#15/April 2014

STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Michigan Court of Appeals
Fitzgerald, P.J. and O'Connell and Shapiro, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDRICK L. CUNNINGHAM,

Defendant-Appellant.

______________________________/

Supreme Court No. 147437

Court of Appeals No. 309277

Allegan Circuit Court No. 11-17200-FH

THE STATE'S (1) RESPONSE TO DEFENDANT-APPELLANT'S SUPPLEMENTAL AUTHORITY AFTER ORAL ARGUMENT AND (2) CITATION OF SUPPLEMENTAL AUTHORITY

147437

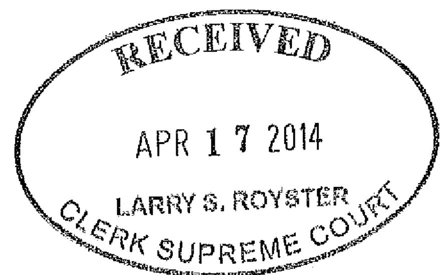

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TABLE OF CONTENTS

Page

Table of Contents i

Index of Authorities ii

Counter-Statement of Question Presented iii

Response and Supplemental Authority 1

I. Allowing trial courts to impose reasonable court costs does not violate separation of powers. 1

II. The Sixth Circuit's recent decision in *Prewett v Weems* reinforces the principle that this Court should not pencil into a statute a limitation the Legislature expressly included in another statute. 3

INDEX OF AUTHORITIES

Cases

ALA Schechter Poultry Corp v United States,
295 US 495 (1935)....................2

Michigan v US EPA,
213 F3d 663 (CA DC, 2000)....................2

Mistretta v United States,
488 US 361 (1989)....................2, 3

People v Hegwood,
465 Mich 432; 636 NW2d 127 (2001)....................1

Prewett v Weems,
__ F3d __, 2014 WL 1408809 (CA 6, Apr 14, 2014)....................3, 4

Taylor v Smithkline Beecham Corp,
468 Mich 1; 658 NW2d 127 (2003)....................2

United States v Martinez-Flores,
428 F3d 22 (CA 1, 2005)....................2, 3

United States v Ressam,
553 US 272 (2008)....................3

Statutes

MCL 769.1k....................3

MCL 769.1k(1)(b)(*ii*)....................iii

MCL 771.3....................3

COUNTER-STATEMENT OF QUESTION PRESENTED

1. Does MCL 769.1k(1)(b)(*ii*)'s grant of authority to courts to impose "[a]ny costs" preclude a court from taxing overhead costs or maintenance costs or require a court to impose case-specific costs instead of average costs?

   Appellant's answer: Yes.

   Appellee's answer: No.

   Trial court's answer: No.

   Court of Appeals' answer: No.

RESPONSE AND SUPPLEMENTAL AUTHORITY

I. Allowing trial courts to impose reasonable court costs does not violate separation of powers.

Cunningham's supplemental brief focuses on whether "an unlimited interpretation of the language '[a]ny fine' of MCL 769.1k(1)(b)(i)" would violate the separation-of-powers doctrine by "unconstitutionally delegat[ing]" the Legislature's "sentencing authority" and giving "unlimited sentencing discretion" to trial judges. (Cunningham Suppl Br, p 2.)

Cunningham is correct that "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature." *People v Hegwood,* 465 Mich 432, 436; 636 NW2d 127 (2001). So with respect to fines, the non-delegation doctrine would prevent any attempt by the Legislature to delegate to the judiciary the authority to decide what maximum and minimum penalties should be imposed for a given crime. *Id.* at 437 ("It is, accordingly, the responsibility of a circuit judge to impose a sentence, but only *within the limits* set by the Legislature."). This background principle limits the phrase "[a]ny fine" to those authorized by law.

But this case is about court costs, not fines, and delegating authority on the narrow issue of reasonable court costs is quite different from delegating the authority to establish criminal penalties. The non-delegation doctrine does not prohibit narrow delegations of discretionary authority: "If [a legislature] delegates a relatively narrow task, it need not cabin the actor's discretion as to how to accomplish that task, whereas if it delegates a broad duty—for example, setting

national air quality standards—it must provide 'substantial guidance.'" *United States v Martinez-Flores*, 428 F3d 22, 27 (CA 1, 2005); see also *Mistretta*, 488 US at 372 ("In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."); *Michigan v US EPA*, 213 F3d 663, 680 (CA DC, 2000) (observing that courts often allow delegation "precisely on the ground of the narrower scope within which the agencies could deploy that discretion"). And as this Court has explained, "'the separation of powers principle, and the nondelegation doctrine in particular, do not prevent Congress [or our Legislature] from obtaining the assistance of the coordinate Branches.'" *Taylor v Smithkline Beecham Corp*, 468 Mich 1, 8; 658 NW2d 127 (2003), quoting *Mistretta v United States*, 488 US 361, 371 (1989).

The discretionary authority to impose reasonable costs is not the type of "sweeping delegation of legislative power" that undermines the separation of powers. *ALA Schechter Poultry Corp v United States*, 295 US 495, 539 (1935). In *Schechter*, for example, Congress attempted to "authorize[] the President to approve 'codes of fair competition,'" authority that would have allowed him to impose "codes of laws" on "a host of different trades and industries." *Id.* at 521–522, 529, 539. The situation in *Schechter*—the last time the U.S. Supreme Court struck a law down on non-delegation grounds—is a far cry from the narrow scope here of setting a reasonable amount of court costs at sentencing, an issue the judiciary is best situated to answer in the first place.

Simply put, delegating the power to define criminal penalties, including fines, would be delegating a core legislative power with a sweeping scope—the entire range of criminal law. But the narrow delegation actually at issue in this case—setting a reasonable amount of court costs—is "a relatively narrow task," *Martinez-Flores*, 428 F3d at 27, that is of a reasonable "extent and character" that reflects "common sense and the inherent necessities of the government co-ordination." *Mistretta*, 488 US at 372. So while there may be situations where the non-delegation doctrine serves important separation-of-powers principles, the doctrine does not extend so far as to eliminate all grants of discretion on minor matters.

II. The Sixth Circuit's recent decision in *Prewett v Weems* reinforces the principle that this Court should not pencil into a statute a limitation the Legislature expressly included in another statute.

The fact that MCL 771.3 includes the precise limitation that Cunningham seeks to insert into MCL 769.1k—that "costs shall be limited to expenses specifically incurred in prosecuting the defendant"—militates against inserting that limitation into the latter statute. The Sixth Circuit's decision this week in *Prewett v Weems*, __ F3d __, 2014 WL 1408809 (CA 6, Apr 14, 2014), reinforces this point. "Omitting a phrase from one statute that Congress has used in another statute with a similar purpose 'virtually commands the . . . inference' that the two have different meanings." *Id.* at *5, quoting *United States v Ressam*, 553 US 272, 276–277 (2008). "When Congress opts not to include a well known and frequently used approach in drafting a statute, the courts should hesitate to pencil it back in under the guise of

interpretation." *Id.* Applying that rule here precludes Cunningham's interpretation and requires affirmance.

Respectfully submitted,

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