STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VIRGIL SMITH,

Defendant-Appellee.
_____/

Supreme Court No. 156353

Court of Appeals No. 332288

Wayne Circuit Court
No. 15-005228-01-FH

**The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.**

# ATTORNEY GENERAL'S BRIEF IN SUPPORT OF THE WAYNE COUNTY PROSECUTOR'S OFFICE

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## TABLE OF CONTENTS

## INDEX OF AUTHORITIES

Page

**Cases**

**Statutes**



**Other Authorities**



**Rules**



**Constitutional Provisions**

## STATEMENT OF QUESTIONS PRESENTED

In its September 11, 2017 order, the Court requested that the parties address the following three issues in their supplemental briefing:

1. Whether a prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office violates the separation of powers, see Const 1963, art 3, § 2; see also *United States v Richmond*, 550 F Supp 605 (ED NY, 1982), or is void as against public policy, *Davies v Grossmont Union High Sch Dist*, 930 F2d 1390, 1392–1393 (CA 9, 1991).

   Appellant's answer: No.

   Attorney General's answer: No.

   Appellee's answer: Yes.

   Court of Appeals' answer: Yes.

2. Whether the validity of the provision requiring the defendant to resign from public office was properly before the Court of Appeals since the defendant resigned from the Michigan Senate after the Wayne Circuit Court had struck that part of the plea agreement and, if so, whether it violates the separation of powers or is void as against public policy.

   Appellant's answer: Yes, and no.

   Attorney General's answer: Yes, and no.

   Appellee's answer: Yes, and yes.

   Court of Appeals' answer: Yes, and yes.

3. Whether the trial court abused its discretion by voiding terms of the plea agreement without affording the prosecutor an opportunity to withdraw from the agreement, see *People v Siebert*, 450 Mich 500, 504 (1995).

   Appellant's answer: Yes.

   Attorney General's answer: Yes.

   Appellee's answer: No.

   Court of Appeals' answer: No.

## INTRODUCTION

The decision whether to resign from office after having engaged in misconduct or criminal activity is ultimately a decision for the office holder himself. While the Constitution has created parameters for removal, a decision to resign is something different. It is a voluntary decision, where the defendant gives up a right that belongs to him, not a power that belongs to a branch of government.

For that reason, the prosecution may ask an official, like Virgil Smith, to resign as a part of plea agreement. A resignation does not operate substantively as a removal. Sometimes an official engages in conduct that disgraces himself and his office, and resigning may serve as an act of humility, like a public apology, to repair some of the damage done. Prosecutors often ask a candidate to resign, and even to refrain from holding office during the period of probation, as a condition of a plea in reducing some of the possible punishment. This is done for the good of the community, corresponding to the scandal caused by the misconduct.

Just this past summer, the federal government included the resignation of Seth Williams, the former district attorney for Philadelphia, in his plea for corruption. The conditioning of a reduced sentence on this act does not violate the separation of powers. And it is good policy. It has been successfully implemented many times in the past, and the only cases suggesting that it is improper are not persuasive, are not binding on this Court, and are decades old. This Court should issue a decision, acknowledging the legitimacy of such a plea as was offered and accepted by former Senator Virgil Smith.

The Attorney General supports the Wayne County Prosecutor's Office on each of the Court's questions for the following reasons:

*First*, the prosecutor's inclusion of a provision in a plea agreement that prohibits a defendant from holding public office does not violate the separation of powers or public policy. A defendant waives *his* individual, constitutional rights, not rights belonging to the courts, in pleading guilty, and the public is not harmed – but rather assisted – by the prosecution's authority to offer these pleas.

*Second*, requiring the defendant to resign from public office does not violate the separation of powers and is not void as against public policy for the same reasons. The authority to resign or to decide to refrain from running from office is up to the official. Like William Tecumseh Sherman, he can decide "if nominated, I will not run; if elected, I will not serve." The fact it is the individual's choice is what gives value to the decision to resign, because the law does not require it. Smith relinquished something he did not have to forgo for the good of the community.

*Third,* the trial court abused its discretion by voiding terms of the plea agreement without giving the prosecutor an opportunity to withdraw from the agreement. Giving the prosecutor an opportunity to withdraw is the traditional rule, and it should have governed here. The trial court cannot accept piecemeal parts of the agreement and reject others. Unlike the prior two issues, this one has real separation-of-powers concerns: a court cannot choose which terms to offer in a plea agreement, because that discretion belongs to the executive-branch prosecutor. The trial court should have accepted the plea here.

## STATEMENT OF FACTS AND PROCEEDINGS

The Attorney General agrees with the statement of facts and proceedings as outlined by the Wayne County Prosecutor's Office.

## ARGUMENT

### I. The plea offer asking Virgil Smith to resign and not hold public office while on probation did not infringe on the separation of powers and did not violate public policy.

The holding of elected office in this country is a great honor. It is one of the hallmarks of democracy that we elect officials to reflect our views and embody our ideals. When a public official, like a member of the state senate, commits a crime, it causes a scandal. The harm is broader than just that of the injury to the victim; the entire community is diminished because those that the community has upheld as an example of civic virtue have failed to meet those standards. Holding office is a privilege, but it also comes with responsibilities.

For that reason, a public official's decision to voluntary resign from office in response to that person's transgression makes some repair to the wrongdoing done to the community. For this case, the direct victim of State Senator Virgil Smith's crime was his former wife. It was a serious crime. But the crime also harmed the community because of the public nature of his office. The community was scandalized by his conduct. Thus, his decision to resign from office – *when the law did not require him to do so* – was a significant gesture, one that rightly entitled him to a sentencing consideration as a matter of fairness. It is different in kind than removal from office and does not violate the separation of powers.

### A. The request to resign does not infringe on the Constitution's creation of qualifications, nor on the power conferred to remove.

The Wayne County Prosecutor's Office and the dissent in the Court of Appeals below have persuasively explained why the paucity of precedent does not govern here. The only two reported relevant cases are not binding and are not persuasive. See Wayne Co's Br, pp 16–18; slip op, pp 1–3 (Riordan, J., dissenting), distinguishing *Leopold v States,* A3d 860 (Md App 2014); *United States v Richmond,* 550 F Supp 605 (ED NY 1982). This amicus brief will not reiterate these points.

Instead, this brief seeks to emphasize the ways in which the Michigan Constitution provisions establishing qualifications for state senators, see art 4, § 7; art 11, § 8, and creating the ability to expel them, see art 4, § 16, are not prejudiced here. The same is true with respect to the limitations on the governor's powers of removal. See art 5, § 10. These provisions serve a distinct function from resignation; they provide those branches of government a legal mechanism for forcing someone from office. But one key to Senator Smith's resignation was the fact that it was *not* required by law. He was giving something up that he did not have to give up.

For the qualifications, the Michigan Constitution forbids a person who has been "convicted of subversion" or who has been "convicted of a felony involving a breach of public trust" (within the preceding twenty years) from being eligible to serve in either house of the Legislature. Const 1963, art 4, § 7. In 2010, the people included an additional qualification, forbidding a person from holding any state or local office if that person were convicted in the last 20 years of a "felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity" while in office. Art 11, § 8.

These qualification provisions are notable for what they do not exclude. A person convicted of a heinous murder or a vicious rape is not disqualified. Instead, the qualifications in the Constitution relate to criminal dishonesty that occurred while in public office. The 2010 addition of § 8 of article 11 to Michigan's constitution substantively reflected this criminal-dishonesty standard and expanded it to include all elected officials, including those running for "local elective office[s]." See, e.g., *Paquin v City of Ignace,* ___ Mich App ___, ___; 2017 WL 4700045, *3 (released October 19, 2017) (applying article 11, § 8 to a person running for a local city council).

The idea that someone who has violated the public trust should not be able to hold office is a straight-forward one. If someone has used his office to act with criminal dishonesty in the past, he might well engage in dishonest practices that will frustrate the will of the body. It does not guarantee that only virtuous persons will hold office, and it does not seek to do so. That question is for the people who elect the officers. Cf. 2 Official Record Constitutional Convention 1961, April 27, 1962 pp 2928–2929 ("I think that there is also the fact that if people, the voters, want to select somebody, that this is a matter of public knowledge, that the voters should have that opportunity.").

Nothing in the actions of the Wayne County Prosecutor in asking Senator Smith to resign and to refrain from holding office undermines these constitutional provisions. These requests are not an effort to create new qualifications. They are also not an effort to protect the Legislature from Senator Smith's dishonesty or deceit.

Rather, in any circumstance in which a public official is requested to resign, the request to resign reflects the reality that the official has not just harmed the specific victim, but also the entire community. By resigning, the official attempts to redress that harm.

The same is true for removal: the plea process here does not displace or intrude on the Legislature's authority to remove someone. Under § 16 of article 4, the Legislature ("Each house") may "with the concurrence of two-thirds of all of the members elected . . . expel a member." The Legislature is given plenary authority to remove a member. See OAG, No. 5295, p 416 ("the members of the House of Representatives have plenary, or full and complete, jurisdiction to determine that expulsion proceedings are in order"). Nothing in law prevents the state House or Senate from expelling a member for committing a felony if that is vote of the body. And as for the governor's authority, the governor is expressly *not* given the authority to remove a member of the Legislature. Const 1963, art 5, § 10 ("[The governor] may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein . . . except legislative").

In any event, there is a fundamental difference in the purpose and function of expelling a member for committing a felony, and a public official who *voluntarily* agrees to relinquish that office in an effort to repair the harm caused by that public official's misconduct. Viewing this voluntary step as a separation-of-powers issue confuses individual rights with the powers of the separate branches; the fact that a prosecutor (who is part of the branch of government with the removal power) suggests stepping down is no more a separation-of-powers problem than it would be

for a member of Congress (which also has a removal power) to urge a president to resign.

The voluntariness of the act is one of the central components of the resignation. Resignation is more than just an admission of wrongdoing, which itself is a recognized good in law. See *Maryland v Shatzer,* 559 US 98, 108 (2010) ("Voluntary confessions are not merely a proper element in law enforcement they are an unmitigated good, essential to society's compelling interest in finding, convicting, and punishing those who violate the law.") (internal quotes omitted; citations omitted). Resignation recognizes that the harm extends to the community itself, justifying a recompense that corresponds to that harm. In the same way that a sentencing court may require a defendant to make a public apology to the community generally, see *United States v Clark,* 918 F2d 843, 848 (CA 9, 1990) (requiring police officers who engaged in perjury to make a public apology), overruled on other grounds, *United States v Keys,* 95 F3d 874 (CA 9, 1996) (en banc), this action is a public statement, a form of an apology, in which here the public officeholder agrees to accept the loss of office as an acknowledgment of the greater harm caused by his crime. As a voluntary act, it is act of humility.

It is also common. Just this past summer, the Philadelphia District Attorney, Seth Williams, pled guilty to financial corruption and, as part of his plea with federal authorities, he agreed to resign from office. See *United States v Williams,* No. 17-137 (ED Pa) "Guilty Plea Agreement," signed on June 29, 2017, p 6 ("The defendant states that he shall resign as the District Attorney for the City and County of Philadelphia, effective immediately upon the entry of his guilty plea.").

The examples are manifold, and they are not limited to executive offices, but include legislative resignations.[1] Likewise, it is not uncommon for a public official to resign and then plead guilty, asking the court to consider the resignation.[2]

The assertion that the prosecution might use this power to seek to threaten potential opposing candidates with criminal action and obtain a promise not to run is unwarranted. Contra slip op, p 8 ("[I]t is not hard to extend the prosecution's actions in this case to reach a situation where a prosecutor in the future might go on a fishing expedition against a political opponent, threaten to charge with serious felonies, and then provide a 'voluntary' outlet from that possibility by giving up their position in the Legislature and agreeing not to run in the future."). (Servitto, J.).

Such a claim is unsupported. And the claim does not create a font of authority to interfere with prerogatives that the Constitution has conferred on county prosecutors and the Attorney General. See Const 1963, art 7, § 4, and art 5, § 21. But the proper response to any nefarious attempts is not an expansion of judicial authority, but democracy. The truth will come out, and the people can be trusted to defeat anyone manipulating a prosecution in an attempt to sideline opponents.

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[1] *Tampa Bay Times,* November 1, 2017 ("Democratic Rep. Daisy Baez has officially resigned her seat in the Florida Legislature as part of her agreement to plead guilty to a misdemeanor perjury charge in a case over her legal residency.") The link may be found at the following web address: http://www.tampabay.com/florida-politics/buzz/2017/11/01/miami-lawmaker-to-resign-plead-guilty-in-criminal-case-over-residency/ [last accessed on December 6, 2017.]

[2] *The Post and Courier,* September 1, 2017 ("Rep. Jim Merrill pleads guilty to misconduct, agrees to assist investigators in Statehouse corruption probe"). The line may be fund at the following web address (last accessed on December 6, 2017]): https://www.postandcourier.com/news/rep-jim-merrill-pleads-guilty-to-misconduct-agrees-to-assist/article_8bec18cc-8e85-11e7-9e9d-27efad3582f1.html

Moreover, the analysis that the resignation and the decision to refrain from running from office is not genuinely "voluntarily," see slip op, p 8 (Servitto, J.), is rebutted by the fact the courts routinely uphold as voluntary pleas that are induced based on sentence reductions and the dismissal of charges. See, e.g., *People v Moore,* 129 Mich App 354, 356–357 (1983). While it might have been even more laudable if Senator Smith had resigned in the absence of this plea offer, it is not without merit that he agreed to do so here. The public is better off having prosecutors urge resignation than having a public official engage in serious criminal acts, refuse to admit wrongdoing, and cling to public office. This Court should confirm the ability of the prosecution to assist in vindicating the interests of the community by reversing the decision below.

### B. It is good policy to allow a public official who has disgraced himself to make amends by resigning from office and agreeing to not hold office during the period of probation.

The concept of giving scandal is an old one, but the effort to combat it continues to play an important role in ensuring the safety and welfare of the community. The corollary virtue is good example. The prosecution exercises its discretion in making plea offers consistent with its efforts to foster a respect for law.

As already noted, it is valuable to have a public official to admit wrongdoing and resign from office in exchange for a reduced plea play; this step makes amends for the bad example the crime provided and for the community's disappointment in the role model's poor conduct.

And there is nothing unusual in asking a defendant to waive rights in pleading guilty, such as the right to a jury trial, and to forgo certain constitutional rights during the period of probation, such as the right to carry a firearm, see MCL 750.224f (felon cannot carry a firearm for three years), or maybe even the right to be free from suspicion-less searches if reasonably tailored to a defendant's rehabilitation, see *People v Hellenthal,* 186 Mich App 484, 486 (1990). As a plea, it is the defendant's decision to waive individual rights.

The primary error in the lower court's policy analysis is the conclusion that such a plea "diminishes the nature and purpose of the public office and reduces it to a simple tool used solely to better or worsen an officerholder's criminal position." Slip op, p 7 (Servitto, J.). This misunderstands the point. The plea process is not designed to maximize outcomes for criminal defendants. That is too cynical a view.

Instead, the process is one in which the prosecution attempts to achieve a just result for the specific victim, the community, and for the defendant himself. And while some criminal defendants merely seek to protect themselves, it is still the case where an offender who expresses real remorse, true contrition, this expression of regret helps the victim and the community recover from the crime. The prosecution's decision to ask the public official to resign is not a political act, but one that is penological. It is a consideration of justice and it serves the community.

## II. If a trial court wishes to reject one of the prosecution's terms, then it must reject the entire plea agreement; the judiciary cannot modify the terms and accept an agreement the executive never offered.

Under well-established case law, where the prosecution reduces the charge or offers to dismiss one or more of the other charges in exchange for a plea along with the other conditions, the trial court has only one of two options, either accept the whole thing or reject the plea. See *People v Siebert,* 450 Mich 500, 509–516 (1995) (Boyle, J., for the majority). It does not have the opportunity to second-guess the plea-offer to modify the terms and accept the plea. That general point is not really in dispute here.

Nonetheless, the Court of Appeals affirmed the trial court's refusal to enforce the terms – and modified them – while holding the prosecution to its dismissal of the felony firearm charge for two reasons, neither of which is persuasive.

***First***, the Court of Appeals concluded that the term was unconstitutional and violated public policy. See slip op, pp 8–9. The Attorney General disagrees as argued above. But even if it were the case that the conditions were improper, the right remedy would not have been to accept the dismissal of the felony firearm charge without enforcing its terms, but to reject the plea entirely. The refashioning of the plea's terms violates the separation of powers. It invades the prosecution's control over plea-bargaining, as this Court said in *Siebert*:

> Therefore, the trial court's exclusive authority to impose sentence does not allow it to enforce only parts of a bargain. A court may not keep the prosecutor's concession by accepting a guilty plea to reduced charges, and yet impose a lower sentence than the one for which the prosecutor and the defendant bargained. *Accepting a plea to a lesser charge over the prosecutor's objection impermissibly invades the constitutional authority of the prosecutor.* [*Siebert,* 450 Mich at 511 (emphasis added).]

This is no small matter. The Court of Appeals majority cited the fact that the Wayne County Prosecutor's Office discontinued making any offers for some time to criminal defendants in cases pending before that same circuit court judge. See slip op, p 7 n 2. But that point cuts just the other way than the lower court contends. The prosecution's response underscores the importance it places on protecting control of plea terms. It is a core prosecution function, and Wayne County is right to jealously guard its authority to make plea offers. This Court's prediction proved exactly true here, recognizing that "prosecutors will be more reluctant to offer these bargains" if the courts invade their province. *Siebert,* 450 Mich at 515. Justice Boyle hit the nail on the head.

The assertion from the Court of Appeals that it was bound to interpose itself in the plea-bargain process to avoid "send[ing] the wrong message" because prosecutors "will [have] little impetus to stop the practice," slip op, p 9, shows the wrong understanding of prosecutors in a basic way. The Attorney General, the county prosecutors in Michigan, and the law enforcement community more generally are duty-bound to uphold the federal and Michigan constitution. If the Court of Appeals had been correct that the plea terms were improper, its statement of that point in a published opinion would have been all that would be necessary to remedy the problem. The contention that the prosecution will callously ignore this decision is not well taken. That point alone merits an opinion from this Court clarifying the principle. If a plea term is improper, the right remedy is to reject the plea, not change its terms.

***Second,*** the Court of Appeals concluded that Smith's interests would be prejudiced because the prosecution "now knows that [1] defendant is willing to make a plea, [2] [he] revealed the location of the weapon . . . , and [3] [he] has since voluntarily resigned his state Senate seat." Slip op, p 9. The analysis here fails to recognize the limited role courts play in this arena.

The ability to control the plea offer and its terms ultimately rests with the prosecution. See *Siebert,* 450 Mich at 510 ("Were a court allowed to maintain its acceptance of the plea over the prosecutor's objection, it would effectively assume the prosecutor's constitutional authority to determine the charge or charges a defendant will face."). It is an executive function. The judiciary's function is different, and the court retains the authority to reject a plea offer, even if there is no impropriety in the offer. *Id.* at 509 ("In the context of plea and sentence agreements, the court's interest in imposing a just sentence is protected by its right to reject any agreement, except that which invades the prosecutor's charging authority."). These are separate roles.

As for the listing of three things that cannot be undone here if this were an improper plea offer, none justifies enforcing the agreement without honoring its terms. The idea that Senator Smith is harmed by the prosecution's knowledge that he would be willing to plead guilty is mistaken. The withdrawn plea could not be used against him at trial. *People v Russell,* 149 Mich App 110, 116 (1985), citing *People v Street,* 288 Mich 406, 408 (1939) ("when a guilty plea is vacated[,] it is a nullity"); see also MRE 410(1).

As for the information regarding the weapon that would not have been otherwise known, another possible remedy was available – suppression. At the very least, the prosecution should have had a choice to either allow the plea to go forward as modified, or acquiesce to the suppression of the gun and to allow the prosecution to go forward. It would be analogous to the fruit of the poisonous tree. See, e.g., *People v Frazier,* 478 Mich 231, 247 (2007).

And, last, as for the resignation itself, that is a loss that would have to be borne by Senator Smith if this Court somehow agreed that the plea terms were improper. Before this case, nothing in Michigan would suggest that the plea conditioned on a resignation from public office was improper. While this has occurred out-of-state in the last few months, see 7–8 above, there is significant precedent of it in Michigan, the most notable being the plea and resignation of former Detroit mayor, Kwame Kilpatrick in 2008.

Thus, in the absence of bad faith, it is hard to see the justification for providing a windfall for Senator Smith for a plea that any fair-minded commentator would believe to have been authorized by Michigan law. Where the courts have stepped in and enforced an agreement over the objection of the prosecution, they have done so where they have concluded the prosecution acted in bad faith. See, e.g., *People v Jackson,* 192 Mich App 10, 16 (1991) (describing the prosecution's conduct as "reprehensible"). Nothing like that is at issue here. The only options for the court below were to accept the plea or reject it, but not modify it. This Court should reverse.

## CONCLUSION AND RELIEF REQUESTED

This Court should reverse the decision below and reinstate the terms of Senator Smith's plea.

Respectfully submitted,

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