STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Fitzgerald, P.J. and O'Connell and Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

FREDERICK L. CUNNINGHAM

Defendant-Appellant
_____/

Supreme Court No. 147437

Court of Appeals No. 309277

Lower Court No. 11-17200 FH

AMICUS CURIAE BRIEF OF THE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AND THE AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN

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Amici answers, "Yes" to both questions.

STATEMENT OF JURISDICTION

Amici accept that this Honorable Court has jurisdiction over this matter.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Criminal Defense Attorneys of Michigan (CDAM) is an organization consisting of hundreds of criminal defense attorneys licensed to practice in this state. CDAM was organized for the purposes of: promoting expertise in criminal and constitutional law; providing training for criminal defense attorneys to improve the quality of representation; educating the bench, bar, and public of the need for quality and integrity in defense services; promoting enlightened thought concerning alternatives to and improvements in the criminal justice system; and guarding against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. *CDAM Constitution and By-laws*, Art 1, sec 2. CDAM was invited to file an amicus brief in this matter. *People v Cunningham*, __ Mich __; 839 NW2d 202 (Nov. 20, 2013).

The American Civil Liberties Union of Michigan is the Michigan affiliate of a nationwide nonpartisan organization of nearly 500,000 members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan.

Over the last several years, the ACLU of Michigan has led an effort in the state to draw attention to the problem of debtors' prisons. In October 2010, the ACLU published the report *In for a Penny: The Rise of America's New Debtors' Prisons*, containing a detailed section discussing issues in the Michigan courts relating to legal fines and obligations, including the problems created when excessive court-imposed costs lead to incarceration of the indigent.[1] In 2011, the ACLU of Michigan engaged in court watching around the state and filed emergency appeals in five district-court cases in order to draw attention to the widespread problem of "pay

[1] Available at http://www.aclu.org/prisoners-rights-racial-justice/penny-rise-americas-new-debtors-prisons (accessed March 11, 2014).

or stay" sentences.[2] In 2012 and 2013, the ACLU of Michigan again engaged in court watching and found that the practice of imposing so-called "pay or stay" sentences without an indigency hearing remains endemic throughout the state. The ACLU of Michigan has also been working with judges to draft a proposed new Court Rule that would address current constitutional deficiencies in the collection of costs imposed on defendants. Given the interconnection between unconstitutional "pay or stay" sentencing and the increasing costs imposed on indigent defendants, the ACLU of Michigan believes that, as an amicus, it can contribute to the Court's understanding of the present case.

STATEMENT OF FACTS

Amici rely on the statement of facts provided by the parties.

[2] *See* ACLU, *ACLU Challenges Debtors' Prisons Across Michigan* (Aug. 4, 2011), available at http://aclumich.org/issues/poverty/2011-08/1599 (accessed March 11, 2014).

I. CIRCUIT COURTS LACK THE STATUTORY AUTHORITY TO REQUIRE DEFENDANTS TO PAY A PRORATED SHARE OF THEIR GENERAL OPERATING EXPENSES. SUCH A PRACTICE VIOLATES SEPARATION OF POWERS, THREATENS EQUAL PROTECTION, AND UNDERMINES THE LEGISLATURE'S GOAL OF UNIFORM STATEWIDE SENTENCING.

CDAM and the American Civil Liberties Union of Michigan, as amicus curiae, urge this Court to vacate the assessment of $1,000 in circuit court costs against Defendant-Appellant Frederick Cunningham. With this assessment, the circuit court has shifted the burden of financing the criminal justice system from the taxpayers to criminal defendants. Not only must Mr. Cunningham repay Allegan County for the expenses unique to his case; he must also pay a prorated share of the circuit court's expenses for "building use, maintenance and insurance, salaries and fringe benefits of court employees, phones, copying, mailing, and the courthouse gym." *People v Cunnigham*, 301 Mich App 218, 234; 836 NW2d 232 (2013) (Shapiro, J., dissenting); (132a).

Circuit courts, however, lack the statutory authority to require criminal defendants—many of whom are indigent—to pay a prorated share of their general operating expenses. The "reasonable flat fee" approach of *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012) ("*Sanders I*"), and *People v Sanders (After Remand)*, 298 Mich App 105, 106-107; 825 NW2d 376 (2012) ("*Sanders II*"), has no basis in the text of MCL 769.1k(1)(b)(ii). That statute merely broadened the class of defendants required to pay assessments authorized by other statutes and created a procedural mechanism for making those assessments part of the sentence. MCL 769.1k(1)(b)(ii) does not independently authorize assessments that are not defined elsewhere. Nor does it authorize assessments for general overhead.

Michigan courts have long refused to uphold overhead costs and indirect expenses absent clear legislative authority. *See, e.g., People v Wallace*, 245 Mich 310; 222 NW 698 (1929);

People v Teasdale, 335 Mich 1; 55 NW2d 149 (1952), and *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011). Mr. Cunningham has expertly summarized this history in his brief to this Court, and Amici will not belabor the point here. Rather, Amici merely wishes to emphasize that the Legislature has not clearly authorized assessments for overhead and other indirect expenses. If it ever chooses to do so, it will raise a host of constitutional questions and policy concerns.

A. Assessments for overhead and other indirect expenses operate as an extraordinarily regressive tax on indigent criminal defendants and pose a serious threat to their right to equal protection of the law.

The *Sanders* rule raises several policy questions regarding the propriety of allowing circuit courts to set their own fees to cover general expenses ordinarily borne by the taxpayer. Even without these indirect expenses, convicted criminal defendants bear a heavy financial burden. *See* Yantus, *Nickel and Diming the Criminal Defendant*, Criminal Defense Newsletter, Vol. 31, No. 2 (November 2007).[3] Defendants must pay $68 per felony conviction, plus $130 per felony case. MCL 769.1j; MCL 780.905. They must also pay nothing less than full restitution to the victims of their conduct. *See, e.g.,* MCL 780.766(2). Indigent defendants are often required to contribute to the cost of their court-appointed lawyers. *See People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009). Several other statutorily authorized fees may also come into play, as summarized in Mr. Cunningham's brief to this Court. (Deft. Br. at 31). And on top of everything else, courts are empowered to charge a 20% late fee if the defendant fails to satisfy this debt within eight weeks of sentencing. *Compare* MCL 600.4803, *with* SCAO Form

[3] Available at http://reentry.mplp.org/reentry/index.php/Image:Yantus_-_Nickel_and_Diming-1.doc (last accessed March 11, 2014).

cc219b ("Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.").[4]

Frequently, a defendant's largest debt will come in the form of court costs. The $1,000 in court costs ordered in this case makes up 83% of Mr. Cunningham's total $1,198 obligation. (*Joint Appendix*, 9a). In *Sanders*, the $1,000 assessment for court costs amounted to 81% of the defendant's total $1,228. *See Sanders I*, 296 Mich App at 711. In either case, the failure to pay court costs within eight weeks of judgment will subject the defendant to an additional $200 in late fees.

For defendants who are incarcerated, the burden is even more onerous. Inmates cannot seek outside employment and therefore lack the opportunity to satisfy their debts within an eight-week timeframe. Inmates who are fortunate enough to obtain employment within the prison earn an average wage of only 75 cents per day. *See* Senate Legislative Analysis, HB 4658 (March 21, 2012). Thus, an inmate would have to work seven days per week for more than 3½ years just to pay off a $1,000 assessment. And it would take an additional 38 weeks to pay of the late fee.

The *Sanders* construction of MCL 769.1k also raises the specter of a debtor's prison. Under *Sanders*, court costs become part of the sentence imposed. A judgment of sentence remains an enforceable order that follows defendants even after the completion of the remaining sentence. *See, e.g.*, MCL 769.1k(6). Nonpayment can expose defendants to probation violation proceedings or parole revocation; indeed, a number of Michigan courts have jailed individuals

[4] Available at http://courts.mi.gov/Administration/SCAO/Forms/courtforms/criminaldisposition/cc219b.pdf (last accessed March 11, 2014).

for nonpayment without even assessing their ability to pay. Bannon, Nagrecha, & Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice (2010), at 21-22.[5]

Further, court costs function as an "extremely regressive" tax. Hogg, *District Court Tax Farming*, 90 Mich Bar J 2, at 30 (included as Attachment A). Criminal defendants are often "disproportionately poor and the least able to pay for governmental programs." *Id.* This, in turn, raises equal protection concerns. The greater the assessment of court costs, the more difficult it is for an indigent to defendant to complete the sentence. As a result, indigent defendants will remain under the thumb of the State for much longer than their wealthier counterparts. The constitutional guarantee of equal protection requires a rational relationship between the costs assessed and some governmental purpose. *Id.* (citing *Dawson v Secretary of State*, 274 Mich App 723, 739; 739 NW2d 339 (2007) (opinion by Wilder, P.J.)). There is little rational basis for requiring only criminal defendants to share the cost of the courthouse gym.

Lastly, "[r]aising revenue for the state through court assessments may actually hurt trial court funding." *Id.* Over-dependence on fees can "interfere with the judiciary's independent role, divert courts' attention from essential functions, and threaten the impartiality of judges." Bannon, Nagrecha, & Diller, *Criminal Justice Debt: A Barrier to Reentry*, Brennan Center for Justice (2010), at 30-31.[6] Another relates to the instability of fee revenue creation. *Id.* at 30. New Orleans, in the wake of Hurricane Katrina, faced a crumbling public defender system due to the systems reliance on traffic revenue fines. *Id.* Once the revenue fines dried up, the system was placed in jeopardy. *Id.*

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[5] Available at http://brennan.3cdn.net/c610802495d901dac3_76m6vqhpy.pdf (last accessed March 11, 2014).

[6] *See* Note 3, *supra.*

B. Assessments for overhead and other indirect expenses also violate separation of powers and undermine the Legislature's goal of uniform statewide sentencing.

The *Sanders* rule also threatens other statutory and constitutional goals. One such concern relates to the "the legislative goal of sentencing uniformity," as reflected in the statutory sentencing guidelines. *People v Smith*, 482 Mich 292, 313; 754 NW2d 284 (2008). Appropriations vary from jurisdiction to jurisdiction, as do the expenses incurred. Defendants in high-volume circuit courts may receive price breaks that defendants in rural areas do not.

More importantly, there are constitutional concerns. Michigan has no constitutional provision addressing "costs" incurred in the prosecution of crimes. But the Michigan Constitution addresses several other monetary assessments. Crime victims enjoy a right to "restitution." Const 1963, Art I, §24(1). Criminal defendants must also pay an "assessment" for deposit in the Crime Victim's Rights Fund. Const 1963, Art I, §24(3). All "fees" and "perquisites" collected by the courts must be deposited in the state's general fund. Const 1963, Art VI, §7. And all penal "fines" assessed and collected must be exclusively applied to support public libraries. Const 1963, Art VIII, §9.

The concepts of "court costs" and "costs of prosecution," however, do not appear in the Michigan Constitution, even though the document requires that such costs be incurred. The State is required to maintain a court system. Const 1963, Art VI, §1. And criminal defendants are given the rights to trial by jury and to due process of law. Const 1963, Art VI, §§14, 20.

Nothing in the Michigan Constitution gives courts the power to create revenue streams by fiat. Rather, it merely gives the courts the power to recommend a budget and then spend the money appropriated to it by the Legislature. Const 1963, Art VI, §7. Only the Legislature can decide how to fund trial court operations. Const 1963, Art IX, §1; *Grand Traverse Co v*

Michigan, 450 Mich 457; 538 NW2d 1 (1995). And when it does so, it must "distinctly state the tax." Const 1963, Art IV, §4. A vague grant of limitless taxing power to the circuit courts would not clear this high bar.

"Courts are not tax-gatherers." *People v Barber*, 14 Mich App 395, 405; 165 NW2d 608 (1968). A measure which allows individual courts to set their own price and then require indigent defendants to pay a share of that price—if such a law existed—would violate Michigan's separation of powers provision. Const 1963, Art III, § 2. It is one thing for the Legislature to fix a modest fee of $68 per felony count, and then ask the courts to make that fee part of the sentence. *See* MCL 769.1j(1)(a). But it is quite another to delegate the task of setting the appropriate amount—quintessentially legislative prerogative—to another branch.

Indeed, other jurisdictions have concluded that requiring defendants to pay "costs" for items not directly related to their trials violate provisions requiring the separation of powers. The highest criminal court of Oklahoma, for example, has held that the collection of unrelated costs renders courts "tax gatherers" in violation of separation of powers. *State v Claborn*, 870 P2d 169, 171 (Okla Crim App 1994). For similar reasons, this Court must adopt a construction of MCL 769.1k that avoids these constitutional concerns. Indeed, "it is this Court's role to construe statutes to avoid unconstitutionality, if possible, by a reasonable construction of the statutory language." *Rowland v Washtenaw County Rd Comm'n*, 477 Mich 197, 275; 731 NW2d 41 (2007) (citing *United States v Harriss*, 347 US 612, 618; 74 S Ct 808; 98 L Ed 989 (1954).

C. MCL 769.1k(1)(b)(ii) does not independently authorize assessments that are not defined elsewhere, must less assessments for overhead and other indirect expenses.

The parties have characterized this case as one that turns on the proper construction of MCL 769.1k. That statute provides, in relevant part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> [* * *]
>
> (b) The court may impose any or all of the following:
>
> [* * *]
>
> (ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

[MCL 769.1k(1)(b)(ii)].

When interpreting statutes, this Court must give effect to the intent of the Legislature by applying its plain language. *People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002). This Court considers both the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme. *US Fidelity Ins. & Guaranty Co. v Michigan Catastrophic Claims Ass'n,* 482 Mich 414, 423; 759 NW2d 154 (2008); *People v Gillis*, 474 Mich. 105, 114, 712 N.W.2d 419 (2006). Reviewing courts "should presume that every word has some meaning and should avoid any construction that would render a statute, or any part of it, surplusage or nugatory." *People v Nickerson*, 227 Mich App 434, 439; 575 NW2d 804 (1998).

If the statutory language is unambiguous, the Legislature is deemed to have intended the meaning clearly expressed, and this Court will enforce the statute as written. *Shinholster v Annapolis Hosp.*, 471 Mich 540, 549; 685 NW2d 275 (2004). But if the statutory language is ambiguous, judicial construction is appropriate. *People v Feezel*, 486 Mich 184, 205; 783 NW2d 67 (2010). A statutory provision is ambiguous if it is equally susceptible of more than one meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). Even statutory

language which is unambiguous on its face may be rendered ambiguous through its interaction with and relationship to other statutes. *People v Valentin*, 457 Mich 1, 6; 577 NW2d 73 (1998). When there is ambiguity, this Court may rely upon legislative history to construe the ambiguous provision. *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003).

1. Plain Language

The Code of Criminal Procedure does not define the word "cost." Under MCL 8.3a, this Court must give undefined statutory terms their plain and ordinary meaning, unless the undefined word or phrase is a term of art. *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). "We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning." *Id.* at 151-152 (citing *Robinson v Detroit*, 462 Mich 439, 456; 613 NW2d 307 (2000)). "This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary." *Id.* at 152 (citing *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998)).

The word "cost" is not a legal term of art. Nor does it carry any unique legal meaning. As the Conference of State Court Administrators has observed, "[t]here is wide variation among the states (and sometimes within a state) as to the terms used to describe court revenue vehicles and the particular meaning associated with the term in differing circumstances." Courts Are Not Revenue Centers (2011-2012 Policy Paper) p. 1, available at http://cosca.ncsc.org/Policy-Papers.aspx. Reference to legal dictionaries, therefore, is inappropriate in this case. *Compare Thompson*, 477 Mich at 152 *with* Plaintiff-Appellee's Brief on the Merits, at 5.

Lay dictionaries, however, offer competing definitions of the word "cost." The term can refer to "the amount of money that is needed to pay for or buy something" or it can refer to "an

amount of money that must be spent regularly to pay for something (such as running a business or raising a family)." Merriam-Webster's Collegiate Dictionary (11th Ed., 2009). The former definition equates a "cost" with a specifically incurred expense, whereas the latter encompasses general operating expenses. Thus, contrary to what the Court of Appeals held in *Sanders I*, the meaning of this term is far from clear. *Cf. People v Sanders*, 296 Mich App 710, 712; 825 NW2d 87 (2012).

2. Legislative History

Given this ambiguity, it is necessary to resort to other interpretative aids. *Feezel*, 486 Mich at 205. Legislative history constitutes one such aid. *In re Certified Question*, 468 Mich at 115 n 5. The statute at issue, MCL 769.1k, is relatively new, taking effect on January 1, 2006. *See* 2005 PA 316. It originated as House Bill 5023, with the purpose of "allow[ing] a court at sentencing (or earlier if sentencing is delayed or entry of judgment is deferred) to impose any authorized fines, costs, assessments, or restitution. . . even if it does not place the defendant on probation, revokes probation, or discharges the defendant from probation." House Fiscal Agency Analysis, HB 5023, October 4, 2005, at 1. The court could additionally order an employed defendant to "execute a wage assignment to pay any fines, costs, assessments, or restitution." *Id.* The idea was to make it easier for courts to "to impose any ***authorized*** fines, costs, assessments, or restitution." *Id.* (emphasis added).

The House restructured the bill before passing it on October 12, 2005. The bill was amended to allow for the imposition of costs "if the defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty." HB 5023 (as passed by the House). This language was most likely added in order to account for delayed sentencing dismissals following an adjudication of guilt, in case there was any ambiguity

in merely stating that they would be imposed at the time of judgment or sentencing. In addition, the court could impose "reimbursement under section 1f of this chapter." *Id.* This refers to MCL 769.1f, which permits the collection of expenses incurred in relation to the incident, such as emergency response and expenses for prosecuting the person (including the salaries or wages of law enforcement personnel for time spent responding to the incident).

The substituted bill also stated that "the court may provide for the amounts imposed under this section to be collected at any time." This addition gives the courts more discretion as to when they can collect the fines and costs from the defendant, so that they are not limited to having to collect them at a particular time. For example, a court may initially decide not to impose restitution, and when circumstances change may decide to impose it later.

Lastly, the substituted bill added the language at issue in this case. It retained the modifier "authorized," but shifted its placement in the text to permit imposition of "any fine; any cost in addition to the minimum state cost; the expenses of providing legal assistance to the defendant; and/or any assessment authorized by law..." House Fiscal Agency Analysis, HB 5023, October 11, 2005, at 2. The Senate passed the substituted bill without amendments. *See* 2005 PA 316.

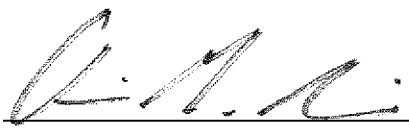
In 2006, the Legislature passed House Bill 5135, which made certain additions to MCL 769.1k. *See* 2006 PA 655. Two main changes were made to the text of the Act. The first provided that "[i]n addition to any fine, cost, or assessment imposed under subsection 1, the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance." HB 5135 (as passed by the Senate). The second change made stated that "[e]xcept as otherwise provided by law, the court may apply payments received on behalf of a defendant that exceed the total of any fine, cost, fee, or other assessment imposed in the case to any fine,

cost, fee, or assessment that the same defendant owes in any other case." The text of MCL 769.1k has not undergone further changes since 2006.

This history confirms that the Legislature did not intend to authorize a new type of assessment when it enacted MCL 769.1k. Rather, it merely intended to broaden the class of defendants required to pay assessments to include those subject to non-probationary sentences or delayed sentencing. Significantly, even after the addition of the text at issue, the House Fiscal Analysis of this bill emphasized that "[c]urrrent law already allows a court to impose various assessments, fines, costs, and orders of restitution." House Fiscal Agency Analysis, HB 5023, October 11, 2005, at 3. MCL 769.1k merely creates a procedural mechanism for collecting those assessments. It is not a limitless grant of taxing power to the circuit court; nor does it provide authority for assessments for overhead and other indirect expenses.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, CDAM and the American Civil Liberties Union of Michigan, as amicus curiae, urge this Court to vacate the assessment of $1,000 in circuit court costs against Defendant-Appellant Frederick Cunningham.

BY: 

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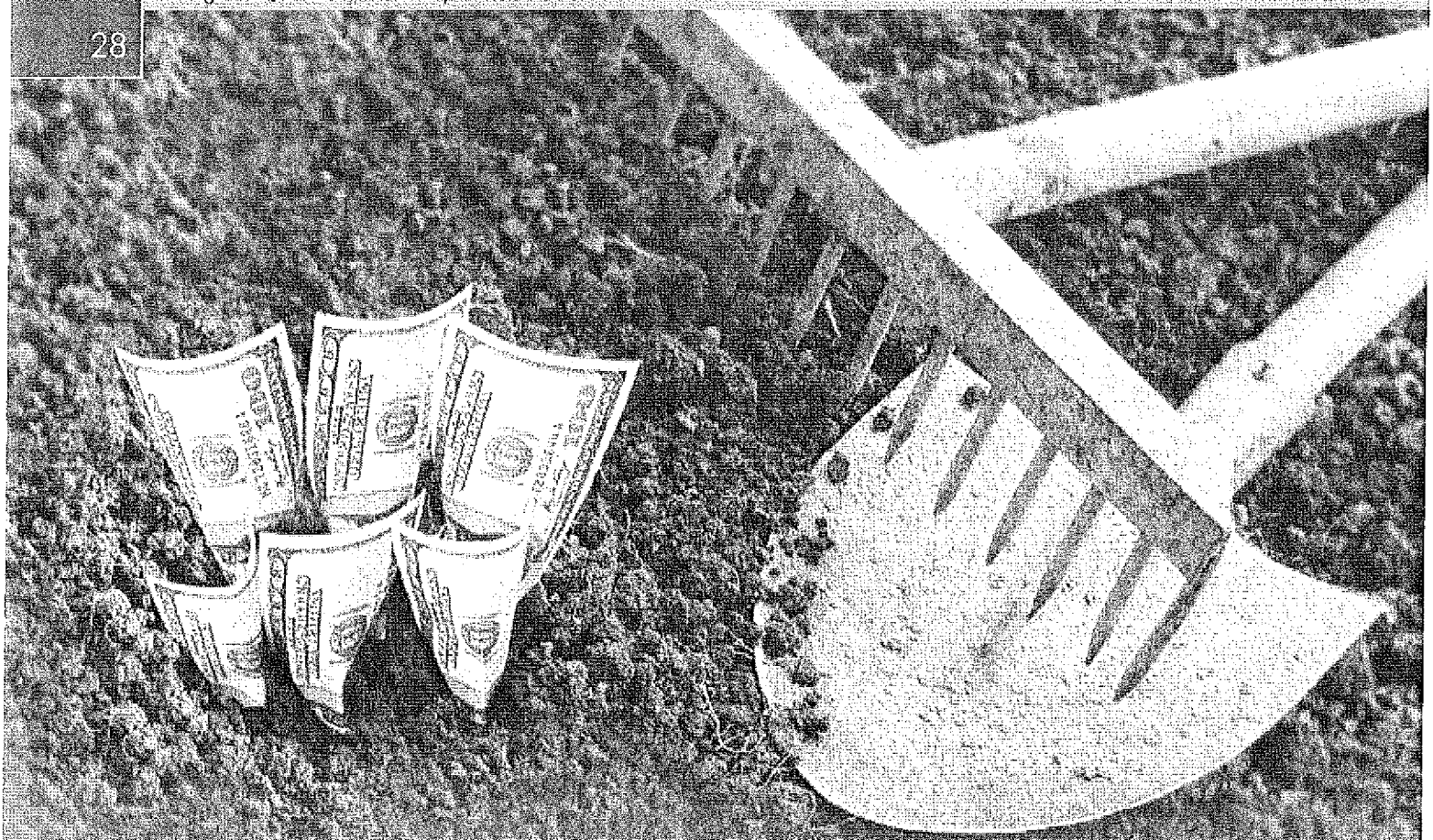
ATTACHMENT A



District Court Tax Farming

Are Judges the New Publicans?

By Hon. David A. Hogg

As Roman legions vanquished Asia Minor in about 125 B.C., politicians struggled with the escalating costs of an expanded government. Understanding his countrymen's distaste for direct taxation, a clever tribune named Gaius Gracchus invented the practice now known as *tax farming*.[1] Rome assigned the duty to collect taxes in the recently acquired provinces to *publicans*, entrepreneurs who underwrote the cost of the collection process.[2] By sharing the wealth with the provincial tax collectors, Gaius guaranteed that the new revenue source would be enthusiastically exploited, without antagonizing tax-averse Roman citizens.[3]

Segue to twenty-first century Michigan. Our state is broke, and the taxpayers have learned how to say no.[4] Where can lawmakers find the money to create or enhance worthwhile programs without appearing to raise taxes to pay for them? The answer: district courts.

As were Roman publicans, today's judges have been appointed revenue agents, collecting sums to be shared with the state from people in no position to complain. Local governments bankroll a collection hub, known as the district court, hoping this investment will provide a sufficient return for them, after obligations to the state treasury are satisfied. The beauty of collecting this money in district court is that the exaction process is almost invisible to the general public. Lawmakers can speciously pledge no new taxes, then increase court assessments to pay for their favorite programs.

Requiring people to pay for the privilege of using their own court system is nothing new. Judges have historically assessed costs of prosecution,[5] and courts have long charged fees to cover administrative expenses.[6] These sums are logically and transparently retained by the local units of government that foot the bill.[7]

Beyond that, these reimbursements are required to bear a reasonable relationship to the expense that the government actually incurred on a case-specific basis.[8] But today, commingled with monies intended to reimburse direct court expenses, are mandatory charges that pay for an assortment of state programs that one would expect to be supported by general taxation. All trial courts participate, but the district courts' high case volume provides the most lucrative cash pool by far. This scheme is efficient, but it poses serious unintended consequences for the courts, state policymakers, and the people they serve.

Court users now unknowingly support a variety of state programs by paying hidden fees that may have nothing to do with the purpose of their court visit, in amounts unrelated to their consumption of government resources.

The History of Trial Court Tax Farming

Tax farming in the Michigan court system began by requiring trial courts to collect money for state officers' pensions. When the judicial retirement system was created in 1951, the state paid for it by grabbing a portion of each circuit court filing fee.[9] The Legislative Retirement System was born in 1961, and it was funded the same way.[10] Next, the Law Enforcement Officers' Training Council was established in 1965, and trial judges were required to impose a surcharge on penal fines to pay for the new state program.[11] The Court of Appeals invalidated this assessment,[12] but lawmakers followed up with a $5 judgment fee for state retirement programs.[13] The judgment fee survived a constitutional challenge,[14] and this practice has metastasized since then. Court users now unknowingly support a variety of state programs by paying hidden fees that may have nothing to do with the purpose of their court visit, in amounts unrelated to their consumption of government resources.

District Court Tax Farming Today

People filing civil lawsuits and offenders fulfilling sentences all contribute to a myriad of dedicated funds maintained by the state treasurer. Between 56 and 79 percent of every civil filing fee is deposited in the Civil Filing Fee Fund.[15] Motion fees enrich the State Court Fund.[16] When levying fines and costs for a crime or traffic civil infraction, a judge must order the payment of $40, $48, $53, or $68 to the Justice System Fund.[17] One convicted of a serious misdemeanor pays an additional $75 or $130, and 90 percent of this amount is sent off to the Crime Victim's Rights Fund.[18] A person who pays a traffic ticket too late illogically contributes $15 to the Juror Compensation Reimbursement Fund.[19] Trial courts now send off more than $100 million a year to the state treasury to be deposited in these funds.[20]

The path this money travels afterward looks like a money laundering scheme. Each dollar is broken to bits and then transferred back and forth through a labyrinth of other dedicated funds. A big chunk of dough is eventually returned to the counties that financially support the trial courts.[21] But before this occurs, enough cash has been siphoned off by the state to pay for lots of other things that may have no relationship to the court activity that generated the money in the first place. (The author's best attempt at describing this process is the creation of the flowchart shown on page 31.[22])

It's probably best that people paying speeding tickets don't know they are making a defined contribution to their legislator's pension.[23] Why should stray-dog citations help to house felons in county jails?[24] And judges should be embarrassed that the solvency of their retirement plan depends on the number of cases filed by people whose taxes have already paid their salaries.[25] A recent addition to this family of dubious fees is an $8 Justice System Fund add-on to pay for the newly created Sexual Assault Victim's Medical Forensic Intervention and Treatment Fund and the Children's Advocacy Center Fund.[26] Most people who pay this increase will not have abused a child or sexually assaulted anyone. They won't derive a benefit from these new programs greater than the vast majority of Michigan citizens who will pay nothing toward funding them. Is it legal to do this? And, more importantly, is it wise?

FAST FACTS

Where can lawmakers find the money to create or enhance worthwhile programs, without appearing to raise taxes to pay for them? The answer: district courts.

Some district court assessments may violate United States and Michigan constitutional protections.

District court tax farming is fundamentally unwise. It is regressive and unfair, hurts local trial court funding, and promotes tangential programs over core services. Worst of all, it diminishes respect for our justice system.

Is This Legal?

Are Justice Fund Assessments and Victim's Rights Charges Unconstitutionally Diverted Fines?

The legality of requiring trial court users to pay for unrelated expenses of state government may depend on whether these charges are considered to be costs of prosecution, penal fines, taxes, or user fees.[27] This issue was last addressed in 1982, when the Court of Appeals in *Saginaw Library Bd v District Judges* considered a $5 "judgment fee" earmarked for legislative and judicial retirement funds.[28] Article 8, §9 of the 1963 Michigan Constitution requires that state penal fines be used exclusively to support public libraries. The library board claimed that the judgment fee was

a fine because it was uniform in each case and unrelated to the actual costs of prosecution. The Court disagreed, holding that the state could obtain revenue by requiring trial courts to collect reasonable, uniform "base costs" that were not considered to be fines because their purpose was *compensatory*.[29] How court users consume or benefit from state officers' pensions was not explained.

Whether today's justice fund and victim's rights charges would survive a similar challenge is uncertain. These assessments are significantly larger than the judgment fee considered in *Saginaw Library Bd*, measured both by their absolute amounts and in proportion to the overall fines and costs imposed. For example, a meager $81 speeding ticket now includes a whopping $40 Justice System Fund assessment.[30] Trial court collections for the Justice System and Crime Victim's Rights funds now exceed $70 million annually.[31] This past December, crime victim's rights assessments were drastically increased to provide $3.5 million in seed money for a statewide trauma center.[32] After that, these court charges will continue to provide trauma center funding of at least $1.75 million annually, even if crime victims' use of the trauma center is never demonstrated.[33]

The Court warned in *Saginaw Library Bd* that "fee[s]...which would be considerably greater than that involved here might offend the constitutional or statutory provisions."[34] As these charges have grown larger and become disconnected almost completely from the expense of prosecution, a constitutional challenge based on the misdirection of fine revenues has become more likely to succeed.

Do Mandatory District Court Charges Violate Constitutional Equal Protection?

Money collected by the district courts for the state treasury could also be challenged as unconstitutional taxes or user fees; a distinction that sometimes matters.[35] In 2007, the Court of Appeals considered a constitutional attack on the contentious Michigan driver responsibility fee, an amount charged by the secretary of state to bad drivers as a requirement of maintaining an operator's license.[36] The Court upheld the constitutionality of this assessment, but the judges on the panel could not agree whether this charge is a tax, a user fee, or a penal fine. A fair reading of the individual opinions suggests that two judges on this panel might find some mandatory district court charges to be taxes.[37]

Taxes and fees must pass muster of equal protection under both the United States and Michigan constitutions, and analysis under each is the same.[38] If taxes or fees are charged to some citizens, but not others, the classification system must be rationally related to some governmental purpose.[39] Clearly, the crime victim's rights fee, imposed on persons convicted of crimes, would pass this test. But the rational basis for taxing speeders to house felons in county jails is harder to explain. And it is a real stretch to claim that people who use the court system should pay more toward legislators' pensions than those who do not.

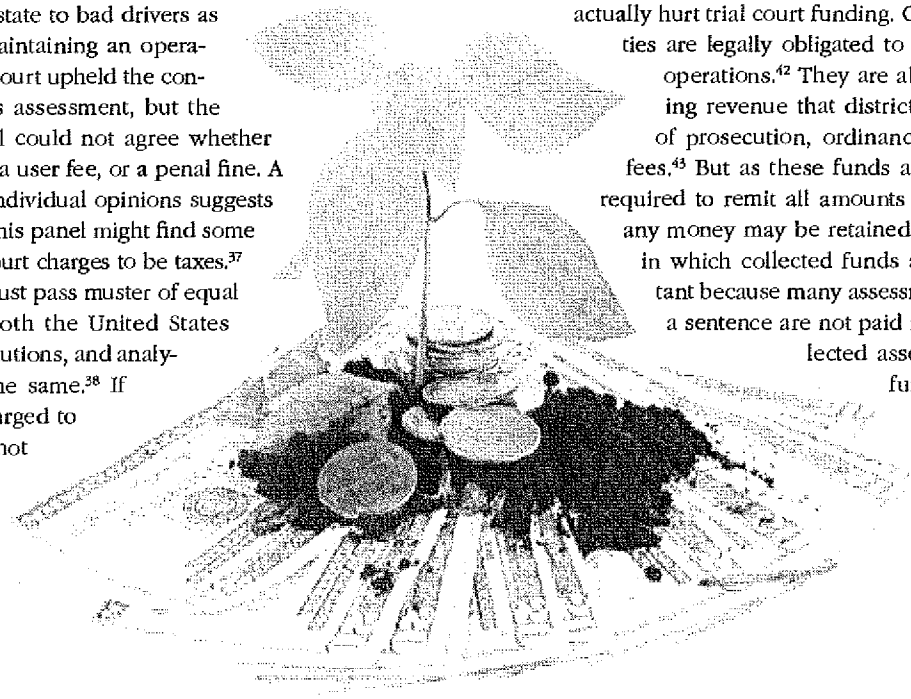
Are Mandatory District Court Charges Really Taxes Not "Distinctly Stated?"

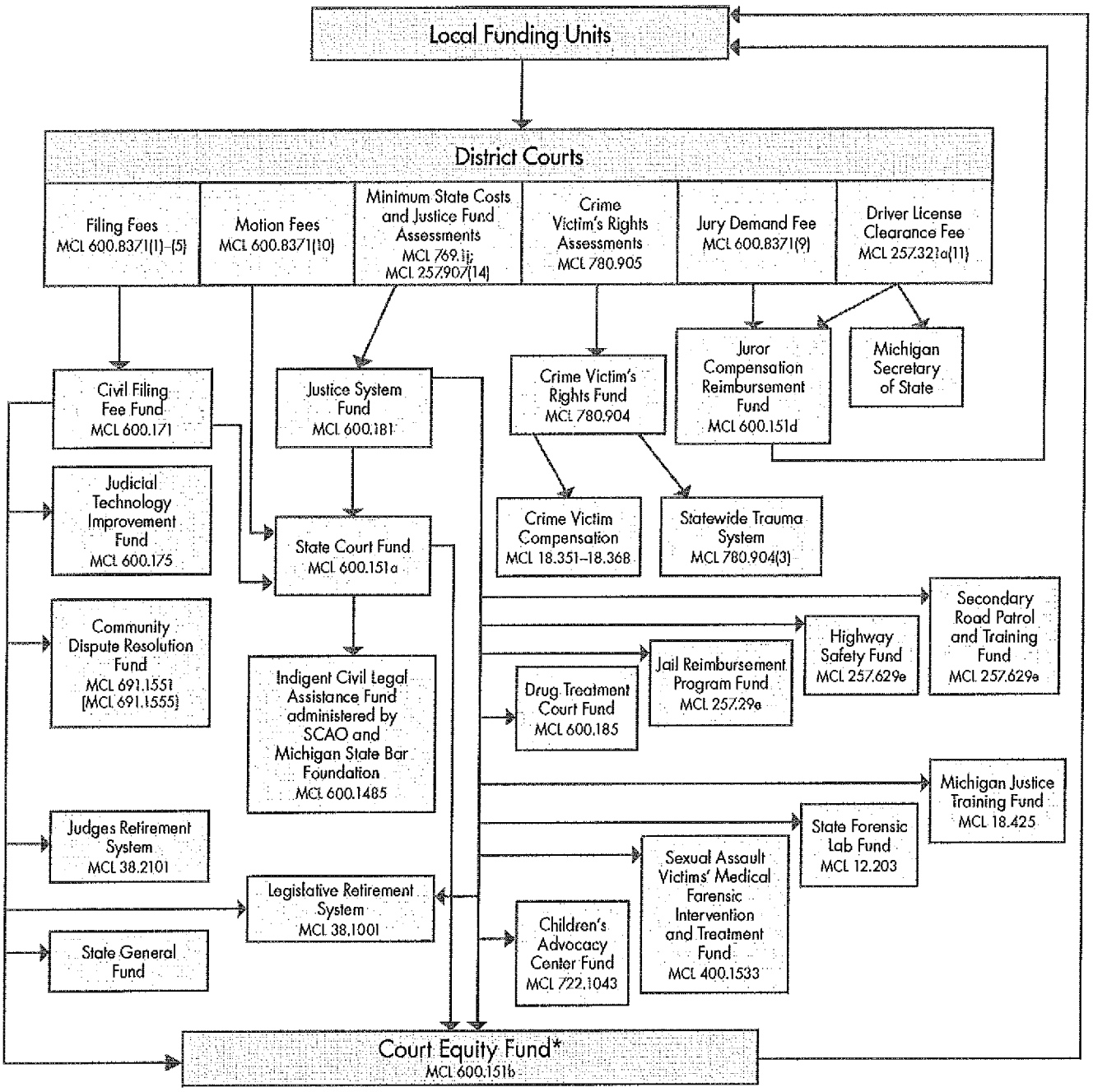
If determined to be taxes, district court financial assessments would also need to comply with article 4, §32 of the 1963 Michigan Constitution, which provides that "[e]very law which imposes, continues or revives a tax shall distinctly state the tax." This obscure constitutional provision appears to be aimed at preventing the legislature from deceiving itself and furnishing moneys for unintended purposes.[40] A challenge under this section would determine if the wording of statutes creating various trial court assessments adequately discloses their purpose of funding peripheral state programs, such as legislative pensions.[41] No assessment has ever been struck down for violating this section, but if its true purpose is to prevent deceitful taxation, hidden court charges could be the first.

Is This Wise?

An appellate court may someday decide if trial courts *can* legally raise revenue for state government in this way, but state government leaders shouldn't wait until then to decide if they *should*. There are good reasons to question the wisdom of district court tax farming. As a tax policy, it is extremely regressive. Most of this money is paid by criminal or traffic offenders. These people are disproportionately poor and the least able to pay for governmental programs. Imposing these assessments can be counterproductive. Unmet financial obligations cause poor people to fail on probation, thwarting the courts' primary goal of behavior modification.

Raising revenue for the state through court assessments may actually hurt trial court funding. Counties and municipalities are legally obligated to pay for state trial court operations.[42] They are able to do this by retaining revenue that district courts collect as costs of prosecution, ordinance fines, and civil filing fees.[43] But as these funds are collected, courts are required to remit all amounts due to the state before any money may be retained locally.[44] The sequence in which collected funds are disbursed is important because many assessments ordered as part of a sentence are not paid in full. For partially collected assessments, it is a court's funding unit that is always shortchanged. As state base costs increase, the local share of collected revenue correspondingly shrinks in every case





*Only county funding units receive Court Equity Fund payments. The funding units of third-class district courts—those supported by political subdivisions within a county—do not receive Court Equity Fund payments.

in which court charges are not fully paid. Ironically, the local governments' ability to financially support the district courts is undermined by increasing the courts' burden to collect money for peripheral state programs.

The ability to hide a funding source within a trial court assessment promotes tangential programs over core services. Consider recent events. Plummeting tax revenues caused general fund expenditures to be slashed by executive order.[45] Prisons were slated for closure,[46] and state police officers were laid off.[47] At about the same time, lawmakers incurred the expense of creating the Children's Advocacy Center Fund.[48] Was this an intelligent balance of our citizens' limited resources? We don't know because the burden of funding the new program was simply assigned to the trial courts by increasing the Justice System Fund assessment.[49] Prioritizing the value of enhanced victims' services against the loss of cops and prison cells never occurred. Worthwhile programs should compete on the level playing field provided by general-fund financing to get the biggest bang for our buck.

The most troubling aspect of district court tax farming is its inevitable damage to the stature of the courts. As people look to

the courts to resolve their disputes and enforce our laws, most expect to pay their fair share. Offenders will generally accept a reasonable financial penalty as a consequence of their conduct, and most litigants are resigned to paying for their actual use of court services. But respect for judicial authority will erode as people learn that their court appearance has simply become a taxable event, an opportunity for the government to take their money without regard to their acts or omissions. With each new assessment, the brash, pecuniary goal of our justice system becomes more difficult to conceal.

Conclusion

The scheme of assigning locally funded trial courts to collect money for peripheral state programs is fundamentally unwise, and parts of it may be unlawful. This fertile revenue source cannot immediately be replaced in these difficult times. But we should draw a lesson from the history of the first tax farmers and begin to reverse the trend. Caesar Augustus ended Roman tax farming after it revealed itself to be not only unjust, but ineffective.[50] And we know this: as Roman revenue collection grew arbitrary and disproportionately directed at the poor, the publicans became disrespected, then ultimately despised.[51] Many Michigan citizens will form their opinions of our justice system solely from their experience in district court. As they seek justice, we can't allow them to view our judges as tax collectors. ■

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FOOTNOTES

1. Balsdon, *Roman Civilization* (Baltimore: Pelican, 1965), p 43.
2. Grant, *History of Rome* (New York: Charles Scribner's Sons, 1978), p 173.
3. *Id.* at 174.
4. Executive Order No. 2009-22.
5. MCL 769.3; MCL 771.3(5).
6. MCL 600.2529 (former MCL 600.2528).
7. *Id.*; MCL 600.8379.
8. *People v Wallace*, 245 Mich 310, 314; 222 NW 698 (1929).
9. 1951 PA 154; former MCL 646.2.
10. Former MCL 600.2528 (now MCL 600.2529).
11. 1965 PA 203; MCL 28.613.
12. *People v Barber*, 14 Mich App 395, 407; 165 NW2d 608 (1968).
13. 1970 PA 248; MCL 600.8381.
14. *Saginaw Library Bd v District Judges*, 118 Mich App 379; 325 NW2d 777 (1982).
15. MCL 600.171; MCL 600.8371(1) to (5).
16. MCL 600.151a; MCL 600.8371(10).
17. MCL 600.181; MCL 769.1j(1)(a) to (c); MCL 257.907(14); MCL 600.8381(5).
18. MCL 780.904; MCL 780.905.
19. MCL 600.151d; MCL 257.321a(1)(c).
20. Budget officers at the Michigan Supreme Court and the Department of Community Health have identified for the author the following fund revenues for fiscal year 2009–2010: Civil Filing Fee Fund, $40,525,043; Justice System Fund, $63,337,036; State Court Fund (considering motion fees only), $3,128,687; Juror Compensation Reimbursement Fund, $4,391,291; Crime Victim's Rights Fund, $9,068,272.
21. MCL 600.151b. Cities and townships that fund third-class district courts, however, do not receive Court Equity Fund distributions.
22. Amounts retained by funding units, moneys transmitted to state agencies for administrative costs, and fees assessed for conservation violations are omitted from the chart.
23. MCL 257.628; MCL 257.907(14); MCL 600.181(3)(b)(iv).
24. MCL 287.262; MCL 287.286; MCL 769.1j; MCL 600.181(3)(b)(ii); MCL 257.629(e).
25. MCL 600.8371(1) to (5); MCL 600.171(3)(e).
26. MCL 600.181(3)(b)(xi) and (xii).
27. See *Dawson v Secretary of State*, 274 Mich App 723, 740–741; 739 NW2d 339 (2007) (opinion by Wilder, P.J.).
28. *Saginaw Library Bd*, 118 Mich App at 388–389.
29. *Id.* at 389.
30. MCL 257.907(14). For 2009, the State Court Administrative Office recommended a minimum total assessment of $81 for a minor speed violation. See MCL 257.907(7).
31. See n 20 *supra*.
32. MCL 780.905; MCL 780.904.
33. MCL 780.904(3).
34. *Saginaw Library Bd*, 118 Mich App at 389.
35. See *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 664–668; 697 NW2d 180 (2005).
36. *Dawson*, 274 Mich App at 724 (opinion by Wilder, P.J.).
37. *Id.* at 724 (opinion by Wilder, P.J.); *id.* at 748 (opinion by Zahra, J.).
38. *Id.* at 738 (Wilder, P.J.).
39. *Id.* at 739.
40. See *Westenhausen v People*, 44 Mich 265, 266–267; 6 NW 641 (1880).
41. See, e.g., *Dawson*, 274 Mich App at 747 (opinion by Wilder, P.J.).
42. See *46th Circuit Trial Court v Crawford Co*, 476 Mich 131; 719 NW2d 553 (2006).
43. MCL 600.8379; MCL 8371(1) to (5).
44. MCL 775.22; MCL 780.766a.
45. Executive Order No. 2009-22.
46. State of Michigan Executive Budget, Fiscal Year 2009–2010 <http://www.michigan.gov/documents/budget/budget20small_267048_7.pdf> (accessed January 24, 2011).
47. Michigan State Police, *December 18, 2009—Official Statement: State Police to Recall 28 Troopers Using Grant Funds* <http://www.michigan.gov/msp/0,1607,7-123-228254--,00.html> (accessed January 24, 2011).
48. MCL 722.1043.
49. MCL 600.181(3)(b)(xii).
50. Eck, *The Age of Augustus* (Oxford: Blackwell Publishing, 2003), pp 83–84.
51. Cahill, *How the Irish Saved Civilization* (New York: Doubleday, 1995), p 24; *Luke* 18:9–14.