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

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DEFENDANT-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED

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Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. IS THERE A FUNCTIONAL DIFFERENCE BETWEEN COURT COSTS AND COSTS OF PROSECUTION?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

III. MAY COURTS ASSESS A FLAT FEE FOR CERTAIN STANDARD EXPENSES, YET ORDER ACTUAL COSTS FOR EXPENSES UNIQUE TO THE CASE?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

IV. IN MR. CUNNINGHAM'S CASE, DID THE COURT OF APPEALS MAJORITY ERR IN AFFIRMING COSTS FOR COURT OPERATING EXPENSES AND OTHER INDIRECT EXPENSES, AND DID THE DISSENTING JUDGE CORRECTLY FIND THESE COSTS MUST BE BORNE BY THE PUBLIC AS A WHOLE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant Frederick Cunningham pled guilty to obtaining a controlled substance by fraud, MCL 333.7407(1)(c), in the Allegan County Circuit Court on May 6, 2011. The Honorable Margaret Zuzich Bakker sentenced Mr. Cunningham to a term of one to four years imprisonment on June 3, 2011.

The plea bargain provided for dismissal of the fourth habitual offender notice in return for Mr. Cunningham's guilty plea to the charged offense (16a).

According to Mr. Cunningham's plea admissions and information presented in the presentence report, this defendant forged a prescription for the drug Norco using his son-in-law's name as the patient and the son-in-law's doctor as the prescribing physician (20a; PSI[1] 3).

The sentencing guidelines recommended a range of 0 to 17 months (39a). The circuit judge departed above the guidelines range and imposed a prison sentence of one to four years due to "the consistent, ongoing, 36 year relationship with the criminal justice system involving multiple crimes of property crimes and crimes involving fraud and deception to this Court is not contemplated by the sentencing guidelines." (39a-40a).

The circuit judge also assessed $1,000 in court costs, $130 for the crime victim rights fee, and $68 in state costs (16a). *Judgment of Sentence*, 9a.

In response to a timely post-conviction motion to correct the sentence, the circuit judge denied defendant's challenge to the costs, reasoning costs were authorized by MCL 769.1k and MCL 769.34(6), and there was no requirement that costs bear a reasonable relationship to expenses actually incurred in the specific case before the court. *Opinion and Order*, 109a-110a.

[1] PSI refers to presentence investigation report.

Mr. Cunningham moved for leave to appeal, and the Court of Appeals granted leave to appeal. *Order*, 112a. The Court of Appeals remanded for a hearing to establish the basis for costs. *Order*, 113a. On remand, the trial judge held a hearing, found a reasonable relationship between the costs imposed and the actual costs incurred by the court, and affirmed the assessment of costs in the amount of $1,000. *Order*, 145a. The trial judge made clear she intended to assess $500 in costs and $500 for court-appointed attorney fees (139a-141a). She accepted the testimony of the circuit court administrator that the average cost per criminal case was $1,238.48 (125a, 140a-141a). This figure included $462.84 as the amount assigned per criminal case vis-à-vis the court's overall operating expenses, $563.15 as the average cost of court-appointed counsel per criminal case, and $212.48 for assumed clerk and deputy expenses (124a-125a, 154a). The court's operating expenses included indirect costs that included fees for building use, county board of commissioners, county administration, finance, audit, county personnel, county treasurer, network phone, facilities maintenance of the courthouse, mailing and typing, building security, fringe benefit processing, building insurance and a county fitness center (132a).

By published opinion dated May 28, 2013, the Court of Appeals affirmed in a split decision. Judges Peter D. O'Connell and E. Thomas Fitzgerald ruled that costs were appropriate in light of *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), and *People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012). Dissenting Judge Douglas B. Shapiro found that costs were calculated inappropriately in light of *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011). *People v Cunningham (After Remand)*, 301 Mich App 218; 836 NW2d 232 (2013); Opinion, 146a.

Mr. Cunningham moved for leave to appeal to this Court, and the Court granted leave to appeal by order dated November 20, 2013. *People v Cunningham*, 839 NW2d 202 (2013), *Order,* 152a.

SUMMARY OF ARGUMENT

For more than a century, the Michigan Legislature has passed cost statutes that apply in criminal cases. And for more than a century, the judicial branch interpreted those statutes in a very consistent manner. According to the courts, costs may not be imposed for court operating expenses and should reasonably relate to expenses of the particular case. Moreover, costs must be authorized by statute and do not include investigative expenses or salaries of the police and prosecutor unless the legislature expressly authorized these costs.

Even today, as we move into 2014, the Legislature continues to pass statutes that allow costs in criminal cases. Review of those statutes shows continued adherence to the above principles.

In late 2005, and operating within this context, the Legislature enacted MCL 769.1k(1)(b)(ii). This statute provides for "[a]ny cost in addition to the minimum state cost." As the Court will see, MCL 769.1k reflects the Legislature's intent that costs be permitted as part of a criminal sentence, delayed sentence or deferred judgment of guilt. Subsection (1)(b)(ii) expressly allows costs in excess of the minimum state cost, but it does not independently authorize costs. Instead, the rule remains that a statute – other than MCL 769.1k(1) (b)(ii) - must authorize costs for a particular crime and costs are limited absent express legislative language to the contrary.

To the extent recent Court of Appeals decisions have strayed from these well-established principles for criminal costs, they have done so incorrectly. This Court should expressly overrule the decisions in *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012), and *People v Jones*, 300 Mich App 652, 658; 834 NW2d 919 (2013) (following *Sanders*). The Court should also reverse

the decision in the instant matter and adopt the opinion of the dissenting judge that costs in a criminal case may not include court operating expenses and other indirect expenses of the court. This Court should also separately recognize that neither MCL 769.1k(1)(b)(ii) nor MCL 769.34(6) independently authorizes costs in criminal cases.

I. THE TRIAL COURT ERRED IN ASSESSING $1,000 IN COURT COSTS BASED ON THE GENERAL COSTS OF PROSECUTING INDIVIDUALS IN ALLEGAN COUNTY INCLUDING THE OVERHEAD COSTS OF OPERATING THE COURTHOUSE BECAUSE COSTS ARE LIMITED TO THE SPECIFIC EXPENSES OF THE CASE AND DO NOT INCLUDE OPERATING EXPENSES WHICH ARE PROPERLY BORNE BY THE PUBLIC AS A WHOLE AND NOT THE INDIVIDUAL DEFENDANT.

The trial court's authority to order costs is a question of law subject to *de novo* review. *People v Lloyd*, 284 Mich App 703, 706-707; 774 NW2d 347 (2009).

The Court should reverse the trial court's assessment of $1,000 in circuit court costs as costs may not include the expenses of maintenance and functioning of governmental agencies. Contrary to the conclusion of the trial judge, the Legislature has not authorized costs in *any* amount. And contrary to the conclusion of the Court of Appeals, costs may not include overhead expenses of the court and instead must be tailored to the specific expenses of the case. To the extent that such a ruling conflicts with the decisions in *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012), and *People v Jones*, 300 Mich App 652, 658; 834 NW2d 919 (2013) (following *Sanders*), the Court should overrule all three decisions.

In late 2005, the Michigan Legislature passed a law that permitted the sentencing judge to assess"[a]ny cost in addition to the minimum state cost" at the time of sentencing. 2005 PA 316; MCL 769.1k(1)(b)(ii) (effective January 1, 2006). The statute has been interpreted by the Court of Appeals to allow assessment of a "generally reasonable amount" of costs that need not be particularized to the individual expenses of the case. *People v Sanders*, *supra* at 711, 715; *People v Sanders (After Remand)*, *supra* at 106. According to the Court of Appeals, costs may include "overhead costs" and trial court may utilize a "flat fee" approach. *Sanders* at 714-715.

The Court of Appeals' interpretation of MCL 769.1k(1)(b)(ii) is incorrect. For more than a century, Michigan cases and statutes have formed a remarkably consistent body of law with respect to assessment of costs in criminal cases. MCL 769.1k(1)(b)(ii) must be read in this context. As the Court will see, the courts have consistently held that costs may not include operating expenses of the courts and should reasonably relate to the expenses of the particular case. The courts have also consistently held that costs must be authorized by statute and may not include investigative costs or salaries of the police and prosecutor unless the legislature expressly authorizes such costs. The Legislature has operated consistent with these rules, and there is nothing in MCL 769.1k(1)(b)(ii) that would indicate the Legislature's intent to repeal all past cost provisions to be replaced by a wide-open "any costs for any reason" approach in criminal cases.

A Consistent Rule: No Costs for Court Operating Expenses

As far back as 1885, the Michigan Supreme Court made clear that costs may not include ordinary court expenses. *People v Kennedy*, 58 Mich 372; 25 NW 318 (1885). In *Kennedy*, the circuit judge assessed costs that included $24 for "12 jurymen 1 day each." *Id.*, at 320. The Supreme Court concluded there was no authority for such costs in criminal cases (although a different rule was in place for civil cases) and it would be unjust to penalize the defendant for exercising his constitutional right to jury trial:

> We know of no authority in the circuit courts to add the per diem of jurymen to the fine and costs in a case like this. It costs a litigant in a civil cause only three dollars for a jury trial, and certainly it would be monstrous to establish a practice of punishing persons convicted of misdemeanors for demanding what the constitution of the state gives them, - a trial by jury. [58 Mich at 377.]

The *Kennedy* decision was cited with approval by the Eighth Circuit in a case reversing jury costs and bailiff's fees. The Eighth Circuit concluded jury and bailiff costs were the "general

expense of maintaining the system of courts and the administration of justice" that should be the "ordinary burden of the government":

> By appropriate assignment of error (18) appellant presents that the court erred in taxing as costs of the prosecution the items: 'Jury fees,' 'jury mileage,' 'jury bailiffs' fees,' 'jury meals and lodging,' 'jury professional services,' 'marshal's fees,' and 'Judge Bell, traveling and maintenance.' These items seem self-explanatory, being the expens[es] incurred by the government in providing a tribunal, that is, a judge and jury for the trial of the case, though it may be stated 'jury professional services,' were amounts paid to a doctor for his services to several of the petit jurors during the trials, and the items total about $2,500.
>
> We do not find any authority for holding that such governmental expense can be taxed against one convicted of a criminal offense as 'costs of the prosecution' in the absence of statute or established local practice. The expression 'costs of prosecution' means such items of costs as are taxable by statute or by established practice or rule of court based on statute, and in the federal courts, where no federal statute is found to be directly applicable, recourse may sometimes be had to the statutes and practice of the state. See Henkel v. Chicago, St. P., M. & O. Ry. Co., 284 U.S. 444, 52 S.Ct. 223, 76 L.Ed. 386, Ex parte Peterson, 253 U.S. 300, 316, 40 S.Ct. 543, 64 L.Ed. 919, U. S. v. Minneapolis, St. P. & S. S. M. Ry. Co. (D.C.) 235 F. 951, 954, and cases cited in these opinions. *It does not include the general expense of maintaining the system of courts and the administration of justice, all of which is an ordinary burden of government.* That the enumerated items could not be taxed as costs was expressly held in United States v. Murphy (D.C.) 59 F.(2d) 734, and we are satisfied with the conclusions concerning taxation of costs there indicated. See, also, U. S. v. Wilson (C.C.) 193 F. 1007; State v. Morehart, 149 Minn. 432, 434, 183 N.W. 960; Board of Com'rs v. Board of Com'rs, 84 Minn. 267, 269, 87 N.W. 846; McLean v. People, 66 Colo. 486, 497, 180 P. 676; Saunders v. People, 63 Colo. 241, 165 P. 781; *People v. Kennedy, 58 Mich. 372, 373, 25 N.W. 318*; Stanton County v. Madison County, 10 Neb. 304, 308, 4 N.W. 1055, citing 1 Bouvier Law Dict. 370; Corpus Juris, vol. 15, § 833, page 330.
>
> The taxation of these items is reversed with direction that they be eliminated from the bill of costs. [*Gleckman v United States*, 80 F 2d 394, 403 (CA 8, 1935); emphasis added.]

See also United States v Mink, 476 F3d 558, 564 (CA 8, 2007) (invalidating jury costs, relying on *Gleckman*).

The Sixth Circuit likewise adopted the *Kennedy* rule to preclude costs for summoning the jury venire when the attorney failed to appear on the trial date. In reversing jury costs, the Sixth Circuit quoted extensively from the Eighth Circuit opinion in *Gleckman*, which itself had relied on this Court's decision in *Kennedy*, to conclude that "the cost of a jury is not a taxable cost within the meaning of the statute [which authorized costs when an attorney multiplied proceedings "unreasonably and vexatiously"]. . . ." *United States v Ross*, 535 F2d 346, 351 (CA 6, 1976). The Court noted in a footnote that if carried to its logical conclusion, an attorney who improperly caused proceedings to be extended "could be required to pay the pro rata salaries of the judge, his staff, the U.S. Attorney and marshals, in addition to the expenses for any witnesses called. We do not believe the statute was meant to include such 'costs.'" 535 F2d at 351 n. 23

In 1931, there was some debate over whether the probation statute, which at the time broadly authorized costs for expenses incurred in the "apprehension, examination, trial and probationary oversight of the probationer," could include costs that represented ordinary operating expenses of the court. A majority of the Michigan Supreme Court affirmed costs of $200 without specifying the nature of the costs, relying on the broad wording of the probation statute to uphold the costs. *People v Robinson*, 253 Mich 507, 511; 235 NW 236 (1931). In a separate opinion, Justice Wiest, joined by Justice Potter, rejected the prosecutor's argument that costs under the probation statute could include items such as the coroner's fees, juror compensation and the "subsistence of the prisoner." Justice Wiest concluded the "expenses of the established judicial system" could not be taxed as costs:

> I concur in affirmance of the conviction, but think the amount of costs, imposed in the order of probation, not justified by the provision of the Criminal Code.
>
> The expense of arrest, costs of examination before the magistrate, and costs of the trial may be summarily estimated and imposed, but there may not be included 'coroner's fees, per diem compensation of the jurors and subsistence of the prisoner,' as mentioned in the prosecutor's brief. If such items are included, we will have a new meaning for the term 'costs.' Expenses of the established judicial system cannot be taxed as costs incident to any trial; neither may the board and lodging of a prisoner while awaiting trial.
>
> In People v. Wallace, 245 Mich. 310, 222 N. W. 698, and again in People v. Davis, 247 Mich. 672, 226 N. W. 671, we held that costs in criminal cases must bear a true relation to the expense of prosecution. This still holds good, and costs are expenses incident to a prosecution, and not inclusive of any of the expenses of holding required terms of the circuit court. [*People v Robinson,* 253 Mich at 512 (Wiest, J., concurring in part)].

In 1941, the Supreme Court adopted the opinion of Justice Wiest (seven justices adopted the opinion and an eighth justice concurred in the result)[2] in a case construing a statute that authorized "costs of prosecution" rather than costs under the probation statute. *People v Hope*, 297 Mich 115, 117; 297 NW 206 (1941). As the *Hope* Court explained, juror fees could not be assessed as costs and the Court agreed with Justice Wiest in *Robinson* that "'costs are expenses incident to a prosecution, and not inclusive of any of the expenses of holding required terms of the circuit court.'" *Id.*, at 118-119, quoting *People v Robinson, supra* at 512 (Wiest, J.).

In 1952, eight justices unanimously concluded that costs could not include "the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law." *People v Teasdale*, 335 Mich 1, 6; 55 NW 2d 149 (1952). This was true even under the probation statute which, as it did in the *Robinson* case,

[2] There were eight justices on the Court at the time. *See Woodland v Michigan Citizens Lobby*, 423 Mich 188, 220 n.34; 378 NW2d 337 (1985); Const 1963, Schedule § 6.

authorized costs for "all such expenses, direct and indirect, as the public has been or may be put to in connection with the apprehension, examination, trial and probationary oversight of the probationer." *Id.,* at 4-5, quoting MCL 771.3.

In *Teasdale,* the Court explained that costs "must have been incurred in connection with the particular case in which the order of probation is made" and rejected the prosecutor's argument that costs might properly include "the payroll of the police department, the rental value for one year of premises occupied by the vice squad in police headquarters, the costs of operation of a courtroom used in the case, a portion of the salary of the assistant prosecuting attorney . . . and the cost of a grand jury investigation . . . ." *Teasdale* at 6-7.

In 1975, in an appeal questioning who should pay witness fees in a civil infraction case, the Court of Appeals concluded the responsibility fell to the litigant (there the municipality) and not the courts. *City of Muskegon v Muskegon County*, 63 Mich App 44; 233 NW2d 849 (1975). The Court of Appeals adopted much of the trial court's written opinion that expressly concluded court operating costs were the responsibility of the court even if no cases were ever heard by the court:

> 'We then return to Plaintiffs' proposition that witness fees are included in maintaining, operating and financing the District Courts.
>
> 'The District Court is a forum-a place of jurisdiction; a place of litigation, a place where remedy is pursued. See Black's Law Dictionary, 4th Rev. Ed. It is a locus-it is a situs in the sense of a fixed place or location wherein litigation shall occur. The forum is created by statute and the expense of maintaining, operating and financing it is imposed by statute. Moreover, the court or the forum, in addition to the creation of a locus or situs, includes the retention and pay of a staff to operate it; rent or ownership of the real property; provision of the physical facilities and furnishings such as the bench, jury box, counsel tables, chairs, audience seating, heat, lights, office machinery and all that is necessary to afford litigants a place in which to fully prosecute and defend their suits, including furnishment and payment of jurors.

> 'And it is to this end and purpose that M.C.L.A. 600.8104(2) (M.S.A. 27A.8104(2)) directs the District Control Units to undertake the 'maintaining, operating, and financing' of the court (forum).
>
> 'Witness fees are not a part of or included in the maintenance, operating or financing of a court. *The Court or forum per se is a passive element of the system. Theoretically, the District Control Unit might create the court, maintain it, operate it, and a case may never be tried in it, or a proceeding of any kind may never take place in it. Having created it, maintained, operated and financed it, the District Control Unit has acquitted its obligation under the statute. It is the litigants and their supporting cast (including their witnesses) who are the active participants in the pit. Witness fees are a part of the cost of litigation, not an element of maintaining, operating or financing the court, and it is the litigants who must initially pay their own costs-whether those costs of litigation, costs of prosecution, costs of defense, are ultimately recoverable depending upon result, is a matter determined by Statute or Court Rule.*" [63 Mich App at 51-52; emphasis added.]

In 1982, the Court of Appeals likewise concluded costs for civil infractions must be limited to the specific expenses of the case and could not include costs for the "day to day operations of the district court." *Saginaw Public Libraries v Judges of 70th District Court*, 118 Mich App 379, 387-388; 325 NW2d 777 (1982). The Court relied on *Teasdale* to reach this conclusion and explained that even under a statute authorizing "all expenses, direct and indirect, to which the plaintiff has been put in connection with the civil infraction," costs could not be assessed to support the daily operation of the court:

> The circuit court found that the costs, as fixed by defendants, had no relationship to the actual costs legitimately chargeable to the specific case before the district court. The trial judge also found that defendants designed the schedule to support the day to day operations of the district court. We agree with the circuit court that neither approach is authorized by the statute. As in criminal cases, court costs may only be assessed as authorized by statute. People v. Teasdale, 335 Mich. 1, 55 N.W.2d 149 (1952). The statute does not allow the assessment of costs unrelated to the actual costs but only those expenses, "direct and indirect, to which the plaintiff has been put in connection with the civil infraction". Indirect expenses are not

> unrelated expenses. Likewise *the statute does not authorize assessment of costs to support the day to day operations of the district court.* [*Id.*, at 387-388; emphasis added.]

Most recently in *People v Dilworth*, 291 Mich App 399; 804 NW 2d 788 (2011), the Court of Appeals concluded that only costs outside the normal prosecution and court functions, such as expert witness fees, may be collected in the form of "costs of prosecution." The Court relied on *Teasdale* and expressly rejected costs for the prosecutor's wages:

> When authorized, costs of prosecution "must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace*, 254 Mich 310, 314; 222 NW 698 (1929). Furthermore, those costs may *not* include "expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law." *People v Teasdale*, 335 Mich 1, 5; 55 NW2d 149 (1952).
>
> In this case, the prosecutor offered to provide the trial court with details of the expenses that were claimed to justify the $1,235 in costs, but that information was never placed into the record. Furthermore, it appears from the transcript of the proceedings that defendant may not have been afforded the opportunity to challenge those costs. We have no way to know the extent to which those costs were based on appropriate charges, such as expert witness fees, *People v Brown*, 279 Mich App 116, 139; 755 NW2d 664 (2008), or *impermissible charges, such as the prosecutor's wages,* which are set by a board of supervisors pursuant to a statute and independent of any particular defendant's case. See MCL 49.34. The prosecutor's costs are likely all allowable, but as a court of record without the benefit of a record, we cannot so determine. [*Dilworth* at 400-402; emphasis added.]

Michigan case law demonstrates a remarkably consistent set of rules for the assessment of costs in criminal cases. The Legislature is presumed to act with knowledge of these appellate court decisions. *Gordon Sel-Way, Inc. v Spence Bros., Inc.*, 438 Mich 488, 506; 475 NW2d 704 (1991); *People v Lowe*, 484 Mich 718, 729; 773 NW2d 1 (2009). And while the legislature has the power to depart from well-established judicial interpretation, it must do so by speaking in no

uncertain terms. "While the Legislature has the authority to modify the common law, it must do so by speaking in 'no uncertain terms.'" *People v Moreno*, 491 Mich 38, 46; 814 NW2d 624 (2012). *See also People v Serra*, 301 Mich 124, 130; 3 NW2d 35 (1942) (same, finding no legislative intent to modify longstanding case law).

Nothing in MCL 769.1k(1)(b)(ii) reflects clear Legislative intent to permit costs for normal court operating expenses. To the contrary, the language of MCL 769.1k(1)(b)(ii): "[a]ny cost in addition to the minimum state cost," is exceptionally nondescript and cannot be construed to modify the a century's worth of case law in "no uncertain terms."

A Consistent Rule: Costs Must Bear Reasonable Relation to Actual Expenses

As early as 1929, the Supreme Court made clear that when assessing costs, the costs "must bear some reasonable relation to the expenses actually incurred in the prosecution." *People v Wallace,* 245 Mich 310, 313; 222 NW2d 698 (1929).[3] The Court reiterated the same rule that "costs imposed in a criminal case must bear a true relation to the expense of the prosecution" in *People v Davis*, 247 Mich 672, 673; 226 NW2d 671 (1929). *See also People v Robinson, supra* at 512 (1931) (Wiest, J.) ("In *People v Wallace* . . . and in *People v Davis* . . . we held that costs imposed in criminal cases must bear a true relation to the expense of prosecution. This still holds good . . . .")

In 1952, the Court similarly held in *People v Teasdale, supra,* that costs imposed pursuant to the probation statute must relate to the expenses of the case and were intended to "reimburse the public for expenditures reasonably and properly made in connection with the case." 395 Mich at 5.

[3] The statute in *Wallace* authorized "costs of prosecution." 245 Mich at 313-314.

In 1987, the Court likewise invalidated costs under the *Teasdale* rule, reversing costs for the "salaries and benefits of four witnesses." The Court apparently believed the costs did not relate to the expenses of the case. *People of the City of Ypsilanti v Kircher*, 429 Mich 876; 415 NW2d 864 (1987).

The Court of Appeals has consistently held that costs must bear some direct and reasonable relation to the actual expenses incurred in the prosecution. *People v Barber*, 14 Mich App 395, 401-402; 165 NW2d 608 (1968) (relying on *Teasdale* to conclude that costs "must bear some direct relation to actual costs incurred in a given criminal prosecution" and invalidating costs to support law enforcement officers training council); *People v Blachura*, 81 Mich App 399, 403-44; 265 NW2d 348 (1978) ("costs must bear a reasonable relationship to the expenses of prosecution"; remanding to determine basis for $5,000 costs); *People v Dilworth*, *supra* at 401 (costs of prosecution "'must bear some reasonable relation to the expenses actually incurred in the prosecution[,]'" quoting *Wallace*).

Nothing in MCL 769.1k(1)(b)(ii) demonstrates clear legislative intent to authorize costs that do not bear a direct and reasonable relation to the actual expenses of the case.

A Consistent Rule: Costs Must Be Authorized by Statute

"The right of the court to impose costs in a criminal case is statutory." *Wallace,* 245 Mich at 313. "The power to tax costs is wholly statutory[,]" although "the Michigan Supreme Court may by rule regulate the taxation of costs." *People v Cousino*, 81 Mich App 416, 418; 265 NW2d 355 (1978) (noting this Court's authority to regulate costs under MCL 600.2401, which provides that "the supreme court shall by rule regulate the taxation of costs."). *See also Kuberski v Panfil*, 275 Mich 495, 497; 267 NW2d 730 (1936) (right to recover costs is conferred by statute and did not exist at common law).

Recognizing the rule that costs must be authorized by statute, the Court of Appeals has consistently reversed the imposition of costs where no statute permits costs. *See People v Tims*, 127 Mich App 564, 339 NW2d 488 (1983); *People v Watts*, 133 Mich App 80, 84; 348 NW2d 39 (1984); *People v Jones*, 182 Mich App 125, 126-128; 451 NW2d 525 (1989); *People v Krieger*, 202 Mich App 245, 247-248; 507 NW2d 749 (1993); *People v Antolovich*, 207 Mich App 714, 716; 525 NW2d 513 (1994).

This Court also recently reversed an award of costs against the prosecutor, finding there was no statutory or court rule authority for the costs. *People v Rapp*, 492 Mich 67; 821 NW2d 452 (2012) (court rules allowing costs in civil cases do not apply in criminal cases).

The Legislature is well aware that it must authorize costs in criminal cases. As the Court will see below, the Legislature has authorized costs for select criminal cases. Nothing in MCL 769.1k(1)(b)(ii) was meant to reverse course or broadly authorize costs for all cases and without reference to any other cost provision. To the contrary, and despite the passage of MCL 769.1k in 2005, the Legislature continues to add or modify cost statutes each year.

A Consistent Rule: Costs Are Limited to Those Authorized by Statute

The rule that costs must be authorized by statute has an additional limitation: that the costs permitted by statute are those expressly authorized by the Legislature and within the limitations recognized by courts when construing those statutes. In other words, a broadly worded cost statute, using a term like "costs of prosecution," cannot be read to authorize *unusual* costs like wages and salaries of the prosecutor absent express language to this effect.

In Michigan, costs statutes tend to fall into three general categories for criminal cases: 1) "costs of prosecution" (sometimes worded "costs of the prosecution"), 2) investigative and/or response costs, and 3) miscellaneous or unique costs.

Statutes authorizing "costs of prosecution" abound. *See e.g., Wallace,* 245 Mich at 314 ("costs of prosecution" under Prohibitory Liquor Law); MCL 750.50(4)(b)(c)(d) ("costs of prosecution" for animal cruelty); MCL 750.50b(4) ("costs of prosecution" for animal cruelty); MCL 750.49(5) ("costs of prosecution" for animal fighting); MCLL 752.845 ("costs of prosecution" for death or injuries from firearms); MCL 257.625(13) ("costs of the prosecution" for drunk driving); MCL 324.80178(2) ("costs of the prosecution" for drunk boating); MCL 769.3(1) ("costs of prosecution" with conditional sentence); MCL 771.3(5) ("expenses specifically incurred in prosecuting the defendant" as condition of probation).[4]

The Legislature also passed a handful of statutes allowing investigatory and/ response costs. *See* MCL 28.754(3) ("costs of responding to the false report or threating, including . . . use of police or fire emergency response vehicles and teams"); MCL 750.411a(5) ("costs of responding to the false report or threat including, but not limited to, use of police, fire, medical, or other emergency vehicles and teams"); MCL 750.159j(2)(b) ("costs of the investigation and prosecution" for criminal enterprise crimes); MCL 324.20101(1)(rr) ("'Response activity costs'" or 'costs of response activity' means all costs incurred in taking or conducting a response activity, including enforcement costs") MCL 333.7401c(6) ("response activity costs"); MCL 769.1f(1)&(2)(d) ("expenses for an emergency response and expenses for prosecuting the person" and expenses for "time spent investigating and prosecuting the crime" for certain listed crimes including drunk driving, homicide with a motor vehicle, false report of a crime, etc.).[5]

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[4] There are close to one hundred costs of prosecution statutes. A Westlaw search found 72 hits for statutes that include the term "costs of prosecution," and 27 hits for statutes that include the term "costs of the prosecution."

[5] There are also six statutes authorizing costs "in the manner" or "same manner" as provided in MCL 769.1f: MCL 750.145d(8) (use of Internet or computer to commit crime); MCL 750.411s(4) (posting messages thru electronic medium without consent); MCL 750.462j(5) (obtaining labor or services by force); MCL 750.543x (anti-terrorism chapter); MCL 752.797(7) (fraudulent access to computers); MCL 752.1084(4) (organized crime).

And there are several statutes that authorize unique or miscellaneous costs such as transportation costs,[6] extradition costs,[7] medical and animal care costs,[8] offender supervision costs,[9] court costs,[10] and court-appointed counsel costs.[11]

Within this universe of costs, the Legislature is surprisingly specific when it intends to authorize recovery of law enforcement and prosecution expenses, including wages and salaries. In the response activity statute, MCL 324.2101, which statute applies to certain drug crimes offenses involving the cleanup of hazardous substances, MCL 333.7401c(6), the Legislature authorized all costs in taking or conducting a response activity, including "enforcement costs."[12]

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[6] MCL 780.23a(a) ("Transportation costs" for extraditing offender), MCL 769.1f(2)(e)(i) ("Transportation costs" for extraditing offenders for certain listed offenses).

[7] MCL 780.23a ("actual and reasonable costs of that extradition" including transportation costs and salaries or wages of law enforcement personnel for processing extradition and returning individual); MCL 769.1k(2) ("any additional costs incurred in compelling the defendant's appearance"); MCL 769.1f(2)(e) ("cost of extraditing a person from another state to this state").

[8] MCL 769.1f(2)(c) ("costs of medical supplies lost by fire department and emergency medical service personnel"), MCL 750.49(6) ("costs for housing and caring for the animal, including, but not limited to, providing veterinary medical treatment" for animal fighting); MCL 750.50(8) ("costs of the care, housing, and veterinary medical care for the animal" in addition to costs of prosecution for animal cruelty); MCL 750.50b(4) ("costs of the care, housing, and veterinary medical care for the impacted animal victim" in addition to the costs of prosecution for animal cruelty).

[9] MCL 257.625(14) ("cost of supervision" in addition to costs of prosecution for drunk driving); MCL 324.80178(3) ("costs of supervision" in addition to costs of prosecution for drunk boating), MCL 771.3(5) ("supervision of the probationer). See also MCL 771.3c (probation supervision fee).

[10] MCL 750.159j(2)(a) ("court costs" in addition to investigation and prosecution costs for racketeering crimes).

[11] MCL 771.3(5) (probation costs including "expenses specifically incurred in . . . providing legal representation to the defendant"); MCL 769.1k(1)(b)(iii) ("The expenses of providing legal representation to the defendant").

[12] The response activity statute provides:

> **324.20101. Definitions**
>
> * * *
>
> (qq) "Response activity" means evaluation, interim response activity, remedial action, demolition, providing an alternative water supply, or the taking of other actions necessary to protect the public health, safety, or welfare, or the environment or the natural resources. Response activity also includes health assessments or health effect studies carried out under the supervision, or with the approval of, the

In the extradition statute, the Legislature authorized salaries, wages and overtime pay of both law enforcement and prosecution personnel.[13] And in the most comprehensive cost statute to date, namely the emergency response statute, the Legislature authorized salaries, wages, overtime pay, other compensation, and also medical supplies lost or expended.[14]

> department of community health and enforcement actions related to any response activity.
>
> (rr) "Response activity costs" or "costs of response activity" means all costs incurred in taking or conducting a response activity, including enforcement costs. [MCL 324.20101(qq)-(rr).]

[13] The extradition statute provides:

> **780.23a. Payment of costs by person extradited**
>
> Sec. 23a. The court may order an individual who is extradited to this state for committing a crime and who is convicted of a crime to pay the actual and reasonable costs of that extradition, including, but not limited to, all of the following:
>
> (a) Transportation costs.
>
> (b) The salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the individual to this state. [MCL 780.23a.]

[14] The emergency response statute provides:

> **769.1f. Reimbursement by person convicted for expenses related to incident; expenses for which reimbursement may be ordered; payment; condition of probation or parole; enforcement of order**
>
> Sec. 1f. (1) As part of the sentence for a conviction of any of the following offenses, in addition to any other penalty authorized by law, the court may order the person convicted to reimburse the state or a local unit of government for expenses incurred in relation to that incident including but not limited to expenses for an emergency response and expenses for prosecuting the person, as provided in this section:
>
> * * *

(2) The expenses for which reimbursement may be ordered under this section include all of the following:

(a) The salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine.

(b) The salaries, wages, or other compensation, including overtime pay, of fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, for time spent in responding to and providing fire fighting, rescue, and emergency medical services in relation to the incident from which the conviction arose.

(c) The cost of medical supplies lost or expended by fire department and emergency medical service personnel, including volunteer fire fighters or volunteer emergency medical service personnel, in providing services in relation to the incident from which the conviction arose.

(d) The salaries, wages, or other compensation, including, but not limited to, overtime pay of prosecution personnel for time spent investigating and prosecuting the crime or crimes resulting in conviction.

(e) The cost of extraditing a person from another state to this state including, but not limited to, all of the following:

(i) Transportation costs.

(ii) The salaries or wages of law enforcement and prosecution personnel, including overtime pay, for processing the extradition and returning the person to this state.

(3) If police, fire department, or emergency medical service personnel from more than 1 unit of government incurred expenses as described in subsection (2), the court may order the person convicted to reimburse each unit of government for the expenses it incurred. [MCL 769.1f(2) – (3).]

In other words, the Legislature understands the power to tax unusual costs and selectively exercises that power.

With this background in mind, the Legislature did not operate in a vacuum when it created either MCL 769.1j (state costs) or MCL 769.1k (the general fines and costs statute at issue). The latter statute expressly refers to the former, and the two statutes must be read together. "Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper,* 479 Mich 599, 621; 739 NW2d 523 (2007).

The State Costs Statute – a Minimum, Flat Fee to Support the Justice System Fund:

The state costs statute, MCL 769.1j, sets a flat fee based on the number of convictions. The money collected is directed into the "justice system fund":[15]

> **769.1j. Court ordered fines, costs, or assessments; amount; disposition**
>
> Sec. 1j. (1) Beginning October 1, 2003, if the court orders a person convicted of an offense to pay any combination of a fine, costs, or applicable assessments, the court shall order that the person pay costs of not less than the following amount, as applicable:
>
> (a) $68.00, if the defendant is convicted of a felony.
>
> (b) $50.00, if the defendant is convicted of a misdemeanor or ordinance violation.

[15] The minimum state costs are paid to the justice system fund under MCL 600.181. The justice system fund distributes the proceeds to a variety of funds and organizations including the secondary road patrol and training fund, the highway safety fund, the jail reimbursement program fund, the Michigan justice training fund, the legislative retirement system, the drug treatment courts fund, the state forensic lab fund, the state court fund, and the court equity fund. MCL 600.181(3). *But see People v Barber*, 14 Mich App at 399 (finding unconstitutional a statute that provided for an additional "cost," representing 10% of any fine imposed, which cost would be transmitted to the law enforcement officers training fund, in part because the assessment could not be considered a "cost" because it did not bear a direct relation to the actual expenses of the case).

(2) Of the costs ordered to be paid by a person convicted of an offense, the clerk shall pay to the justice system fund created in section 181 of the revised judicature act of 1961, 1961 PA 236, MCL 600.181, the applicable amount specified as a minimum cost under subsection (1).

(3) Payment of the minimum state cost is a condition of probation under chapter XI of this act. [FN1]

(4) If a defendant who is ordered to pay a minimum state cost under subsection (1) posts a cash bond or bail deposit in connection with the case, the court shall order that the minimum state cost be collected out of the bond or deposit as provided in section 15 of chapter V of this act [FN2] or section 6 or 7 of 1966 PA 257, MCL 780.66 and 780.67.

(5) If a defendant who is ordered to pay a minimum state cost under this section is subject to any combination of fines, costs, restitution, assessments, or payments arising out of the same criminal prosecution, money collected from that person for the payment of fines, costs, restitution, assessments, or other payments shall be allocated as provided in section 22 of chapter XV. [FN3] A fine imposed for a felony, misdemeanor, or ordinance violation shall not be waived unless costs, other than the minimum cost ordered under subsection (2), are waived.

(6) On the last day of each month, the clerk of the court shall transmit the minimum state cost or portions of minimum state cost collected under this section to the department of treasury for deposit in the justice system fund created in section 181 of the revised judicature act of 1961, 1961 PA 236, MCL 600.181.

(7) As used in this section:

(a) "Felony" means a violation of a penal law of this state for which the offender may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.

(b) "Minimum state cost" means the applicable minimum cost to be ordered for a conviction under subsection (1).

As the statute makes clear, there are *minimum* state costs that must be transmitted to the justice system fund. The statute also leaves open the possibility of additional costs.

The Discretionary Cost Provision of MCL 769.1k:

MCL 769.1k was enacted two years after MCL 769.1j and provides for costs as part of a sentence, delayed sentence or deferred judgment of guilt. MCL 769.1k(1)(b)(ii). The statute expressly provides for discretionary costs going beyond to the minimum state costs:

> **769.1k. Imposition of minimum state costs, fines, costs, assessments, etc., at tie of sentencing or deferral of judgment of guilt; collection**
>
> Sec. 1k. (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 of entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.
>
> (b) The court may impose any or all of the following:
>
> (i) Any fine.
>
> (ii) *Any cost in addition to the minimum state cost set forth in subdivision (a).*
>
> (iii) The expenses of providing legal assistance to the defendant.
>
> (iv) Any assessment authorized by law.
>
> (v) Reimbursement under section 1f of this chapter.
>
> (2) In 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.
>
> (3) Subsections (1) and (2) apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation.
>
> (4) The court may require the defendant to pay any fine, cost, or assessment ordered to be paid under this section by wage assignment.

> (5) The court may provide for the amounts imposed under this section to be collected at any time.
>
> (6) Except 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. [Emphasis added.]

If the Court reads MCL 769.1j and 1k together, it will find there are minimum state costs, but the trial court also has discretion to impose other costs. Further, when these two statutes are read within the context of the entire statutory scheme as a whole,[16] and in light of the surrounding case law,[17] it is clear that MCL 769.1k(1)(b)(ii) authorizes the trial court to impose other costs, but those costs must be authorized by statute, i.e., authorized by a statute already in existence.

When the Legislature created MCL 769.1k, it was certainly aware of the countless cost provisions it had enacted previously - including nearly one hundred "costs of prosecution" statutes,[18] dozens if not hundreds of civil and quasi-criminal cost provisions,[19] and the specific criminal cost statutes mentioned earlier. The "[a]ny cost" provision of MCL 769.1k(1)(b)(ii) merely recognizes this universe of costs. *See also* MCL 775.22 (allocation of costs, fines, and restitution including payment of "minimum state cost" and "other costs").

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[16] It is appropriate for this Court to consider the entire statutory scheme as a whole. *See People v McGraw*, 484 Mich 120, 124-125; 771 NW2d 655 (2009) ("Our determination of how offense variables should be scored was based on a reading of the sentencing guidelines statutes as a whole.").

[17] It is a "well-established principle of statutory construction that the Legislature is presumed to act with knowledge of statutory interpretations of the Court of Appeals and this Court." *Gordon Sel-Way, Inc. v Spence Bros., Inc.* 438 Mich at 506.

[18] See note 4, *supra.*

[19] *See e.g.*, MCL 15.271 (court costs for civil action to compel compliance with open meetings act); MCL 15.342d (standards for public employees and officers, remedies including portion of costs of litigation); MCL 37.802 (remedies under civil rights act including portion of costs of litigation).

The language "[a]ny cost in addition to the minimum state cost" cannot be read to authorize *any* cost, i.e., in any amount, for any reason, because this would represent an illogical construction of the statute. If subsection (1)(b)(ii) literally authorized *any* cost, there would be no need to authorize costs to compel the defendant's appearance in court. Yet the Legislature did precisely that in subsection 2 of MCL 769.1k, a subsection which was added months later by 2006 PA 655 (effective January 1, 2007). Subsection 2 expressly authorizes "additional costs incurred in compelling defendant's appearance." "In interpreting a statute, this Court avoids constructions that would render any part of the statute surplusage or nugatory." *People v Moreno*, 491 Mich at 45.

Moreover, if subsection (1)(b)(ii) authorized *any* cost, there would be no need to add or modify cost statutes after January 1, 2006. Yet the Legislature did precisely this, adding and modifying cost statutes several times since January 1, 2006.[20] There are likewise two pending bills to modify MCL 769.1f.[21] These subsequent statutes, bills and statutory amendments should not be viewed as an effort to repeal MCL 769.1k(1)(b)(ii), because repeals by implication are disfavored and the courts should avoid this conclusion if there is any other reasonable construction. *Wayne County Prosecutor v Dep't of Corrections*, 451 Mich 569, 576-577; 548 NW2d 900 (1996). Instead, the Court should conclude that subsection (1)(b)(ii) refers to something other than any and all costs in any amount.

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[20] The Legislature has continued to add or expand costs provisions since the January 1, 2006 effective date of MCL 769.1k(1)(b)(ii). It amended MCL 750.411a in 2012 to expand the costs for making a false report of a crime or threat to include costs "for use of police, fire, medical, or other emergency response vehicles and teams" rather than simply "police or fire emergency response vehicles and teams." 2012 PA 330. Likewise, the Legislature expanded the crimes subject to emergency response costs under MCL 769.1f in both 2008 and 2012. 2008 PA 466; 2012 PA 331. And in 2013, the legislature authorized "costs of prosecution" for the new crime of soliciting a personal injury victim. MCL 750.410b(4), 2013 PA 219.

[21] There are two pending bills to expand the coverage of MCL 769.1f. SB 279, introduced 12/12/13, and HB 5055, introduced 10/3/13.

The reasonable construction of MCL 769.1k(1)(b)(ii) is that it was meant to authorize costs for delayed sentences and deferred judgments of guilt, and it retains the trial court's authority to order costs going beyond the minimum state costs if authorized by a statute already in existence. This construction harmonizes MCL 769.1k with the entire body of statutory costs.

This interpretation is supported by the Legislature's use of the term "any fine" in MCL 769.1k(1)(b)(i). The Legislature surely did not intend to authorize "any fine" in the unlimited sense because this would violate the Excessive Fines Clause of US Const, Amend VIII and Const 1963, art 1,§ 16. To the contrary, and despite the "any fine" language which took effect January 1, 2006, the Legislature continues to set the maximum fine for new crimes. *See e.g.,* MCL 750.349b (maximum fine of $20,000 for false imprisonment, effective 8-24-06); MCL 750.520n(2) (maximum fine of $2,000 for violation of lifetime monitoring law, effective 8-28-06); MCL 750.174(7) maximum fine $50,000 or three times the value of the property embezzled for the crime of embezzlement by agent, effective 3-30-07); MCL 750.411v(2) (maximum fine of $20,000 for retaliation for withdrawal from gang, effective 12-16-10); MCL 445.65 and 445.69(1)(b) (maximum penalty of $50,000 for identity theft second offense, effective 4-1-11).

Finally, as a matter of statutory construction, "any" cannot be construed to mean "all" or "unlimited," at least in this context. The Court implicitly rejected such an interpretation in *People v Teasdale, supra*, when it narrowly construed the probation cost statute despite that statute's authorization for "any costs." 395 Mich at 4. Similarly in *Small v United States*, 544 US 385, 388; 125 S Ct 1752; 161 L Ed 2d 651 (2005), the United States Supreme Court expressly rejected an interpretation of "any" as meaning "all" when it concluded the statutory language "convicted in any court" did not include convictions from a foreign court. Justice Breyer explained for the majority that the meaning of "any" depends on context and may be

limited. *Id.* Justice Souter likewise spoke for the Court one year earlier when he wrote: "'[A]ny' can and does mean different things depending on the setting." *Nixon v Missouri Municipal League*, 541 US 125, 132; 124 S Ct 1555; 158 L Ed 2d 291 (2004).

In sum, when MCL 769.1k(1)(b)(ii) is read within the context of the entire statutory scheme, and when read in conjunction with existing case law, it is clear that the language "[a]ny cost in addition to the minimum state cost," refers to costs going beyond the minimum state cost and as expressly authorized by other statutes. The Legislature did not intend wholesale repeal of every existing cost statute when it enacted MCL 769.1k(1)(b)(ii).

The Court should conclude that costs in a criminal case may not include court operating expenses, they must be reasonably related to the direct and actual expenses of the case, they must be authorized by statute, and MCL 769.1(b)(ii) must be read within the context of a century's worth of case law and statutes.

II. THERE IS NO FUNCTIONAL DIFFERENCE BETWEEN COURT COSTS AND COSTS OF PROSECUTION.

In the order granting leave to appeal, the Court asked "whether assessments of 'court costs' are similar to, or interchangeable with, 'costs of prosecution'[.]" *Order Granting Leave,* 152a. The answer is "Yes," although with a caveat.

This Court should find no functional difference between "court costs" and the "costs of prosecution" because these are closely related if not interchangeable concepts. But to be consistent with legislative terminology, the Court should refer to "court costs" as a civil remedy except where "court costs" are expressly permitted as part of a criminal sentence

The prosecutor argued below that the case of *People v Dilworth*, 291 Mich App 399; 804 NW2d 788 (2011), which case interpreted "costs of prosecution" to exclude normal governmental expenses, was distinguishable because it addressed "costs of prosecution" rather than "court costs" (71a). The circuit judge reached the same conclusion in her *Opinion and Order,* 107a. The Court of Appeals in *Sanders* echoed the same conclusion that "*Dilworth*, however, considered a number of statutes related to the ordering of the payment of the costs of a prosecution. It did not consider the specific statutory provision at issue here." *People v Sanders,* 296 Mich App 710, 713; 825 NW2d 87 (2012).

But court costs and the "costs of prosecution" are nearly interchangeable concepts. On several occasions the Court of Appeals and this Court have referred to court costs when they meant the costs of prosecution. *See People v Courts,* 70 Mich App 664, 667; 247 NW2d 325 (1976), *rev'd* 401 Mich 57, 59; 257 NW2d 101 (1977) (Court of Appeals discusses "court costs" imposed pursuant to MCL 774.22, which statute actually refers to "costs of prosecution"; and Michigan Supreme Court likewise refers to stipulated facts including $150 in "court costs"); *Saginaw Public Libraries v Judges of 70th District Court,* 118 Mich App 379, 388 ; 325 NW2d

777 (1982) (referring repeatedly to "court costs" imposed by district court for civil infractions and stating "[c]osts imposed must reasonably relate to the costs of the prosecution of a civil infraction . . . ."); *People v Tims*, 127 Mich App 564; 339 NW2d 488 (1983) ("court costs" of $1,000 not authorized under conditional sentence statute that provided for "costs of prosecution"); *People v Cousins*, 196 Mich App 715, 716; 493 NW2d 512 (1992) ("court costs" permitted for drunk driving conviction under MCL 257. 625, which statute permits "costs of the prosecution"); *LaLone v Rashid*, 34 Mich App 193, 199; 191 NW2d 98 (1971) (quoting trial court instruction to the jury "nor are they to be concerned with costs of the prosecution, such as the common term court costs.")

And while argument could be made that "court costs" refers to a slightly broader mix of costs including prosecution, defense and probation supervision costs, see MCL 771.3(5) (probation "costs," authorizing all three), *People v Pickett,* 391 Mich 305, 308; 215-695 (1974) (referring to "court costs" required as condition of probation); *People v Beaudin*, 417 Mich 570, 572; 339 NW2d 461 (1983) ("court costs" with probationary sentence); *People v Long*, 419 Mich 636, 639; 359 NW2d 194 (1981) (same); *People v Menton*, 7 Mich App 267, 268; 151 NW2d 360 (1967) (same); *People v Hill*, 192 Mich App 102, 107; 480 NW2d 913 (1991) (same), in practice the courts rarely differentiate between court costs as a condition of probation and court costs as part of a non-probationary sentence. *See e.g., People v Rosecrants*, 88 Mich App 667, 668; 278 NW2d 713 (1979) ("court costs" and fine or 60 days in jail – but no probation - for resisting an officer); *People v Webb*, 96 Mich App 493, 494; 292 NW2d 239 (1980) (fine and "court costs" or jail – but no probation - for carrying a concealed weapon).

There are also "court costs" in criminal cases for missed deadlines, impertinent tone or vexatious proceedings.[22]

The Michigan legislature tends to be more precise, authorizing "court costs" in civil cases and as a civil remedy,[23] but rarely in criminal cases. The one exception appears to be the authority for "court costs" for criminal enterprise convictions, although that statute also contains a civil forfeiture provision. MCL 750.159j (2)(a) (criminal enterprise, court costs); MCL 750.159r (forfeiture of properly under criminal enterprise statute, including court costs). *See* also MCL 324.80178 (drunk boating statute *title* – not part of the statute - refers to "court costs," but text of statute refers to "costs of the prosecution" and "cost of supervision.")

Considering this history, it might be wise for the courts to discard the terminology "court costs" in criminal cases except as expressly provided in the criminal enterprise statute, MCL 750.159j. This would leave authorized "costs" for criminal cases as those falling within the three categories previously identified: 1) "costs of prosecution," 2) investigative or response costs, and 3) unique or miscellaneous cost provisions such as costs for indigent defense, probation supervision, extradition, transportation, and medical and animal care costs.

In any event, the circuit judge clearly erred in concluding that court costs were separate from the costs of prosecution and thus not controlled by the decision in *People v Dilworth, supra.* A century's worth of case law addressing "cost of prosecution," probation costs and other miscellaneous cost statutes suggests to the contrary.

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[22] On occasion, courts assess costs, sometimes called "court costs," as punishment for vexatious appeals or missed deadlines. *See People v Cousino*, 81 Mich App 416; 265 NW2d 355 (1978) (costs for vexatious appeal); *People v White*, 392 Mich 404, 427; 221 NW2d 357 (1974) (noting Court of Appeals assessed $100 in "court costs" for failure to meet the time limits of the appeal by right); *People v Steegman*, 450 Mich 1015 n. 2; 547 NW2d 868 (1996) (Levin, J., noting $100 "court costs" imposed by Court of Appeals against SADO attorney for "disrespectful and impertinent tenor of his motion").

[23] See e.g., MCL 324.30712; 333.7524; 445.257; 493.112; 555.601; 600.2591; 600.2913.

III. COURTS MAY ASSESS A FLAT FEE FOR CERTAIN STANDARD EXPENSES, BUT SHOULD ORDER ACTUAL COSTS FOR EXPENSES UNIQUE TO THE CASE.

In the order granting leave to appeal, the Court asked whether the Court of Appeals correctly held in the two *Sanders* cases that the legislature intended to "adopt a 'reasonable flat fee' approach that does not require precision, and does not require separately calculating the costs involved in a particular case[.]" *Order Granting Leave,* 152a. The answer is "No," although the flat fee approach may be appropriate for some standard expenses.

Nothing in MCL 769.1k refers to a flat fee approach. In contrast, a flat fee approach was approved for costs in civil infraction cases under a statute that directed the district courts to "summarily tax and determine the costs in the action." *Saginaw Public Libraries v Judges of 70th District Court,* 118 Mich App 379, 387-388; 325 NW2d 777 (1982). The same statutory language appeared in an earlier version of the probation statute, as noted in *People v Teasdale,* 335 Mich 1, 4; 55 NW2d 149 (1952), [24] and this language may explain the Court's affirmance of an unspecified order for $200 in costs in *People v Robinson,* 253 Mich 507, 511; 235 NW 236 (1931). *See also* MCL 774.22 (costs not to exceed $15 for criminal case heard in a municipal court).

There is no similar language in MCL 769.1k, and the statute offers no guidance for the assessment of costs in a criminal case.

Given the variety of criminal cost statutes, and recognizing the consistent rule that costs must bear some reasonable and direct relation to the expenses actually incurred in the

[24] The *Teasdale* Court quoted the probation statute, MCL 771.3, which then authorized "any cost [and the court] shall not be confined or governed by the laws or rules governing the taxation of costs in ordinary criminal procedure, but may summarily tax and determine such costs . . . ."

prosecution,[25] this Court should hold that a flat fee approach is appropriate for some standard expenses such as witness and prosecution fees (where authorized), but is inappropriate for expenses unique to the case. This rule is consistent with the many statutes that set standard fees for certain court-related expenses, but also recognizes the range of unique expenses that have no standard amount. *See* MCL 775.11 (standard fees for services of prosecuting attorney); MCL 775.13 (standard witness fees); MCL 775.19 and 19a (interpreter fees); MCR 1.111(F) (interpretation costs); MCL 775.13a (expert witness fee in excess of ordinary witness fees); *People v Brown,* 279 Mich App 116; 755 NW2d 664 (2008) (allowing expert witness fee of $4,200).

Of course, costs should not be ordered if the defendant has no ability to pay or the imposition of costs will chill the exercise of a constitutional right. *See e.g., People v Kennedy,* 58 Mich 372; 25 NW 318 (1885) (no costs for jury); *People v Davis,* 199 Mich App 502, 518; 503 NW2d 457 (1993) (indigent defendant entitled to waiver of costs for court fees, transcripts and expert witness services reasonably necessary for his defense); MCL 28.754(4)(c) (costs for false report of child abduction may be cancelled in whole or part if manifest hardship would result); MCR 1.111(F)(5) ("If a party is financially able to pay for interpretation costs, the court may order the party to reimburse the court for payment of interpretation costs"); MCR 6.433(A) (production of transcripts for indigent defendant "without cost to the defendant" if necessary to pursue appeal by right).

In sum, the Court should reject the flat fee approach except for standardized expenses that are not unique to the particular case.

[25] *See* Issue I, *supra.*

IV. IN MR. CUNNINGHAM'S CASE, THE COURT OF APPEALS MAJORITY ERRED IN AFFIRMING COSTS FOR COURT OPERATING EXPENSES AND OTHER INDIRECT EXPENSES, AND THE DISSENTING JUDGE CORRECTLY FOUND THESE COSTS MUST BE BORNE BY THE PUBLIC AS A WHOLE.

This Court asked in its order granting leave whether "the Court of Appeals in this case properly applied *Sanders* to affirm the assessment of $1,000 in court costs on the basis that it was reasonably related to the $1,238.48 average actual cost per criminal case in Allegan Circuit Court, which included overhead costs and indirect expenses." *Order Granting Leave*, 152a.

The answer to that question is "No." The majority erred as a matter of law, while the dissenting judge correctly found that costs should not include court operating expenses or other indirect expenses and instead must reflect actual expenses of the case.

In the Court of Appeals decision, two judges relied on *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), to conclude that "a sentencing court may consider overhead costs when determining the reasonableness of a court cost figure." *People v Cunningham (After Remand)*, 301 Mich App 218, 221; 836 NW2d 232 (2013) (146a-147a). The majority also quoted language from *People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012), as to the dangers of assessing costs based on a long trial versus a short plea. 301 Mich App at 221-222 (147a).

In dissent, one judge believed the matter was controlled by *People v Dilworth,* 291 Mich App 399; 804 NW2d 788 (2011): "I would instead follow *People v Dilworth* [citation omitted], a case that had previously decided this question, but which *Sanders* failed to follow. *People v Cunningham*, 301 Mich App at 222 (Shapiro, J., dissenting) (149a). According to the dissenting judge, *Dilworth* stood for the proposition that the costs of operating a court system should not be

assessed against a defendant because the public must bear the expenses of government operations regardless of any violation of the law. *Id.*

The dissenting judge relied on the history of costs in Michigan and the *Sanders* court's failure to follow this Court's decision in *Teasdale*:

> The *Sanders* panel also rejected a holding of the Michigan Supreme Court. It concluded that it need not follow *People v Teasdale*, 335 Mich 1, 6; 55 NW2d 149 91952), which held that an assessment of costs against a convicted defendant "excludes expenditures in connection with the maintenance and functioning of governmental agencies that must be borne by public irrespective of specific violations of the law." *Sanders* sidestepped *Teasdale* in two ways. First, *Sanders* noted that *Teasdale* could be ignored because it was decided "decades" ago although there has been no intervening decision overruling or even criticizing *Teasdale*. Second, *Sanders* suggested that *Teasdale* rested its conclusion on statutory language that barred an assessment of such maintenance costs. This assertion is simply not true. The statute considered in *Teasdale* did not contain any language excluding maintenance or overhead costs. In fact, the language of the statute applicable in *Teasdale* was extraordinarily broad, providing that in imposing costs, the court:
>
> > shall not be confined to or governed by the laws or rules governing the taxation of costs in ordinary criminal procedure, but may summarily tax and determine such costs without regard to the items ordinarily included in taxing costs in criminal cases and may include therein *all such expenses, direct and indirect*, as the public has been or may be put to in connection with the apprehension, examination, trial and probationary oversight. [PA 1931, No. 309; CL 1948, § 771.3 (emphasis added)].
>
> Thus, *Teasdale's* bar against costs for the overall operation of the courts was set out in the context of a statute which was far more consistent with such assessments than were the later amendments, that now control and which were likely a codification of the Teasdale holding. [*People v Cunningham,* 301 Mich App at 223-224 (Shapiro, J., dissenting)]

This Court should conclude that the dissenting opinion is the correct statement of the law as it relates to costs for court operating expenses and other indirect expenses. Costs may not

include expenses necessary to operate a government agency. *People v Hope*, 297 Mich 115, 117; 297 NW 206 (1941) (costs do not include expenses of holding required terms of the circuit court); *People v Teasdale*, 335 Mich 1, 6; 55 NW 2d 149 (1952) (costs could not include "the maintenance and functioning of governmental agencies that must be borne by the public irrespective of specific violations of the law").

The Court should also hold, contrary to the majority decision in this case and contrary to the decision in *People v Sanders (After Remand), supra,* that the trial court should consider whether conviction occurred by plea or trial to the extent that a statute authorizes prosecution costs or compensation of the prosecutor. *See People v Wallace*, 245 Mich 310, 314; 222 NW2d 698 (1929) (taking judicial notice that $250 in prosecution costs was "far in excess of the actual costs of the prosecution" where defendant waived jury, the trial was brief and the entire record consisted of 21 pages). The concern that a defendant should not pay a price for exercising his or her constitutional right to stand trial is inconsistent with statutes that authorize the costs of prosecution and/or compensation of prosecution personnel, as both costs will increase dramatically with trial. A rule that does not differentiate between a trial and plea is inconsistent with the long-held rule that costs must bear a direct relation to the actual expenses of the case.

The Court should correct one small point of the dissenting opinion in this case. Judge Shapiro expressed his agreement with the decision in *People v Dilworth, supra,* but that decision incorrectly assumed costs could be assessed in criminal cases pursuant to the probation statute (MCL 771.3) or more generally pursuant to MCL 769.1k(1)(b)(ii) and MCL 769.34(6). *Dilworth*, 291 Mich App at 400-401. The assumption that MCL 769.1k(1)(b)(ii) independently permits costs has been addressed previously. MCL 769.34(6) likewise does not independently authorize costs. That statute is embedded in the sentencing guidelines framework and merely

retains the trial court's authority to order fines, costs, or assessments with a sentence imposed under the statutory sentencing guidelines.[26]

Finally, the Court should agree with Judge Shapiro's conclusion that the cost of operating the government itself should be borne by all Michigan residents, not merely those who "run afoul of the law" or who file or respond to a lawsuit:

> Convicted felons have committed crimes and we punish them for doing do. They may be fined, incarcerated, or placed under other forms of supervision and restrictions upon their conduct. However, they remain citizens of our state. Whatever their conduct, they do not constitute a special class upon whom the court may assess higher taxes or fees to pay for the expense necessary to maintain the constitutionally required operations of government. As held in *Dilworth* and *Teasdale*, if a particular case requires a court to incur specific costs, then those costs may be assessed. However, the costs of operating the government itself is borne by all Michigan residents, not merely or particularly, by those that run afoul of the law. [*Id.*, 152a.]

The Michigan court system is not a private system. Instead, courts are required by the state constitution and each circuit court must hold at least four sessions per year – even if no cases are filed during that year. Const 1963, art VI, §11. Courts are a necessary part of society's infrastructure, and the need for a forum to resolve disputes has existed for centuries. *See* Elizabeth Campbell, Taynya Marcum, and Patricia Morris, *Study: The Rationale for Taxing Costs*, 80 U Det Mercy L Rev 205, 205 (2003) (recognized need for forums to resolve disputes since the start of civilization). There is a recognized public benefit to the court system, and the expenses of the system should be borne by the public as a whole: "Government exists and

[26] MCL 769.34 is the statute setting forth the requirement that trial judges use the sentencing guidelines for all felony offenses committed on or after January 1, 1999. The statute sets forth the departure standard, identifies improper departure reasons and provides for appellate review. See MCL 769.34(1)-(11). The statute was passed in 1994 as part of the framework for development of the statutory sentencing guidelines. 1994 PA 445 § 1. It is clear when read in context that subsection 6 merely preserves the trial court's authority to impose a fine, cost or assessment with a sentence imposed under the statutory sentencing guidelines. But see *People v Lloyd*, 284 Mich App 703, 707-708; 774 NW2d 347 (2009) (both MCL 769.1k and MCL 769.34(6) provide statutory authority for the assessment of costs in a criminal case).

operates for the common good based upon a common will to be governed, and the expense thereof is borne by general taxation of the governed." Conference of State Court Administrators, *Courts Are Not Revenue Centers* (2011-2012 Policy Paper) pp. 7-8, available at http://cosca.ncsc.org/Policy-Papers.aspx.

As applied to Mr. Cunningham's case, the costs imposed were improper. Proceedings were short and Mr. Cunningham did not stand trial. He accepted the plea offer in the district court, the case was set for entry of a guilty plea shortly thereafter, and sentencing occurred less than one month after the plea. Yet on remand from the Court of Appeals, the circuit judge justified costs of $1,000 based on "funds allocated by the county for building use, maintenance and insurance, salaries and fringe benefits of court employees, phones, copying, mailing, and the courthouse gym." *People v Cunningham* (Shapiro, J., dissenting), 301 Mich App at 223 (150a).[27] None of these costs related to the actual expenses of the case, but instead reflected the operating expenses of the court and other indirect expenses. More importantly, there was no applicable cost statute that authorized costs in this criminal case.

As Mr. Cunningham was declared indigent,[28] and there was no cost statute applicable to the case, the Court should reverse the decision of the Court of Appeals and remand for issuance of an amended judgment of sentence vacating the $1,000 in circuit court costs.

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[27] Judge Shapiro listed these expenses as the ones approved in *Sanders*, but there is no reference to these expenses in either *Sanders* decision. Instead, it would appear Judge Shapiro was referring to the expenses calculated in the instant case. During the November 2012 evidentiary hearing, the court administrator for Allegan County calculated the costs of operating the courthouse and the various costs allocated to the county, including a building use charge, Board of Commissioners fee, audit costs, phone costs, facility maintenance fee, costs for mailing, copying, security, insurance and fringe benefits, and a cost allocation for the county fitness center (123a-126a, 132a). *See also Plaintiff-Appellee's Cost Evaluation per Criminal Case*, 154a.

[28] Mr. Cunningham was declared indigent for trial and appellate purposes and was receiving disability payments before his conviction and sentence (77a-78a). He is currently serving a sentence in a federal prison in Beaver, West Virginia.

SUMMARY AND RELIEF AND REQUEST FOR ORAL ARGUMENT

WHEREFORE, for the foregoing reasons, the Court should reverse the decision of the Court of Appeals and remand for entry of an amended judgment of sentence vacating the assessment of $1,000 in costs.

The Court should also overrule the decisions in *People v Sanders*, 296 Mich App 710; 825 NW2d 87 (2012), *People v Sanders (After Remand)*, 298 Mich App 105; 825 NW2d 376 (2012), and *People v Jones*, 300 Mich App 652, 658; 834 NW2d 919 (2013) (following *Sanders*), and should expressly recognize that neither MCL 769.1k(1)(b)(ii) nor MCL 769.34(6) independently authorizes costs in criminal cases.

Respectfully submitted,

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