

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,**

v

No. _____

**VIRGIL SMITH,
Defendant-Appellee.**

**Court of Appeals No. 332288
Circuit Court No. 15-005228-01-FH**

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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JUDGMENT APPEALED AND RELIEF SOUGHT

The People apply for leave to appeal from the August 22, 2017, opinion of the Court of Appeals affirming the circuit court.¹ This case presents two jurisprudentially significant issues: (1) whether provisions of a plea agreement requiring an elected official to resign from office and not hold office during the probationary period violate the separation of powers clause or are against public policy, and (2) whether a circuit court may decline to vacate a plea on the prosecutor's motion after the court voided provisions of a plea agreement.

The People and defendant Virgil Smith entered into a plea agreement whereby the People would dismiss charges of felonious assault, felony-firearm and domestic violence in exchange for defendant pleading guilty to malicious destruction of personal property, defendant resigning his position as State Senator and not holding elective or appointed office during his probation, defendant serving an agreed-upon sentence of five years of probation with ten months in jail (no early release), and defendant meeting other conditions of probation. The circuit court accepted the plea, and sentenced defendant to five years of probation with the first ten months in jail. Only after imposing that term of probation and incarceration did the court question the parties' agreement regarding the resignation and bar-to-office provisions. The court struck the provisions as violative of the separation of powers clause, and then denied the People's motion to vacate the plea, reasoning that vacating the plea would violate public policy.

The Court of Appeals and circuit court erred in holding that the plea agreement provisions violated the separation of powers. An elected official's voluntary decision not to hold office neither infringes on the Legislature's authority to remove an elected official from office

¹ The Court has jurisdiction over the People's timely application for leave to appeal from the Court of Appeals' August 22, 2017, opinion (Appendix A). MCR 7.303(B)(1); MCR 7.305(C)(2).

nor hinders a citizen's right to choose among candidates who voluntarily seek public office. An official's voluntary offer to resign and not hold office as part of plea bargaining negotiations, and a prosecutor's decision to include those terms in a plea offer, in no way forces an elected official to agree to those terms. Only forced resignation would violate the separation of powers; an official's choice to exercise his or her right *not* to hold office does not.

The second jurisprudentially significant issue does involve a violation of the separation of powers doctrine in determining whether a circuit court has discretion to deny a prosecutor's motion to vacate a plea after the court voids portions of a plea agreement. A circuit court must grant the motion to vacate because it otherwise will invade the charging authority of the prosecutor by imposing a different plea agreement on the People than the one the People had negotiated. Neither a court's desire to "send a message" to prosecutors nor the fact that the remedy may negatively affect a defendant who benefitted from the error justify a court's violation of the separation of powers.

This Court must address these issues and remedy the errors of the circuit court and the Court of Appeals. This case meets this Court's threshold for review in that the issues have significant public interest and the State is a party to the action,² the issues involve legal principles of major significance to the state's jurisprudence,³ the Court of Appeals' decision conflicts with this Court's decisions, and the Court of Appeals' decision is clearly erroneous and will cause material injustice.⁴ The People therefore request that the Court either grant the People's application or peremptorily reverse the Court of Appeals.

² MCR 7.305(B)(2).

³ MCR 7.305(B)(3).

⁴ MCR 7.305(B)(5).

STATEMENT OF QUESTIONS PRESENTED

I

Only the actual exercise of powers of another branch of government can violate separation of powers. Defendant voluntarily agreed to resign from office and not hold office during the term of probation as part of a plea agreement. Do provisions of a plea agreement under which an elected official voluntarily resigns his public office and agrees not to hold public office violate separation of powers or public policy?

The People answer: “NO.”

Defendant would answer: “YES.”

The Circuit Court answered: “YES.”

The Court of Appeals answered: “YES.”

II

A prosecutor has a right to withdraw from a plea agreement when its conditions are not met. The Court of Appeals held that the circuit court did not abuse its discretion by refusing to vacate the plea after it struck provisions of the plea agreement. Did the Circuit Court and the Court of Appeals err and infringe on the prosecuting attorney’s charging authority when the courts did not vacate the plea?

The People answer: “YES.”

Defendant would answer: “NO.”

The Circuit Court answered: “NO.”

The Court of Appeals answered: “NO.”

STATEMENT OF FACTS

This case arises from the assault by defendant Virgil Smith, at the time a State Senator, targeting his ex-wife, during which defendant fired shots from an assault weapon at his ex-wife, at her car, and into the air. 6/25/15, 50-51, 56-65. The People charged defendant with felonious assault,⁵ domestic violence,⁶ malicious destruction of personal property (\$20,000 or more),⁷ and felony-firearm.⁸

In February 2016, the People and defendant entered into a plea agreement whereby the People would dismiss the charges of felonious assault, felony-firearm and domestic violence in exchange for defendant pleading guilty to malicious destruction of personal property, defendant resigning his position as State Senator and not holding elective or appointed office during his probation, defendant serving an agreed-upon sentence of five years of probation with ten months in jail and no early release, and defendant meeting other conditions of probation.⁹

Defendant pleaded guilty on February 11, 2016.¹⁰ The terms of the plea, which were placed on the record, included that defendant agreed to “resign the position of State Senator” and agreed that he “cannot hold elective or appointed office during the full pendency of his probation.” 2/11, 6. During a lengthy discussion with the attorneys, the trial court expressed concern “whether or not public officials should be sanctioned or punished differently” and pondered the weight to give that factor in determining a reasonable sentence. 2/11, 14-15. In response, defense counsel stated, “Mr. Smith is resigning his office” and “cannot run for an

⁵ MCL 750.82.

⁶ MCL 750.81.

⁷ MCL 750.377a.

⁸ MCL 750.227b.

⁹ Settlement Offer and Notice of Acceptance, attached as Appendix F.

¹⁰ 2/11, 35-45. Transcripts are cited throughout this application by month/date of proceedings and page numbers.

elective office again.” He added that “[t]he idea that Mr. Smith is being treated differently because he’s a public official given those facts should be certainly diminished.” Counsel also stated that defendant arguably was being “treated more harshly,” and that possibly “he should be.” 2/11, 15-16.

The court inquired whether incarceration in prison, not the jail, which is funded by the county, would be more appropriate. 2/11, 19-24. The court also expressed a desire that the parties submit sentencing memoranda to assist the court in determining whether the agreement was reasonable. 2/11, 28-35.

Defendant elected to proceed with the plea, and during the plea colloquy stated that he accepted the plea agreement. 2/11, 35. The court recited the agreement, including the resignation and bar to holding office terms, and confirmed that defendant understood the terms. 2/11, 37. The court then accepted defendant’s plea of guilty. 2/11, 45.

The court did not indicate that it was concerned regarding the validity of the provisions requiring that defendant resign from office and not hold elective or appointive office during the term of his probation. 2/11, 3-52.

Sentencing occurred on March 14, 2016. The court acknowledged receipt of the parties’ joint sentencing memorandum, defendant’s sentencing memorandum, and defendant’s objections to the presentencing investigation report. 3/14, 5, 9. The court then addressed the objections, as well as issues involved in calculating the sentence guidelines range of ten to twenty-three months. 3/14, 6-37. The victim addressed the court, and the People requested that the court follow the sentence agreement. 3/14, 40-44. Defense counsel also requested that the court follow the agreement, stating “this is a case [where] you should rely upon [the fact that Assistant Prosecutor] Lindsey and I have reached this agreement in a fair and equitable manner and the

People of the State of Michigan are served by this sentence. He's removed from his office as State Senator. I ask you to approve the agreement." 3/14, 49. Defendant declined the opportunity to speak. 3/14, 49.

After an extended discussion of the charges that would be dismissed and the agreed-upon jail term, the court sentenced defendant to five years of probation with the first ten months in jail and no early release. 3/14, 61. The court then inquired about the drug testing provision because defendant had a medical marijuana card. The assistant prosecutor indicated that she would have to "consult" regarding whether the People would move to set aside the plea if defendant would not be required to submit to drug testing.¹¹ 3/14, 62-64.

The court also challenged the provision that defendant resign from office. Defense counsel explained that "it was an additional requirement not set forth in any statute, not set forth in any constitution, that we had to – that we decide[d] to accept in order to reach an agreement." 3/14, 69. The court inquired whether, putting aside the sentencing agreement, defendant would have to resign because of his conviction. The prosecutor responded that defendant would not be forced to resign. 3/14, 70. The court then opined that the constitution "reserves to the senate to decide whether or not to expel a member." 3/14, 72.

The court discussed three opinions from other jurisdictions¹² before opining that defendant did not have the "right" to resign as part of a plea:

Who does – does Mr. Smith have the right to agree to give up his seat in the senate in exchange for this guilty plea? Does he have the – is that his constitutional right? I don't think so. I think that belongs to his constituents, the

¹¹ The court ultimately allowed testing for marijuana, but provided that defendant would be in compliance if the drug was prescribed by a licensed physician. 3/28, 28-29.

¹² *United States v Richmond*, 550 F Supp 605 (ED NY, 1982); *Leopold v Maryland*, 216 Md App 586; 88 A3d 860 (Md Ct App, 2014); *Powell v McCormack*, 395 US 486; 89 S Ct 1944; 23 L Ed 2d 491 (1969).

people that elected him, or I should say really his constituents, everyone who can vote in that district regardless of whether they voted for him or not.

It's along that right in the constitution about his being expelled belongs to them. They can choose to vote for him or they can choose not to vote for him. The other way that someone can be expelled is they can be expelled pursuant to the constitution with a two thirds vote of the senate. [3/14, 76-77]

The court determined that it would be "illegal" to impose conditions that defendant resign and not hold office because it would violate the separation of powers clause. 3/14, 77-78. The court acknowledged that "someone could resign," but believed "this type of agreement is fraught with danger if this Court were to allow it and his voluntary consent to this doesn't cure that because he doesn't have that right to resign in exchange for this sentence agreement." 3/14, 78-79. The court believed the agreement was against public policy because it involved "a technique that has the possibly of executive or prosecutorial domination of members of the state legislator (sic) through forced resignation." 3/14, 79. The court determined that that provision of the agreement was "void." 3/14, 80.

When the court inquired whether the prosecutor was asking to set aside the agreement, the prosecutor responded that she would have to consult with her office. 3/14, 82-83. The court, however, did not wait for the prosecutor's request to withdraw the agreement. It stated that "it would not be in the interest of justice for me to allow this plea to be withdrawn if the prosecutor were to make that motion." 3/14, 83.

In an order entered on March 14, 2016, the court held that the portions of the plea agreement requiring defendant to resign and not hold elective office were "an unconstitutional interference by the Prosecutor with the legislative branch of government and with the rights of

the defendant's constituents." Rather than voiding the entire plea agreement, the court held that the plea remained valid.¹³

The People moved to vacate the plea under MCR 6.310(E) because defendant had not resigned from the Senate, arguing that nothing prevented defendant from complying with the agreement's terms, even if the court was reluctant to enforce them.¹⁴

The court denied the People's motion at a hearing held on March 28, 2016:

Enforcement of the plea agreement without the offending portions serves the interest of justice. Vacating the plea bargain would not serve the interest of justice for the reasons stated on the record here today, for the reasons stated on the record on March 14th, for the reasons stated in its order declaring void portions of the plea agreement and for the reasons stated in this opinion and order denying the prosecutor's motion to vacate the plea.

Vacating the plea bargain would, in fact, harm the interest of justice. Vacating the plea would violate the fundamental principle that it is the right of the People to elect whom they chose to elect for office by allowing the prosecutor to pressure a member of the legislative branch to resign or face prosecution and likely imprisonment.

Vacating the plea would violate the separation of powers set forth in the Michigan constitution where only the Senate can discipline or remove one of its members convicted of this type of crime by allowing the prosecutor to pressure a member of the legislative branch to resign and face prosecution and likely imprisonment.

Vacating the plea would violate public policy by allowing the prosecutor to dominate the legislative branch of government with the threat of forced resignation.

In granting the prosecution's motion to vacate this plea would compromise the Court's integrity by involving it in an act that violates public policy and offends the constitution. It does not matter that Defendant voluntarily agreed to this portion of the plea agreement because these constitutional protections exists (sic) not for the Defendant's personal benefit, but to protect the rights of the Defendant's constituents and the right of the legislative branch of government.

The prosecutor's motion to vacate the plea is denied. [3/28, 23-24.]

¹³ Appendix D.

¹⁴ Motion to Vacate Plea.

In an opinion and order entered that day, the court reasoned that “[e]nforcement of the plea agreement without the offending portions serves the interests of justice” and that vacating the plea “would violate the fundamental principle that it is the right of the people to elect whom they choose to elect for office by allowing the prosecutor to pressure a member of the legislative branch to resign or face prosecution and likely imprisonment.” The court further explained that vacating the plea would “violate the separation of powers” and also “public policy by allowing the prosecutor to dominate the legislative branch of government with the threat of forced resignation.” The court believed that granting the motion to vacate the plea “would compromise the court’s integrity by involving it in an act that violates public policy and offends the constitution.”¹⁵

On April 1, 2016, the People applied for leave to appeal in the Court of Appeals, challenging the trial court’s March 14, 2016 order voiding the resignation and bar-to-office provisions of the plea agreement and the court’s March 28, 2016 order denying the People’s motion to vacate the plea.

On August 26, 2016, the Court of Appeals granted the People’s application for leave to appeal.

Upon plenary consideration, the Court of Appeals dismissed the People’s appeal as moot in an opinion issued on April 18, 2017.¹⁶ The Court observed that defendant had resigned his seat in the Senate on April 12, 2016 (eleven days after the People applied for leave to appeal), and “[h]e has also, it is believed, indicated an intention to not run for public office during his probationary period.” The Court determined that the appeal was moot because defendant

¹⁵ Appendix E.

¹⁶ *People v Virgil Smith*, unpublished per curiam opinion of the Court of Appeals, issued April 18, 2017 (Docket No. 332288) (Appendix B).

voluntarily resigned his seat and defendant “appears to have no intention of running for public office during his term of probation.”¹⁷ The Court declined to address the issues it deemed moot. The Court reasoned: “While the questions at issue are arguably of public significance and could conceivably recur, we believe that since the terms of the plea agreement appear to have been voluntarily satisfied this is not the appropriate case in which to resolve a constitutional question.”¹⁸

The Court then turned to the issue whether the trial court abused its discretion in denying the People’s motion to set aside the plea. The Court determined that the trial court had abused its discretion, but nevertheless declined to grant relief to the People. It concluded that permitting the People to renegotiate the plea would subvert the ends of justice and be fundamentally unfair because defendant had fulfilled the majority of the terms in the plea agreement.¹⁹

On April 26, 2017, the People moved for reconsideration, arguing that the Court of Appeals palpably erred in stating that defendant did not intend to run for public office during his probationary period when he had, in fact, filed to run for Detroit City Council.²⁰ The Court denied the People’s motion for reconsideration on June 2, 2017.²¹

The People applied for leave to appeal from the Court of Appeals’ decision, and in lieu of granting leave, this Court remanded the case to the Court of Appeals for consideration on reconsideration granted. The Court directed that the Court of Appeals render a decision by 5:00 p.m. on August 25, 2017.

¹⁷ *Id.*, slip op p 2.

¹⁸ *Id.*

¹⁹ *Id.* at 3.

²⁰ Appendix G.

²¹ Appendix C.

On remand, the Court of Appeals affirmed the decision of the circuit court in a published opinion.²² First, Judge Servitto, writing for the majority,²³ determined that the constitutional questions were not moot. Next, the majority determined that the resignation and bar-to-office provisions of the plea agreement were unconstitutional because the Constitution describes when an individual is no longer eligible to run for office and reserves for the Legislature the right to determine when a member should be expelled. The majority discounted the voluntary nature of a defendant's decision to enter into a plea agreement, opining that drawing a distinction between voluntary and involuntary action would allow the prosecution to do indirectly what it is prohibited from doing directly. The majority was persuaded by the reasoning of *Richmond* and *Leopold*, and concluded that the prosecution's offering of the plea agreement was an unconstitutional attempt to violate the separation of powers. The majority believed that allowing the prosecution to negotiate the provisions would permit "the possibility of threatened prosecution to be used for nefarious purposes" and could open the door to the use of prosecutorial power to "remove those from elected office that do not align with the executive's political preferences."²⁴ The majority believed that allowing the provisions would treat elected officials as a "second class of citizens" with an additional, uncommon benefit with which to bargain.

²² *People v Smith*, __ Mich App __; __ NW2d __ (Docket No. 332288; issued 8/22/17).

²³ Judge Karen Fort Hood did not participate on remand. Judge Michael Kelly joined Judge Servitto in forming the majority.

²⁴ In a footnote, the majority decried the prosecutor's temporary decision not to offer plea bargains in cases heard by the trial judge. The majority not only failed to recognize that a defendant has no constitutional right to a plea offer, *Weatherford v Bursey*, 429 US 545, 562; 97 S Ct 837; 51 L Ed 2d 30 (1977), but also ignored the reasonable justification for the prosecutor's decision. A prosecutor cannot offer plea bargains in cases before judges who believe they can rewrite plea offers and bind the prosecutor to new, different plea agreements. To do so would cede to the court the prosecutor's constitutional power. It is the authority of the prosecutor, not the trial court, to enter into plea agreements.

The majority then addressed the circuit court's decision to deny the People's motion to vacate the plea, and, contrary to its earlier opinion, concluded that the court did not abuse its discretion. The majority determined that refusing to vacate the plea served the administration of justice because to vacate the plea would "send[] the wrong message" and provide little impetus to stop the practice of including the provisions in plea agreements. The majority also opined that defendant had been placed in a worse bargaining position since the plea was accepted by the court because he had resigned and served his jail term.

Judge Riordan dissented, and would have held that the circuit court abused its discretion. Judge Riordan concluded that while imposing resignation, withdrawal, or forbearance on an elected official involuntarily would violate the separation of powers doctrine, the Constitution does not prohibit a person from voluntarily resigning or forbearing future public office. Judge Riordan also rejected the majority's assertion that the prosecutor would use his or her power of prosecution to remove an elected official for political reasons. Judge Riordan explained:

Such a blanket assertion is troublesome on many levels. First, it seeks to insulate publicly elected officials from a voluntary mechanism for the efficient resolution of charges of criminal wrongdoing. The majority then limits, without any legal justification other than a naked prediction of the impending demise of the electoral process and the imaginary specter of prosecutors running amok, the ability of a public office holder to freely enter into a plea agreement. Further, it implies that the judiciary in our state is incapable of recognizing instances of potential prosecutorial misconduct. In short, I do not find the majority's public policy doomsday hyperbole to be persuasive. In fact, anecdotally, over the past thirty-five years since the Brooklyn federal district court's dicta in *Richmond*, there have been many instances of elected officials voluntarily resigning office as a result of plea agreements and there is nothing I have found indicating that any of those resignations or forbearances have been the "product of an abuse of power by the executive branch."

Judge Riordan would have treated an elected official no differently than any other citizen.

Judge Riordan further opined that a defendant should have the opportunity to inform the court if he believes he has been coerced into accepting a plea, and that if the court voids terms of

the plea agreement, the prosecutor should be afforded the opportunity to reinstate criminal charges that were dismissed as part of the agreement. Judge Riordan therefore would have found that the circuit court abused its discretion in denying the People's motion to vacate the plea agreement.

The People now apply for leave to appeal from the Court of Appeals' decision.²⁵

²⁵ In compliance with the Court's order dated August 15, 2017, the People have filed this application before 5:00 p.m. on August 28, 2017.

ARGUMENT

I.

Only the actual exercise of powers of another branch of government can violate separation of powers. Defendant voluntarily agreed to resign from office and not hold office during the term of probation as part of a plea agreement. Provisions of a plea agreement under which an elected official voluntarily resigns his public office and agrees not to hold public office do not violate separation of powers or public policy.

Standard of Review

An appellate court reviews questions of law, such as whether a violation of the separation of powers has occurred, *de novo*.²⁶

Discussion

The Court of Appeals clearly erred in affirming the circuit court's decision to void the portion of the plea agreement that required defendant to resign from office and not hold office during the term of probation. While the Michigan Constitution sets forth a procedure for removing a State Senator *involuntarily*,²⁷ nothing in the Constitution prohibits an elected official from *voluntarily* resigning his position. Once elected, a person is not forced to serve a full term of office unless removed by voters or other mechanism provided by law. An elected official may choose not to serve by resigning from office and an official, like any other person, may choose not to hold office in the future. And, like any other defendant, an elected official who is charged with a crime can agree to resign from his employment and not be so employed in the future as

²⁶ *Hopkins v Michigan Parole Bd*, 237 Mich App 629, 635; 604 NW2d 686 (1999).

²⁷ Const 1963, art 4, § 16.

part of a plea agreement. Plea agreements containing those provisions do not violate the separation of powers clause or public policy.

The separation of powers doctrine is not violated when an elected official agrees to resign from office voluntarily and not hold office for a period of time in exchange for a reduction of criminal charges or other consideration. In negotiating such an agreement, the prosecutor is not infringing on the powers of the legislative branch. The prosecutor is not *forcing* the official to resign from office; instead, the official is *agreeing* to exercise his or her right—the right *not* to hold public office—to secure what he or she believes is a favorable resolution of criminal charges. Nor is a court infringing on the powers of the legislative branch in accepting a plea agreement that includes resignation as one of its terms. The court is not ordering an official to resign *involuntarily*; it is merely accepting an official’s agreement to resign *voluntarily*.

Const 1963, art 3, § 2 provides: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” The separation of powers doctrine “does not require so strict a separation as to provide no overlap of responsibilities and powers.”²⁸ “If the grant of authority to one branch is limited and specific and does not create encroachment or aggrandizement of one branch at the expense of the other, a sharing of power may be constitutionally permissible.”²⁹

A prosecutor’s entry into a plea agreement with a defendant where the defendant agrees to resign from the Michigan Senate, and a court’s acceptance of that agreement, do not involve the exercise of powers belonging to the Legislature. The prosecutor, a member of the executive

²⁸ *Judicial Attorneys Association v Michigan*, 459 Mich 291, 296; 586 NW2d 894 (1998).

²⁹ *Hopkins*, 237 Mich App at 636.

branch of government, is the constitutional officer who determines whether to prosecute and what charges to file.³⁰ That power carries with it the authority to enter into plea bargains,³¹ including sentence agreements.³² In contrast, the judiciary does not negotiate plea agreements, but has the authority to impose a sentence.³³ A court thus need not accept a plea agreement that provides “for the defendant’s plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation.”³⁴

The prosecutor’s and the court’s exercise of their respective powers to negotiate and accept a plea agreement that includes a provision that a member of the Legislature voluntarily will resign from office and not hold office for a specified term does not infringe on the Legislature’s authority to discipline members. The Michigan Constitution grants the House and the Senate the power to “expel a member.”³⁵ To expel is to force someone to leave by official action.³⁶ A senator or representative who voluntarily resigns is not being forced to leave the Legislature by official action. The legislator instead has agreed to leave voluntarily. That the decision is made during plea negotiations does not transform a voluntary action into a forced resignation. The legislator has no right to a reduced plea,³⁷ and is free to accept or reject a plea offer. Because the decision to resign from office and not hold office during the term of probation is the legislator’s alone, he or she is not being forced to leave by action of the prosecutor or the

³⁰ *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972).

³¹ *People v Jackson*, 192 Mich App 10, 14-15; 480 NW2d 283 (1991).

³² *People v Killebrew*, 416 Mich 189, 200-201; 330 NW2d 834 (1982), overruled on other grds, *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

³³ *Killebrew*, 416 Mich at 205.

³⁴ MCR 6.302(C)(3).

³⁵ Const 1963, art 4, § 16 (“Each house shall be the sole judge of the qualifications, elections and returns of its members, and may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member”).

³⁶ <http://www.merriam-webster.com/dictionary/expel>

³⁷ *Weatherford v Bursey*, 429 US 545, 562; 97 S Ct 837; 51 L Ed 2d 30 (1977).

court. The provisions of the plea bargain therefore do not infringe on the Legislature's constitutional authority to expel a member.

The opinions from courts of other jurisdictions, relied on by the Court of Appeals and the circuit court, fail to recognize that the prosecutor and the court are not actually exercising the powers of the legislative branch when an elected official agrees to resign voluntarily. In *United States v Richmond*,³⁸ the district court voided provisions of a plea agreement that required the defendant to resign from Congress and withdraw as a candidate for reelection. Observing that the Constitution establishes the qualifications for office and provides for a mechanism to expel a congressman, the court reasoned that a prosecutor “may not, directly or indirectly, subvert the people’s choice or deny them the opportunity to vote for any candidate.”³⁹ The court opined that “[t]he prosecutorial practice of dealing in legislative office in negotiations with congressional defendants must be arrested before its potential for abuse is realized.”⁴⁰ The court then concluded that a defendant’s voluntary consent did not cure the defect because, it reasoned, “[a] member of Congress may not barter away constitutional protections which belong not to him but to his constituents.”⁴¹ The Maryland Court of Appeals followed *Richmond* in concluding in *Leopold v Maryland*⁴² that a condition of probation prohibiting a defendant from running for elective office, which apparently was not part of any plea agreement, violated the separation of

³⁸ *United States v Richmond*, 550 F Supp 605 (ED NY, 1982).

³⁹ *Id.* at 608.

⁴⁰ *Id.* at 609.

⁴¹ *Id.*

⁴² *Leopold v Maryland*, 216 Md App 586, 609-613; 88 A3d 860 (Md Ct App, 2014).

powers doctrine because a comprehensive statutory scheme governed the eligibility and removal of public officials.⁴³

Those non-binding opinions⁴⁴ are premised on a mistaken view of the separation of powers. Only the *actual exercise* of the power of another branch of government can violate the separation of powers. The Michigan Constitution provides that “[n]o person *exercising* powers of one branch shall *exercise* powers properly belonging to another branch except as expressly provided in this constitution.”⁴⁵ As the Court of Appeals explained in *People v Conat*,⁴⁶ “[t]he impetus behind the separation of powers doctrine is that ‘where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.’”

A prosecutor is not exercising the powers of the Legislature in negotiating a plea agreement that includes resignation from elective office as one of its terms. The Legislature’s power to expel a member does not bar a member from resigning his office.⁴⁷ Michigan law recognizes that a state senator or representative may resign.⁴⁸ Resignation is fundamentally

⁴³ The third opinion mentioned by the circuit court, *Powell v McCormack*, 395 US 486; 89 S Ct 1944; 23 L Ed 2d 491 (1969), does not involve plea agreements. The issue in *Powell* was whether the court had the authority to review the House of Representatives’ decision not to seat someone duly elected to serve in Congress. While the Supreme Court discussed the House’s constitutional authority to expel a member, it concluded that the House’s action was one of exclusion, not expulsion, and ultimately reviewed that decision, concluding that the House was without power to exclude Powell.

⁴⁴ *In re Herbert Trust*, 303 Mich App 456, 464; 844 NW2d 163 (2013).

⁴⁵ Const 1963, art 3, § 2 (emphasis added).

⁴⁶ *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999), quoting *Soap & Detergent Ass’n v Natural Resources Comm*, 415 Mich 728, 752; 330 NW2d 346 (1982).

⁴⁷ For example, representative Tim Melton resigned in 2011.

⁴⁸ MCL 168.176 provides: “The office of state senator or representative shall become vacant on the happening of any of the following events, before the expiration of the term of such office: The death of the incumbent; *his resignation*; his removal from office; his ceasing to be an inhabitant of the district for which he shall have been elected; the decision of a competent

different than expulsion, and a senator who exercises his right to resign and not run for office is not infringing on the Legislature's constitutional authority to expel a member. Nor does the senator's decision infringe on the electorate's power to choose their representatives, as no one can be forced to run for office or hold office once elected.⁴⁹ Because a senator's decision to exercise his rights does not infringe on the Legislature's authority, the prosecutor's negotiation of a plea agreement that includes voluntary resignation and a bar to future office during the probationary period, and the court's acceptance of those terms, do not violate the separation of powers. This Court therefore should decline to adopt the reasoning in *Richmond*, and hold that the circuit court erred in concluding that the resignation and bar-to-office provisions violated the separation of powers clause.

These plea provisions also do not violate public policy. An elected official should be treated no differently than others accused of a crime. Members of certain professions commonly agree to resign their positions or relinquish their licensure as part of plea agreements. Doctors and lawyers surrender their medical and law licenses. Teachers and police officers resign their positions. An elected official, like those professionals, may negotiate with a prosecutor to exercise his or her right not to serve the public as part of a plea agreement.

Permitting an elected official to negotiate regarding resignation and forbearance from holding office has not, and will not, encourage abuse by prosecutors, as the Court of Appeals majority suggested. The majority's baseless speculation that prosecutors would use their

tribunal declaring void his election or appointment; or his refusal or neglect to take and subscribe to his oath of office. Regardless of any change in the boundaries of any state senatorial or representative district, an incumbent state senator or representative shall continue to represent the district from which he was elected until his current term of office shall expire or his successor is elected and qualified." (emphasis supplied)

⁴⁹ Cf. *Roberts v U.S. Jaycees*, 468 US 609, 623; 104 S Ct 3244; 82 L Ed 462 (1984) ("Freedom of Association therefore plainly presupposes a freedom not to associate").

charging authority to force an elected official to resign for political purposes is completely devoid of factual support. The People, like Judge Riordan, are aware of no such conduct, or even allegations of such conduct, during the decades following *Richmond* and the 44 years since Vice President Spiro Agnew resigned as part of a plea agreement.⁵⁰ Plea agreements containing resignation and bar-to-office provisions are not uncommon, and the experience of Michigan courts and other courts with those agreements over the past four decades demonstrates that the majority's fear of prosecutorial overreach is simply unfounded.

The integrity of the court is not compromised by accepting a plea agreement containing a promise to resign or not hold office. An official is capable of resigning without a directive of the court, just as she is capable of not holding public office in the future. If the official chooses not to keep her end of the bargain, the court can revoke her probation⁵¹ and resentence her accordingly or, if the prosecutor moves to vacate the plea, the court can vacate the plea and return the parties to their pretrial positions.⁵² What cannot happen is that a court, upon disagreeing with certain terms of the agreement, vacates only those terms.

The circuit court therefore erred in voiding the provisions of the plea agreement. The provisions did not violate the separation of powers clause because neither the prosecutor nor the court exercises the Legislature's power to expel a member when the member agrees to resign voluntarily. Nor does the voters' right to elect their government representatives compel an elected official to hold office or preclude a person from choosing not to run for office.

⁵⁰ Vice President Agnew had been charged with accepting bribes. He pleaded no contest to income tax evasion as part of a plea agreement under which he agreed to resign from office.

⁵¹ MCR 6.445(G).

⁵² MCR 6.310(E).

To remedy the circuit court's error, this Court must reverse the decision of the Court of Appeals, vacate the circuit court's March 14, 2016 order, and remand this case for inclusion of *all* the terms of the plea agreement in the judgment of sentence.

II.

A prosecutor has a right to withdraw from a plea agreement when its conditions are not met. The Court of Appeals held that the circuit court did not abuse its discretion by refusing to vacate the plea after it struck provisions of the plea agreement. The Circuit Court and the Court of Appeals erred and infringed on the prosecuting attorney's charging authority when the courts did not vacate the plea.

Standard of Review

The Court reviews questions of law de novo.⁵³

Discussion

The Court of Appeals committed clear legal error in holding that the circuit court did not abuse its discretion in denying the People's motion to vacate the plea after it voided provisions of the plea agreement. The circuit court violated the separation of powers by infringing on the prosecutor's charging authority. The Court of Appeals committed the same error.

The Court of Appeals erred in setting aside its own prior decision holding that the circuit court abused its discretion in denying the People's motion to vacate the plea agreement. *Both* parties, not just the defendant, are entitled to rely on an agreement's terms. Under MCR 6.310(E), a court may, on the People's motion, vacate a plea if the defendant has failed to comply with the terms of a plea agreement. This is so because the People, no less than defendant, are entitled to receive the benefit of the agreed-upon bargain.⁵⁴ As the Court of Appeals explained in *People v Siebert*,⁵⁵ "[w]here . . . a prosecutor, in the exercise of the discretion of that office, agrees to a charge reduction if certain conditions are met, that agreement

⁵³ *People v Hall*, 499 Mich 446, 451-452; 884 NW2d 561 (2016).

⁵⁴ *People v Siebert*, 201 Mich App 402, 413; 507 NW2d 211 (1993), aff'd 450 Mich 500; 537 NW2d 891 (1995).

⁵⁵ *Id.* at 415.

remains conditional until the terms of the agreement are fulfilled.” Therefore, the People’s agreement with defendant remained conditional until *both* parties fulfilled the terms.

On appeal in *Siebert* and a companion case, *People v Jefferson*, this Court held that when a prosecutor has entered into a sentencing agreement, the prosecutor may withdraw from the agreement if the court deviates from the agreed-upon terms.⁵⁶ Justice Boyle wrote:

[T]he 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. . . . When a court receives information that in its judgment dictates a lower sentence, it must alert the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea.^[57]

Although the Court of Appeals had relied on contractual principles in *Siebert*,⁵⁸ Justice Boyle cautioned that the “gloss of contract jurisprudence is here unnecessary and generally unwise.”⁵⁹ Even after Justice Boyle’s admonishment, the Court of Appeals has, however, continued to rely on contractual theories, but has indicated that it will not apply the law of contracts if to do so would “subvert the ends of justice.”⁶⁰

The ends of justice are not subverted in requiring a public official to adhere to an agreement that he resign and not hold office or else lose the benefit of that agreement. Indeed, the ends of justice are in no way served by permitting an elected official to receive the benefit of charges dismissed via a plea agreement that was secured by a promise of resigning and not

⁵⁶ *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995) (Boyle, J; Weaver, J concurring).

⁵⁷ *Id.* at 510-511.

⁵⁸ *Siebert*, 201 Mich App 413.

⁵⁹ *Siebert*, 450 Mich 515.

⁶⁰ *People v Blanton*, 317 Mich App 107, 125; 894 NW2d 613 (2016); *People v Swirls*, 218 Mich App 133, 135; 553 NW2d 357 (1996).

holding future office without requiring him to keep that promise. Under these circumstances, justice demands that the plea be vacated and the parties be returned to their pre-agreement positions. The circuit court's decision otherwise was unprincipled and an abuse of discretion.

Allowing that error to remain uncorrected imposes a different plea agreement on the executive branch of government than the one negotiated by the prosecuting attorney. Plea bargaining is "an essential component of the administration of justice"⁶¹ and the prosecutor alone has the authority to enter into sentencing agreements. Those agreements do not infringe on the court's power to sentence because the court may choose not to accept them. Yet a court's retention of sentencing discretion "does not permit it to invade the prosecutor's charging authority that is the basis of the plea bargaining process."⁶² Thus, where the prosecutor and the defendant have agreed to a specific sentence in exchange for dismissal of charges, a court does not have discretion to select among the provisions in the sentencing agreement, retaining some while discarding others, and yet still bind the parties to those modified terms. Unless *both parties* agree to the modified sentence, the court must permit the parties to withdraw from the agreement.

The circuit court violated that rule in this case. The resignation and bar-to-office provisions were part of the plea offer and the agreed-upon sentence. When the circuit court voided those provisions, the People had a right to withdraw the plea offer. The circuit court denied the People their right, and in so doing invaded the prosecutor's charging authority.

The Court of Appeals engaged in unfounded speculation in an attempt to justify the circuit court's violation of the separation of powers clause. The majority's stated proposition

⁶¹ *Santobello v New York*, 404 US 257, 260; 92 S Ct 495; 30 L Ed 2d 427 (1971).

⁶² *People v Martinez*, 307 Mich App 641, 654; 861 NW2d 905 (2014).

that future prosecutors would go on a “fishing expedition” for political gain and, knowing that resignation and bar-to-office provisions are unconstitutional, still seek a defendant’s agreement to those provisions is as absurd as it is offensive. Prosecutors are bound by oath to uphold the law, and this Court surely does not share the majority’s view that prosecutors will violate that oath and ignore the rule of law. No “message” need be sent to prosecutors to ensure compliance with the law. If this Court holds that the provisions are unconstitutional, the topics of resignation and forbearance of public office will not be discussed during plea negotiations. The Court of Appeals’ reasoning on this point should be rejected as it does not provide a sound legal basis to avoid vacating the plea.

The Court of Appeals’ second reason for denying relief fares no better. That returning the parties to their original positions before error occurred may have negative effects on a defendant does not justify a judicial intrusion into the prosecutor’s charging authority.⁶³ Defendant agreed to comply with *all* the provisions of the plea agreement, not just some of them, and his recent decision to run for public office indicates that he has no intention of keeping his promise and fulfilling his end of the bargain. Clearly, allowing defendant to receive the benefit of the plea agreement without adhering to all its terms subverts the ends of justice. This Court simply cannot countenance a lower court’s intrusion on the prosecutor’s constitutional powers, and must vacate the plea agreement and reinstate the dismissed charges if it does not uphold the resignation and bar-to-office provisions of the plea agreement.

⁶³ See *Siebert*, 450 Mich at 511 (Boyle, J) (“accepting a plea to a lesser charge over the prosecutor’s objection impermissibly invades the constitutional authority of the prosecutor”).

RELIEF

THEREFORE, the People request that this Honorable Court either grant leave to appeal or peremptorily reverse the Court of Appeals' decision and either reinstate the provisions of the plea agreement stricken by the circuit court or vacate the plea agreement and remand for renegotiating of the agreement or, failing an agreed-to plea bargain, for defendant's trial.

Respectfully submitted,

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