

**STATE OF MICHIGAN
IN THE SUPREME COURT**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.: 156353

-vs-

VIRGIL SMITH,

Defendant-Appellee.

_____/

WAYNE COUNTY PROSECUTOR

Attorneys for Plaintiff-Appellant

STATE APPELLATE DEFENDER OFFICE

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**VIRGIL SMITH'S RESPONSE TO PROSECUTION'S
APPLICATION FOR LEAVE TO APPEAL**

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Virgil Smith

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COUNTER STATEMENT OF QUESTIONS PRESENTED

- I. DID THE TRIAL COURT PROPERLY VOID THE PLEA CONDITIONS THAT VIRGIL SMITH NOT HOLD APPOINTED OR ELECTED OFFICE WHERE THOSE CONDITIONS VIOLATE THE MICHIGAN CONSTITUTION'S SEPARATION OF POWERS?**

Court of Appeals answers, "Yes."

Defendant-Appellee answers, "Yes".

- II. DID THE TRIAL COURT PROPERLY DENY THE PROSECUTION'S MOTION TO VACATE THE PLEA BECAUSE THE PROSECUTION SHOULD NOT BENEFIT FROM ENTERING INTO AN UNCONSTITUTIONAL AGREEMENT?**

Court of Appeals answers, "Yes".

Defendant-Appellee answers, "Yes".

INTRODUCTION

In this case, the executive branch used the threat of its prosecutorial power to expel a sitting Legislator and then forbid that Legislator from seeking any other public office for five years. This authorization violates Michigan’s constitutional separation of powers. Typically, one branch’s self-aggrandizement is not so readily apparent; “But this wolf comes as a wolf.”¹

Michigan’s Constitution does not grant a county prosecutor—a member of the executive branch—the power to expel a sitting representative from the Legislature. That power lies with the representative’s specific house and requires a supermajority vote. Nor does the Constitution authorize a county prosecutor to determine who is eligible to run for office. That authority lies with the Legislature, which the Constitution tasks with passing laws to maintain the purity of elections and to declare certain individuals ineligible for office.

Here, the prosecution attempted to carry out both functions through its plea agreement with then-state senator Virgil Smith. The lower-court decision properly rejected these exercises of power by the executive branch. This Court should uphold the separation of powers outlined by Michigan’s Constitution and affirm the lower-court’s decision.

In addition, the Court should affirm the lower-court’s decision upholding the trial court’s denial of the prosecution’s motion to vacate the plea. Any other outcome would send Virgil Smith back to the bargaining table with nothing to offer: he has pled guilty, publicly resigned his office, completed his jail sentence, and complied with every single legal condition of his plea agreement. The Court should not award the prosecution a windfall for entering into an unconstitutional agreement.

¹ See *Morrison v Olson*, 487 US 654, 699; 108 S Ct 2597; 101 L Ed 2d 569 (1988) (SCALIA, J., dissenting).

STATEMENT OF FACTS

In 2016, then-state senator Virgil Smith pled guilty to malicious destruction of personal property worth \$20,000 or more. (Plea Transcript (PT), 38.) Smith agreed to a five year term of probation, serving the first ten months in jail with no early release; to undergo alcohol and drug treatment; to never contact the complaining witness during probation; to submit to mental health treatment; to surrender a personal firearm; and to pay full restitution to the property owner. (Settlement Offer and Notice of Acceptance.) In return, the prosecutor dropped three related charges. *Id.* In addition, the prosecutor demanded that Smith resign his office as state senator and promise not to hold elected or appointed office while on probation. *Id.* Smith agreed. *Id.*

At the sentencing hearing on March 2016, the trial court reviewed the terms of the plea agreement. Sentencing Transcript (ST), 50–51. The trial court declared that the prosecution’s demand for Smith to resign and not hold office while on probation was an unconstitutional interference with the Legislature by the executive branch, but the court held that the rest of the agreement was still valid. *Id.* at 80. The court cited numerous cases that served as the basis of its decision. *Id.* at 75–76.

The prosecution moved to vacate the plea agreement, arguing that, if Smith did not have to resign, it did not receive what it had bargained for. (Prosecutor’s Motion To Vacate.) The trial court denied the motion in a written opinion that described the court’s analysis in detail. (Order Denying Motion to Vacate.) Three days later, Smith resigned his office anyway.² The prosecution appealed.

The Court of Appeals held that the issues raised by the prosecution’s appeal were moot because Smith had resigned and had not declared an intention to run. *People v Smith*,

² Kathleen Gray, Detroit Free Press, *Sen. Virgil Smith Resigns His Seat in Michigan Senate* <<http://www.freep.com/story/news/politics/2016/03/31/sen-virgil-smith-resigns-seat-senate/82474194/>> (accessed September 12, 2016).

unpublished opinion per curiam of the Court of Appeals, issued April 18, 2017 (Docket No. 332288), p 1–3.

In December 2017, Smith completed his jail sentence.³ Four months later, he filed to run for Detroit City Council.⁴ In response, the prosecution filed a motion for reconsideration, which the Court of Appeals denied. *People v Smith*, unpublished order of the Court of Appeals, entered June 5, 2017 (Docket No. 332288). The prosecution appealed.

This Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals “for consideration as on reconsideration granted.” *People v Smith*, __ Mich __; __ NW2d __ (August 15, 2017) (Docket No. 156182). On remand, the Court of Appeals affirmed the trial court’s decision, holding that the plea agreement violated Michigan’s Constitution and that vacating the existing plea agreement would be unjust. *People v Smith*, __ Mich App __; __ NW2d __ (August 22, 2017) (Docket No. 332288). This appeal followed.

³ Ann Zaniewski & Kathleen Gray, Detroit Free Press, *Ex-state Sen. Virgil Smith Released from Jail*, <<http://www.freep.com/story/news/local/michigan/detroit/2016/12/07/virgil-smith-jail/95109060/>> (accessed August 20, 2017).

⁴ Jonathan Oosting & Christine Ferretti, The Detroit News, *Ex-Sen. Smith Files to Run for Detroit Council*, <<http://www.detroitnews.com/story/news/local/detroit-city/2017/04/19/ex-sen-smith-files-run-detroit-council/100651732/>> (accessed August 20, 2017).

ARGUMENT

I. THE PROSECUTOR'S VOIDED PLEA CONDITIONS VIOLATED THE MICHIGAN CONSTITUTION'S SEPARATION OF POWERS.

Standard of Review

The Court reviews a constitutional question de novo. *Coalition of State Emp Unions v State*, 498 Mich 312, 322; 870 NW2d 275 (2015).

Argument

The Michigan Constitution declares, "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." Const 1963, art 3, § 2. And the prosecutor is a member of the executive branch. *People ex rel Leonard v Papp*, 386 Mich 672, 683; 194 NW2d 693 (1972).

A. The Constitution grants to the Legislature alone the power to expel a legislator.

A court must give effect to the plain meaning of the Constitution's text. *People v Tanner*, 496 Mich 199, 223-24; 853 NW2d 653 (2014). The maxim *expressio unius est exclusio alterius* aids constitutional construction. *See Frey v Dept of Management and Budget*, 429 Mich 315, 337; 414 NW2d 873 (1987) (recognizing the use of the maxim for constitutional interpretation, except when doing so would do “manifest violence” to the framers’ intent). Article 4, § 16 of the Constitution details the process to expel a legislator from office:

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. The reasons for such expulsion shall be entered in the journal, with the votes and names of the members voting upon the question.

The houses of the Legislature have the “sole” power to expel their members. The Constitution permits no other process and no other body to carry out this solemn duty. Here, a county prosecutor, a member of the executive, attempts to expel a state senator—an option that is expressly denied to the head of the executive branch by the Constitution. *See* 1963 Const. art. 5, § 10 (granting the Governor authority to remove or suspend any elective or appointive state officer, “except legislative or judicial”). If the head of the executive branch cannot remove a legislator from office, no member of the executive branch can.

The Constitution explains the procedure—to the exclusion of any other procedure—for removing a legislator from office: expulsion by the legislator’s house. And expulsion requires a

supermajority. These Constitutional safeguards guarantee two things: (1) that the legislator is judged by his or her peers, and (2) that the decision is made by a significant number of publicly accountable people. A decision for the appellants would permit a single member of the executive branch to accomplish the same result through a plea agreement—which circumvents both of the safeguards enshrined in the Constitution.

The appellants argue that Smith’s resignation did not implicate the Constitution because it was voluntary—but appellants do not provide their definition of “voluntary.” A “voluntary” act is intentional, “not impelled by outside influence . . . [and it is] *without valuable consideration or legal obligation.*” *Black’s Law Dictionary* (9th ed), p 1806 (emphasis added). Appellants’ own brief undercuts their assertion when it admits that Smith agreed to resign and not hold office “in exchange for a reduction of criminal charges or other consideration.” Appellant’s Application, at 12. This case is before the Court for a reason: the executive branch is asking the judicial branch to prevent Smith from running for office. Contrary to appellants’ assertion, once the prosecutor brings the plea agreement to the court for enforcement, the actions compelled by the Court are no longer “voluntary.”

The appellants also argue that the prosecutor was not “exercising” the Legislative power. Even if this were true, the Constitution denies the Governor the ability to remove a legislative official from office. *See* 1963 Const. art. 5, § 10. Nowhere does appellants’ brief explain why a member of the executive branch may exercise a power denied to the head of that branch.

Moreover, however noble the motive, good intentions do not trump the Constitution’s separation of powers, which exists to preserve our system of checks and balances. Even if Smith’s resignation were considered “voluntary,” the Michigan Constitution does not maintain the separation of powers for the good of Virgil Smith; it maintains the separation for the good of

the citizenry. Smith's legislative seat is not property that he can use as a bargaining chip in a judicially enforceable agreement. Winning an election provides a public official with many privileges, but trading that public office for personal gain is not among them.

B. Only the Legislature can determine a citizen's eligibility for elections.

The prosecutor not only attempted to force Virgil Smith out of his then-existing term, but also attempted to preclude him from holding future office during probation. Yet again, the plea condition violated Michigan's Constitution. The Michigan Constitution declares explicitly the types of crimes that disqualify a citizen from holding office. Const. 1963, art. 11, § 8 (declaring a person ineligible who has been convicted of a felony—related to the person's official capacity while holding office—"involving dishonesty, deceit, fraud, or a breach of public trust"). This provision does not disqualify a person who has pled guilty to malicious destruction of personal property. *See Id.*

In addition, the Michigan Constitution vests sole authority to enact election laws in the Legislature. Const. 1963, art. 2, § 4; *Socialist Workers Party v Secretary of State*, 412 Mich 571, 595; 317 NW2d 1 (1982). This authority includes the power to enact laws that "preserve the purity of elections." Const. 1963, art. 2, § 4. The Constitution also grants to the Legislature the authority to exclude mentally incompetent or jailed citizens from voting. Const. 1963, art. 2, § 2. And the Legislature did just that in 1975 when it passed MCL 158.758b to prohibit people from voting while confined to jail or prison.

There is a common theme throughout Michigan's constitutional and statutory election law: the Legislature decides. The Legislature chooses the manner of elections; the Legislature enacts laws that preserve the purity of elections; and the Legislature declares who is ineligible to

vote or run for office. In Michigan’s election law, the executive branch was nowhere to be found—until this case. The prosecutor’s attempt to extract a promise from Virgil Smith that he will not hold office during probation veers directly into the Legislature’s lane of election purity. And that power lies only with the Legislature. No other branch can exercise it.

Appellants cite no case supporting the proposition that the executive branch may determine who is eligible to run for office. But this determination is precisely what the prosecution seeks to do:

“In a statement to The Detroit News, [an assistant Wayne County prosecutor] wrote that in the event Smith advances in the primary election on Aug. 8, the office ‘would move the court for immediate consideration and try to expedite review of the application and ask for a decision prior to the date the ballots (for the November election) are printed.’”⁵

Our Constitution does not authorize county prosecutors to make these decisions. Instead, the Constitution spells out a clear process for expelling a sitting legislator. Furthermore, the Constitution entrusts to the Legislature the determination of electoral eligibility for Michigan’s citizens. For both voided plea conditions, the prosecutor attempted to exercise authority that is expressly granted to another branch. This Court should affirm the lower-court decision.

⁵ Stephanie Steinberg, The Detroit News, *Worthy Files Appeal to Void Virgil Smith’s Plea Deal* < <http://www.detroitnews.com/story/news/local/detroit-city/2017/07/28/worthy-files-appeal-void-virgi-smith-plea-deal/104083690/>> (accessed August 20, 2017).

II. THE TRIAL COURT PROPERLY DENIED THE PROSECUTION'S MOTION TO VACATE THE PLEA BECAUSE THE PROSECUTION SHOULD NOT BENEFIT FROM ENTERING INTO AN UNCONSTITUTIONAL AGREEMENT.

Standard of Review

The Court reviews a decision on a motion to withdraw a plea for an abuse of discretion. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012). “An abuse of discretion will be found when the decision is so palpably and grossly violative of fact and logic that it evidences . . . not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Dacon v Transue*, 441 Mich 315, 329; 490 NW2d 369 (1992) (citation omitted). The Court reviews a constitutional question de novo. *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014).

Argument

A court uses contract principles to interpret a plea agreement, so long as the result serves the interests of justice. *People v Martinez*, 307 Mich App 641, 651; 861 NW2d 905 (2014). The maxim *in pari delicto potior est condition defendantis* (in cases of equal fault, the position of the defendant is stronger) is a contract principle founded on justice. *Pantely v Garris, Garris & Garris, P.C.*, 180 Mich App 768, 774; 447 NW 2d 864 (1989). “As between parties in pari delicto, that is equally in the wrong, the law will not lend itself to afford relief to one as against the other, but will leave them as it finds them.” *Orzel by Orzel v Scott Drug Co*, 449 Mich 550, 558; 537 NW2d 208 (1995) (citation omitted). Michigan courts have consistently applied this rule. *Id.* at 558–59 (citing twelve cases that date back to 1916). “Suit is barred not because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim

to the aid of the court.” *Pantely*, 180 Mich at 774.

It is the fault of both parties that they entered into an unconstitutional agreement. As this Court said in *Orzel by Orzel*, the Court should leave the parties where it finds them rather than redistribute the losses resulting from the voided illegal conditions. This is not because Smith deserves it; it is because the prosecution does not deserve the windfall of returning to the plea-bargaining table after Smith has already pled guilty, publicly resigned his office, completed his jail sentence, and complied with every single legal condition of his plea agreement. If the Court vacates the plea, it will place the prosecution in a stronger bargaining position than it was in initially; the prosecution will profit from entering into an unconstitutional agreement. No principle—whether of contract or justice—supports this result.

Appellants assert that “the court does not have discretion to select among the provisions in the sentencing agreement, retaining some while discarding others.” Appellant’s Application, at 21. But case law holds the opposite. See *People v Miller*, 182 Mich App 711; 452 NW2d 890 (1990). In *Miller*, the court rewrote a provision from a guilty plea because the provision was illegal. *Id.* at 714 (“We amend this condition on the order of probation to read, ‘you shall not associate with [the father of the defendant’s child] until further order of the court.’”).

Because vacating the plea would violate both contract principles and the principles of justice, the Court should affirm the trial court’s denial of the prosecution’s motion to vacate the plea.

CONCLUSION AND RELIEF REQUESTED

The Constitution denies a county prosecutor—a member of the executive branch—the authority to expel a sitting Legislator and to determine a citizen’s eligibility to hold office. The Court should deny leave to the prosecution thereby 1) upholding the Michigan Constitution’s separation of powers and 2) upholding the trial court’s reasoned denial of the prosecution’s motion to vacate the plea because, under contract principles and principles of justice, the prosecution should not receive a bargaining windfall for entering into an unconstitutional agreement.

Respectfully submitted,

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