislation including whether the legislation constitutes punishment.

Smith, 538 US at 93, is the preeminent case holding that a sex offender registration and notification law, as applied to an adult defendant, is not a form of punishment. The *Smith* Court noted that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded." *Id.* (quotation marks and citation omitted); see also *Helman v State*, 784 A2d 1058, 1077 (Del, 2001) (noting that, "in their brief history most courts seem to regard notification statutes as remedial in nature"). Indeed, consistent with *Smith*, courts from various jurisdictions have held that, as applied to adult defendants, sex offender registration and notification laws are non-punitive in nature. See e.g. *Cutshall v Sundquist*, 193 F3d 466, 477 (CA 6, 1999); *Femedeer v Haun*, 227 F3d 1244, 1253 (CA 10, 2000); *People v Malchow*, 193 Ill 2d 413, 421; 250 Ill Dec 670; 739 NE2d 433 (2000); *State v Seering*, 701 NW2d 655, 667-669 (Iowa, 2005); *State v Pentland*, 296 Conn 305, 314; 994 A2d 147 (2010) (concluding that states' sex offender legislation did not impose punishment in the constitutional sense); but see *Commonwealth v Baker*, 295 SW3d 437, 447 (Ky, 2009); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *Starkey v Oklahoma Dep't of Corr*, 2013 OK 43; 305 P3d 1004, 1030 (2013) (concluding that respective states' sex offender registry and notification laws imposed punishment).

In addition, unlike traditional forms of public shaming, such as branding and banishment, publicity and stigma are not integral parts of the SORA; instead, "[t]he purpose and the principal

effect of notification are to inform the public for its own safety, not to humiliate the offender . . . attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 US at 99. As this Court previously noted in *Ayres*:

> The notification provisions themselves do not touch the offender at all. While branding, shaming and banishment certainly impose punishment, providing public access to public information does not . . . [a]nd while public notification may ultimately result in opprobrium and ostracism similar to those caused by these historical sanctions, such effects are clearly not so inevitable as to be deemed to have been imposed by the law itself. [*Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1110.]

Here, although defendant was adjudicated under the HYTA, the HYTA does not provide that defendant's adjudication would be sealed from the public. Instead, the HYTA provides that an individual adjudicated as a youthful trainee "shall not suffer a civil disability or loss of right or privilege" "*except*" for youthful trainees who were adjudicated before October 1, 2004, for a listed offense under the SORA. MCL 762.14(2) (3) (emphasis added). Thus, the SORA makes public information that was not confidential under the HYTA.

In considering the "historical treatment of analogous measures," the *Dipiazza* Court concluded that "no analogous measures exists, nor is there an historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and . . . was assigned to youthful trainee status. . . ." *Dipiazza*, 286 Mich App at 151. The *Dipiazza* Court considered the historical treatment of the SORA in the context of the unique facts of that case, thus the reasoning is inapplicable in this case. Furthermore, given that the 2011 amendment added a consent exception, this reasoning is no longer applicable.

In short, we conclude that the SORA is unlike traditional forms of punishment and the first *Mendoza-Martinez* factor weighs in favor of finding that the SORA is non-punitive in its purpose and effects as applied to defendant.

(2) Affirmative Disability or Restraint:

The second relevant factor concerns whether the SORA imposes an affirmative disability or restraint. *Smith*, 538 US at 97. The *Smith* Court noted that, in applying this factor, "we inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 99-100. The Court concluded that the Alaska Sex Offender Registration Act (ASORA) did not impose an affirmative disability or restraint. *Id.* at 100. The ASORA did not resemble imprisonment because it did not impose physical restraints, it did not limit the offender's ability to change jobs or residences, and the effects were less harsh than occupational debarment, which the Court previously found to be non-punitive. *Id.* at 100. The Court rejected the argument that the ASORA imposed a severe restraint in that it likely would render offenders "completely unemployable," explaining that, even absent the ASORA, employers and landlords could obtain the same information by conducting "routine background checks." *Id.* The Court stated: "[a]lthough the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions,

but from the fact of conviction, already a matter of public record." *Id.* at 101. Moreover, unlike probation or supervised release, which "entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," under the ASORA, offenders were "free to move where they wish and to live and work as other citizens, with no supervision," and any infraction required a prosecution separate from the original offense. *Id.* at 101-102.

Defendant argues that the SORA has imposed significant hardships on him and his family including "loss of employment, loss of ability to be a father to his children, harassment, and depression." Apart from the SORA, defendant argues that a criminal background check would not reveal any conviction for a sexual offense.

In addition, the SORA "inflicts no suffering, disability or restraint." *Pennington*, 240 Mich App at 195, quoting *Kelley*, 961 F Supp at 1108-1109. Although defendant certainly experiences adverse impacts from being listed on the PSOR, these impacts stem from the commission of the underlying act, not the SORA's registration requirements. While secondary effects may flow indirectly from the PSOR, "'punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline. Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.'" *Pennington*, 240 Mich App at 196, quoting *Kelley*, 961 F Supp at 1111. The central purpose of the SORA is not intended to chastise, deter or discipline; rather, it is a remedial measure meant to protect the health, safety and welfare of the general public.

The *Dipiazza* Court found that the defendant in that case did suffer a disability and loss of privilege in part because the SORA no longer contained "strict limitations on public dissemination as there were in *Lanni*." *Dipiazza*, 286 Mich App at 151. However, the 2011 amendment narrowed the scope of the SORA by allowing certain individuals to petition the court for removal from the registry because they engaged in a consensual sexual act. While the Legislature did not extend the exemption to individuals who commit sexual offenses against children under the age of 13, this does not serve to transform the SORA into punishment. Rather, this furthers the SORA's purpose of protecting the public. In short, *Dipiazza's* reasoning with respect to this factor is inapplicable in the present case and we conclude that the second *Mendoza-Martinez* factor weighs in favor of finding that the SORA does not impose punishment as applied to defendant.

(3) Traditional Aims of Punishment

The third relevant factor also fails to indicate a punitive purpose where the SORA does not promote the traditional aims of punishment, such as retribution and deterrence. See *Earl*, 495 Mich at 46; *Smith*, 538 US at 97. The *Smith* Court reasoned that although the ASORA may have served to deter future crime, this alone was not indicative of punishment where "[a]ny number of governmental programs might deter crime without imposing punishment." *Smith*, 538 US at 102. The Court noted, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Id.* (quotation marks and citations omitted). And, although the length of the reporting requirement was tied to categories of offenders, the registration obligations were

not retributive, but instead were "reasonably related to the danger of recidivism," which was "consistent with the regulatory objective." *Id.*

Smith's reasoning is persuasive and applies in this case. While the SORA may deter future sexual offenses, that is not the primary purpose of the act and it does not render the SORA punitive. Further, while the SORA exempts certain individuals from the registry requirements in situations involving a consensual act, and categorizes offenders into tiers depending on the severity of the underlying offense, like in *Smith*, these mechanisms are "reasonably related to the danger of recidivism," which is "consistent with the regulatory objective." *Id.*

(4) Rational Connection to Non-Punitive Purpose

The SORA has a rational connection to a non-punitive purpose, and therefore the fourth relevant factor weighs in favor of finding that the act does not impose punishment. *Smith*, 538 US at 97. The *Smith* Court noted that the ASORA "has a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community." *Id.* at 103 (quotation marks and citation omitted). The SORA has the same legitimate non-punitive purpose of public safety. See *Doe*, 490 F3d at 505 (noting that "this Court has previously concluded that the state's interests in protecting public safety and in aiding effective law enforcement are advanced by the SORA's registration requirements.")

(5) Excessive With Respect to Non-Punitive Purpose

The fifth and final relevant factor for purposes of our analysis concerns whether the SORA is excessive with respect to its non-punitive purpose of protecting the safety and welfare of the general public. *Smith*, 538 US at 97. In weighing this factor, the *Smith* Court reasoned that neither the duration nor the broad dissemination of information to the public was excessive. *Id.* at 104-105. Alaska's public notification scheme was passive and required individuals to search for information, and the website warned users they would be prosecuted for committing criminal acts against offenders. *Id.* at 105. The Court stated, "[g]iven the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." *Id.*

We find *Smith's* analysis regarding this factor persuasive and equally applicable in the context of Michigan's SORA as applied to defendant. The PSOR is passive and requires individuals to seek-out information on sex offenders. The registry warns members of the public not to use information from the PSOR to "injure, harass, or commit a crime against" individuals listed on the registry and warns that such acts could lead to prosecution.[8] Moreover, the duration of the registry requirements are reasonably tied to the legitimate regulatory purpose of protecting the public. The SORA categorizes offenders into tiers with the more serious offenses requiring lifetime registration. Furthermore, the SORA contains exceptions for certain offenders who

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[8] See Michigan's Public Sex Offender Registry at <www.communitynotification.com/cap_main.php?office=55242/> (last accessed August 1, 2014).

engaged in a consensual sexual act, limiting the impact of the registry to those individuals that the Legislature deemed posed a greater threat to the public.

Although the HYTA requires certain individuals to register under the SORA based on what, at first blush, appears to be an arbitrary date of adjudication (October 2004), there was a rational basis underlying this provision. Notably, when the Legislature amended the HYTA to require youthful trainees adjudicated before October 2004 to comply with the SORA and exempted youthful trainees adjudicated after that date, the Legislature also amended the HYTA to provide that, beginning in 2004, individuals who pleaded guilty to more serious sexual offenses (including CSC-I and CSC-II) were no longer eligible for youthful trainee status under the HYTA. See 2004 PA 239 (amending Sections 11 and 14 of the HYTA). Therefore, the class of youthful trainees adjudicated under the HYTA before October 2004 includes individuals who pleaded guilty to more serious sexual offenses whereas the class of youthful trainees adjudicated after October 2004 did not. Thus, it was reasonable for the Legislature to require the pre-October 2004 class of HYTA youthful trainees to comply with the SORA—i.e. it could have concluded that this class contained individuals who were more likely to reoffend and posed a greater threat to the public. This statutory scheme is not overly-excessive and instead "[t]he 2004 amendments continue to advance public safety goals while simultaneously 'weeding out' those youthful trainees who have been deemed least likely to reoffend." *Doe*, 490 F3d at 505.

The *Dipiazza* Court found that the effects of the SORA were "devastating" to the defendant in that case. However, unlike in *Dipiazza*, this case involves different circumstances. Here, defendant was not engaged in a consensual relationship with the 12-year-old complainant. Thus, the adverse effects that flow from the SORA in this case are not "overly excessive" as compared to its regulatory purpose and this factor weighs in favor of finding that the SORA is non-punitive as applied to defendant.

V. CONCLUSION

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

Reversed. Jurisdiction is not retained.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly